

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(75) 442 final
Brussels, 25 July 1975

Amended Proposal for a

COUNCIL DIRECTIVE

to facilitate the effective exercise by
lawyers of freedom to provide services

(Presented by the Commission to the
Council pursuant to the second paragraph
of Article 149, of the EEC-Treaty)

Explanatory Memorandum

1. On 17 April 1969 the Commission Submitted to the Council a proposal for a Directive concerning the attainment of freedom to provide services for certain activities of lawyers⁽¹⁾. The Economic and Social Committee and the European Parliament delivered their Opinions on this proposal for a Directive on 25 February 1970⁽²⁾ and 21 September 1972⁽³⁾ respectively.
2. Discussions on this proposal for a Directive began in the Council at the end of 1972. These discussions quickly revealed differences of opinion, in particular with regard to, first, the interpretation of Article 55 of the Treaty, and secondly, after the enlargement of the Community, the taking into account of certain factors peculiar to the new Member States whose legal systems are based on common law.
3. Furthermore, in the Judgments in Cases 2/74 (Reyners v. Belgian State) of 21 June 1974 and 33/74 (Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid) of 3 December 1974, the case law of the Court of Justice of the European Communities revealed some important new elements.
4. At its 315th meeting on 26 November 1974, the Council (Ministers of Justice) requested the Commission to present an amended proposal for a Directive. This amended proposal takes account of the new legal situation created by Judgments 2/74 and 33/74 as well as of the circumstances of Member States with common law systems.
5. The Commission has adopted this amended proposal after discussions with the government authorities of Ireland and the United Kingdom, on the one hand, and with the Consultative Committee of Bar Associations of the EEC Member Countries on the other.

(1) OJ No. C 78, 20 June 1969

(2) OJ No. C 36, 28 March 1970

(3) OJ No. C 103, 5 October 1972.

6. The principal amendments contained in this document are described below.
7. In its Judgment 33/74, the Court of Justice of the European Communities stated that since 1 January 1970 Article 59 and the third paragraph of Article 60 of the Treaty have had direct effect. Consequently those parts of the original proposal for a Directive which concern the removal of restrictions are no longer necessary.
8. The original proposal for a Directive envisaged, in Article 2(2), the right, in the provision of services, of arguing a case without restriction before the courts, access to documents, visits to the prisoner and presence at the preparatory enquiry.

Following the interpretation of Article 55 of the EEC Treaty given by the Court of Justice in Judgment 2/74, there is no doubt that activities such as the representation and defence of parties in a lawsuit are not covered by that Article, even if they are carried out pursuant to an obligation or an exclusive right laid down by law. It therefore appears possible to adopt measures to "facilitate the effective exercise" of all the activities of lawyers.

9. A new formula has been introduced into Article 2 of the amended proposal. This means that "the effective exercise" of the activities in question is in the main made possible by the recognition as lawyers of persons who are regularly practising this profession in another Member State. For the purpose of clarity, the professional titles of these persons are given in detail in paragraph 2 of Article 1.

10. Article 3 of the new text replaces the first indent of Article 5 of the original proposal without material change.
11. The new Article 4 takes account of the special aspects arising in connection with activities of representation and defence of a client before the courts. It is necessary first of all to adopt the principle of the application of the conditions in force in the host Member State, with the exception, of course, of any condition of residence that State. Then it is essential that the lawyer acting within the framework of the judicial system of a country other than his own should be subject to the professional rules applicable to lawyers established in the host Member State, although remaining subject to the rules of the country from which he comes. Moreover, certain special provisions are necessary to take account of the different types of lawyer within Ireland and the United Kingdom.

As to other activities, not directly related to the administration of justice, the requirement to respect the professional rules of the host Member State would introduce a noticeable constraint upon the provision of services, without sufficient reason; moreover such a requirement would not correspond to present practice, where there exists almost complete freedom as regards these activities.
12. Following discussions which it had with representatives of the profession, the Commission proposes that Article 3 of the original proposal be deleted. First, it is evident that, by definition, the provision of services does not take place from an establishment in the host country within the meaning of Article 52. Secondly, a provision whereby services would have to be provided under "a contract concluded in the course of the lawyer's professional activities", appears to be too restrictive.

13. In Article 5 of the new text the Commission has provided for certain amendments to Article 6 of the original proposal in order to take account in particular of the new legal situation created by Judgment 33/74. First, it appears necessary to change the original provision into a non-binding provision, to enable Member States with less restrictive rules or practices to retain them.

Secondly, the provision relating to collaboration between the person providing services and the local lawyer has become the subject of a new text. The Commission has been unable to agree to a suggestion made by some that provision should be made for a Member State to be able to require that a lawyer providing services relating to the representation and defence of a client before the courts should act "under the direction" or "under the control" of a local lawyer. Such wording would in fact make it possible to remove a great deal of the substance of the Directive. The Commission accepts however that in cases where a lawyer providing services is required to act in conjunction with a local lawyer, it may also be necessary, in some Member States, to require that the local lawyer concerned should be the person responsible to the Court in question. Provision has accordingly been made to meet this point.

14. Article 6 of the new text constitutes an adapted and simplified version of the provisions of Article 7 of the original proposal.
15. Article 7 of the new text combines the provisions of Articles 8 and 9 of the original proposal.

Amended proposal for a Council Directive
to facilitate the effective exercise
by lawyers of freedom to provide services

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 and 66 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas pursuant to the Treaty all restrictions on the provision of services which are based on nationality or on conditions of residence have been prohibited since the end of the transitional period;

Whereas this Directive deals only with measures to facilitate the effective exercise of the activities of lawyers by way of the provision of services; whereas measures to facilitate the effective exercise of the right of establishment will require more detailed preparation;

Whereas if lawyers are to exercise effectively the freedom to provide services the host Member State must recognise the status as lawyers of those persons practising the profession in the various Member States;

Whereas, since this Directive solely concerns provision of services and does not contain provisions on the mutual recognition of diplomas, a beneficiary of the Directive must adopt the professional title used in the Member State in which he is established;

Whereas the lawyer should exercise activities relating to the representation and defence of a client before the courts under the same conditions as lawyers established in the host country, to the exclusion, however, of any requirement of a fixed abode in that country and any condition of registration with a professional organisation;

Whereas for the exercise of these activities provision should be made to ensure that the lawyer observes the rules of professional conduct of the host Member State, without prejudice, however, to his obligations in the Member State from which he comes; whereas, if in a Member State the profession of lawyer is carried on by several categories of lawyer, each of which is subject to its own professional rules it is necessary to determine which rules must be observed by a lawyer from another Member State;

Whereas for the exercise of activities other than those relating to the representation and defence of a client before the courts, and in order to preserve the freedom which at present exists in this field within the Community, it is sufficient to ensure that the lawyer remains subject to the professional rules of the Member State from which he comes;

Whereas, as regards activities relating to the representation and defence of a client before the courts, the existing differences between certain Member States in matters of rules of procedure could justify a requirement that a lawyer providing services should collaborate with a local lawyer who would be, if necessary, responsible to the court in question;

Whereas the professional organisation of the host Member State should be given powers to verify that the person providing services is duly authorised to pursue his activities in the country in which he is established;

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. The provisions of this Directive shall apply, within the limits and under the conditions laid down by them, to the activities of lawyers carried on by way of provision of services.
2. "Lawyer" means persons exercising a professional activity under one of the following designations:

Belgium

Avocat - Advocaat

Denmark

Advokat

Germany

Rechtsanwalt

France

Avocat

Ireland

Barrister practising at the bar

Solicitor in private practice

Italy

Avvocato

Luxembourg

Avocat - avoué

Netherlands

Advocaat

United Kingdom

Advocate practising at the bar

Barrister practising at the bar

Solicitor in private practice

Article 2

Each Member State shall recognise as a lawyer for the purpose of exercising the activities specified in Article 1 (1), any person listed in para. 2 of that article.

Article 3

A person referred to in Article 1 shall adopt the professional title used in the Member State from which he comes expressed in the language of that country, with an indication of the professional organization to which he belongs, or the court of law with which he is registered pursuant to the laws of the Member State from which he comes.

Article 4

- 1) The activities of lawyers relating to the representation and defence of a client before the courts shall be carried on in each host Member State under the conditions laid down in respect of lawyers established in that State, with the exception of any condition requiring residence in that State or registration with a professional organization.
- 2) In the exercise of these activities the lawyer will obey the rules of professional conduct laid down in the host Member State without prejudice to his obligations in the Member State from which he comes.
- 3) When these activities are pursued in the United Kingdom, "rules of professional conduct laid down in the host Member State" means the rules of professional conduct applicable to solicitors, where the activities are not reserved for barristers and advocates. Otherwise the rules of professional conduct applicable to the latter shall apply. However, barristers from Ireland shall always be subject to the rules of professional conduct applicable to barristers and advocates.

When these activities are pursued in Ireland, "rules of professional conduct laid down in the host Member State" means the rules of professional conduct applicable to solicitors. However, barristers and advocates from the United Kingdom shall always be subject to the rules of professional conduct applicable to barristers.

- 4) For the exercise of activities other than those referred to in para. 1, the lawyer remains subject to the rules of professional conduct only of the Member State from which he comes.

Article 5

For the pursuit of activities relating to the representation and defence of a client before the courts, Member States may impose the following obligations on persons wishing to provide services :

- they must be introduced, in accordance with local custom, to the presiding judge;
- they must work in conjunction with a lawyer who is a member of the competent bar of the host Member State and who would be, if necessary, responsible to the court in question, or with an "avoué" or "procuratore" practising at that court.

Article 6

1. The professional organization in the host Member State may request the person providing the services to establish his qualifications as a lawyer. On request, it may have the validity of such qualifications confirmed.
2. In the event of a breach of the rules of professional conduct of the host Member State, the professional organization of the latter shall determine in accordance with its own rules and procedure the consequences of this behaviour, and to this end can obtain the transmission of the file of the person providing services. It shall inform the professional organization in the Member State from which he comes of any decision taken. Such communications do not alter the confidential character of the file;

Article 7

1. Member States shall bring into force the measures necessary to comply with this Directive within eighteen months of its notification and shall forthwith inform the Commission thereof.
2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive..

Article 8

This Directive is addressed to the Member States

Done at Brussels

For the Council

The President