Court to contrast the treatment of imports with that of domestic goods, the cases referred to above confirm the Court's previous case law on the concept of measures having equivalent effect to quantitative restrictions. The law may be summarised as follows. The measures prohibited are all those capable of acting as a direct or indirect, actual or potential hindrance to intra-Community trade. Hindrance to intra-Community trade may result from discrimination between intra-State and intra-Community trade, or from discrimination between different channels of intra-Community trade.[15] Discrimination may be either formal or material. Formal discrimination results from national measures differentiating explicitly between intra-State and intra-Community trade, while material discrimination results from measures which, although equally applicable to intra-State and intra-Community trade, in fact bear more heavily upon the latter.[16] Where there is a common organisation of the market, embracing both intra-State and intra-Community trade, measures which hinder the latter may amount to measures having equivalent effect, even if they equally affect the former.[17] Measures which are prohibited under Article 30 may nevertheless be excused under Article 36, provided (i) they are calculated to protect an interest specified in that Article, and (ii) such measures place no more burden on intra-Community trade than is strictly necessary to achieve the desired end.

Freedom to provide services

Lawyers' freedom under the new Directive

H. Bronkhorst *

During its session of March 22, 1977, the Council adopted Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services.[1] The present article will consider the main legal problems which played a part in the prehistory of the Directive, the provisions of the Directive itself and the problems which remain open concerning the free circulation of lawyers in the Community.

The initial proposal

The Commission's initial proposal, submitted to the Council in 1969, was designed to achieve in the Community of the Six freedom for lawyers to give legal advice, on the one hand, and to exercise certain activities before courts, on the other. The proposal covered the exercise of those activities by means of provision of services in the sense of Articles 59 and 60 EEC.[2]

Based on Article 63 as well as Article 57, it could be qualified as dealing at the same time with the last two phases of the attainment of freedom to provide services[3]: it was intended to abolish all restrictions on this freedom based on

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[15] Case 8/74, *Dassonville*, note 4, *supra*; Case 104/75, *De Peijper*, note 6, *supra*.
[16] Case 65/75, *Tasca*, and Cases 88/90/75, *SADAM*, note 9, *supra*.
[17] Case 190/73, *Van Haaster*, [1974] E.C.R. 1123, [1974] 2 C.M.L.R. 521; and see *Kramer*, note 12, *supra*.

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[1] Dir. 77/249/EEC, O.J. 1977 L 78/17.
[2] Thus it did not cover establishment in the Member State where the activity is performed. See Arts. 52-58 EEC.
[3] The first stage, *i.e.* the prohibition for the Member States to introduce new restrictions (Art. 62), being directly applicable community law, is considered to have been implemented at the date of the entry into force of the EEC Treaty (and for the three new Member States at the date of the entry into force of the Treaty of Accession).

nationality and residence as well as to recognise implicitly the professional capacity of the visiting lawyer, thus enabling the latter to perform functions reserved in the host country to certain categories of lawyers possessing a certain (professional) qualification.

Progress in the Council was slow. The coming into existence of the Directive was threatened by Member States taking the view that, because of the compulsory connection of the lawyer with certain judicial processes, and hence the close relationship between the profession and the exercise of judicial authority, large sectors of the profession should be excepted by way of Article 55 (1) EEC[4] from the application of the Treaty rules concerning freedom of establishment and freedom to provide services.[5]

The amended proposal

Three events persuaded the Commission to amend its proposal.[6]

In the first place, the above mentioned problem of the applicability of Article 55 (1) was resolved by the European Court in its judgment in Case 2/74, *Reyners*.[6] In answer to the questions referred to it by the *Conseil d'Etat* of Belgium, the Court ruled in respect of Article 55 that the exception provided for by that Article must be restricted to those activities *which in themselves involve a direct and specific connection* with the exercise of official authority, and that it is not possible to apply this description, in the context of a profession such as that of *avocat*, to activities such as consultation and legal assistance or the representation and defence of parties in court, even if the performance of these activities is compulsory or the object of a legal monopoly. This ruling not only brought the discussion on the applicability of Article 55 (1) to an end, but also made the Commission decide to extend the scope of its proposal to the whole range of activities carried on by lawyers.

Secondly, a few months after *Reyners* there came the judgment of the Court in Case 33/74 *Van Binsbergen*.[7] Here it was held that Articles 59 and 60 (3) EEC have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided. New directives, so far as they provided for the abolition of restrictions (Art. 63 EEC) had become superfluous,[8] and could even be misleading since the direct effect of Articles 59 and 60 had applied since the end of the transitional period.[9] The amended proposal accordingly deleted every element referring to the abolition of restrictions and emphasised in its structure the aspect of the *recognition* of the lawyer coming from another Member State *as a lawyer*.

Thirdly, there was the enlargement of the Community. The proposal necessitated technical adaptations especially in relation to the rules of conduct to be respected by visiting lawyers in the new Member States with a divided legal profession.

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[4] This Article although found in the Chapter of the Treaty on establishment applies to the freedom to provide services by virtue of Article 66.

[5] This view is reported in the judgment of the European Court in Case 2/74, *Reyners v. Belgian State* [1974] E.C.R. 631, 635 *et seq.*

[6] O.J. 1975 C213/3.

[7] Case 33/74, *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid* [1974] E.C.R. 1299. See the comment by H. Bronkhorst (1975) 12 C.M.L.Rev. 245.

[8] See Eighth General Report on the activities of the European Communities points 121, 122.

[9] For the three New Member States since the entry into force of the Treaty of Accession.

The amended proposal contained another substantial change in respect of the rules of professional conduct to be observed in the host country when activities in the nature of giving of legal advice were undertaken. Mainly in order to preserve the degree of liberty existing in this field, the Commission's amended proposal provided for the application only of the rules of conduct of the home Member State of the lawyer, whereas the initial proposal required the visiting lawyer also to observe the rules of conduct applicable to the lawyers of the host country.[10]

The two different approaches were based on different interpretations of the rules of the Treaty concerning freedom to provide services.[11] Thus, the complete application of the professional rules of the host country went with the conception that Article 60 (3) requires under all circumstances a complete assimilation of the person providing a service to a person exercising the same activity by way of establishment in the host country. On the other hand, the application to visiting lawyers of the professional rules of the Bar of their country of establishment, and not those of the host country, can be justified, first, by interpreting Article 60 (3) in the sense that assimilation with the local practitioner is necessary only in case of a temporary sojourn and, secondly, by pointing to the possibility of co-ordination under Article 57, the legal basis of the amended proposal) as the means of overcoming any problems resulting from the equality of treatment accorded by Article 60 (3).

Substance of the Directive

The Directive applies in principle to all activities pursued by lawyers in the Member States (Art. 1 (1)). For the definition of lawyers, it refers to the titles under which the profession(s) are exercised in the various Member States (Art. 2 (2)). Thus, by providing this definition, the Directive circumscribes at the same time the activities covered.

However, an exception to the general principle can be made by the Member States with regard to the preparation of formal documents for obtaining title to administer the estates of deceased persons, and to the drafting of formal documents creating or transferring interests in land (Art. 1 (1)). This possibility was introduced in order to remedy the inequality arising from the fact that these activities are exercised in the United Kingdom and Ireland by solicitors (covered by the Directive) but in most other Member States by notaries (a category of professionals not covered by the Directive). A legal basis can be found for this exception in Article 55 (1) since it concerns the drafting of *formal* documents (French: *actes authentiques*) and may, therefore, be regarded as connected with the exercise of official authority.[12]

Article 2 would appear to contain the key mechanism of the Directive, since it provides, following the lead of Article 57 (1), for the imposition upon the Member States of an obligation to recognise as a lawyer any person listed in the second paragraph of Article 1.

Together with the first article, it opens the way for a lawyer, established in one country of the Community to pursue in another the activities of a lawyer established in that State. For example, a barrister from the United Kingdom,

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[10] See, for the reasons which can be invoked to support this conception, the article by Leleux, "La libre circulation des avocats," C.D.E. 1976, esp. pp. 684 *et seq.*

[11] Leleux, *ibid.*, p. 683.

[12] Since a similar suggestion was made by the European Parliament, the Commission amended its proposal March 8, 1972, in that sense.

wishing to supply a service in Germany, may pursue the activities reserved in the latter country to the *Rechtsanwalt*. In this example, the solicitor is able with the help of the Directive to breach possibly two monopolies: in order to give legal advice, Germany normally requires the qualification of *Rechtsanwalt* or *Rechtsberater*, while for activities relating to the representation of a client in legal proceedings, the quality of *Rechtsanwalt* is generally required.

The activities of representing a client in legal proceedings or before public authorities have to be pursued in each host Member State under the conditions laid down for lawyers established in that State (Art. 4 (1) and (2)). This follows from the circumstances that the proper functioning of the judicial organisation in the host country is at stake, which, of course, necessitates compulsory rules.[18] Moreover, the host Member State may require that the visiting lawyer be introduced to the presiding judge and, where appropriate, to the president of the relevant Bar; and that he works in conjunction with a lawyer who practices before the judicial authority in question and who would where necessary, be answerable to that authority (Art. 5).

For the purposes of court work, Article 4 (3) of the Directive regulates the situation where the host country has a double profession, indicating which set of professional rules is to be observed. So far as relevant to the United Kingdom, the paragraph provides that:

> "'rules of professional conduct of the host Member State' means the rules of professional conduct applicable to solicitors, where such 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 in the United Kingdom to barristers and advocates."

However, even in respect of representation in legal proceedings, not all the rules applicable to local lawyers will have to be observed: the visiting lawyer is exempted, in the first place from those rules which would constitute a restriction on grounds of residence (forbidden already as a result of the direct effect of Arts. 59 and 60 (3)). In addition, Article 4 (1) exempts the visiting lawyer from the condition of registering with a professional organisation in the host country.

More problems may arise, at least in theory, from the rules which have to be applied where the activity of giving legal advice or any other form of extra-judicial legal assistance is concerned, since the Commission's proposal set out above was not accepted in its pure form. As a compromise between the proposal, and the advocates of the view, that for these activities also the visiting lawyer should be subjected to the local rules in their entirety, the Council ended up by applying to visitors the professional rules of the host Member State, "especially those concerning the incompatibility of the exercise of other activities in that State, professional secrecy, relations with other lawyers with mutually conflicting interests and publicity." However, "the latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incapability."

This provision, referring to national rules but at the same time limiting their application on certain complicated conditions, is one which may seem difficult for a conscientious lawyer to comply with. Its most straightforward aspect is the list of

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[18] Leleux, *supra*, p. 685.

principles to which conformity is particularly required, since they will exist in all Member States as matters of professional ethics. As for the requirement that the rules must be capable of being observed by visiting lawyers, this can be understood as the expression of a wish to avoid *hidden* discrimination on grounds of residence. Similarly, although it will be hard to tell when a rule is necessary to ensure in a State the proper exercise, and good standing, of the profession, this provision may be seen as facilitating the free movement of lawyers, since it imposes a limit upon the excessive application of the local rules. A more troublesome issue is that of respect for the rules of the host State concerning incompatible activities. The point to be determined here is whether a visiting lawyer may exercise the same range of activities (apart from those connected with the lawyer's profession), as he is entitled to exercise at home: *e.g.* has a solicitor coming from England the right to be, at the same time, a director of a company in France, which is forbidden for French "avocats"? (An incompatibility rule would not, of course, have to be observed if such observance were impossible for a lawyer not established in the host Member State, or if the rule could not be considered to be objectively justified.) The solution found by the Council appears to have been inspired by the judgment of the Court in Case 33/74 *Van Binsbergen* [14]: It follows, in particular, from the reasoning in paragraphs 12 and 14 that requirements imposed on a person providing a service, in order to be compatible with the Treaty, must be objectively necessary to ensure the observance of professional rules which are *justified by the general good*.[15]

This, again, is an extremely difficult concept to apply. However, there is comfort to be derived from the frequency with which services in the form of legal advice are provided without hindrance, suggesting that the rule of Article 4 (4) may turn out to be of small practical interest.

In several Member States lawyers in the salaried employment of undertakings may represent the latter in legal proceedings, while in other Member States the concept of the independence of the lawyer does not permit such a practice. Article 6 of the Directive contains an in-between solution, implicitly allowing such employed lawyers to appear before the courts, but only if the party represented is not the employer himself.

Although the economic impact of the Directive is not negligible, it may be of rather limited importance to the lawyer with an international practice. Many such lawyers will not be interested in appearing before foreign courts, and very often this will be impossible for linguistic reasons. Moreover, especially between bars with a similar cultural and linguistic background, customs already exist allowing members to appear in each others' courts. Between the Netherlands and Belgium there even exists an international (Benelux) treaty on the subject. The Directive—legally speaking—will, however, make this practice official, and extend it to all Member States.

As far as giving legal advice is concerned, Member States have seldom created a monopoly for (their own) lawyers. However, the Directive offers a remedy in case, in future, a Member State may do so; lawyers from other Member States will not be bothered by such measures.

The main criticism is that the Directive does not make freedom of establishment any easier. Here, the lawyer has to cope very often with far more serious difficulties than in the case of a single visit.[16] But facilitating freedom of estab-

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[14] [1974] E.C.R. 1299.

[15] *Ibid.* para. 12.

[16] See written questions 397/75 (O.J. 1976 C1/10) and 56/76 (O.J. 1976 C158/31).

lishment, since it brings about a far more intensive integration in the host country, will need more detailed measures of co-ordination.

Possible solutions would be a partnership with a lawyer possessing the professional qualifications of the host Member State, or an obligation upon the Member States to provide for shortened education schemes, to enable the foreign lawyer to adapt himself to the new legal order in which he is going to work. Much imagination will be needed, and not only on the part of the Commission's services, which will have to make the draft proposals; there is a task here also for the different bars and professional organisations of the Member States.

Competition and industrial property

EEC Competition Checklist *

Kynric Lewis
Hugh Laddie
Alan Dashwood

B. Cases

European Court

Judgment of February 1, 1977, Case 47/76, *De Norre* v. *N.V. Brouwerij Concordia* (not yet reported) (Dutch). See *infra*.

Judgment of March 9, 1977, Cases 41, 43 and 44/73, *S.A. Générale Sucrière and Société Béghin-Say* v. *Commission et al.* (not yet reported) (French).

Application, under Article 40 of Protocol on Statute of Court and Article 102 of Rules of procedure, for interpretation of *Sugar Industry* judgment.[1] Court held: (a) that amount of fines imposed on parties was that expressed in national currency, which appeared between brackets alongside amount expressed in units of account; (b) that although Commission is under no obligation to do so, it may accept payment in another national currency at exchange rate *on free foreign exchange market* applicable at date of payment.[2]

Note: Parties had taken view that amount of fine was that expressed in units of account and sought to pay in Italian lire at rate established by Financial Regulation.[3]

Commission

Decisions

Decision of April 19, 1977, *Re. ABG oil companies operating in the Netherlands*, O.J. 1977 L117/1.

During oil crisis of 1973 to 1974 BP reduced supplies of motor spirit to ABG (purchasing co-operative in Netherlands) much more severely than to other customers. Amounted to abuse of dominant position, contrary to Article 86.[4]

Cases where no decision was necessary

Restrictions imposed by Dutch publishers Bull. EC 10-1976, point 2110.

Contracts between certain members of Koninklijke Nederlandse Uitgevers Bond (Royal Dutch Publishers' Association) and their Dutch customers included prohibition against exportation of books to Belgium and against reimportation of books from Belgium. Most of those concerned voluntarily deleted clause from

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* Supplementing and continuing Checklist published in (1977) 2 E.L.Rev.
[1] Cases 40-48, 50, 54-56, 111, 113 and 114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295. Noted (1975-76) 1 E.L.Rev. 479.
[2] This case will be more fully discussed in a future issue of E.L.Rev.
[3] Reg. 73/91/ECSC, EEC, Euratom, O.J. 1973 L116/1.
[4] This Decision will be more fully discussed in a future issue of E.L.Rev.