

# Guidelines for Bars & Law Societies on Free Movement of Lawyers within the European Union



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#### CONTACT:

Council of Bars and Law Societies of Europe  
Conseil des barreaux européens  
Rue Joseph II, 40/8  
1000 Brussels  
T +32 (0)2 234 65 10

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[www.ccbe.eu](http://www.ccbe.eu)  
[ccbe@ccbe.eu](mailto:ccbe@ccbe.eu)

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# INTRODUCTION

European Union (EU) lawyers have, uniquely among the liberal professions in Europe, a distinct regime governing the free movement of lawyers in the EU (here after referred to as the “EU regime on free movement of lawyers”), including their own sectorial Directives. The present guidelines for bars and law societies aim to outline this specific structure.

The guidelines are divided into seven parts, as follows:

- (1) Being a lawyer – in other words, who can take advantage of the EU regime on free movement of lawyers;
- (2) Double deontology – in other words, how to deal with professional rules from different bars in situations whereby conflicts under the EU regime on free movement of lawyers may arise;
- (3) Establishment – when a lawyer moves permanently to another Member State to practise law in that State under his professional home title (covered principally by the Establishment Directive (98/5/EC));
- (4) Temporary provision of services – when a lawyer provides cross-border legal services temporarily under his professional home title (covered principally by the Services Directive (77/249/EEC));
- (5) Acquisition of another Member State’s professional title – when a lawyer obtains a lawyer’s title in another Member State and uses it as either being established in his home Member State or in any other Member State (in other words, requalification);
- (6) Lawyers who are not fully qualified – when a person with some legal training and experience but who has not yet been admitted to a bar or by a law society as fully qualified lawyer is able to take advantage of the EU’s free movement (the *Morgenbesser* case);
- (7) Cooperation between bars.

These parts are described in greater detail in this Guide. There is a list of the jurisprudence from the Court of Justice of the European Union (CJEU) on the EU regime on free movement of lawyers available [here](#).

Each of the Directives mentioned in this Guide will have been implemented into national law. The first place to look for the interpretation of a Directive’s provisions will be in its national implementing law for the jurisdiction in which the question arises. On the Commission’s website, there is a [page](#) summarising the national provisions on the transposition of EU law into national law in the different Member States.

The Directives themselves can be consulted in all the official languages of the EU. No one language version predominates over another and each is equally authentic. Obviously, if there is further accession to membership of the EU, there will be more language versions (and indeed further lawyers’ titles covered by the Directives).

In a case of difficulty in interpreting the applicable legal provisions, the CCBE offers a service of assistance, as outlined in the CCBE’s [guidelines](#) on implementing the Establishment Directive:

*The CCBE will provide a service to competent authorities in attempting to resolve difficulties in interpreting provisions of the Directive, to ensure that, so far as possible, there is a uniform interpretation of the Directive around the EU. Accordingly, competent authorities are encouraged to alert the CCBE to any such difficulties. The CCBE will also offer an advisory service, which will be voluntary and non-binding and offered only where requested by parties, for the resolution of disputes between parties under provisions of the Directive.*

PART 1

BEING A LAWYER

#1



There is one fundamental condition which needs to be satisfied before a person can take advantage of the Directives: being a lawyer. This condition is common to both the Services Directive and the Establishment Directive (the Lawyers' Directives), as is the definition of the term "lawyer", which follows in the next section.

## Who is a lawyer?

Only those persons recognised by the Directives as being lawyers can benefit from the EU's free movement provisions for lawyers. The Establishment Directive defines a lawyer by listing two cumulative conditions:

- (1) the person must be an EU national; and
- (2) the person must hold one of the professional titles listed within the Directive.

In both Directives, the term 'lawyer' is not defined by area or length of years of practice, nor by educational qualifications or years of study, but only by whether the person concerned holds one of the titles listed in the Establishment Directive. The titles refer to fully qualified lawyers. The holding of such a title, together with being a national of a Member State, entitles any fully qualified lawyer to take advantage of both of the Lawyers' Directives.

As a fully qualified lawyer holding a title listed in the Establishment Directive and the Services Directive the lawyers' regime differs from most, or indeed probably from all other liberal professions. In other liberal professions, the ability to cross borders is derived from a mutually recognised educational route to qualification, whereas in the legal profession it arises solely from the acquisition of a title, through whichever route that is nationally recognised. The routes to qualification as a lawyer in the Member States differ quite widely, with different emphasis placed (for instance) on practical or academic training. However, the Lawyers' Directives override these differences, as they are based on the mutual recognition that each Member State has an adequate route to qualification with equivalent consumer protection.

Regarding which titles are recognised, the Lawyers' Directives state (Article 1 of both Directives) that a lawyer is someone who is authorised to pursue his or her professional activities under one of the following professional titles:

Belgium	Avocat/Advocaat/Rechtsanwalt
Bulgaria	Адвокат
Czech Republic	Advokát
Croatia	Odvjetnik
Denmark	Advokat
Germany	Rechtsanwalt
Estonia	Vandeadvokaat
Greece	Δικηγόρος
Spain	Abogado/Advocat/Avogado/Abokatu
France	Avocat
Ireland	Barrister/Solicitor
Italy	Avvocato
Cyprus	Δικηγόρος
Latvia	Zvērināts advokāts
Lithuania	Advokatas
Luxembourg	Avocat <sup>1</sup>

<sup>1</sup> Notwithstanding the wording of the Directives, the actual title to be considered in Luxembourg is "Avocat à la Cour".

Hungary	Ügyvéd
Malta	Avukat/Prokuratur Legali
Netherlands	Advocaat
Austria	Rechtsanwalt
Poland	Adwokat/Radca prawny
Portugal	Advogado
Romania	Avocat
Slovenia	Odvetnik/Odvetnica
Slovakia	Advokát
Finland	Asianajaja/Advokat
Sweden	Advokat
United Kingdom	Advocate/Barrister/Solicitor

By decision of the European Economic Area (EEA) Joint Committee, the Lawyers' Directives have been incorporated into the EEA *acquis* so that lawyers from Iceland, Norway and Liechtenstein complete the above list as follows:

Iceland	Lögmaður
Norway	Advokat
Liechtenstein	Rechtsanwalt

In addition, following the Swiss-EU bilateral agreement on the free movement of persons, Swiss lawyers are also entitled to take advantage of the Lawyers' Directives:

Switzerland	Avocat, Avocate / Anwalt, Anwältin / Rechtsanwalt, Rechtsanwältin / Fürsprecher, Fürsprecherin / Avvocato
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## Frequently asked questions

### *How can I discover whether someone is a member of a profession recognised under the Lawyers' Directives?*

There is a variety of ways:

- (1) The lawyer seeking to establish under the Establishment Directive must in any case present 'a certificate attesting his registration with the competent authority in the home Member State' under Article 3 – see more on this below.
- (2) The competent authority of the host Member State may request the lawyer seeking to provide temporary services under the Services Directive to establish his qualification as a lawyer (Article 7.1).
- (3) The host bar may be able to use the Internal Market Information System ([IMI](#)) which permits professional organisations to seek information from their counterparts in other Member States.
- (4) Most European bars have electronic directories of their registered members, most of which are now collected into a single 'Find-A-Lawyer' [directory](#) (in all official EU languages) on the European Commission's e-Justice portal.
- (5) The lawyer can be asked for his or her professional ID card. Not all competent authorities issue such cards, but there are two possibilities: the national competent authority may issue its own





professional ID card; and the CCBE has an EU identity card which lawyers can obtain from their own competent authority. A lawyer may have one or both of these professional ID cards.

- (6) Obviously, contact can be made with the bar of which the lawyer claims to be a member. Contact details of relevant bars may be obtained through the CCBE.

***If a legal profession is not listed in the Lawyers Directives, is there a remedy?***

If a legal profession is not listed – e.g. notaries-, then a member of that profession cannot take advantage of the Lawyers’ Directives. Efforts can be made to have the profession listed (see below). Alternatively, the person may be able to take advantage of the general provisions of the Treaty on the Functioning of the European Union (TFEU) regarding free movement of persons.

***What is the position of non-EU nationals?***

Non-EU nationals are not able to take advantage of the Directives, nor of the general provisions of the TFUE regarding the free movement of persons in order to establish themselves or provide temporary services. However, they may be able to take advantage of a certain amount of free movement, if there are existing free trade agreements concluded at national or EU level with their home jurisdiction.

At this point it should be stressed that several EU Member States have special territories which enjoy special status within or outside the EU (e.g. the Outermost Regions and the Overseas Countries and Territories). As the applicability of primary and secondary EU law may vary, national authorities should be aware whether a lawyer from one of these territories is able to invoke the rights laid down in the Lawyers’ Directives.

***How are legal professions added to the list of recognised lawyers?***

When the Lawyers’ Directives were adopted, the legal professions of those States that had become EEC Members by 1977, respectively EC members by 1998, were listed. When future Member States acceded by means of the accession treaties additional professions from these Member States were added to the list. Of course, when Member States accede to the EU, the recognised titles of their lawyers as provided for in their accession treaty will be added to the list.

***Can trainee lawyers take advantage of the Directives?***

The CCBE’s [guidelines](#) on the implementation of the Establishment Directive say that ‘Avocats stagiaires’ or trainee lawyers do not fall within the scope of the provisions of the Directive.

However, it may be possible for candidates who are in the process of becoming lawyers to take advantage of the free movement provisions of the TFUE – see Part 6 below.

***How are seconded lawyers within a law firm (sent from a branch/office operating in one Member State to a branch/office operating in another Member State) treated under the Establishment Directive?***

The CCBE’s [guidelines](#) on the implementation of the Establishment Directive, cited above, state that:

*‘Lawyers who are seconded from one firm or branch of a firm within one Member State to another firm or branch of a firm within a second Member State in order to be trained or to further their personal development shall not be considered as falling within the provisions of the Directive.’*

PART 2

## DOUBLE DEONTOLOGY

(ARTICLE 6 OF THE ESTABLISHMENT DIRECTIVE  
AND ARTICLE 4 OF THE SERVICES DIRECTIVE)

#2



## General

Lawyers practicing under the EU regime on free movement of lawyers are subject simultaneously to two professional codes of conduct, the code of their home state and the code of the host state, in respect of all activities pursued in the host state. This kind of situation is referred to as 'double deontology'.

The CCBE has adopted an [interpretation](#) of the 'double deontology' provision of the Directives, (Article 6 of the Establishment Directive, Article 4 of the Services Directive).

### **Article 6 of the Establishment Directive:**

*A lawyer practising under his/her home Member State professional title remains subject to the rules of professional conduct of his/her home State only to the extent that these do not conflict expressly or impliedly with the rules of professional conduct of the host State. In case of conflict between rules of conduct, host State rules override home State rules.*

### **Article 4 of the Services Directive:**

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

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

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

*According to Article 4.4 a lawyer pursuing activities other than those referred to in paragraph 1, i.e. "out of court" work, "shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes". But at the same time host Member State professional rules are applicable as well "to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility". As a general rule the lawyer has to comply with home country professional rules without regard to host country rules – this general rule is consistent with the E-Commerce-Directive's country of origin regime where cross-border services are provided under circumstances governed by said Directive. In exceptional situations however host country professional rules come into play.*

*On the basis of fact finding done by the CCBE, it appears that, with regard to individual lawyers, there is no field of application for Article 4.4 2nd sentence; i.e. no cases of such conflicts have come to the knowledge of Bars and Law Societies, and no complaints from clients and/or lawyers seem to have been made.*

*Nevertheless, it is desirable to uphold the provision of Article 4.4 2nd sentence in order to be able to deal with conflicts of rules should such conflicts occur in the future. Such potential situations might arise if professional rules in other Member States undergo drastic changes, e.g. in case a Member*

State should abolish the interdiction to directly address another lawyer's client, thereby depriving said client of his/her lawyer's advice and protection.

Where a team of lawyers from different jurisdictions handles a client's case, national conflict of interest rules may differ from one another. Law firms in such a case apply in practice the strictest rule one of the lawyers concerned will have to comply with and may on these grounds from time to time refuse to accept a client's case.<sup>2</sup>

In summary it appears that:

- Real practical problems do not occur with regard to individual lawyers.
- Practical problems that may occur where lawyers from different jurisdictions handle cases within a team cannot be tackled by a conflict rule in favour of home country rules, but by application of the strictest home country rules.

The following should also be borne in mind:

- (1) The CCBE has developed a [Code of Conduct](#) for European Lawyers<sup>3</sup>, one of whose stated purposes is:  
*“to minimise, and if possible eliminate altogether, the problems which may arise from “double deontology”, that is the application of more than one set of potentially conflicting national rules to a particular situation (see Article 1.3.1)”.*
- (2) There can be no problem if the content of the particular rule in question is identical or nearly identical in both code of conducts. If both rules go in the same direction, then it is usually stated that the application of the wider rule will also incorporate the application of the narrower.
- (3) It is only if there is a conflict between the two rules that a problem might arise; however, this is a rare occurrence.

<sup>2</sup> The [Maastricht University/Panteia study's](#) suggestion to introduce a conflict rule according to which only home country rules should be applicable obviously would not be helpful in situations where lawyers from different Member States jointly handle a common client's case.

<sup>3</sup> see Article 1.5 of the CCBE Code of Conduct for European Lawyers that refers to its field of application (ratione materiae): *“Without prejudice to the pursuit of a progressive harmonisation of rules of deontology or professional practice which apply only internally within a Member State, the following rules shall apply to the cross-border activities of the lawyer within the European Union and the European Economic Area. Cross-border activities shall mean:*  
*(a) all professional contacts with lawyers of Member States other than the lawyer's own;*  
*(b) the professional activities of the lawyer in a Member State other than his or her own, whether or not the lawyer is physically present in that Member State.”*

The CCBE Code of Conduct for European lawyers [last version 2008-11-29] is available on the CCBE website: [http://ccbe.eu/fileadmin/speciality\\_distribution/public/documents/DEONTOLOGY/DEON\\_CoC/EN\\_DEON\\_CoC.pdf](http://ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf)



## Frequently asked questions

### ***Does double deontology mean that a lawyer established in a host Member State might suffer disciplinary sanctions from two different bars (home and host) for the same incident?***

The CCBE's [guidelines](#) on implementation of the Establishment Directive say the following:

*A lawyer registered under Article 3 of the Establishment Directive is subject to regulation not only by his or her home bar but also in accordance with Article 6 of the Directive by the host bar where he or she is registered. In the case of professional misconduct, this may lead to disciplinary proceedings both by the host bar and by the home bar in respect of the same misconduct, although it is recognised that the disciplinary sanction accorded by each competent authority in such a case may be different, or be of a different severity, according to circumstances.*

### ***Does double deontology mean that a lawyer who temporarily renders legal services in a host Member State might suffer disciplinary sanctions from two different bars (home and host) for the same incident?***

As opposed to established lawyers under Article 3 of the Establishment Directive, lawyers temporarily providing services under the Services Directive, are not members of a bar or law society in the host State.

Whether these lawyers nevertheless are subject to disciplinary sanctions by a host Member State bar, depends on the host Member State's legislation. Article 7.2 of the Services Directive affirms the host Member State's jurisdiction over temporarily servicing lawyers from other Member States in so far as it provides that:

*"In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance"*

The Services Directive is addressed to Member States. Hence it depends on the host Member State's domestic regulation whether the host Member State delegates disciplinary power over temporarily servicing lawyers –although non-members- to a bar or law society or to another competent authority.

The host Member State may also – and some Member States have done so- decide to refrain from exercising disciplinary power over temporarily servicing lawyers, instead leaving it to the competent authorities in the home Member State to discipline lawyers in relation to a breach of professional rules in the host Member State.

## PART 3

LAWYER FROM ANOTHER  
MEMBER STATE ESTABLISHED  
UNDER HIS HOME MEMBER  
STATE PROFESSIONAL TITLE  
(ESTABLISHMENT DIRECTIVE)

#3



This regime is governed by the Establishment Directive, whose full title is 'Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained' (OJ L 77, 14.3.1998, p. 36)

It is available in all official languages of the EU [here](#).

On the Commission's website, there is a [page](#) summarising the national provisions on the transposition of EU law into national law in the different Member States.

## Two basic conditions: (a) being a lawyer, and (b) being established

After having ascertained that the person is a lawyer the host bar has to verify his or her establishment.

### What does 'establishment' mean?

There are two key ways of providing cross-border services under home title as a lawyer in the EU: by practising on a permanent basis in another Member State, or by providing temporary services across the border. A third possibility described in the introduction is providing services across border under host title, after having acquired the host title. While the extremes of each of the two types of provision under home title are clear, the boundary between them is not. Opening a law firm under home title after permanently migrating to another Member State would be establishment. Dealing with a brief client matter for one day in another Member State would be the provision of temporary services. But what about a sojourn of a few months? The answer is important because very different rights and duties flow from the correct decision, depending on which Directive a lawyer falls under. And he or she cannot fall under both: the Directives are mutually exclusive (Article 1.4 of the Establishment Directive).

Article 2 of the Establishment Directive defines establishment as the lawyer pursuing an activity on a permanent basis in another Member State, without giving further details. But Article 10, which provides certain rights after three years of such permanent practice, provides more detail by saying that the lawyer must have '*effectively and regularly pursued*' the activity, and "*Effective and regular pursuit means actual exercise of the activity without any interruption other than that resulting from the events of everyday life*" (Article 10.1 of the Establishment Directive).

There is no case law yet regarding the meaning of this wording when translated into the actual circumstances of lawyers' lives. However, there was a seminal case decided by the Court of Justice of the European Union at a time before the passage of the Establishment Directive became effective – the *Gebhard* case (Case C-55/94) – which gives some indication of the difference between establishment and the temporary provision of services by lawyers. The wording is rather general, but the Court said that the temporary nature of the provision of services is to be determined '*in the light of its duration, regularity, periodicity and continuity*'; and that establishment implies 'a stable and continuous basis' of professional activity in another Member State. In particular, the Court said the following:

*the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.*

## Registration with the Host Bar (Article 3, Establishment Directive)

In order to take advantage of the Establishment Directive, the established lawyer must register with the competent authority in the host State. This is usually the bar which has jurisdiction in the area of the lawyer's residence. In order to register, the Directive requires that the lawyer submits 'a certificate attesting to his registration with the competent authority in the home Member State' – in other words, his or her home bar. The host authority can require that the certificate be not more than three months old (Article 3.2 of the Establishment Directive).

The CCBE's [guidelines](#) on implementation of the Directive comment on the certificate of attestation as follows:

*Where a lawyer registering under Article 3 of the Directive has more than one home jurisdiction, the relevant competent authority is entitled to ask for a certificate of attestation under Article 3.2 of the Directive from each of the competent authorities with which that lawyer is registered in a Member State.*

*A certificate of attestation under Article 3.2 of the Directive shall mention all disciplinary proceedings (as defined ... below) which have been commenced in the home member state against the lawyer applying for registration under Article 3 of the Directive, or in which a finding has been made against the lawyer.*

*For the purposes of:*

*(b) any declaration to be made by the relevant competent authority in the home Member State in a certificate of attestation under Article 3.2 of the Directive;*

*disciplinary proceedings shall be defined as having commenced when formal proceedings have started before the court, tribunal or other body which has jurisdiction in the home member state to take disciplinary actions against, and impose sanctions upon, the lawyer registering under Article 3 of the Directive. The mere receipt of a complaint against the lawyer is not considered for these purposes to be «disciplinary proceedings».*

If the bar publishes a list of its local lawyers, it must include any lawyer registered under the Directive also on such a list. In addition, registered lawyers must be granted appropriate representation in the professional associations of the host Member State. This must include at least the right to vote in elections to those associations' governing bodies.

Article 9 states that decisions not to effect a registration, or to cancel a registration and decisions imposing disciplinary measures, must state the reasons on which they are based. In addition, a remedy must be available against such decisions before a court or tribunal in accordance with the provisions of domestic law. In the case of *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* (Case C-506/04), it was held that Article 9 precludes an appeal procedure in which the decision refusing registration must be challenged at first instance before a body composed exclusively of lawyers practising under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts.

On the other hand, the CJEU has considered the Consiglio Nazionale Forense in its capacity as a court to be a judicial body in the sense of Article 267 TFEU (e.g. *Torresi* C-58/13 and 59/13).





## Frequently asked questions

### *With which bar must the lawyer register?*

There are Member States which offer multiple options for registration dependent on the field of practice and regional aspects.

In the [UK and Ireland](#), there are two legal professions and in the UK this applies in each of its three jurisdictions (England and Wales, Scotland and Northern Ireland). This is the only instance of the 'which-bar-to-choose' dilemma that is explicitly dealt with in the Establishment Directive itself. The Directive states that registrants from outside the UK and Ireland must choose with which of the two professional bodies to register and that between the UK and Ireland barristers and solicitors must register with their corresponding professional body in the other Member State. It is possible for a European lawyer to register in more than one of the UK jurisdictions, but on the condition that they choose one of the two legal professions with which to register, and always from the same side of the profession (i.e. they must follow the same barrister/advocate or solicitor side in whichever of the three jurisdictions they choose to register).

In [Poland](#) (which became a member of the EU after the Directive was passed), registrants must also choose between two legal professions, the advocates (Naczelna Rada Adwokacka) or the legal advisors (Krajowa Izba Radców Prawnych);

In [Brussels](#), registrants must choose between two bars based on language, either Flemish (Nederlandse Orde van Advocaten bij de Balie te Brussel) or French (L'Ordre français des avocats du barreau de Bruxelles).

In [France, Italy, Spain, Germany, Austria, Hungary, Luxembourg, Belgium \(apart from Brussels – see above\) and Greece](#), the lawyer must register with the bar local to his or her intended practice;

In the rest of the Member States, the lawyer must register with the national bar.

### *Must the bar register a lawyer if he or she has provided a valid certificate?*

There are provisions of the Establishment Directive which may give cause for a bar not to register a lawyer, even if the lawyer has fulfilled the requirements of Article 3. There are the following possible further grounds for refusal:

- (1) not an EU national
- (2) no valid professional indemnity insurance according to Article 6
- (3) practising within a legal structure in the sense of Article 11.5

However, the bar cannot add criteria for registration which do not exist in the Directive itself. This was confirmed in the case of *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg* (Case 506/04), where the Court held that registration cannot be made subject to a prior examination of proficiency in the languages of the host Member State.

A lawyer from another Member State is not to be treated like applicants in the host State who are not yet a lawyer, but rather as a fully qualified lawyer from another Member State entitled to mutual recognition and free movement, subject to the conditions laid out in the Directive.

### *Must the lawyer pay a registration fee even though the lawyer is also paying a fee to his or her home bar for enrolment on the home bar's list?*

Yes, the double payment of fees (to home and host bar) is a consequence of the Establishment Directive's provisions.

***Must the registration fee for the established lawyer be at the same level as that of the host bar's own lawyers?***

The CCBE's [guidelines](#) on the implementation of the Establishment Directive say the following about the registration fee:

*All lawyers registering under Article 3 of the Directive shall pay a registration fee or fees (which term includes either a one-off or a regular payment) to the relevant competent authority (as defined under Article 1.2(f) of the Directive), and to such other authorities as may be required under local rules. Such fee or fees may be equivalent to, but not higher than, the fee or fees charged to lawyers enrolled in the host Member State. Such fee or fees may be lower than the fee or fees charged to lawyers enrolled in the host Member State, for instance in the following circumstances:*

- (a) if the registration fee covers work (such as that reserved to host state lawyers under Article 5.2 of the Directive) which the lawyer registering under Article 3 of the Directive will not be entitled to carry out under the Directive; or*
- (b) if the fee covers items already paid elsewhere by the registering lawyer, such as indemnity insurance or social security contributions.*

*A lawyer registering under Article 3 of the Directive who does not pay the fee requested by the relevant competent authority shall be considered to be guilty of unprofessional conduct, and the relevant competent authority may report the matter to the lawyer's home bar for further consideration, and may itself bring disciplinary proceedings against the lawyer under Article 7 of the Directive.*

***What documents can be requested from the registering lawyer?***

The registration process should not be so burdensome as to count as an obstacle to free movement. The CCBE's guidelines on implementation of the Establishment Directive (cited above) say:

*So far as possible, the following documents only should be requested by a bar or law society on a request for registration:*

- (a) a completed application form for the registration;*
- (b) a certificate of attestation from the home bar or law society;*
- (c) evidence of existing professional indemnity insurance.*

*In any case, the requested documents for such an application should not exceed those which would be requested from a lawyer transferring from one bar to another bar within the host Member State.*

*An authenticated translation of the requested documents, into an official language of the host bar, may be requested by the host bar or law society.*

The [CCBE guidelines](#) also have a model registration form for use by the bars.

**Practical requirements to avoid confusion with host State professional title (Article 4, Establishment Directive)**

It is important that the registered, established lawyer practises under his or her home title. This should not be translated into the equivalent title in the host state, because it could cause the misunderstanding that the lawyer is admitted to the host title of the bar in the host state. Instead it must be expressed in the official language (or one of the official languages, if more than one) of the home state. In other words, a



French 'avocat' established in Ireland must use the title of 'avocat' and not 'solicitor' or 'barrister'.

The Directive also provides that it must be expressed 'in an intelligible manner'. This has not yet been tested in court, but could mean that a Greek 'Δικηγόρος' should also use a transliteration of the title - 'dikigoros' – in countries which do not use the Greek alphabet (and vice versa for other lawyers established in Greece).

The host Member State can also insist on the established lawyer including a reference to the home bar of which he or she is a member plus a reference to his or her registration with the competent authority. In the example given above, it would be 'Δικηγόρος' (dikigoros registered with the Athens Bar under licence number 12345) or the equivalent.

The CCBE's [guidelines](#) on implementation of the Directive add the following:

*In order to inform clients and other lawyers, EU bars and law societies are encouraged to ensure that, in addition to the provisions of Article 4 of the Directive, lawyers practising under their home title in another Member State also put on their notepaper the following information:*

- (a) *a statement attesting to their registration with the competent body in the host state (written in the host language); and*
- (b) *a statement of their registration with the home bar in the home state (translated into the host language).*

## Salaried practice (Article 8, Establishment Directive)

One of the significant differences in the practice of law across the EU is the extent to which lawyers are entitled to be employed, either by other lawyers or by non-lawyers. Employment is considered by some bars to be inconsistent with the idea of independence. In particular, in-house counsel are not recognised by some European bars as independent lawyers who can enrol with the bar.

Article 8 of the Establishment Directive allows employed lawyers, whether employed by lawyers or non-lawyers, to take advantage of the Directive only to the extent that the host State permits such practice. So, if a lawyer working as an in-house counsel is admitted as a member of his or her home bar, he or she will only be able to establish as an in-house counsel in a host State which similarly recognises in-house counsels as members of the bar.

The CCBE has additionally provided its [interpretation](#) of Article 8 in its position on Evaluation of the Lawyers' Directives, as follows:

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

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

## Professional indemnity insurance (Article 6.3, Establishment Directive)

There is one area of double application of rules – see double deontology above - with which the Directive specifically deals and that relates to professional indemnity insurance. A lawyer establishing in the host country will have to satisfy both home and host rules relating to professional indemnity insurance, which may not be the same.

The Directive states that a host Member State **may** require (not **must** require) a lawyer practising under home State professional title, either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. However, a lawyer practising under Home-State professional title shall be exempted from that requirement if he or she can prove the existence of insurance taken out or a guarantee provided in accordance with the rules of the home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host Member State may require (again **may**, and not **must**) that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State.

The CCBE's [guidelines](#) on the implementation of the Directive say:

### *7. Professional liability insurance*

*The bodies responsible in each Member State for arranging and/or providing professional indemnity insurance as mentioned in Article 6.3 of the Directive shall liaise with corresponding bodies in other Member States to ensure that, so far as possible, insurance arrangements made by a lawyer in one Member State are respected and recognised in another Member State both before and after integration under Article 10 of the Directive, to avoid problems relating to double premiums and double insurance.*

The European Commission has in the past encouraged member bars to follow the example of the Paris Bar and the Law Society of England and Wales, which have come to a mutual recognition agreement in respect of the professional indemnity insurance schemes in each other's jurisdiction.

## Frequently asked questions

### ***What steps has the CCBE taken to ensure better co-operation on insurance matters between Member States?***

The CCBE has undertaken a significant body of work attempting to bring the various insurance regimes in the Member States into closer co-operation, as follows:

- (1) [Minimum standards](#) for European Lawyers' Professional Indemnity Insurance;
- (2) [Model](#) of a questionnaire on professional indemnity insurance for lawyers asking for registration under the Establishment Directive;
- (3) [Terms of Difference in Conditions Cover](#)
- (4) [Insurance terminology](#) (a glossary of terms in English, French and Dutch)



## Legal Form and Shareholding Requirements

Article 11 of the Establishment Directive regulates the extent to which differing legal form requirements as well as shareholding requirements in Member States may impede free movement of lawyers and law firms as follows:

- (1) the general provisions found in Article 11.1-11.4, which deal with legal form among lawyers (see (1) below); and
- (2) the specific provisions for non-lawyer shareholding or management under Article 11.5, which raise their own complex and lengthy issues in the case of non-lawyer involvement (see (2) below).

### (1) Article 11.1-11.4, Establishment Directive

Joint practice between lawyers is allowed under the Establishment Directive where the host State permits it. Therefore, if two or more established lawyers in a host State belong to the same grouping in their home State, they shall be allowed to practise together in a branch or agency of their grouping in the host State.

However, if the fundamental rules governing the grouping in the home State are incompatible with fundamental rules in the host State, the host State rules shall prevail *‘insofar as compliance therewith is justified by the public interest in protecting clients and third parties’* (Article 11 .1 of the Establishment Directive).

The CCBE has considered this provision in its [position](#) on the Evaluation of the Lawyers’ Directives, and says the following:

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

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

The lawyers entitled to joint practice must be given access to a form of joint practice. If there is a choice between several forms in the host State, these same forms must also be made available to established lawyers, always governed by the rules in the host State. Lawyers from different Member States as well as host State lawyers, must also be allowed to practise together under the same conditions.

## Frequently asked questions

### *What about limited liability structures crossing borders?*

Please see the answer given in the text in italics above. In addition to what is stated there, the host Member State may seek to provide for a higher professional indemnity insurance obligation in such cases, to compensate for the lack of personal liability (as Germany does).

***What are the consequences when law firms themselves are registered with the bar in the home State?***

The CCBE has considered this in its [position](#) on the Evaluation of the Lawyers' Directives, and says the following:

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

**(2) Shareholding/management by persons who are not members of the profession - Article 11.5, Establishment Directive**

Some Member States now permit what are called alternative business structures (ABSs), allowing non-lawyer participation in a law firm to differing degrees. Other Member States still strictly forbid such practices. This section considers joint practice in these circumstances.

The CCBE has a [position](#) on ABSs, summarised below:

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

The CCBE position paper on the Evaluation of the Lawyers' Directives (cited in the paragraph above) describes some of the forms that ABSs might take:

*Non-lawyer involvement in law firms is not restricted to third party capital, i.e. non-lawyer investors being owners or co-owners of a law firm. Non-lawyer involvement does occur in certain Member States in a range of particularly different forms, e.g., retired partners, widows or offspring of former partners to avoid law firms having to be liquidated as a result of the death or retirement of a partner, lawyer's spouses or other non-lawyers acting as clerks or managers and earning their own living within the firm, or non-lawyer professionals practicing within a common structure.*

The Establishment Directive provision (see Article 11.5) which governs the cross-border activities of ABSs entitles a Member State which forbids ABSs to refuse to allow a lawyer to practise in its jurisdiction in its capacity as a member of an ABS. In order to prohibit such lawyers from practising in their jurisdiction, the following conditions laid out in the Directive (but see additionally below) must be satisfied:

- (1) The Member State must prohibit its own lawyers from practising in such a structure;
- (2) The structure must be such that:
  - i. the capital of the grouping is held entirely or partly; or
  - ii. the name under which it practises is used; or
  - iii. the decision-making power in that grouping is exercised de facto or de jure by persons who do not have the status of a European lawyer as listed in Article 1.2 of the Establishment Directive.

However, the exercise of the possibility provided by Article 11.5 of the Establishment Directive for Member States to refuse the right of establishment to individual lawyers (1st sentence) as well as to law firm's branches or agencies (2nd sentence) also needs to be justified by overriding reasons in the general interest and be subject to a proportionality test on the basis of a case-by-case evaluation.

Primary EU law (as in case law of the CJEU) demands these tests – overriding general interest and a proportionality test – whenever a Member State is given the right to restrict free movement.



Article 49 TFEU reads:

*“(1) Within the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State.*

*(2) Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject the provisions of the chapter relating to the capital.”*

Restrictions on the freedom of establishment occur as a result of differing domestic regulation from one Member State to another. According to CJEU case law such restrictions may by way of derogation from the general rule laid down in Article 49 (1) TFEU be justified by overriding reasons in the general interest, if they are applied in a non-discriminatory manner, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.

Whether restrictions of free movement rights, caused by a Member State’s domestic laws, by way of derogation from Article 49.1 TFEU may be considered justified on grounds of overriding reasons in the general interest, therefore depends on the application of EU law, in particular Article 49.1 TFEU, CJEU case law and the Charter of Fundamental Rights. This question may arise due to a lack of EU-wide regulation as well as due to provisions in Directives leaving options to Member States. In order to facilitate freedom of establishment, as provided for by Article 50 TFEU, of the legal profession, the Establishment Directive has been adopted.

With regard to legal form requirements of lawyers’ joint practice Article 11.1 of the Establishment Directive restricts Member States’ competence to hinder or make less attractive establishment to two specific overriding reasons in the general interest: protection of clients or third parties.

As opposed to legal form requirements, Article 11.5 of the Establishment Directive, does not in any way, restrict the scope of overriding reasons in the general interest, that Member States may rely on, in case their domestic regulation restricts establishment of individual lawyers practising the profession of lawyer within a grouping in the sense of Article 11.5 of the Establishment Directive, i.e. non-lawyer involvement in the grouping, as well as the establishment of the grouping itself. Nevertheless, the exercise of the option laid down in Article 11.5 in any event needs to be justified by an overriding reason in the general interest and has to be enacted in a proportionate way.

These details are explained and laid out in more detail in the CCBE’s [position](#) on the Evaluation of the Lawyers’ Directives.

First, the refusal must be justified because of overriding reasons in the general interest and the CCBE has stated the following about this:

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

Secondly, there is the proportionality test. As applied to legal services, the definition of such a test is taken from the Gebhard case of 30 November 1995 (case C-55/94), which defined the test as follows:

*National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:*

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

The CCBE considers that it is only if all of the conditions outlined (those taken from Article 11.5 itself, together with the tests on ‘overriding reasons in the general interest’ and proportionality) are satisfied that a Member State may refuse to allow a lawyer from an ABS to register in its jurisdiction.

Article 11.5 2<sup>nd</sup> subparagraph of the Establishment Directive covers groupings of lawyers (whereas Article 11.5 1<sup>st</sup> subparagraph covers individual lawyers from such groupings). This provision states that where the fundamental rules governing a grouping of lawyers in the home Member State are incompatible with the rules in force in the host Member State or with the other provisions of Article 11.5 of the Establishment Directive regarding groupings, the host Member State may by way of derogation from the restrictions laid down in Article 11.1 oppose the opening of a branch or agency within its territory without the limitation of possible justification to ‘the public interest in protecting clients and third parties’.

## Compulsory pensions and social security schemes

The Establishment Directive includes no specific provisions on the impact of lawyer mobility on compulsory pension and social security arrangements, but this has nevertheless proved to be a matter of occasional questions because of the different ways that such arrangements are made in the Member States. In some Member States, there are lawyer-specific pension and social security arrangements, usually run by the bars, and in others lawyers are treated no differently from any other member of the population. Movement from one system to another can create difficulties.

The CCBE’s [guidelines](#) on the implementation of the Establishment Directive state:

*In order so far as possible to avoid double payment of pension, social security and health scheme payments by EU lawyers practising under their home title in another Member State, EU bars and law societies are encouraged to permit where possible migrant EU lawyers to continue paying into such schemes in their home state, without the necessity of their also contributing to any schemes in the host State, provided that they are able to provide evidence of such home state payments to the appropriate authorities in the host State.*

The CCBE has created a [practical guide](#) for lawyers to the different arrangements in the Member States.

Finally, the CCBE has produced [Guidelines](#) with a view to a homogeneous application of the principles present in regulation 1408/71/EC by social security organisations.

## Continuing education

The Establishment Directive has no provisions about continuing professional education, however, the compatibility of different systems, either compulsory or mandatory, to which a migrant lawyer may be subject in the home and host State has given rise to some questions, which the CCBE has tried to resolve.

The CCBE’s [guidelines](#) on implementation of the Directive state the following:

*In order to avoid the multiple application of continuing professional education schemes, where a lawyer is established under the Directive in a Member State other than that in which he or she is qualified, the lawyer shall be subject to the continuing professional education rules of the host State bar, except where the home State bar has rules which oblige the lawyer to continue home State*





*professional education wherever he or she is based. In addition, the bars and law societies of all Member States are encouraged to develop flexible continuing professional education rules which will permit migrant lawyers to satisfy them by undertaking continuing professional education not only in host state law but also in home state law.*

More recently, the CCBE has agreed a [resolution](#) on continuing legal education, which is largely devoted to this issue and states the following:

- 1. Continuing legal training helps to ensure the quality of services provided by lawyers.*
- 2. The competent authorities of Member States should establish clear and straightforward mechanisms of recognition without the necessity of providing sworn translations of the contents of training received or that otherwise make the recognition of a training course unduly cumbersome.*
- 3. The realization of joint training courses by lawyers of different countries, in particular, training in European Union law and European comparative law is a very positive step to establish a legal culture in Europe and to generate confidence in the respective legal systems. For this reason, providers of such training courses should not be required to ask for recognition of these training courses in every Member State. Likewise, lawyers who receive such training should not have to undergo a recognition process unless the applicable national system also provides such recognition for national training courses.*
- 4. The competent authorities of each Member State which establish a system of compulsory continuing legal education should expressly regulate the situation of lawyers under the Establishment Directive and which are confronted with dual compulsory continuing training requirements. Therefore,*
  - a. they should develop flexible continuing legal education rules that will permit migrant lawyers to satisfy such rules by undertaking continuing legal education not only in host state law, but also home state law and EU law, regardless of where such training takes place.*
  - b. the trust in the competent authorities of other Member States which require compulsory continuing legal education should prevail.*
  - c. additional national continuing training requirements may only be established if national lawyers are required to have specific knowledge in particular legal areas or in order to comply with a minimum number of hours of training.*
  - d. continuing legal training should never be a barrier to the freedom of free establishment.*
- 5. The competent authorities of the Member States which establish systems of compulsory continuing legal education should implement an easy mechanism for the recognition of:*
  - a. courses offered by service providers that have been accredited or recognised by the competent authorities of another Member State in which systems of compulsory continuing legal education exist (system of pre-accreditation of courses).*
  - b. courses followed by lawyers that have already been accredited or recognised by the competent authorities of one Member State in which systems of compulsory continuing legal training exist (system of post-recognition initiated by the participating lawyer).*
- 6. In order to facilitate and simplify the recognition of continuing legal education, it is recommended to require that such courses follow a common system of recognition that is suitable to the legal profession.*

PART 4

LAWYER FROM ANOTHER  
MEMBER STATE PROVIDING  
SERVICES IN A HOST MEMBER  
STATE

#4



## Introduction

Lawyers in Europe advise companies wishing to acquire new markets, couples and their children who travel for business matters, families with inheritance in several European countries, consumers who wish to order a product in a neighbouring country, workers whose job search does not stop at their country's border, citizens facing criminal prosecution in a country where they are not resident.

Travelling lawyers bring with them their status and ethics when practicing in another European country; they meet colleagues, ethics and professional law from the host country. They communicate with courts, be it civil, criminal or administrative courts. They communicate with the government or the police.

They enter a world in which they do not always have a good command of everything. Their activity is based on the freedom to provide services (Article 56 of the TFUE) and is protected by the core values of the legal profession which «guarantee the proper performance by the lawyer of his mission recognized as essential to the proper functioning of any human society» (« *garantissent la bonne exécution par l'avocat de sa mission reconnue comme indispensable au bon fonctionnement de toute société humaine* »). The code of Conduct for European lawyers and Article 4 of the Services Directive define the requirements:

*Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.*

*A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.*

When a lawyer practices within the freedom to provide services, that is to say, occasionally, local bars may face a number of issues.

Bars must balance several European and national requirements, arising from law and case law:

- (1) Lawyers Services Directive 77/249/EEC, aka Directive on the freedom to provide services,
- (2) The local legislation regarding the legal profession,
- (3) Directive 2006/123/EC of 12 December 2006 on services in the internal market,
- (4) The *Gebhardt* judgment (C-55/94), in particular its proportionality principle,
- (5) The CCBE Code of Conduct for European lawyers, where applicable.

The prime duty of the host bar is obviously to facilitate the freedom to provide services for any European lawyer within the given legal framework.

## Who can benefit from the Services Directive?

### *Is it about provision of services?*

The distinction between provision of services and the establishment of a lawyer is not always clear. The nature of the intervention of the European lawyer should be checked in a factual manner. Indeed, it is not excluded, especially in border regions, that an activity which started with the provision of timely services develops into a main activity which does require on site establishment. The outward signs of such establishment can be the creation of an office, hiring staff and the frequent presence of the lawyer at the host bar. But this is not necessarily sufficient to be considered as establishment.

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Explanations concerning the case law, and in particular the *Gebhard* decision on this issue are found in the chapter 3 "What does establishment mean?"

### *Is he or she a lawyer?*

The necessary verifications needed are explained in the first part of this guide. However, some specific aspects apply to freedom to provide services.

### *How to deal with a salaried lawyer (Article 6, Services Directive) ?*

This case is provided for by the Services Directive to facilitate the effective exercise by lawyers of freedom to provide services.

Indeed, Article 6 provides that salaried lawyers employed by a company cannot represent their employers in the courts of the host State if this is not allowed in the host State.

It is therefore necessary to check in the host State domestic law whether a salaried lawyer employed by a company is able to represent his/her employer before the national courts. If this is the case, any salaried lawyer from another country can do so; otherwise it is forbidden. (For a civil servant: CJEU 2 December 2010 *Jakubowska* - C-225/09).

Practical issues encountered by a bar in the framework of the freedom to provide services of a colleague from another Member State can arise in four aspects:

- courts
- local lawyers
- clients
- the activities of the bar

The Services Directive provides a number of rules concerning lawyers providing services by making a distinction between representation and defence of a client before courts or administrative authorities and other types of activities.

In the first case, i.e. court-related work, lawyers must respect the rules of the host Member State, while still being bound to the professional rules of their home Member State (Article 4.1 and 4.2).

Finally, concerning court-related work, the Directive provides the Member States with the possibility to require the roaming lawyer to work in conjunction with a local lawyer (Article 5).

For non-judicial activities, Article 4.4 subjects lawyers to the rules of their home State first, then they must comply with the rules of the host Member State according to the circumstances set out in Article 4.4.

How is it possible to apply these principles in practice?



## Frequently asked questions - Courts

The fundamental rule is in Article 4.1 of the Services Directive. A lawyer must be treated like a local lawyer.

### *Should a European lawyer be treated by the courts or other public authorities in the same way as a local lawyer?*

If necessary the bar should intervene regarding courts or other public authorities so that lawyers registered to a European bar can benefit, while delivering services, from the same conditions as local lawyers without any additional obligations (CJEU 1 July 1993 *Hubbard/Hamburger C-20/92*).

### *Does a European lawyer benefit from the same conditions during access to courts and prisons?*

Those lawyers should be treated in the same way as members of the host bar when they access courts. It should be ensured in particular that they are not subjected to any additional searches for safety reasons for the mere reason that they are not registered with the local bar. The same obviously applies for access to prisons.

This is a matter of protection of lawyers' confidentiality and professional secrecy. It is a general principle which cannot be treated differently by courts and local governments based on the country in which lawyers are registered.

### *Should a European lawyer have same access to case files as local lawyers?*

According to some national legislation, access to case files, especially in criminal cases, may be limited to a lawyer registered at the local or national bar. In this case, courts refuse to grant access to criminal files to lawyers registered with foreign bars, even EU bars. This issue, if it arises in any state, arises from local legislation, which potentially infringes Article 4.1 of the Services Directive. Unless proceedings are commenced in relation to this matter, the issue can only be resolved by the host bar by amicable means. If this is not possible, the European lawyer's client will need to engage a local lawyer to access the case files.

### *Can a European lawyer ask for case files to be sent by post?*

In some countries, courts send case files to lawyers by post. Such courts often refuse to send files abroad. Unfortunately, this obstacle to the freedom to provide services cannot be reversed by the bars.

### *Can a European lawyer take part in electronic communications?*

The same question arises in the context of electronic communications as communications with the courts are electronic in several European countries. Most often, one must benefit from secure access or access to an intranet network. If those electronic communications are administered by courts, bars cannot intervene in order to allow a European lawyer to gain access to the proceedings they are undertaking. Again, it will be necessary to have a lawyer on site.

### *Can a lawyer acting in conjunction with the lawyer be imposed upon a European lawyer?*

Article 5 of the Services Directive provides that domestic legislation may require the presence of a local lawyer to work in conjunction with the European lawyer. Depending on the implementation of this rule in your national law, you can solve the mentioned situations by acting as an intermediary to find a lawyer to work in conjunction (CJEU 10 July 1991 *Commission/France C-294/89*).

If local legislation provides for the legal fees of a case to be charged to the losing party, charging the legal fees of the lawyer working in conjunction is mandatory (CJEU 11 December 2003, *AMOK C-289/02*).

### ***Can internal rules of procedure be imposed to European lawyers when they represent clients before the courts?***

We have explained in a few lines the link between the professional rules of the host State and those of the home State. These rules may conflict or even be contradictory.

In such case, the answer is yes according to the CCBE as set out in its Evaluation of the Lawyers' Directive:

#### *Article 4.1 and 2 representation of clients in legal proceedings*

*With regard to the representation of clients in legal proceedings, according to Article 4.1, the lawyer pursues that activity "under the conditions laid down" for lawyers established in the host Member State. The "conditions laid down for lawyers established" in the host country for the pursuit of such representation do comprise specific proceeding-related professional rules in some jurisdictions. Rules that are considered to be rules of civil or criminal procedure in one Member State may be considered to be professional conduct rules in another Member State. Temporarily servicing lawyers have to comply with these rules without regard to their qualification as procedural or professional conduct rules. Article 4.2 stipulates that "a lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes". The CCBE considers that the only interpretation of Article 4.2 (in the sense of a conflict rule), in line with the Directive's language is the same interpretation as already adopted on Article 6 of Directive 98/5, i.e. **"in case of a conflict between home and host State professional rules the host Member State's professional rules prevail."***

### ***How can a conflict of interest be dealt with?***

The CCBE states the following in its Evaluation of the Lawyers' Directives:

*Where a team of lawyers from different jurisdictions handles a client's case, national conflict of interest rules may differ from one another. Law firms in such a case apply in practice the strictest rule one of the lawyers concerned will have to comply with and may on these grounds from time to time refuse to accept a client's case.*

### ***Shall the bar intervene before the court in the event of an incident?***

If national legislation or practice requires the intervention of the bar during an incident between a judge and a lawyer, the European lawyer should be defended in the same way the bar would defend a fellow member of the bar.

### ***How should a bar react in the event of searches, wiretapping or any other infringement to professional secrecy?***

Since the judgment of the European Court of Human Rights in the *Xavier da Silveira vs France* case (5th section 21 January 2010 No. 43757/05), it can be said that a lawyer from another European country enjoys the same guarantees as a national lawyer. Therefore, if domestic law provides special rules for searches of law firms and wiretapping to protect confidentiality, the fellow European lawyer should benefit from these rules in the same way. The bar should intervene on behalf of the European lawyer before the courts or any other competent authority as the bar would do for a member of her own.

### ***What defence should European lawyers benefit from when they are held in custody?***

If a European lawyer is held in custody during the defence of a client, it is necessary to defend him/her as a fellow member of the bar.



## Frequently asked questions - Local lawyers

### *Should a lawyer pay for the fees of a European lawyer?*

A dispute may arise between a member of a national bar and a foreign lawyer regarding fees.

The CCBE Code of Conduct for European lawyers deals with most of these issues.

Article 5.4 clearly states that no referral fees can ever be charged.

Article 5.7 makes responsible for the payment of the fees any lawyer having entrusted a lawyer from another member State with a mission. In the absence of specific provisions between lawyers and their clients, such responsibility is unlimited.

In some Member States the matter governed by Article 5.7 is considered to be a matter of contract law as opposed to professional rules so that neither CCBE nor national delegated professional law is considered competent to regulate this matter. In any event, it is preferable to clarify ex ante, whether the lawyer instructs the European lawyer on his own behalf or in the client's name.

### *Is correspondence between lawyers from two national bars subject to the obligation of professional secrecy?*

The scope of professional secrecy may vary, especially as regards correspondence between lawyers. In some European countries it is - vis à vis the own client - protected by professional secrecy. The Code of Conduct for European lawyers resolved the issue as follows:

*Article 5.3 If a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice he or she should clearly express this intention prior to communicating the first of the documents.*

*Article 5.3.2. If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he or she should inform the sender accordingly without delay.*

## Frequently asked questions - Clients

Clients may address the host bar about three issues:

- They can first contact the bar regarding fees. Indeed, in many Member States', bars provide advice during litigation between lawyers and their clients. There are also several types of mediation. Eventually, bars may be competent to decide on fees, as in France.
- They may criticize the quality of a lawyer's work and ask for your intervention before a professional indemnity insurer. Not in all jurisdictions will the bar be competent or have a role as intermediary between client and insurance company.
- The client might submit a complaint because of a professional misconduct.

### *How to respond when a client asks a host bar to settle the fees of a European lawyer who is not a member of the host bar?*

The competence of bars to intervene with regard to fees differ. A bar may act as a mediator or as an expert if seized by a court in civil proceedings between lawyers and their clients. In other jurisdictions bars are competent to take decisions in the same way as a judge at first instance. Accordingly, the correct answer differs from jurisdiction to jurisdiction.

Regarding fees, two different situations may arise, which must be distinguished from one another:

If it is an intervention within the framework of legal aid, it is sufficient, in order to obtain it, to refer the European lawyer to Council Directive 2003/8/EC of 27 January 2003 and its implementation in domestic law.

If there are non-fixed fees and the bar is competent to rule on this issue or is asked for its opinion, there are some conventional arguments to use in this context:

If the parties have entered into a fee agreement which establishes to what extent a bar is competent on the matter, one should check if the clause is valid. Indeed, some European case law considers the competence of bars to rule on fees as public policy from which the parties may not derogate.

In the absence of a valid agreement, the lawyer should refer to his or her national law to establish the competence of the bar. If it depends, which is most likely, on the lawyer being registered with the host bar, the bar is not competent. In this case, it is suggested that the person concerned be informed and provided with the details of the European lawyer's bar.

If the host bar has competence to rule on fees in the framework of the provision of occasional services, the applicable law has to be determined. In the absence of choice by the parties, Article 4 1b of Regulation EC 593/2008 on the law applicable to contractual obligations may be considered. Additionally, it is important to keep in mind the application of consumer law since the judgment of the CJEU of 15 January 2015 *SIBA* (C-537/13) which applies the Unfair Contract Terms Directive<sup>4</sup> to a contract for legal services.

#### ***What if a client complains about infringements of professional rules by a lawyer from another member State?***

The host Member State bar's reaction will depend on how the respective Member State has implemented Article 7.2 of the Services Directive. In a case where a Member State has designated a host Member State bar as competent authority to exercise the Host State's jurisdiction over lawyers from other Member States the competent bar will, according to its own professional rules and procedures, decide on possible disciplinary proceedings against the lawyer. Whether professional rules of the lawyer's home Member State or host Member State' professional rules will be applied, must be decided in conformity with Article 4 of the Services Directive. Should the host Member State designate a competent authority other than the bar, the complaint must be referred to the competent authority.

Where the host Member State has decided not to exercise jurisdiction over temporarily servicing lawyers, the host Member State bar may refer the complaint to the home bar or consider disciplinary actions or proceedings.

#### ***Can a European lawyer ask to benefit from all services offered by the bar to its local lawyers?***

An issue may arise regarding the possibility for the European lawyer to benefit from services organised, provided for and financed by the host bar.

Such services may be timely services, for instance in the framework of larger criminal proceedings: organising rooms, providing resources and communicating with courts.

These services may also include such privileges as the use of a library, car parks or meeting rooms.

They may be related to training and to services during proceedings, such as representation at a preliminary hearing or completing formalities.

Of course, courtesy and fellowship require European lawyers to have access to all premises, which are made available to lawyers in courts or out of courts.

<sup>4</sup> See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29)





However, participation in this type of activity might cause problems, when it is financed by contributions from the local lawyers. In this case, we suggest a simple rule. If the service is available not only to lawyers of the bar, but also to those of other bars from this country, it must then also be extended to lawyers from another Member State or an agreement to individually contribute to the financing could be sought.

PART 5

LAWYER FROM ANOTHER  
MEMBER STATE OBTAINING  
A HOST MEMBER STATE  
PROFESSIONAL TITLE

#5



European lawyers may in addition to the qualification obtained in one Member State wish to acquire another Member State's professional title. It appears that a remarkable number of young professionals seek to enhance their career development in this way. Lawyers established under their home title in another Member State may seek to acquire the host Member State's professional title in order to integrate into the host Member State's profession. This is a choice. Establishment under the home Member State's title is in no way a transitory measure that is intended necessarily to end up in the integration into the host Member State's profession. Lawyers established under their home title enjoy all the desirable practising rights and consequently in general do not see the need to practise under the host Member State title.

EU law offers lawyers wishing to obtain an additional professional title a choice between two different routes – both routes take into account the fact that a lawyer fully qualified in one of the Member States does not need to start professional training in another Member State from scratch:

**Recognition of Qualifications** - Admission to host Member State professional title through the Professional Qualifications Directive<sup>5</sup> (Articles 13 & 14) sitting an aptitude test or passing an adaptation period.

**Three years' practice** - Admission to host Member State professional title through the Establishment Directive (Article 10) through practice under home state title in the host state law.

It appears that compared with the number of integrations through an aptitude test within the framework of the Professional Qualifications Directive, a limited number of lawyers are integrated into the host Member State through Article 10 of the Establishment Directive after three years of effective and regular practice under his/her home title. Lawyers choose the method for obtaining an additional professional title according to the different goals they may pursue.

Lawyers may choose to establish without seeking integration at all, as establishment under the home country title is an option explicitly offered by the Establishment Directive (recital 3) and provides for all practising rights. They may also choose to pass the aptitude test in order to be integrated in the host Member State immediately, without having to wait for the period of establishment required under Article 10 of the Establishment Directive to have elapsed. Finally, they may choose to pass the aptitude test while not seeking establishment in the host Member State. That is for instance the case for a large number of young lawyers, especially those seeking to obtain the qualification as solicitor in England and Wales through the Professional Qualifications Directive, in order to improve their chances of finding employment with a law firm in a country other than the UK.

It is to be noted that some of the big law firms insist on their own lawyers obtaining the title of the jurisdiction in which they are practising, if it is not their home State. Some even insist on these lawyers doing so via the aptitude test rather than the alternative route of Article 10.

## Recognition of Qualifications - Professional Qualifications Directive, Articles 13 & 14

This section looks at the possibility of acquiring the professional title of a second Member State, without the need to move to that Member State, either temporarily or permanently. The Professional Qualifications Directive governs this route and repeals the original Directive 89/48.

<sup>5</sup> See Directive 2005/36/EC on the recognition of professional qualifications as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013

## Requirements

The principle behind the Professional Qualifications Directive is that there should be recognition of qualifications already possessed by the applicant lawyer when applying to acquire the new title. There is therefore no need for the applicant lawyer to start the study of law all over again, but rather to fill in the gaps of difference between the legal knowledge already acquired through possession of the home title, and the knowledge required for acquisition of the new title.

This filling in of the gaps can be undertaken in two ways recognised by the Professional Qualifications Directive: by taking an aptitude test or by fulfilling a period of adaptation. Usually, the host State must leave the choice to the applicant as to which of the two methods the applicant wishes to choose, but for lawyers (defined as “*professions whose pursuit requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity*”), the host State may choose. In this respect, all Member States other than Denmark have chosen to require applicant lawyers to undertake an aptitude test.

### (1) Aptitude test

This is defined by the Professional Qualifications Directive as follows:

*“a test of the professional knowledge, skills and competences of the applicant, carried out or recognised by the competent authorities of the host Member State with the aim of assessing the ability of the applicant to pursue a regulated profession in that Member State.*

*In order to permit this test to be carried out, the competent authorities shall draw up a list of subjects which, on the basis of a comparison of the education and training required in the host Member State and that received by the applicant, are not covered by the diploma or other evidence of formal qualifications possessed by the applicant.*

*The aptitude test must take account of the fact that the applicant is a qualified professional in the home Member State or the Member State from which he comes. It shall cover subjects to be selected from those on the list, knowledge of which is essential in order to be able to pursue the profession in the host Member State. The test may also include knowledge of the professional rules applicable to the activities in question in the host Member State.”*

The following essential criteria of the test can be seen from this definition:

- it must cover only subjects not covered by the existing qualification
- it must cover only those subjects which are essential in order to practise as a lawyer in the host State

### Qualifications from Third Countries

EU nationals may obtain a qualification in a third country which is then recognised by an EU state, e.g. a Portuguese national whose qualification as a Brazilian lawyer is recognised in Portugal. In that example, the Portuguese legal qualification would only have to be recognised by other Member States if the lawyer had three years' experience in Portugal: Article 3(3) of the Professional Qualifications Directive.



## Frequently asked questions

### *Can there be a language element in the aptitude test?*

Article 53 of the Professional Qualifications Directive states that *'Professionals benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State.'*

Nevertheless, it is believed that language is not one of the topics which can be tested directly and as does not fall within the essential criteria listed i.e. it is not essential in order to practise as a lawyer in the host State. For example, a lawyer could provide services solely to people speaking his or her home language. However, for obvious reasons, language is tested indirectly, both through the fact that the aptitude test will be taken in a language of the host state and through the additional possibility to have part or all of the test undertaken orally or in writing, at the option of the host State. Clearly, if the applicant lawyer does not speak or write sufficiently well to answer the question to the standard required, that can be taken into account in the final result.

### Period of adaptation

This is defined by the Professional Qualifications Directive as follows:

*"the pursuit of a regulated profession in the host Member State under the responsibility of a qualified member of that profession, such period of supervised practice possibly being accompanied by further training. This period of supervised practice shall be the subject of an assessment. The detailed rules governing the adaptation period and its assessment as well as the status of a migrant under supervision shall be laid down by the competent authority in the host Member State."*

The period of adaptation is set by the Member State concerned and can be for a period of up to three years.

#### (1) Procedure

In each case – an aptitude test or period of adaptation – the applicant lawyer will have to apply to the competent authority in the host state, usually the bar, in order to find out the national procedure for complying with the Professional Qualifications Directive.

## Three years of effective and regular practice – Establishment Directive, Article 10

The Establishment Directive permits established lawyers from one Member State to be admitted to the professional title of another Member State, subject to certain conditions. The Establishment Directive recognises two kinds of applicant:

- (1) one who has effectively and regularly pursued for a period of at least three years an activity in the host Member State in the law of that State including EU law; and
- (2) one who has effectively and regularly pursued a professional activity in the host Member State for a period of at least three years [but for a lesser period in the law of that Member State](#)

In either case, the established lawyer is to be admitted to the host professional title without an examination. In (1) the host Member State must accept the applicant if the requirements are satisfied, whereas in (2) the host State has a discretion.

In (1), the lawyer must provide the host competent authority with proof of the effective regular pursuit. The Directive states that proof shall include relevant information and documentation, notably on the number of matters dealt with and their nature. The competent authority may verify the effective and regular nature of the activity pursued and may, if need be, request the lawyer to provide, orally or in writing, clarification of or further details on the information and documentation provided. A reasoned decision must be given by the competent authority if the application is not approved because of lack of proof (which appears to be the only ground for refusal of the application), and this decision must be able to be appealed in the host State.

In (2), the host competent authority must take into account the effective and regular professional activity pursued during the three year period and any knowledge and professional experience of the law of the host State, and any attendance at lectures or seminars on the law of the host State, including the rules regulating professional practice and conduct. The lawyer is again required to provide the competent authority with any relevant information and documentation, in particular on matters dealt with. Assessment of the lawyer's effective and regular activity in the host state and capacity to continue the activity pursued there is to be carried out by means of an interview with the competent authority of the host state in order to verify the regular and effective nature of the activity pursued. Once again, reasons shall be given for a decision by the competent authority in the host state not to grant authorisation where proof is not provided that the requirements have been fulfilled, and the decision must again be subject to appeal under domestic law.

Despite the provisions outlining these two routes, the host competent authority has a reserved right (subject to reasoned decision which must itself be subject to appeal under domestic law) to refuse to allow any lawyer to benefit from these provisions if it would be *'against public policy, in particular because of disciplinary proceedings, complaints or incidents of any kind'* (Article 10.4, Establishment Directive).

The competent authority is under an obligation to keep confidential any information received under an application via these two routes.

A lawyer who obtains the host title under these provisions is still entitled to use the host state title in addition to the home State title.

## Frequently asked questions

### *What does effective and regular pursuit of an activity mean?*

The Establishment Directive defines it as follows:

*Effective and regular pursuit' means actual exercise of the activity without any interruption other than that resulting from the events of everyday life.*

This is itself not a very clear answer to the question and there are going to be circumstances where the decision will not be easy. Some circumstances may be easy – for instance, that the pregnancy of the lawyer will not count as an interruption. But, in due course, only the Court of Justice of the European Union will be able to give further guidance on the more difficult cases that might arise.

It should additionally be noted that the CCBE's [guidelines](#) on implementation of the Directive add a gloss to the second route because of a slight difference in wording between the two routes regarding the practice of European law, as follows:

*The definition of "activity in the host Member State in the law of that state", which appears in Article 10.1 and Article 10.3 of the Directive, shall be interpreted as though there is included in both those places the phrase "including Community law" (even though such phrase does not appear in Article 10.3), so that the practice of Community law shall be able to be taken into account in both Article 10.1 and Article 10.3.*



In other words, the view of the CCBE is that practice in the law of the host State includes practice in EU law so as to ensure equal treatment with lawyers of the host Member State.

PART 6

LAWYERS WHO ARE NOT FULLY  
QUALIFIED

#6





## Applying *Morgenbesser*

The free movement provisions found in primary law such as the TFUE and as interpreted by case law of the Court of Justice of the European Union apply not just to fully qualified lawyers, but also to those who are partly qualified whereas the Directives apply only to the fully qualified. The principle of application of primary law to such circumstances was decided in the case of *Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova* (C-313/01) (the 'Morgenbesser' judgement'). Ms Morgenbesser had completed law studies in France, and had undergone some professional experience in both France and Italy. She was not a lawyer in France and applied to the Bar of Genoa to be put on the list of trainee lawyers, which was refused. The Court of Justice held that Italy was wrong to obstruct Ms Morgenbesser's entry to the Italian register of trainee lawyers by reason of the fact that her legal education took place in France. The governing authorities must take an overall look at the experience and skills obtained by the candidate. If there was a gap in the legal education Ms Morgenbesser had gained in France when compared with the requirements stipulated by Italy, it may then require any gaps to be compensated for.

The CCBE has issued [guidance](#) on how bars, as the competent authorities, can deal with applicant trainee lawyers under the *Morgenbesser* judgement.

### ***Duties of the Competent Authority in relation to the comparative evaluation of qualifications***

- a) *The duty of the competent authority is to assess applicants' competences holistically, that is to say they must assess all the applicant's abilities, knowledge and competences to carry out the professional role of "lawyer" in the host country.*
- b) *The knowledge, learning and skills of applicants have to be taken as a whole, and there can be no prior requirement of equivalence of the academic stage of training.<sup>6</sup>*
- c) *The competent authority must assess not only the academic and other stages of training but also the professional experience of the migrant. This has been a requirement since the *Vlassopoulou*<sup>7</sup> case whose ruling in this respect has since been incorporated into Directive 89/48/EEC.*
- d) *The "professional qualification" of the migrant, wherever gained (at §58), has to be taken into account.*
- e) *National competent authorities should have already a "list of subjects" required in their own Member States. This list should be normally reduced to a smaller list of topics "knowledge of which is essential in order to be able to exercise the profession" (Article 1(g) of Directive 89/48/EEC). This is the yardstick against which the migrant applicant's professional qualification should be judged, taking into account objectively justified contextual differences mentioned in items 5 above and f) below.*
- f) *Objective differences in the context of training and legal practice however can be taken into account.*

Generally speaking it can be said that EU law does not compromise the Member States' competence to set their requirements for access to the profession, but obliges Member States to take into account the applicant's academic and other stages of training completed successfully as well as professional experience having regard to the different legal frameworks of the legal profession in the respective jurisdictions.

<sup>6</sup> See case C-234/97 *Teresa Fernández de Bobadilla v Museo Nacional del Prado, Comité de Empresa del Museo Nacional del Prado and Ministerio Fiscal* [1999] ECR I-4773, noted at (2001) 50 ICLQ 168.

<sup>7</sup> Case C-340/79 *Vlassopoulou* [1991] ECR I-2357 and re-affirmed in case C-238/98 *Hocsman* [2000] ECR I-6623.

The relevant competent authority may be a Member State bar or Law Society or other competent authority (e.g. court, Ministry, university etc.) – a significant practical hurdle can be for an applicant to find the relevant competent authority for the particular stage of training which has been reached. Member bars and law societies are encouraged to provide a single contact point to applicants seeking to qualify as lawyers to help them find the appropriate competent authority.

If the competent authority which needs to determine the acceptability or not of a *Morgenbesser* applicant already has to hand a list of competences which is essential in order to be able to pursue the profession i.e. “outcome requirements” expected for domestic entrants to the profession of lawyer in their jurisdiction, such a list can be used as a yardstick against which the applicant’s professional qualifications are to be judged.

But in many Member States the knowledge and skills required will be expressed in terms of education and experiential input into the training expected to have been achieved by someone seeking to join the legal profession through (one of) the prescribed national route(s). It may therefore be expressed in terms of having a particular type of law degree and of having followed a particular route of training defined in national (or sub-national) terms. Here the outcomes may not have been articulated separately but are assumed or implied from the familiar national training routes.

For these competent authorities the *Morgenbesser* assessment is more difficult. At the same time, free movement would tend to be harder for the *Morgenbesser* applicants to achieve. In the absence of a detailed list of outcome requirements, the assessment of *Morgenbesser* applications is problematic for both applicants and competent authorities. This situation hinders free movement of future professionals.

In order to overcome these difficulties, the competent authorities concerned will have to compile a detailed list of competences required in order to be able to pursue the profession i.e. “outcome requirements” for entrants to the profession of lawyer in their jurisdiction specifically for the purpose of complying with the *Morgenbesser* case law.

The CCBE also has collated [information](#) on the national procedures of some Member States in dealing with *Morgenbesser* applications and on questions arising at a national level such as: the applicable law, the necessary procedural steps, the documents required, and the fee charged.

Finally, the CCBE’s position on the impact of the *Morgenbesser* case on the free movement of lawyers may be found [here](#).

## Professional Traineeships, Articles 3 (j), 55a of the Professional Qualifications Directive

According to Article 55a, the Competent Authority of the home Member State is obliged to recognize - to a certain extent- a regulated professional traineeship carried out in another Member State where access to the profession is conditional upon completion of such traineeship. Professional traineeships carried out in a third country have to be taken into account. The competent authority can limit such recognition through setting out limits on the permissible duration of such a traineeship and by issuing detailed guidelines ‘on the organisation and recognition of professional traineeships carried out in another Member State or in a third country, in particular on the role of the supervisor of the professional traineeship.’ Member States have to publish such guidelines, Article 55a (2) of the Professional Qualifications Directive as amended by Directive 2013/55/EU.



PART 7

COOPERATION BETWEEN THE  
BARS

#7



The Lawyers' Directive have provisions which require the competent authorities to co-operate with each other, as follows.

### Establishment – cooperation on registration and disciplinary matters (Articles 3, 7 & 13, Establishment Directive)

Article 3 (2) of the Establishment Directive requires the competent authority in the host Member State to inform the competent authority in the home Member State of the registration, once the European lawyer has been registered under his home Member State title.

Article 7 of the Establishment Directive deals with disciplinary proceedings.

If a lawyer established in another Member State fails to fulfil obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State shall apply. Before initiating disciplinary proceedings against the lawyer, the competent authority in the host Member State must inform the competent authority in the home Member State as soon as possible, providing it with all the relevant details. If disciplinary proceedings are initiated by the competent authority in the home Member State against the lawyer, it must inform the competent authority of the host Member State(s) in the same way.

Both competent authorities are under a duty to co-operate with each other in these circumstances. In particular, the Directive says that the host Member State must take the measures necessary to ensure that the competent authority in the home Member State can make submissions to the bodies responsible for hearing any appeal.

Article 13 of the Establishment Directive states that the two competent authorities must collaborate closely and give each other mutual assistance (and preserve the confidentiality of the information they exchange). After the competent authority in the host Member State has made a decision, the competent authority in the home Member State shall decide what action to take, under its own procedural and substantive rules.

The temporary or permanent withdrawal by the competent authority in the home Member State of the authorisation to practise the profession automatically leads to the lawyer concerned being temporarily or permanently prohibited from practising under home-country professional title in the host Member State (although it is not a prerequisite for the decision of the competent authority in the host Member State).

The CCBE's [guidelines](#) on the implementation of the Directive state the following about co-operation on disciplinary matters:

*As envisaged under Article 13 of the Directive, co-operation between competent authorities in home and host Member States is of the utmost importance for the efficient working of the Directive, and the attached model registration form [already cited above] contains a declaration for the applicant lawyer to sign to the effect that such free exchange can take place in his or her case. Bars and law societies are encouraged (where their ethical rules do not already contain such a measure) to adopt provisions whereby it becomes a duty on their members who practise in another Member State to allow for such a free exchange of information between home and host competent authorities.*

*The provisions of Article 7.2 to 7.4 and of Article 13 of the Directive (relating to liaison between disciplinary bodies in Member States) shall apply so far as possible not only to the position of a registered lawyer practising under home title in another Member State under Article 2 of the Directive, but also to that same lawyer once integrated into the host title of the Member State under Article 10 of the Directive.*

## Temporary provision of services - notification of the home State (Article 7.2, Services Directive)

If a lawyer providing temporary services in another Member State does not comply with the obligations imposed in the Directive, the host competent authority shall decide in accordance with its own rules and procedures what shall happen to the lawyer concerned. To this end, it may obtain any appropriate professional information concerning the lawyer. However, it must notify the home competent authority of the lawyer of any decision taken. The Directive specifically says: 'Such exchanges shall not affect the confidential nature of the information supplied'.

It may be said that under the Services Directive a need for cooperation in disciplinary matters does not occur very often. There are very few complaints against a lawyer for temporary services.

### Frequently asked questions

#### *What about data protection?*

National data protection legislation does not prevent both the home and host Member State's obligation from complying with the rules laid down in Articles 3, 7 and 13 of the Establishment Directive as well as Article 7 of the Services Directive. If Member States have implemented both Directives properly, domestic statutes will explicitly provide for the exchange of information between the respective competent professional authorities.

Where domestic statutes leave the relation between data protection rules and co-operation in disciplinary proceedings open to interpretation, they have to be interpreted in the light of the Directives' provisions. Bars and law societies in their capacity as their respective Member State's competent professional authority have to comply with the obligations laid down in the Directives. Pursuant to the case law of the CJEU, EU law takes precedence, in its application, over contrary national law. The obligations laid down in Article 3.2, Article 7.2 to 7.4 and Article 13 of the Establishment Directive as well as in Article 7.2 of the Services Directive are clear, precise and unequivocal. Accordingly, competent authorities in Member States are bound by these provisions, even where Member State have failed to implement properly the Directives.

#### *How can contact be made with the competent disciplinary authority in another Member State?*

Bars and law societies may for their respective notifications use all means of communication. A growing number of bars and law societies do have direct access to the Internal Market Information System (IMI). If the respective bars or law societies on both sides are involved in the Internal Market Information system, IMI is a satisfactory tool, despite some translation problems.

The CCBE encourages its members to make use of it. However, all other means of communication equally suitable for the exchange of confidential information may be used.

The CCBE has a [list](#) of disciplinary contact points in the Member States. This also briefly describes the disciplinary process used in each jurisdiction.

#### *What if the competent disciplinary authority in another Member State does not reply to correspondence, or there is other lack of co-operation?*

The CCBE will always attempt to conciliate between the disciplinary authorities in two Member States.