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EXERCISING ATTORNEY SHIP IN THE EUROPEAN UNION

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Abstract: *Starting with 1 January 2007, the attorneyship can be exercised by Romanian lawyers, with occasional or permanent title, in any of the European Union member states, as well as in the states part of the Agreement regarding the European Economic Space.*

National regulations on attorneyship and the application of the freedom of establishment principle

As per art. 7 from the Statute of attorneyship, " in a society based on democracy and on the values of the state of law, the lawyer has an essential role. The lawyer is indispensable for the justice and for the justiciables and is bound to defend their rights and interests. He is also the advisor and the defender of his client".

The freedom and independence of the attorneyship are basic principles based on which the lawyer promotes and defends the rights and interests of his clients.

Starting with 1 January 2007, the comprehension scope of the space in which the lawyer can exercise his profession, which contains now, besides the national territory, the member states of the European Union, as well as the states part of the Agreement regarding the European Economic Space.

When, through the regulation of attorneyship from a member state the lawyers are forbidden to belong to several bars, it contravenes to the freedom of establishment, since this freedom contains the possibility of installation and conservation on the Communitarian space, of exercising an activity in more than one state. Consequently, the establishment in another member state should not be refused to a lawyer coming from another Community state only because he already has an office abroad and does not belong to the Bar of origin.⁴⁸¹

The free exercise of attorneyship and the effects of the right of establishment

By order 16 December 1993, received at the Court of Justice of the European Communities⁴⁸² the Consiglio Nazionale Forense (National Council of the Bar) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

The questions have been raised in the course of disciplinary proceedings opened by the Consiglio dell' Ordine degli Avvocati e Procuratori di Milano (Council of the Order of Advocates and Procurators of Milan) against a lawyer, Reinhard Gebhard, who is accused of contravening his obligations on freedom for lawyer who are nationals of a Member State of the European Community to provide services on the ground that he pursued a professional activity in Italy on a permanent basis in chambers set up by himself whilst using the title "avvocato".

In what regards the German national, he is registered in the Stuttgart Bar, without a law office in this communitarian state. Since he married an Italian national, he established himself in Italy, where, at first, he was collaborator at a law office, and then associate to the same office, and subsequently opened his own office.

⁴⁸¹ See Octavian Manolache, Community law, publishing All Beck, Bucharest, 2003, p.275

⁴⁸² See the decision of the Court as of 30 November 1995 in the case Gebhard c. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, in the collection of jurisprudence of the European Court of Justice, 1995, p I-04165

In such conditions, several Italian lawyers have formulated complaints at the Order Council indicated above, Mr. Gebhard being forbidden to use the lawyer title and being suspended from profession for 6 months.

Consiglio Nazionale Forense, the judicial instance seized by the German national with an action against the decision of the Order Council of Milan invited CJEC to pronounce preliminarily on several aspects related to the transposition of a European directive in the Italian legislation, namely the Directive 77/249.

CJEC decide that the situation of a Community national who moves to another Member State of the Community in order there to pursue an economic activity is governed by the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services, these being mutually exclusive.

Such a national comes under the provisions of the chapter relating to the right of establishment, because it is about a person who, as a national of a Member State, pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State.

The right of establishment, provided for in Article 52 to 58 of the Treaty, is granted both to legal persons within the meaning of Article 58 and to natural persons who are nationals of a Member State of the Community. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up.

It follows that a person may be established, within the meaning of the Treaty, in more than one Member State, in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries (Article 52) and, as the Court has held, in the case of members of the professions, by establishing a second professional base.

The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.

Directive 77/249 applies to the activities of lawyers pursued by way of provision of services. It states that a lawyer providing services is to adopt the professional title used in the Member from which he comes, expressed in the language or one of the languages of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practice pursuant to the laws of that State.

In pursuing activities relating to representation, the lawyer must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes. As far as the pursuit of all other activities is concerned, the lawyer remains subject to the conditions and rules of professional conduct of the Member State from which he comes, without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and secrecy.

It is for this reason that Article 57 provides that the Council is to issue directives, such as Directive 89/48, for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

The acknowledgement of professional training of lawyers according to the system instituted by Directive 84/48 and, subsequently, by Directive 2005/36/CE

Pursuant to Council Directive 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, a lawyer who is fully qualified in one Member State may already ask to have his diploma recognised with a view to establishing himself in another Member State in order to practise the profession of lawyer there under the professional title used in that State.

The objective of Directive 89/48/EEC was to ensure that a lawyer is integrated into the profession in the host Member State, and the Directive seeks neither to modify the rules regulating the profession in that State nor to remove such a lawyer from the ambit to those rules.

Starting 20 October 2007 that it has been replaced by Directive 2005/36/EC on the recognition of professional qualifications, the mechanism of recognition established by Directive 89/48/EEC remains unchanged. This Directive does not affect the operation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, or of Directive 98/5/EC of 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.

This Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.

The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.

The profession which the applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State if the activities covered are comparable.

The permanent exercise of a profession in another EU member state based on Directive 98/5 as of 16.02.1998

The purpose of Directive 98/5/EEC is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained.

For the purposes of this Directive, lawyer means "any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the following professional titles, stipulated her".

The Directive shall apply both to lawyers practising in a self-employed capacity and to lawyers practising in a salaried capacity in the home Member State and in the host Member State.

1) Practice under the home-country professional title, that the title acquired in Romania

Any lawyer, including attorney Romanian, shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the following activities: he may give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State; activities relating to the representation or defence of a client in legal proceedings, provided that the Member State may require lawyers practising under their home-country professional titles to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an "avoué" practising before it.

In this sense, unlike the situation with the occasional exercise, the lawyer is obliged to register with the competent authority in that State under a certificate attesting to his registration with the competent authority of the home Member State, Romania.

To avoid confusion with the title of the host Member State lawyer who is practising the profession of lawyer under the professional title obtained in Romania is obliged to exercise the profession of lawyer under this title to be indicated in Romanian language.

He shall in any event comply with the rules of procedure applicable in the national courts.

A lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.

Article 10 of Directive 98/5/EC provides three methods of admission to the profession of lawyer in the host Member State, namely:

a) a lawyer practising under his home-country professional title 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 the State including Community law shall, with a view to gaining admission to the profession of lawyer in the host Member State, be exempted from the conditions set out in Article 4 (1) (b) of Directive 89/48/EEC.

b) a lawyer practising under his home-country professional title in a host Member State may, at any time, apply to have his diploma recognised in accordance with Directive 89/48/EEC with a view to gaining admission to the profession of lawyer in the host Member State and practising it under the professional title corresponding to the profession in that Member State.

c) a lawyer practising under his home-country professional title 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 may obtain from the competent authority of that State admission to the profession of lawyer in the host Member State and the right to practise it under the professional title corresponding to the profession in that Member State, without having to meet the conditions referred to in Article 4 (1) (b) of Directive 89/48/EEC.

A lawyer who gains admission to the profession of lawyer in the host Member State in accordance with paragraphs 1, 2 and 3 shall be entitled to use his home-country professional title, expressed in the official language or one of the official languages of his home Member State, alongside the professional title corresponding to the profession of lawyer in the host Member State.

As a result of the repeal on 20 October 2007 Directive 89/48/EEC references to this Directive shall be read as references to Directive 2005/36/EC on the

recognition of professional qualifications.

2) Salaried practice

A lawyer registered in a host Member State under his home-country professional title may practice as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the host Member State so permits for lawyers registered under the professional title used in that State.

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