# GENERAL REMARKS REGARDING THE LAWYER PROFESSION WITHIN THE EUROPEAN UNION

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**Abstract**

*Legal professions are generally regulated at national level. Although there may be natural similarities between them, these national regulations differ quite substantially from one country to another. The effective exercise by lawyers of the freedom to provide services is governed by the provisions of Directive 77/249/EEC. Lawyers established in the EU may offer their services on a temporary basis in any EU country. However, they must retain their home-country professional title, expressed in the language (or one of the languages) of that country.*

**Keywords:** *European Union; EU law; European lawyer; lawyer profession; freedom of establishment for lawyers.*

## 1. Introductory aspects

One consequence with direct effects on short, medium and long term, of the recent accession of Romania to the EU is the freedom of movement. More specifically, it refers to the correct knowledge, understanding and application of principles and rules governing goods, persons, services, capital and payments in free movement from January 1st, 2007, inclusively on the territory of our country, but also the acquiring, or engaging in a number of mechanisms, not at all simple, which can give rise to exceptions, limitations, restrictions from the freedoms in question. Therefore, in terms of freedoms, the following aspects: norms, rules, knowledge, understanding and, above all, compliance, enforcement are extremely important. Why? Because in Europe too, freedom is seen as constituting what philosophers call "understood necessity", and not as chaos, chance, disorder. Freedom is for all, not just for some of us, under conditions of equal opportunities, but also of involvement in capitalizing, by assimilating a large amount of information in a time, why not recognize it, relatively short and, not least under conditions of competence, professionalism and competition, conditions specific to a market economy that we are already in.

The most important step of the moment/current (phase), for the field theorists and practitioners (lawyers, economists, philologists, and others) is that of scouring carefully, but above all understanding, assimilating and enforcing the legal instrument that connects directly Romania to EU, meaning the Treaty of Accession[1].

From the perspective of our rights and obligations deriving from the Treaty of Accession to the European Union, as European citizens, "one of the consequences that generates direct effects, including legal effects, on short, medium and long term [...], is the highlighting of the four freedoms of movement"[2]. Among these, a special place, as shown both in theory and in the field practice, is occupied by the free movement of people, with positive or negative influence on all the other freedoms of movement. The rule is, as we shall further see, that according to which, this freedom is analyzed together with the free movement of services. We shall operate with an exception to this

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[1] The EU Treaty of Accession is the legal act of accession of a State to the European Union.

[2] The freedom of movement of: goods, persons, services, capital and payments (the latter two are considered together). In this sense, the work of the French doctrinaires Gavalda, Christian, Parleani, Gilbert, "*Droit des affaires de l'Union Européenne*" may be consulted, Litec Publishing House, Paris, 1999.

rule, on the one hand, for reasons related to the great importance of each of the two freedoms[3], and on the other hand, for causes referring to the complexity of such an approach.

In fact, such an analysis, extremely generous, cannot be achieved, because of the multitude of angles and variations of approach, before reiterating the legal force of the Treaty of Accession (as primary source of European Community law) on national law (of Romania), the power conferred on it, even by the fundamental law of our country, namely the revised Constitution of 2003, Constitution which, in Title VI ("Euro-Atlantic Integration"), article 148 ("Integration in the European Union"), paragraph (2) refers to the fact that "[...] as result of the accession, the provisions of EU constitutive treaties [...] and other binding Community regulations take precedence over the contrary provisions of national laws, by complying with the provisions of the Act of Accession"[4] (our underlining). In the third paragraph, the same article 148 states that "The provisions of paragraphs (1) and (2) shall apply accordingly, also for the accession to acts of revising the constituent treaties of the EU" (i.e. to modifying treaties, as primary sources, as they are called in the specialty doctrine).

For these reasons, the analysis of the free movement of persons is reported both to the primary instruments (sources) of European Community law (founding and modifying treaties, including the Treaty of Accession to the EU), highlighting also the issue of transitional periods with exceptions and safeguard clauses and the instruments (sources), derivatives of the same European Community law (Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004[5]).

Trying to define the concepts, we see that, from the wording of the Treaties, the free movement of persons "presupposes the absence of any discrimination based on nationality between workers of the Member States concerning the employment, remuneration and other conditions of work and employment. In this sense, rights are conferred on people and these rights can acquire value in justice, in any Member State. Limitations on grounds of public order, public security or public health are, obviously, regulated"[6].

"The free movement of persons […] is a reality in the European Union"[7].

The free movement of persons is reflected, among other things, also in the free movement aiming at workers, in general, and lawyers in particular. Bernard Teyssié believes about this freedom that "it is a fundamental right that national courts must protect"[8].

**2. The exercise of the freedom to provide services by lawyers**

**A. Directive 77/249/EEC relating to the facilitation of exercising the freedom to provide services by lawyers**

The effective exercise by lawyers of the freedom to provide services is governed by the provisions of Directive 77/249/EEC[9].

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[3] These are freedoms that condition (favouring or disfavouring) the recovery of the others, as already noticed. These were the first freedoms that generated a rich case law, including for states that recently joined the EU, Romania making no exception.

[4] Our underlining.

[5] Directive 2004/38/EC of the European Parliament and of the Council on the right to move and reside freely within the territory of Member States for Union citizens and their members, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[6] Andrei Popescu, Nicolae Voiculescu, *"Drept social european"*, Publishing House of Romania of Tomorrow Foundation, Bucharest, 2003, p. 211.

[7] Andrei Popescu, Nicolae Voiculescu, *op. cit*., p. 211.

[8] Bernard Teyssié, *"Droit Europeen du travail"*, Litec, 2001, p. 74 (taken also by Ovidiu Ținca in his work *"Drept comunitar material"*, Lumina Lex Publishing House, Bucharest, 2003, p. 92).

[9] Council Directive of 22 March 1977 on the facilitation of exercising the freedom to provide services by lawyers.

The Directive applies, "within limits and conditions contained therein, to the activities of lawyers exercised when providing services"[10]. Notwithstanding the provisions of this Directive, Member States may hinder certain categories of lawyers from issuing authentic acts, empowering them to administer assets of deceased persons or whose object is the creation or transfer of real estate rights. The activities of representation and defence of a client in legal proceedings or before public authorities shall be exercised in accordance with provisions of the Directive, in each receiver Member State under the conditions provided for lawyers established in that State, excluding any condition of residence or registration in a professional organization of that state.

It should be noted the fact that the Directive establishes to art. 4 paragraph (2), the concept of double deontology. Thus, the lawyer must comply with the rules of professional practice in the host country, remaining, however, bound by the rules of the Bar of his/her country.

Under art. 5, for exercising activities of representation and defence of a client in legal proceedings, each Member State may require lawyers to be introduced to the President of jurisdiction or to act in agreement with a lawyer who carries his activity under the Court of Justice applied to. Also, the competent authority of the Member State may require the service provider to prove his statute of lawyer.

The Directive of 1977 envisages both the lawyers employed, as well as the non-salaried lawyers. This aspect emerges from the content of art. 6, which provides that "each Member State may prohibit to lawyers employed, bound by an employment contract with a public or private company, to pursue activities of legal representation and defence of this company only if lawyers established in this state are not allowed to exercise them".

While exercising the profession within the host country, the lawyer must follow the rules of this state, regardless of their source of origin: incompatibility between the pursuit of the profession of lawyer and other activities in that State, professional secrecy, relations with peers, prohibiting the assistance by the same lawyer of parties with opposite interests, and advertising.

**B. Directive 98/5/EC[11]**

The Directive is intended, according to art. 1, "to facilitate the exercise of the legal profession with independent or remunerative title in a Member State, other than that where the professional qualification was obtained". Paragraph 2 of the same article provides a range of qualifications, such as: "lawyer" means any person who is a national of a Member State entitled to exercise professional activities under one of the titles mentioned[12]; "home Member State" means the Member State where the lawyer received the qualification; "the host State" is the Member State in which the lawyer is practicing in accordance with the provisions of this Directive etc.

Article 2 provides that any lawyer has the right to exercise under permanent title, in any Member State, under his original professional title, the following activities: he can offer legal consultancy in legal matters of the origin Member State, in Community law, international law and in the host Member State law.

A lawyer who wishes to exercise his activity in a Member State other than that, in which he obtained his professional qualification, is required to register with the competent authority of that Member State[13].

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[10] Article 1 of the Directive.

[11] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998, aims at facilitating the permanent practice of the profession of lawyer in a Member State, other than that in which the qualification was obtained.

[12] In Belgium -Avocat/Advocaat/Rechtsanwalt, in Denmark – Advokat; in Germany – Rechtsanwalt; in Spain - Abogada / Avocat / Avocado / Abokatu; in France – Avocat; in Ireland - Barrister / Solicitor; in Italy – Avvocato; in Luxembourg - Avocat, in the Netherlands – Avocaat; in Austria – Rechtsanwalt; in Portugal – Advogado; in Finland - Asianajaja / Advokat; in Sweden – Advokat; in the United Kingdom - Advocate / Barrister / Solicitor;

[13] Article 3 paragraph 1.

The lawyer performing activities on the territory of a Member State, other than that in which he acquired his qualification, must, irrespectively of professional and deontological rules that he is subject to in his home State, to obey the professional rules of the host Member State for all the activities that he pursues on its territory.

The host State may require the lawyer in question to bring proof for an insurance of professional liability or to join a professional guarantee fund on its territory.

The Directive of 1998, as the previous, provides that if the lawyer, practicing in a state other than that of origin, does not comply with the rules required by the state, may be subject to disciplinary proceedings by the host state.

**3. Council of Bars and Law Societies of Europe (CCBE)**

Currently, the Council of Bars and Law Societies of Europe carries out its activity within the European Union. The main objectives of the Council are: promoting - through dialogue and discussions with the European Union - a progressive liberalization of lawyers' rights to establish and perform their activity similarly to that of Member States, other than their countries of origin and, as much as possible, a progressive harmonization of rules and conditions for the exercise of the lawyer profession in Europe.Over time, the CCBE was the one who has contributed to the total integration of lawyers appointed as full-fledged lawyers within the brother bar, and the recognition of the right to practice under the title obtained in their native country, with permanent statute in Member States, other than that in which they obtained their professional qualification.

To benefit from these advantages, the lawyer, among other provisions, must be registered by the competent authorities of that country and obey the rules of professional conduct of the host Member State, regarding all activities that he will pursue on its territory. Moreover, the lawyer must obey the rules of procedure, penalties and regulations to that effect, in the state that hosts him/ her. The Council plays an important role in the professional training of lawyers and is designed to provide a solid and intense professional training of European lawyers, in order to provide for clients, qualified legal assistance.

Lawyers in EU Member States have, currently, the right to provide legal services in all EU countries, almost freely.

Lawyers engaged in an activity outside the country whose citizens they are:

- cannot practice reserved activities, such as the drawing of documents for the administration of the deceased persons' businesses;
- must work with a local lawyer, only if the case does not require representation by a national lawyer;
- the asked lawyer uses his own title and complies with the ethics rules of his own Bar, while he also complies with those of the host state;
- if his visits become frequent, his statute under the Directive can be questioned and if the services provided continue from a job in the host country, then he will be considered as established, rather that providing occasional services;
- are subject to a "double deontology".

Lawyers from Bars and Lawyers' Associations who are members of the Council subscribe to some ordinary ethical rules and most of these Bars and Lawyers' Associations have implemented a code for the practice in foreign countries.

When Bars promulgate new internal rules, they are required to take into account the Council code and to make sure that any new provision does not preclude it.

Based on the provisions of Community Directives 77/249/EEC and 98/5CE, the Council has developed its own code. Thus, the following main ideas can be drawn from the Code[14]:

[14] For more details, see Cristiana I. Stoica, Janice H. Webster, *"The Romanian lawyer in the European legal system"*, All Publishing House, Bucharest, 1997.

a) Integrity and probity of the lawyer

All jurisdictions have rules that express the absolute necessity of personal integrity and probity. Thus, lawyers must submit, in most states, an oath before entering the Bar, which reflects this requirement.

The Code sets this rule under the name of "Trust and Integrity": *"Relationships of trust can only exist if the honour, honesty and personal integrity of a lawyer are undeniable. These traditional virtues are professional obligations of a lawyer"*.

b) Conflicts of interests

A lawyer should not work for both sides in a dispute at law or a transaction because their opposite interests might generate a conflict. If there is a conflict, the lawyer should withdraw and inform all his clients about the situation generated.

c) Service Quality and Competence

One of the essential obligations of lawyers is that no lawyer should engage in a work that he is not competent for, has not enough knowledge or experience for or for which he has not enough time to achieve.

The service that the lawyer provides, must be efficient and conscientiously achieved, paying special respect to the interests of the client who is entitled to expect a good service, performed in a reasonable time, at a fair retainer and being always rightly informed on all the details. BCEC code expresses this fact in art. 3.2.1 and 3.1.3.: *"A lawyer must advise and represent his client, promptly, thoroughly and in time. He will be directly responsible for the failure to follow instructions received and will always inform his client, in order to note the progress in the matter that has been entrusted to him. A lawyer shall not handle a matter of which he knows or should know that he is not competent to solve, without collaborating with a lawyer who is competent to do better.*

*A lawyer should not accept instructions from a client if he cannot acquit for them on time, taking also into account the pressure exerted by performing another work"*.

d) Financial Issues

*Level of retainers*. In a number of jurisdictions, the retainers are established by law or regulations. Thus, for example Austria and Belgium have, for certain retainers, a fixed retainer system, and Germany and Italy have the same systems. Spain, however, has no mandatory system, but a system with character of recommendation;

In other countries, the so-called "rule of the market place" is functioning.

*Free assistance*. Regarding the free assistance, there are considerable variations across Europe on its availability, which represents the providing of legal services, free of charge or partially exempted, for those who are unable to pay retainer.

In jurisdictions where partnerships are allowed, retainers, profits and losses are shared between the partners, but sharing retainers with other persons than lawyers is not allowed. The Council Code provides it in art. 3.6.1 and 3.6.2, prohibiting a lawyer to share retainer with other persons than lawyers, but allowing the lawyer to pay a retainer, commission or other compensation to the heirs of a deceased or retired lawyer if their activity was taken over.

In relationships with their clients, lawyers must be liable for any funds deposited for them to keep, concerning any payment made for or on behalf of the client, and for any amount received. In some states, lawyers contribute with a sum of money, of which clients, who have suffered from the professional misconduct of a lawyer, can be compensated; this practice is known as the "guarantee fund" or "compensation fund".

e) Relations with the Court

The Code of conduct provides lawyers' relations with the court (including in art. 4:. Thus, lawyers should always have respect for the judge, act kindly and defend clients in a manner believed to be their good interest within limits prescribed by law and without giving false or tendentious information to the Court.

A lawyer pleading a case before the Court or Tribunal of a Member State must comply with the rules of conduct applied before that Court or that Tribunal.

f) Relationships and communication between lawyers

The Code deals with relationships between lawyers in art. 5, which refers to "the corporate spirit of the profession"; at section 5.1, it is provided: *"The corporate spirit of the profession requires a relationship of trust and cooperation between lawyers for the benefit of their clients, and avoiding unnecessary litigation. Placing professional interests against those of justice or of those concerned can never be justified"*.

The rest of the article refers to correspondence, reference retainers, communication with opposing parties, lawyers' replacement, responsibility for other lawyers' retainers, training young lawyers, solving disputes between lawyers from different Member States.

g) Confidentiality/professional secrecy and privilege of the profession of lawyer

A lawyer's obligation is to keep the professional secrecy. This obligation is forever and is not interrupted with the disappearance of his client or after the mandate has ended;

The Code provides[15]:*The essence of a lawyer's function is that he can learn things from a client that he could not tell to other people and be the receiver of other information on a confidential basis. Without the certainty of confidentiality, there can be no trust. Confidentiality is, therefore, a primary right and a duty of the lawyer. A lawyer must, therefore, respect the confidentiality of all information entrusted to him by the client or received about the client or other persons, while providing services for him. The duty of confidentiality is not limited in time. A lawyer shall require his associates, his staff and any other employee in connection with his professional problems, to comply with the same obligation of confidentiality"*.

h) Communication

The Code stipulates in art. 5.3: "*If a lawyer who sends a document to another lawyer from another Member State, wishes that this document remains confidential or without prejudice, then he should clearly express his intention at the same time when communicating the document."If the addressee of the communication is unable to provide its status of confidentiality or lack of prejudice, he should return the document to the sender without disclosing the content to other persons"*.

i) Advertising

All Bars and Lawyers' Associations from Western Europe are favouring corporate advertising and promoting legal services. In the field of personal advertising, there are different views. Thus, in Denmark, the Netherlands and the United Kingdom, a liberal regime applies, while in Spain, Greece and Germany advertising is still highly censored, and France and Austria allow a degree of advertising which remains, however, quite limited.

The Code has tried to find a pragmatic solution, and the basic rule in this regard is "when you are in Rome, act like the Romans": If advertising is forbidden in the host state, then do not advertise.

**4. Conclusions**

This approach aims at clarifying some aspects, including of conceptual nature, but also at drawing attention to the fact that such freedom exists, that it must be respected, both in terms of rights and obligations, equally, regarding the regulation of limitations, restrictions or, even, exemptions which acquire the form and content of exceptions and safeguard clauses.

[15] 2.3.1.-2.3.4.

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