

THE ROMANIAN LAWYER IN THE EUROPEAN LAW SYSTEM

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Abstract:

With Romania’s accession to the European Union, the practice of the legal profession has known a new dimension. Thus, since 1 January, 2007, Romanian lawyers can practice their profession, occasionally or permanently, in any of the European Union member states, as well as in states that are signatories to the Agreement on the European Economic Area. However, there is an increasing need for uniform and high-level training of lawyers in the European Union, in the context of developing the European integration process. This is mainly due to the very nature of the legal profession, which requires a very high level of competence in relation to the increasing complexity of social and economic relationships, as well as guaranteeing the protection of fundamental citizen rights. The rigorous and in-depth knowledge of national and European law norms, along with ethical correctness in the legal profession, are essential conditions for Bar Associations across Europe in the full implementation of fundamental rights, as recognized in the CCBE Charter regarding the legal profession.

Key Words: Lawyer, Romania, European Union, European Parliament, Charter of core principles of the European legal profession

Introduction

The historical perception on the legal profession, i.e. its independence from state authorities, has long been regarded as fundamental not only to the strict interest of the client, but also for society at large.

As regards the role played by lawyers in the modern organizational system of justice, it is viewed as essential. *“A lawyer must possess sound knowledge in matters of law, legislation and legal forms, but also a high moral authority, based on full independence and a genuine passion for truth and for justice”.*

The lawyer must be the first auxiliary of justice and the main collaborator of the judge, by studying the cases that are entrusted to him/her, by examining and re-establishing the facts under scrutiny, settling all matters of law related to those facts and serving the law with all the might of his talent.

“What any man of common sense must see is that, in a free society, a lawyer’s office, exercised by enlightened, honest and independent citizens, is as indispensable to the idea of justice as a magistrate’s, which is also suited for those who represent temperance, dignity and impartiality”.

The forerunners’ ideas have been reprised by our experts in the field of law, who found the lawyer’s mission to be that of defending a person’s property, honor, and freedom, which is why lawyers have enjoy great social standing and the highest of dignities in the state. *The lawyer’s mission is to represent or assist a person in justice or before administrative authorities, to lead and plead in trials as such, to give advice on legal situations.*

Issues currently raised in legal principle concern the optimization of the profession’s forms of organization, especially in this current situation, when the reform of the Romanian legal system must not be seen as having ended.

Main Text

Community Regulations

The community-level opening of the legal profession is governed by two specific directives, namely:

- Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services;
- Directive 98/5/EC 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;

These two directives ensure normative support regarding the free circulation of services provided by lawyers in the European Union and allow the mutual recognition of community lawyers.

There are, however, other directives with important consequences on the exercise of the legal profession within the European Union, such as:

- Directive 2005/36/EC on the recognition of professional qualifications, which replaces 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, regarding the recognition of a lawyer's diploma in Romania;
- Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes;
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters;
- Directive 2006/123/EC of the *European* Parliament of 12 December 2006 on services in the internal market.

All these directives are developments of Article 43 of the EC Treaty, which governs the right of establishment, and of Article 49-55 of the EC Treaty, dedicated to the principle of freedom to provide services.

Theoretically, experts show, Romanian lawyers can provide services in any EU Member State, even if not all of them have implemented laws in this respect. Moreover, in the case where this cannot be achieved in practice, they may prevail before courts in that Member State by the direct effect of the directive, if the implementation deadline has expired (in this case the deadline was 1 January 2007) or if the implementation of the directive in that Member State is incomplete and/or incorrect.

Disjoining the lawyer's freedom of circulation, in relation to the primary provisions referring to the right of establishment and the freedom to provide services, we identify two possibilities to practice the profession:

1. occasional exercise of the legal profession in a Member State other than the state of origin;
2. permanent exercise of the legal profession in a member state.

Occasional (provisional) exercise of the legal profession in a Member State other than the Member State of origin.

If a Romanian lawyer should wish to provide, occasionally, for a certain client, legal services in another Member State of the European Union, s/he will be able to do so by using his/her professional title, expressed in the language of the state of origin, i.e. Romanian, by indicating the professional organization to which s/he is affiliated or the court in which s/he is allowed to practice his/her profession in applying the legislation of the Romanian state.

Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services institutes the principle of mutual recognition of licenses to exercise the legal profession, as the effective exercise of the legal profession entails that "*Member States must recognize as lawyers those persons practising the profession in the various Member States*" (paragraph 3 in the preamble to the directive), "*with the exception of any conditions requiring residence, or registration with a professional organization, in that State*" (art. 4 para. 1 last thesis of the directive).

Thus, the Romanian lawyer is allowed to provide occasional professional services in another Member State, utilizing the professional title in his/her home country, without needing the recognition of professional qualification or having to pass an examination in this respect.

However, as regards activities referring to the representation and defense of a client in court, each Member State has the possibility to require lawyers to meet the following conditions in order to exercise their profession:

- to be introduced, in accordance with local norms or customs, to the president of the jurisdiction and, as the case may be, to the competent dean in the host Member State;

– to collaborate either with a lawyer who practices law within that jurisdiction and who would be responsible, as the case may be, before that jurisdiction, or with an “*avoué*” or “*procuratore*” who practices law in this jurisdiction.

Likewise, the competent authority of the host Member State may require the service provider to make proof of being a lawyer in the Romanian state.

Permanent exercise of the legal profession in a Member State

A lawyer who has obtained the right to exercise this profession in Romania can also perform permanent activities in another Member State or in a country that is a party to the Agreement on the European Economic Area, thus:

- under the professional title in the Member State of origin;
- under the professional title corresponding to the legal profession in the host Member State, along with the professional title in the home country.

a. Exercise of the legal profession under the professional title in the Member State of origin, i.e. under the professional title obtained in Romania.

In principle, any lawyer has the right to permanently perform the same activities as those reserved to lawyers of the host country, under the professional title obtained in the Member State of origin. In this sense, unlike occasional exercise, the lawyer is obliged to register with the competent authority in that state, based on a certificate attesting his/her registration with the competent authority in the Member State of origin, i.e. Romania.

In order to avoid confusion with the professional title in the host Member State, the lawyer who practices his/her profession under the professional title obtained in Romania is obliged to do so under this title, which must be indicated in Romanian.

As regards the field of activity in which the lawyer may profess under the professional title in the Member State of origin, Directive 98/5/CE 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 distinguishes two hypotheses:

- s/he may give legal advice, especially in matters of home Member State law, community law, international law and host Member State law;
- s/he may perform activities related to the representation and defense in court of a client, and inasmuch as the host Member State reserves these activities to lawyers professing under the professional title of that state, the former may require lawyers professing under professional titles in the Member States of origin to collaborate either with a lawyer professing within the court involved and which, when necessary, may be responsible before it, or with an “*avoué*”, who exercises his/her profession within that court. The same directive mentions ways to exercise this profession, provided for lawyers who use the professional title of their home country.

Thus, the lawyer who exercises his/her profession under the professional title obtained in Romania may opt for one of the following possibilities:

- perform independent activities;
- perform activities as an employee in the service of another lawyer, in an association or society of lawyers, or a public or private enterprise (inasmuch as the host Member State allows this for lawyers registered under the professional title used in that state);
- perform activities within a group.

Some specifications must be made regarding the ways to exercise the profession within a group. Thus, lawyers may perform activities under the professional title used in Romania:

- within a subsidiary or agency of their group in the host Member State (when there are incompatibilities between norms regulating that group in the Member State of origin and those in the host Member State, the latter are applied inasmuch as complying with them is justified by general interest, consisting of client and third-person protection);
- optionally, in a form of exercise of the profession within a group, among those that the host Member State also provides to its own lawyers (the ways in which these lawyers jointly perform activities in the host Member State are regulated by provisions laid down by law and administrative acts in that Member State).

Directive 98/5/EC of 16 February 1998 grants Member States freedom in adopting measures required to ensure the possibility of joint exercise of the profession by several lawyers from different

Member States who profess under the professional title in their Member States of origin, or by these lawyers and one or several lawyers in the host Member State.

b. Exercise of the legal profession under the professional title corresponding to the legal profession in the host Member State, along with the professional title in the home country

In order for a lawyer to integrate the legal profession in the host Member State, i.e. to be able to perform activities under the professional title corresponding to the legal profession in the host Member State, the provisions of art. 10 of Directive 98/5/CE of 16 February 1998 institute the following possibilities:

- lawyers who profess under the professional title of the Member State of origin shall make proof of having performed effective and regular activities for at least three years in the host Member State, in the field of law of that State, including community law (excepted from the fulfillment of conditions provided in article 4 paragraph (1) letter (b) of Directive 89/48/EEC, i.e. internship or skills testing);

- lawyers who profess under the professional title of the Member State of origin and who have performed effective and regular professional activities in the host Member State for at least three years, but for a shorter period in the field of law of that Member State, may obtain, from the competent authority in the host Member State, admission to the legal profession in the host Member State and the right to practice it under the professional title corresponding to the profession in that Member State, without being obliged to fulfill the conditions provided in Article 4 paragraph (1) letter (b) in Directive 89/48/EEC (the effectively performed activity and the ability to continue the activity performed in that state shall be evaluated based on an interview).

- lawyers who profess under the professional title of the Member State of origin in a host Member State may, at any time, require their diplomas to be recognized in accordance with Directive 89/48/EEC, for the purpose of obtaining admission to the legal profession in the host Member State and exercise it under the professional title corresponding to the profession in that Member State (entails the fulfillment of conditions in Article 4 paragraph (1) letter (b) of Directive 89/48/CEE, i.e. internship or skills testing).

Lawyers admitted to the legal profession in the host Member State in one of the above-mentioned ways has the right to use, in addition to the professional title corresponding to the legal profession in the host Member State, the professional title in his/her home country, expressed in the official language or in one of the official languages of the Member State of origin.

It can be seen that, in the first two situations, to integrate the legal profession in the host Member State, the lawyer leverages the period in which s/he performs activities in the host Member State, under the professional title in the home country, followed by taking a skills test.

As regards the third variant, a consequence of the abrogation of Directive 89/48/EEC, effective since 20 October 2007, references to this directive shall be read as references to Directive 2005/36/EC on the recognition of professional qualifications.

Similarly to Directive 89/48/EEC, this directive stipulates, under the title “*compensation measures*” (art. 14), the right of the host Member State to require the applicant to pursue an adaptation internship of up to three years, or to undergo skills testing in one of the following cases:

- the duration of training, as evidenced under Article 13 paragraph (1) or (2), is shorter by at least one year than that required by the host Member State;

- the training received by the applicant covers subjects that are significantly different from those covered in the qualification required by the host Member State;

- the profession regulated in the host Member State comprises one or several regulated professional activities that do not exist in the corresponding profession in the applicant’s home Member State, in the sense of Article 4 paragraph (2), and this difference is characterized by special training that is required in the host Member State and which covers subjects that are significantly different from those covered by the applicant’s skill certificate or qualification.

As the exercise of the legal profession requires exact knowledge of national law and essentially and constantly entails the provision of counseling and/or assistance on national law, the host Member State, by exemption from the general principle that the applicant has the right to choose, may require either an adaptation internship, or a skills test. A very important element lies in the provisions of Art. 15 of Directive 2005/36/EC, which stipulates the possibility to renounce the rights of compensation based on a common platform, i.e. an ensemble of criteria pertaining to professional

qualifications, likely to compensate for the significant differences found among the training requirements of the various Member States for a certain profession. Common platforms may be presented to the Commission by Member States or by representative professional associations or organizations, at national and European level.

Consequently, these “common platforms” between homologous professionals in Member States may substitute rules of the general directive, in order to “relax” the general framework of the directive on the recognition of professional qualifications.

Thus, as stated in ECJ practice (case *Christine Morgenbesser vs. Consiglio dell’Ordine degli avvocati di Genova* (C-313/01)) and the European Parliament’s Committee on Petitions (Petition 192/2004), Directive 98/5/EC applies exclusively to fully qualified (definitive) lawyers, whose qualifications are listed in Article 1 of the Directive.

It follows that any applicant who would either require the recognition of his/her qualifications as a lawyer, based on Directive 2005/36/EC, in a Member State (with the permission to exercise his/her professional qualification in the host Member State after receiving recognition), or who wishes to immediately exercise the legal profession in a host Member State, using his/her professional qualification in the Member State of origin, in accordance with Directive 98/5/EC, must be already recognized as a definitive lawyer in the Member State of origin.

Common principles

The principle of national treatment. This principle obliges Member States of the European Community to give lawyers from another Member States the same treatment as given to their own lawyers. A few exceptions are permitted in matters of performing activities concerning the representation and defense in court of a client.

Compliance with the deontology of the host Member State and the obligations of the home Member State. As a general rule, the lawyer who practices his/her profession, either occasionally or permanently, in a Member State other than that in which s/he obtained professional qualification, must comply with professional and deontological rules applicable to lawyers who profess under the corresponding professional title in the host Member State for activities performed on the territory of that State. Likewise, the lawyer, being registered with the competent authority in the home country, will have to comply with the obligations incumbent on him/her in this quality.

Collaboration of competent authorities. The liberalization of the exercise of the legal profession beyond the borders of one’s home country entails a close collaboration among the competent authorities of Member States, indispensable for ensuring the proper application of above-mentioned community provisions, especially as part of disciplinary procedures.

Application of competition law to the legal profession. Community norms and ECJ practice converge in the sense that liberal work, including work performed by lawyers, is an economic activity, similar to the work performed by a commercial company. Thus, in the case *Klaus Höfner and Fritz Elser vs. Macrotron GmbH* (C-41/90), ECJ extensively defined the concept of enterprise (commercial company), stipulating that, in the context of competition law, the concept of enterprise (commercial company) comprises all entities that run economic activities, regardless of legal status and financing sources.

Consequently, rules of competition law also apply to the legal profession, albeit distinguished from trading activities in that the legal profession contributes to general interest.

A fundamental Directive, with important consequences on liberal professions, is Directive 2006/123/EC of the European Parliament on services on the internal market, which applies subsidiarily to the legal profession with regard to aspects that are not covered in sectoral Directives.

The Directive establishes general provisions to facilitate the exercise of the freedom of establishment for service providers and the free circulation of services, while maintaining a high level of service quality. Its application to the legal profession has been contested, proposing the exclusion of the exercise thereof from the scope of the Directive.

The Directive aims to simplify procedures and formalities required for access to a service-providing activity and its exercise. In this sense, incident upon the matter of Bar registration are provisions concerning the establishment of the single-point institution and the use of electronic means.

We mention that the principle established by this directive, that Member States should accept any document of another Member State (certificate, attestation etc.) proving compliance with

requirements by a service provider or recipient, does not apply to documents listed in Article 3 paragraph (2) of Directive 98/5/EC (certificate attesting the lawyer's registration with the competent authority in the Member State of origin, based on which the competent authority in the host Member State registers the lawyer).

The Directive establishes the freedom to provide services and related principles, but shows that these do not apply to fields regulated by Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services.

The Directive is also incident upon the rules regarding publicity, art. 24 para. 1 thereof stating that "*Member States shall remove all total prohibitions on commercial communications by the regulated professions*".

Another aspect concerns the harmonization of professional deontology, encouraging the development of "*codes of conduct at Community level, aimed, in particular, at promoting the quality of services and taking into account the specific nature of each profession.*"

Those codes of conduct should comply with Community law, especially competition law". As such, the Directive confirms assimilation with commercial activities, established by EJC jurisprudence, making reference to competition law.

Major changes on the world market require a pertinent response of the profession to political and commercial pressures on fundamental values.

This "confrontation" also requires the "re-evaluation of the lawyer's institutional position both in relation to the judicial power and, especially, in relation to the business environment and civil society, in a world where the need to ensure legal and judicial security through professional legal services, provided independently, with the authority and competence demanded by the rule of law" cannot be contested.

As remarked, on several occasions, by the European Commission and the Council of Bars and Law Societies in Europe (CCBE), there is an ever-growing need for uniform and high-level training of lawyers in the European Union, in the context of development of the European integration process. This is mainly due to the very nature of the legal profession, which requires a very high level of competence in relation to the increasing complexity of social and economic relations, and in order to guarantee the protection of fundamental citizen rights.

The rigorous and profound knowledge of national and European norms of law, as well as ethical correctness in the legal profession, are essential requirements for Bar Associations in Europe to fully implement fundamental rights recognized in the CCBE Charter on the legal profession. These principles, while adopted slightly differently by national legislations, are common principles for all EU lawyers.

Thus, the European Commission set the target of training 700,000 law professionals in European Union law until 2020. The Commission intends to make available, for half of all European law practitioners (700,000 people), the training means required for applying Union law, a specific prerogative for functions exercised by judges, lawyers and other jurists, at national level. This measure will also contribute to reciprocal confidence among the various law systems in the European Union and will improve the application of European legislation. We believe this measure to be beneficial for citizens and enterprises in Europe, which will then be able to rely on rapid decisions and a veritable respect for rules.

Likewise, the EC decided that law practitioners should benefit from at least one week of training in Union law at any stage in their career.

In order to attain this objective, the Commission invited national governments, high councils of magistrature, professional bodies and training institutes, at both European and national level, to engage in integrating Union law into their training programmes and to increase the number of courses and participants.

The Commission itself undertakes to facilitate access to Union funding for high-quality training projects, including e-learning.

In virtue of its new multi-annual financial framework, the Union aims to prioritize European training for an annual number of around 20,000 law practitioners, until 2020.

European training is susceptible to take place during either initial or lifelong training, with two fundamental elements:

- Union legislation, in both material and procedural law, as well as the corresponding jurisprudence of the European Court of Justice;
- knowledge of national law systems.

These courses may be accompanied by language training. The European judicial training programme comprises two additional elements: European judicial training programmes, in general, and cross-border exchanges.

Conclusion

From the above-stated we may conclude that these are very interesting times for lawyers, with many changes at European Union level. It is a delicate exercise to find the correct balance in the lifelong and unitary training of lawyers.

We believe that the lifelong training of lawyers not only responds to the need to promote the development of the legal profession in Europe and to protect intellectual and moral prestige, but that it also represents the fulfillment of a task of the legal profession in society.

An adequate judicial training would largely contribute to the improvement of the internal market and would facilitate the exercise of rights by citizens.

Training is essential for a modern, well-functioning justice system, able to reduce high risks and costs that can stall economic growth.

Training is, henceforth, an indispensable investment for establishing justice in the service of growth.

References:

Tocilescu, George. *Curs de procedură civilă*. Iași, 2002.

Heroveanu, Eugen. *Principiile procedurii judiciare*. București, 1932.

Mallot, H. *Regles de la profession de avocat*. Paris, 1866, cited in: Vasilescu, Petre. *Tratat teoretic si practic de procedura civila*, Vol. I. Iasi, 1939.

European Commission. *Communication*. Brussels, 13 September 2011.