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## **CCBE POSITION ON THE PROPOSAL FOR A DIRECTIVE ON SERVICES IN THE INTERNAL MARKET**

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**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

*association internationale sans but lucratif*

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### Introduction

The Council of the Bars and Law Societies of Europe (CCBE), which through the national Bars and Law Societies of the Member States of the European Union and the European Economic Area represents more than 700,000 European lawyers, has examined the Commission's proposal for a Directive on Services in the Internal Market (COM (2004) 2 final/3). The position of the CCBE on the draft Services Directive can be summarised as follows:

**The CCBE considers that:**

**(a) lawyers should not be included in the draft Services Directive as they are already covered by sectoral Directives which establish a liberal and specific regime as regards cross-border provision of services and establishment;**

**(b) legal services as a whole should be excluded from the country of origin principle - otherwise non-lawyers would be able to practise activities which are restricted in the public interest to lawyers in some Member States;**

**(c) other issues of a general nature should be taken into consideration (see below).**

### **(a) LAWYERS SHOULD NOT BE INCLUDED IN THE SERVICES DIRECTIVE**

The CCBE considers that lawyers should not be included in the Services Directive since they are already covered by sectoral Directives which provide a model of a liberalised market for professional services in the EU and which take into account the specificities of the legal profession.

The organisation of the profession and its system for cross-border provision of services and establishment are closely linked to the judicial and procedural systems of the Member States. As a result, all related questions are issues of justice and public interest.

The legal profession is a regulated profession in each of the Member States of the European Economic Area. As it takes part in the application of law and, in particular, of European law, and ensures access to justice, the legal profession was the first regulated profession to have texts aimed at liberalising legal services within the European Economic Area. The free provision of lawyers' services was recognised and has been governed by **Directive 77/249** since 1977<sup>1</sup>. Then, through the application of the 1988<sup>2</sup> "Diploma" Directive, the integration of the migrant lawyer was organised in the Community. Finally, the right for lawyers to establish in another Member State was recognised by **Directive 98/5** in 1998<sup>3</sup>.

**Directive 77/249** allows lawyers to cross borders within the European Union, and provide temporary services, including advocacy services in local courts. This free provision of cross border services does not require any registration or notification to the local bar, although a lawyer must be introduced to the court for advocacy purposes. It has permitted lawyers, in essence, to follow their clients across borders in individual cases.

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<sup>1</sup> Directive n°77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

<sup>2</sup> Directive n°89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.

<sup>3</sup> Directive n°98/5/EC 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.

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**Directive 98/5**, which was the result of 20 years' common work between the Commission and the CCBE, permits lawyers from one Member State to establish themselves in any other Member State under their home title, provided that they register with the host State Bar. The migrant lawyer can give advice on the law of his home State, on Community law, on international law and on host State law. For example an English solicitor can go to Germany, set up an office there as an English solicitor and practise home English law, European Community law, third country law and local German law. That is very far-reaching, and is one of the most liberal legal services regimes in the world. Directive 98/5 also regulates the issue of applicable rules by providing that the migrant is subject to both the home State and host State rules on professional conduct. In addition, Directive 98/5 provides that an established EU lawyer can acquire the local title without further examination (in the example given above, the German Rechtsanwalt title) just by proving that he or she has been practising local law (including EC law) for a period of three years (Article 10 of Directive 98/5).

The lawyers' sectoral Directives recognise the fact that different legal systems exist throughout the EU. They are drafted in such a way as to ensure that these systems continue to function effectively, in the public interest. In this respect, the lawyers' sectoral directives have specificities which are inherent to the profession of lawyers and the legal services market. The Court of Justice has recognized these specificities in the *Wouters*' case (both in the fields of free movement and competition), confirming that account must be taken of the objectives of the profession "*which are connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience*" (C-309/99, pt. 97). Experience has shown that the sectoral Directives work well in practice.

Also, the addition of the Services Directive to the lawyers' sectoral directives increases the risk of overlapping provisions and potential contradictions.

**Accordingly, the CCBE supports those proposed amendments to the draft Directive which exclude lawyers from the scope of the Services Directive.**

**(b) LEGAL SERVICES SHOULD BE EXCLUDED FROM THE COUNTRY OF ORIGIN PRINCIPLE**

All legal services, whether provided by lawyers or other persons, should be excluded from the country of origin principle, on the grounds of public interest. This is the case even if lawyers are not themselves included in the Services Directive. Otherwise, the application of the country of origin principle would allow non lawyers to practise, in a given Member State, activities which are restricted to lawyers in that Member State. The reason why activities require certain qualifications and are reserved to lawyers in some Member States is that the Member States themselves consider it vital for the good functioning of the judicial systems and for consumer protection (in other Member States, consumers are protected by different measures).

The European Commission indicated that it had no intention to allow non lawyers to provide services in countries where such activities are reserved to lawyers, and that the Commission would be willing to amend article 17 accordingly.

Consequently we would suggest the amendment of article 17 (7) as follows:

Article 17 (7) of the draft Directive	Amendment proposed by the CCBE
<p>Article 16 shall not apply to the following: (...) (7) matters covered by Council Directive 77/249/EEC<sup>4</sup>;</p>	<p>Article 16 shall not apply to the following: (...) (7) <b>legal services whether carried out by lawyers or other persons;</b></p>

<sup>4</sup> OJ L 78, 26.3.1977, p. 17.

### **(c) OTHER ISSUES**

In addition, the CCBE considers that the text of the Directive should be amended notably on four main issues of a general nature i.e.:

- Article 17 paragraphs 20 to 23 relating to International Private Law.  
It is desirable to delete points 20, 21 and 23 of article 17 and to add a new point to article 17, excluding from the country of origin principle rules relating to applicable law on contractual and non contractual obligations in the field of judicial cooperation in civil matters within the meaning of Articles 61 c) and 65 of the Treaty, in order to ensure legal clarity and coherence with other existing and proposed legal framework (Rome I and II).
- Article 3 on the relationship between the draft Directive and the sectoral Directives on services and establishment.  
It should be specified that the application of the Directive will not prevent the application of other Community instruments both on the right of establishment and the free movement of services. Accordingly, there is a need for clear conflict rules to ensure that sectoral Directives will prevail in case of conflict with the Services Directive.
- Article 14 paragraph 7 on the prohibition of any obligation to provide or participate in a financial guarantee or to take out insurance from a service-provider or body established in the territory of a Member State.  
An exception should be introduced regarding client protection funds and collective insurance schemes operated or negotiated by professional bodies or associations on behalf of their members.
- Article 15 paragraph 5 on the prohibition on imposition of new requirements, listed as requirements to be evaluated, and its exceptions.  
The sentence "*and the need for it arises from new circumstances*" should be deleted as this would be a disproportionate fetter on the powers of the regulators to improve their rules, and, as such, contrary to the public interest.

### **CONCLUSION:**

**The current combination of the lawyers' sectoral Directives already ensures the liberalisation of the legal services market. This regime currently works very well. Moreover the lawyers' Directives have the virtue of taking into consideration the specificities of the legal profession. That is why the CCBE believes that it is not the time to interfere with this liberal, coherent and well-functioning system by subjecting legal services to another overlapping and potentially contradictory Directive.**