



CCBE statement on the European Commission Consultation on the regulation of professions: Member States' National Action Plans and proportionality in regulation

Freedom of establishment of lawyers, core values of the legal profession and the proportionality of regulations (and their application)

The special position of the lawyer, in view of the core values of the legal profession, can justify specific limitations on the free movement of services and the freedom of establishment, limitations that do not apply to other service-providers.

In the absence of specific Community rules in the field, each Member State is, in principle, free to regulate the exercise of the legal profession in its territory.¹ For that reason, the European Parliament Resolution of 26 May 2016 on the Single Market Strategy makes clear that the rules applicable to the legal profession may differ from one Member State to another, and indeed it expressly notes the fact that “one Member State imposes less strict rules than another does not mean that the latter’s rules are disproportionate and hence incompatible with European Union law”.² The CCBE Charter of Core Principles of the European Legal Profession sets out the common ground which underlies the national and international rules governing the conduct of European lawyers.³

In most Member States, the Bar authorities are entrusted with the responsibility of adopting regulations designed to ensure the proper practice of the profession. Some of the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest, and the duty to observe strict professional secrecy.⁴ The necessity of such rules has been analysed in the Yarrow & Decker study⁵, which assesses the economic justification for professional rules in the legal services sector in the European Union.

Thus, they require of members of the Bar that they should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.⁶

In the judgment of *Golder v. the United Kingdom* on 21 February 1975, the European Court of Human Rights (ECHR) already posited that the right of effective access to the courts implies the right to be assisted before the court by an *independent* lawyer.⁷ According to the Court, it is only by the presence of his lawyer that an accused can benefit from “concrete and effective” defence.⁸

According to the ECHR, the independence of the Bar constitutes a necessary corollary to the independence of the lawyer. Only if the Bar can exercise its task in complete independence can it ensure that the independence of the lawyer can be guaranteed as well.⁹

The lawyer must therefore be able to guarantee his independence, in the widest sense of the word, from the government, the court *and* the public prosecutor, as well as from the enforcing authority, and even the legislative authority. There must also be independence from the Fourth Estate, the press, and in a wider sense, public opinion.

In addition to the ECHR, the Court of Justice also considers the independence of the lawyer as a fundamental guarantee for the rights of defence of accused parties.¹⁰

¹ CJEU 107/83 *Klopp* [1984] ECR 2971, § 17, and CJEU 12 December 1996, C-3/95, *Reisebüro Broede*, § 37

² <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0237&language=GA&ring=A8-2016-0171> at paragraph 87.

³ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

⁴ CJEU 19 February 2002, C 309/99, *Wouters* §100.

⁵ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/RPI_study_Yarrow_D1_1348650358.pdf

⁶ CJEU 19 February 2002, C 309/99, *Wouters* §102.

⁷ ECHR 21 February 1975, *Golder v. United Kingdom*.

⁸ ECHR 9 April 1984, *Goddi v. Italy*; ECHR 21 April 1998, *Daud v. Portugal*; ECHR 10 October 2000, *Czekalla v. Portugal*; ECHR 13 November 2003, *Elci v. Turkey*; ECHR 7 October 2008, *Bogumil v. Portugal*; ECHR 20 January 2009, *Güveç v. Turkey*; ECHR 1 April 2010, *Pavlenko v. Russia*, § 99; ECHR 21 June 2011, *Orlov v. Russia*, § 108.

⁹ ECHR 23 November 1983, *Van der Mussele v. Belgium*, §29.

The independence of the lawyer is largely ensured by the fact that supervision of the activities and failings of the lawyer is not left up to the government or the judicial authorities, but to an independent legal entity or collaborative association of lawyers. In this regard, the essential task of Bars, of which every lawyer must be a member, is to ensure regulation in accordance with the CCBE's Charter of Core Principles of the European Legal Profession, as referred to above.

The Court of Justice has decided on several occasions that the application of professional rules to lawyers, i.e. that the rules regarding organisation, qualifications, professional ethics, supervision and liability, serve a goal of general interest, which can justify an impediment to the free movement of persons.¹¹ According to the Court, the application of these professional rules offers the end-consumers of legal services the requisite guarantee of integrity and experience, and thus contributes to the proper administration of justice.¹²

Limitations on the freedom of establishment are foreseen in the Lawyers' Establishment Directive 98/5: see for example Article 11(5) which allows a host Member State to refuse the establishment in its territory of an individual lawyer or law firm's branch or agency from another Member State under certain conditions.

The CCBE considers that, notwithstanding its apparently permissive wording, the exercise of a possibility such as that provided by Article 11.5 for Member States to refuse the right of establishment is subject to a proportionality test on the basis of a case-by-case evaluation.¹³

In its judgment of 30 November 1995¹⁴, the Court of Justice applied for the first time the proportionality principle in relation to free movement of lawyers, and more specifically to establishment. At that time, temporary services had already been facilitated by the Lawyers Services Directive, whereas the Establishment Directive 98/5 had not yet been adopted. The Court ruled that "*national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:*

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

These four conditions are hereafter referred to as the "proportionality test".

Consequently, providing that a lawyer complies with proportionate local rules, to revert to the Article 11 Establishment Directive example, a Member State can refuse the establishment in its territory of a lawyer from another Member State on the grounds that such lawyer is part of a firm which has non-lawyers among its owners or management **only under the conditions of Article 11.1 of the Directive**.¹⁵ Art.11.1 provides for a Gebhard-type proportionality test, albeit with restrictions as to the permitted public policy objectives. With regard to a law firm which has non-lawyers among its owners or management, the way in which the option of a Member State to refuse a lawyer's permission to practice in its territory in his capacity as a member of his grouping laid down in Article 11.5¹⁶ is

¹⁰ CJEU 19 February 2002, no. C-309/99 *Wouters*; CJEU 26 June 2007, no. C-305/05, §32; CJEU 6 September 2012, nos. C-422/11 P and C-423/11 P, §§ 18 and 44.

¹¹ CJEU 3 December 1974, C-33/74, §12-14; CJEU 28 April 1977, C-71/76, §12, CJEU 19 January 1988, C- 292/86, §29; CJEU 12 December 1996, C-3/95, *Reisebüro Broede*, §38.

¹² CJEU 12 December 1996, C-3/95, *Reisebüro Broede*, §38.

¹³ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_12092014_EN_CCBE_1_1412929215.pdf

¹⁴ CJEU 30 November 1995, C-55/94, *Gebhard*, §37.

¹⁵ "(...) *One or more lawyers who belong to the same grouping in their home Member State and who practise under their home-country professional title in a host Member State may pursue their professional activities in a branch or agency of their grouping in the host Member State. However, where the fundamental rules governing that grouping in the home Member State are incompatible with the fundamental rules laid down by law, regulation or administrative action in the host Member State, the latter rules shall prevail insofar as compliance therewith is justified by the public interest in protecting clients and third parties.*"

¹⁶ "*Notwithstanding points 1 to 4, a host Member State, insofar as it prohibits lawyers practising under its own relevant professional title from practising the profession of lawyer within a grouping in which some persons are not members of the profession, may refuse to allow a lawyer registered under his home-country professional title to practice in its*

exercised (or indeed other regulatory decisions by Bar authorities which are capable of restricting free movement rights), equally needs to be justified by overriding reasons in the general interest, which, according to Art. 11.5 (last sentence)¹⁷, are not limited to those mentioned in Article 11.1, and must be subject to a proportionality test.¹⁸

On the basis of the CJEU's case law, the following elements should, amongst 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.

It is the duty of the Bar Authorities to assess these risks and to apply the proportionality test on a case-by-case basis.

territory in his capacity as a member of his grouping. The grouping is deemed to include persons who are not members of the profession if

- *the capital of the grouping is held entirely or partly, or*
- *the name under which it practises is used, or*
- *the decision-making power in that grouping is exercised, de facto or de jure,*

by persons who do not have the status of lawyer within the meaning of Article 1(2). (...)"

¹⁷ "(...) *Where the fundamental rules governing a grouping of lawyers in the home Member State are incompatible with the rules in force in the host Member State or with the provisions of the first subparagraph, the host Member State may oppose the opening of a branch or agency within its territory without the restrictions laid down in point (1).*"

¹⁸ CJEU Case C-289/02 *Amok* (20); (37,40) and Case C-55/94 *Gebhard*

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