**EU integration and advocacy – key questions and challenges**

**(1)** **Lawyers and the provision of services in the internal market – how the *acquis* categorises such services**

Lawyers’ activities are treated under European law as a service like any other. This has long been settled by law and jurisprudence:

* The *Reyners* case (Case 2/74) of over forty years ago settled that lawyers are subject to the free movement provisions of the Treaty. The case concerned a Dutch national was refused entry to the Belgian legal profession because of his nationality. The argument that lawyers should be exempt from the free movement provisions because they were associated with the exercise of official authority (a permitted exception) was refused, because the Court held that the majority of lawyers’ work was not to be considered part of official authority, and the small part that might be could be separated out as a different activity.
* The Services directive of 2006 (2006/123/EC) confirmed that legal services are services able to be regulated by EU law, including also by the provisions of that directive. This is not expressly stated in the directive, but is clear by implication since it excludes from coverage those matters already covered by the lawyers’ directives – see, for instance, Article 5 para 4, and Article 16 (4). This interpretation (of coverage by the directive of those aspects of legal services not within the existing lawyers’ directives) has been agreed by all EU bars as the correct one.
* The *Wouters* case (Case C-309/99) decided that a Bar is an ‘association of undertakings’ for the purpose of competition, and so its decisions must comply with competition law. The case concerned a Dutch lawyer who went into partnership with a firm of accountants, in contravention of the Dutch Bar’s rule against multi-disciplinary partnerships. The question to be decided was whether such a rule contravened EU competition law by restricting the kind of entities which could compete in the legal services market. The Court found that in principle Bars were subject to competition law, and that legal services were an economic activity subject to competition law as well – but that the Bar could nevertheless breach usual competition principles through regulations ‘ for the proper practice of the legal profession’.
* The *Šiba* case (Case C‑537/13) settled that a contract for legal services between a lawyer and a client should be treated like any other service contract for the purposes of Directive 93/13/EEC on unfair terms in consumer contracts. The case concerned a failure by a client to pay her lawyer for legal work related to her divorce. She complained that she had not been given the protection of the 93/13/EEC directive. The Court found that a lawyer-client contract for legal services was like any other consumer contract and so subject to the directive.

**(2) Free movement of lawyers – conditions to practise law in the Republic of Serbia and in other EU countries (right of establishment vs. practising on a temporary basis; aptitude test/period of adaptation)**

1. **The right of lawyers to work temporarily or permanently across borders under home title**

The right to provide temporary services across EU borders is laid out in the Lawyers’ Services Directive 77/249/EEC. This permits a lawyer to provide a temporary service in another Member State, without notifying the local Bar. The area of work permitted includes court representation (but then the host Member State may require the lawyer to be introduced to the court and to work in conjunction with a local lawyer).

The right to establish permanently in another Member State under home title is laid out in the Lawyers’ Establishment Directive 98/5/EC. This permits a lawyer to open an office in another Member State, subject to registration with the local Bar. The area of work covers home law and host law, including court representation.

1. **The right of lawyers to be admitted to the title of lawyer in another Member State**

EU lawyers are able to move to the list of local lawyers in two ways:

(1) Under the Professional Qualifications Directive (2005/36/EC) – this provision applies classically to an EU lawyer who is not in the host state, but in another Member State, and is interested in becoming a host lawyer without moving to the country. The principle behind the 2005 directive is that there should be recognition of qualifications already possessed by the applicant lawyer when applying to acquire the new host 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 host title. This filling in of the gaps can be undertaken in two ways recognised by the directive: by taking an aptitude test or by fulfilling a period of adaptation. Here is the difference between them:

**Aptitude test**:

The following are the essential criteria of the test:

• it must cover only subjects not covered by the incoming lawyer’s existing qualification

• it must cover only those subjects which are essential in order to practise as a lawyer in Serbia

In other words, it should test what is different in the host law from that of other Member States, and should not be the same as the Bar exam.

Examples of the aptitude test from other Member States:

Germany - examination subjects are one compulsory subject, which is civil law, two optional subjects and the legal provisions on the professional conduct of lawyers. The applicant chooses one optional

subject in each of the two following groups:

1. public law or criminal law,

2. commercial law, labour law, areas of civil law which are not covered by the compulsory subject,

public law or criminal law.

The applicant must not choose the same optional subject in both groups.

UK: there is first a multiple choice test, based on general principles of the law, and then – only after passing that test - a more clinical examination in 3 practice areas:

•Business

•Property and Probate

•Civil and Criminal Litigation

France: the subjects for the aptitude test are notified to the candidate once his or her previous education has been investigated by the national Bar, and consist of those subjects not yet - or not sufficiently - covered in previous education. Up to four subjects can be notified. They will be tested by an oral examination of around 20 minutes, after a preparation of half an hour. If four subjects are notified, then one of them must be taken by a written examination of four hours.

**Period of adaptation**

This is defined by the 2005 directive as “*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.

All Member States have chosen to go the route of the aptitude test, apart only from Denmark, which has chosen the period of adaptation.

(2) Under Article 10 of the Establishment Directive (98/5/EC) - the Establishment Directive permits established lawyers from one Member State (i.e. EU lawyers who are already based in the host state) to be admitted to the professional title of the host state, without examinations or otherwise having to satisfy local requirements after 3 years, subject to certain conditions. The Directive recognises two kinds of applicant:

(i) 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 Community law; and

(ii) 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 able to be admitted to the host professional title without an examination. In (i) the host Member State must accept the applicant if the requirements are satisfied, whereas in (ii) the host state has a discretion.

In (i), the lawyer must furnish the host competent authority with proof of the effective regular pursuit. The directive says that the 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 (ii), 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.

**(3)** **Legal form requirements (e.g. sole practice, joint law firm, lawyer’s membership in a partnership, limited liability company, etc.)**

Joint practice must be open to EU lawyers as well (Article 11 of 98/5/EC):

‘*Where joint practise is authorised in respect of lawyers carrying on their activities under the relevant professional title in the host Member State, the following provisions shall apply in respect of lawyers wishing to carry on activities under that title or registering with the competent authority:*

*(1) 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.*

*(2) Each Member State shall afford two or more lawyers from the same grouping or the same home Member State who practise in its territory under their home-country professional titles access to a form of joint practice. If the host Member State gives its lawyers a choice between several forms of joint practice, those same forms shall also be made available to the aforementioned lawyers. The manner in which such lawyers practise jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.*

*(3) The host Member State shall take the measures necessary to permit joint practice also between:*

*(a) several lawyers from different Member States practising under their home-country professional titles;*

*(b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.*

*The manner in which such lawyers practice jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.*

*(4) A lawyer who wishes to practise under his home-country professional title shall inform the competent authority in the host Member State of the fact that he is a member of a grouping in his home Member State and furnish any relevant information on that grouping*.’

Article 11 (1) above makes clear that Serbia may have to allow forms of joint practice by EU lawyers other than the ones currently permitted under Serbian law to Serbian lawyers. EU lawyers are allowed to continue to practise in their home joint practices in Serbia, and it is only when 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 Serbia that Serbian law can prevail - but provided that compliance with Serbian law is justified by the public interest in protecting clients and third parties. Given the EU’s reluctance to see restrictions on legal forms – see Article 15 of the Services directive (2005/36/EC) – that is a tough test.

So, for instance, limited liability partnerships are almost certain to be permitted to cross borders under EU law. The Council of Bars and Law Societies of Europe (CCBE) has considered this question, and [concluded](%28http%3A/www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_12092014_EN_CCBE_1_1412929215.pdf%29) as follows (with two solutions proposed):

*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.*

In addition, 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).

The next point to be considered is that, if limited liability partnerships are to be permitted to EU lawyers practising in Serbia, the question will arise whether they should also be allowed to Serbian lawyers. In any case, if Serbian lawyers are to be able to compete with incoming EU lawyers for the big-ticket work with possible liabilities running into many millions of euros, limited liability partnerships may be the only way to even out the playing field for Serbian lawyers.

Of great interest also to Serbian bars is Article 11(5), which deals with the ability of EU lawyers who are in joint practice with non-lawyers to practise in Serbia. Essentially, Article 11 (5) gives the power to the Serbian government to ban such structures from entering Serbia, but this is hedged around with conditions. The CCBE has issued guidance on the interpretation of Article 11(5): <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_12092014_EN_CCBE_1_1412929215.pdf>

**(4) Impact of the *acquis* on the one-office rule**

(1) For Serbian lawyers: This is one of those rules which will have to be evaluated by the Member State in accordance with fixed criteria – non-discrimination, proportionality, necessity - under Article 15 2) (e) of the Services directive (2006/36/EC):

‘*Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:*

*(e) a ban on having more than one establishment in the territory of the same State*’

(2) For EU lawyers: Article 14 2) of the Services directive (2006/36/EC) makes clear that they are permitted to have offices in their home state and host state:

*‘Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:*

*2) a prohibition on having an establishment in more than one Member State or on being entered in the registers or enrolled with professional bodies or associations of more than one Member State’*

In other words, an EU lawyer must be permitted to have an office in Serbia even if he or she already has an office in another EU Member State.

**(5)** **Lawyers’ tariff**

There is a serious problem with the issue of lawyers’ tariffs at EU level. This does not come from the lawyers’ directives themselves, but from two sources:

(1) from the application of EU competition law to the legal profession – see Case C-35/99 *Manuele Arduino* (19 February 2002) and Joint cases C-94/04 and C-202/04 *Cipolla v. Meloni* (5 December 2006), both of which concerned the setting of a tariff by a national bar. The cases were based on what are Articles 101 and 102 of the Treaty, which forbid cartels and anti-competitive agreements, and abuse of a dominant position. In those two cases, the tariff was permitted, but only because it was the government which approved the tariff (which is not the case in Serbia), and so it fell under an exception to the usual application of competition principles.

(2) after these cases, the Services Directive (2006/36/EC) introduced as one of the items which must be evaluated by every Member State against certain criteria (non-discrimination, necessity, proportionality) the following - Article 15 para 2 (g): ‘*fixed minimum and/or maximum tariffs with which the provider must comply’.* Therefore, the system of setting and approving the lawyers’ tariffs in Serbia will need to be closely examined to be sure that it is compliant with the law. Many Member States have got rid of lawyers’ tariffs, although some have retained a government-approved tariff compliant with the case law mentioned in (1) above.

Germany and Austria, for instance, have a tariff, but it is a tariff laid down in an act of Parliament, and not by the bar.

**(6) Experiences of lawyers in EU member states regarding application of the free movement of lawyers *acquis*; impact of the internal market on legal practice; what changes can Serbian lawyers expect?**

The introduction of EU law, in particular regarding the free movement of lawyers, did not bring about mass and immediate changes in lawyers’ lives. This has been how lawyers have been affected:

**Free movement**

Lawyers did not suddenly start rushing across borders.

There has always been a good deal of provision of temporary services across borders, and this hardly changed with the introduction of 77/249/EEC. Directive 77/249 merely provided a regulatory framework, but it has not been much used (to judge by complaints made to Bars, or litigation on the directive itself). Temporary provision has always been under the radar of supervision – a day’s visit, a telephone call – and that continues.

As for permanent establishment, this affects the following groups:

* the large law firms seeking to service their clients’ commercial transactions in other Member States
* retired lawyers (for instance, along the coasts of Spain and Portugal) who serve their local expatriate communities
* those who live in towns which straddle a border
* those who move to another Member State for personal reasons e.g. marriage

Although there are around a million lawyers in the EU, the numbers who have moved permanently and registered with their local Bars is in the very low thousands, mostly in the big commercial centres (London, Brussels, Paris, Frankfurt) and mostly working on commercial transactions.

The biggest immediate changes will therefore be felt by large firms, as other European firms may seek to offer to undertake their commercial work. However, these European firms will always need and use local lawyers. As result, the overall effect has generally been felt to be positive on the local market, growing the amount of work available and providing training (and better conditions) to local lawyers in some of the best international firms in the world.

There has generally been no competition below the large firm level. Other European lawyers are not interested in undertaking court work, or any of the personal services (for instance, criminal representation, personal injury work, wills and the administration of estates, or divorce) that most sole practitioners offer.

**Advice on EU law**

Again, the impact will be felt first by the large firms, since many of their clients will need to be advised on various aspects of EU law – environment, energy, competition, for instance.

However, in due course all lawyers will be affected, since experience from other Member States shows that in due course the free movement of citizens affects a large part of the population, bringing with it the need to advise on EU aspects: marriages and divorces across borders, personal accidents in other Member States, wills and succession where there is a cross-border element.