European Community Directive

The provision of services by lawyers

A Directive 'to facilitate the effective exercise by lawyers of freedom to provide services' was finally approved by the Council of Ministers on 22nd March 1977 and must be implemented by the member states within two years. The full text is printed below.

This is the first Community act which is of direct and immediate concern to the legal profession as such. It affects 'any person entitled to pursue his professional activities under the designation "advocate" or "solicitor"'. Subject to the conditions laid down, advocates and solicitors will be entitled to plead in the courts of other member states, and lawyers from other member states will be entitled to plead in our courts. So much is clear. What is not clear is whether the Directive will in fact 'facilitate' anything at all, or whether it will only create more problems than it solves.

The development of the Directive, from its first draft in 1969 to the obscure inelegancies of the final text, is an illustration of the process of compromises by which Community legislation comes to be made. Of far greater importance for the future of Scots law and Scots lawyers is the thinking which lies behind it.

The Directive implements a part of the Treaty of Rome which has so far received comparatively little attention. The expression 'Common Market' tends to direct attention to things like tariff barriers, licensing agreements and butter mountains. It is not always recognised that the Treaty creates well-in particular, the right of freedom of movement for persons, services and capital. Chapter 1 (Articles 48-51) deals with 'workers' (employed persons) and establishes their right to take up employment in other member states. Chapter 4 (Articles 67-73) deals with the free movement of capital. Chapters 2 and 3 (Articles 52-66) are the important ones in the present context.

Chapter 2 deals with the right of establishment and Chapter 3 with the provision of services, but the two chapters are interconnected and must be read together. Broadly speaking, the distinction between establishment and provision of services is that the first involves the right to set up in business in another member state, while the second is concerned with the right to provide services in another member state without actually setting up in business there. Article 52 specifically provides that 'freedom of establishment shall include the right to take up and pursue activities as self-employed persons'. Article 60 provides that 'services' shall in particular include . . . (d) activities of the professions'.

The scheme of Chapters 2 and 3 envisages a process of liberalisation taking place in four stages:

(1) The 'standstill'—from the date of the Treaty no new restrictions on freedom of movement may be introduced (Articles 53 and 62);
(2) the abolition of existing restrictions by the end of the 'transitional period'—ie, by 1969, before Britain entered the Community (Articles 52 and 59);
(3) the co-ordination by means of Directives of legal, regulatory and administrative provisions concerning the taking up and pursuit of activities as self-employed persons (Articles 57 (2) and 66); and
(4) the mutual recognition (again through Directives) of diplomas and other professional qualifications (Articles 57 (1) and 66).

Several important points should be noticed before proceeding further. First, the emphasis in the Treaty is on activities, rather than professions as such—on what people do rather than the way in which they are organised. Indeed, it is clearly envisaged that organisational structures and rules may in themselves involve restrictions on the freedom of movement. Second, these chapters of the Treaty are concerned with the freedom of self-employed persons and independent companies and firms. They are not concerned with the freedom of employed persons, who are dealt with under Chapter 1. Third, a distinction is made between the 'taking up' and the 'pursuit' of activities. The English text, by using words which have no precise legal significance, conceals a distinction which is important in most other member states—the distinction between access to a profession and the exercise of it. Restrictions on access to a profession include restrictions based on nationality (which are imposed in several countries) and the requirement of specific pre-entry qualifications. Restrictions on exercise include the numerous rules which govern the way in which an advocate or solicitor is permitted to practise his profession once he has become a member of it.

The freedom conferred by Chapters 2 and 3 is subject to an important exception, which is found in Articles 55 and 66. These Articles provide that 'the provisions of this chapter shall not apply, so far as any given member state is concerned, to activities which in that state are connected, even occasionally, with the exercise of official authority'. In other words, if a particular form of professional activity involves, even occasionally, the exercise of 'official authority', existing restrictions on access and exercise can be maintained. It is probably true to say that it was because of this exception that a Directive was not already in force when Britain entered the Community.

Until the end of the transitional period, while no new restriction could be introduced, existing restrictions could
only be removed by Community action. Therefore, if freedom of movement was to be achieved for lawyers, a Directive was necessary to achieve it. For a long time, it was argued that the activities of the organised legal profession occasioned involvement in the exercise of ‘official authority’ and, consequentially, that the legal profession as a whole was excluded from the operation of Chapters 2 and 3 by Articles 55 and 66. (That is a gross over-simplification of the argument but it is sufficient to explain the point.)

Eventually, in 1969, the Commission produced a draft Directive limited to ‘certain activities of lawyers’. These were: (1) providing legal advice, and (2) arguing a case without restriction before the courts, access to the documents in a case, visits to the prisoner and presence at the preparatory inquiry. Again, the English text fails to convey the true sense of what was proposed. In effect, the draft Directive proposed to liberalise the traditional activities of the French avocat or his equivalent in other countries. The words used were specifically related to Continental procedures and to rights which, under those procedures, are essential to the guarantee of a fair trial.

The 1969 draft also provided that the incoming lawyer must obey the professional rules of the host country and be subject to the discipline of the professional authorities in that country, while remaining subject to the rules and discipline of his country of origin. (This proposed arrangement came to be known, briefly if pompously, as ‘double deontology and double discipline’.)

This draft was considered by the European Parliament in 1972 and various proposals for amendment were made. In essence, however, the Directive was unchanged when Britain entered the Community in 1973. The Commission, which had other professions to deal with, was anxious to make progress and lengthy negotiations began. These negotiations appeared to become bogged down on two main points: (a) the ‘Article 55’ argument which was still alive, and (b) the appalling difficulty of translating legal terminology which fitted the legal systems of the Six into terms which would make sense in the context of completely different systems.

The Gordian knot was cut by the judgment of the European Court in Reynolds v The Belgian State (Case 2/74, 21 June 1974). Reynolds was a Dutch national who had acquired all the professional qualifications necessary for admission to the Belgian Bar except Belgian nationality, which was a required condition under a Belgian law of 1967. He was refused admission to the Bar solely on this ground. It was argued, first, that Article 55 applied to the profession of avocat and that a restriction of nationality was therefore legitimate; and second, that in any event Reynolds could not found on Article 52 because no Directive had been made to bring it into effect. The Court held that Article 52 had become ‘directly applicable’ at the end of the transitional period and that Article 55 did not apply. The decision on Article 55 was of immediate importance for the progress of the lawyers’ Directive. The decision on Article 52 was, and is, of infinitely greater importance in the long term.

Article 52 provides: ‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be abolished by progressive stages in the course of the transitional period.’ The effect of the Reynolds judgment is, shortly put, that the words at the beginning and end of the sentence no longer matter, and only the words in italics apply. No further action is necessary to create freedom of establishment; the right of establishment exists by virtue of the Treaty itself and can be invoked by any individual who is denied that right by reason of his nationality provided of course that he is a national of a member state.

So far as Article 55 was concerned, the Court restricted its application to ‘those activities which in themselves involve a direct and specific connection with the exercise of official authority’ and went on to say: ‘It is not possible to give 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 there is a legal monopoly in respect of it.’

The decision in Reynolds was swiftly followed by another decision dealing with the provision of services—Van Binsbergen v Bedrijfsvereniging voor de Metaalnijverheid (Case 33/74, 3 December 1974). Van Binsbergen was involved in proceedings before a Dutch court, whose rules required parties to be represented by persons established in the Netherlands. He chose to be represented by Kortmann, a Dutchman established in the Netherlands. In the course of the proceedings, Kortmann went to live in Belgium and the Dutch court said that he was no longer qualified to represent Van Binsbergen. The European Court held that Article 59 (like Article 52) had become directly applicable and could be relied upon as an objection to ‘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’.

It had been argued that some restrictions upon who may represent parties before the courts are legitimate and, in particular, that it is legitimate to require residence within the jurisdiction of the court. The European Court said that such restrictions are legitimate provided that they are ‘objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics’. Every restriction must be judged on its merits according to an objective text and must not have the effect of discriminating against those who are nationals of, or resident in, another member state.

In the light of these two decisions, the Commission withdrew the 1969 draft Directive and started again on a different basis. The Court had said that a Directive was not necessary to create freedom of establishment or freedom to provide services but might be necessary to ‘facilitate’ the exercise of those freedoms. Stages (1) and (2) of the process of liberalisation have been achieved and Directives are now only necessary for stages (3) and (4)—co-ordination, and mutual recognition of diplomas.

The new Directive dated 9th April 1975 followed a scheme which, in outline, remains the same in the final text of 22nd March 1977. First, it is stated to what activities the Directive applies. There is then a list, country by country, of the types of lawyer to whom the Directive applies—Avocat, Rechtsanwalt and so on. Member states are then required to recognise the right of those lawyers to pursue the activities to which the Directive applies. Thereafter, provision is made for them to be subject, when pursuing those activities, to the laws and professional rules of the host country, with special provisions as between the United Kingdom and Ireland. Additional provisions are made with respect to court work, and machinery is laid down for complaints of unprofessional conduct.

The text of April 1975 raised a number of problems:

(1) The description of the activities to which the Directive applied was borrowed direct from the judgment in the
Reyners case—in essence they were still the traditional activities of the French avocat: ‘consultation’ and ‘the representation and defence of a client before the courts’. Unfortunately, ‘consultation’, ‘representation’, ‘defence’ and ‘court’ all have different connotations in French and English, not to speak of the other Community languages.

(2) The list of lawyers to whom the Directive applied was simplicity itself for all countries other than the United Kingdom and Ireland—the professional titles of the lawyers concerned were set down without qualification as in the final text. But in the case of the United Kingdom and Ireland the expressions used were ‘barrister practising at the Bar’, ‘advocate practising at the Bar’ and ‘solicitor in private practice’. The reason given for the addition of the words in italics was that, in the other countries, the professional title implies, by definition, that the lawyer concerned is a lawyer in private practice, whereas in Britain and Ireland a barrister, advocate or solicitor can be the salaried employee of central government, local government, industry or commerce.

(3) The Article which applied the host country rules to incoming lawyers repeated the previous requirement of “double deontology and double discipline”. The rules of many, if not most, Continental bars forbid their members to engage in ‘commerce’ or to be actively involved in the running of commercial undertakings as directors or managers. If these rules were to be applied without exception to British solicitors, they would exclude many of them from all professional activity in the countries concerned.

(4) The Article dealing with court work was equally unsatisfactory from the British point of view. It provided simply that a lawyer undertaking court work must (i) choose an address for service within the jurisdiction and (ii) ‘for the purpose of acts of procedure’ only, ‘work in conjunction with or in the presence of a lawyer established in the host member state’. Thus, to take an absurd example, an avvocato from Palermo with no knowledge whatever of the Scots law of evidence and procedure would be entitled to conduct a criminal trial in the High Court in Glasgow entirely on his own, except for ‘acts of procedure’. Needless to say, the phrase ‘acts of procedure’ does not mean the same thing in English as it means in the other languages, (actes de procédure being the function of the avocat rather than the avocat), and it is diverting to recall serious discussions as to whether perhaps ‘le cross-examination’ might be excluded from the purview of the Directive as being an ‘act of procedure’.

Emboldened by a rereading of the judgments in Reyners and Van Binsbergen, the Commission promptly added a fifth problem. Rather than specify the activities to which the Directive applied (‘consultation’ and court work), they substituted the statement that ‘the provisions of this Directive shall apply to the activities of avocat’. In French terms, this makes sense because the ‘activities of avocat’ are capable of fairly precise definition. In the crudest terms, the French avocat is the same sort of animal as the English barrister or Scots advocate, except that he deals direct with the client. He is not a conveyancer, since conveyancing is the province of solicitors, even although the foreign lawyers concerned cannot carry on those activities in their own countries.

Effectively, two years have been spent in finding solutions to this conceptual dog’s breakfast. It is extremely doubtful whether the final text contains anything more than a form of words which glosses over the problems and fails to solve them.

From here on, it will be convenient to examine each of the problems in turn.

(1) ‘The activities of lawyer’ (Article 1 (1))

A partial solution to this problem has been found in the provision which entitles member states to ‘reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land’. A formula along these lines was first suggested by Sir Derek Walker-Smith in the European Parliament. The effect appears to be that the solicitors’ conveyancing monopoly is preserved although not to anything like the same extent as in Section 39 of the Solicitors (Scotland) Act 1933. Even assuming, however, that that problem has been solved, there is still an inherent dubiety about the scope of the Directive.

In the other language texts, the word ‘lawyer’ is replaced by the professional title appropriate to the country or countries concerned. Thus, for example, the German text refers to ‘dieactivities of Rechtsanwalt’ and the Danish text to ‘the activities of Advokat’. In order to discover what activities are open, by virtue of the Directive, to a British lawyer in Germany or Denmark, it is first necessary to know what a Rechtsanwalt or an Advokat does and, equally important, what he does not do. Even that does not end the matter because the fact that a German Rechtsanwalt does not undertake a particular activity may mean either that that activity is the monopoly of some other profession or that it is subject to some other form of legal restriction. It is certainly not safe to assume that, quite apart from professional rules, a British solicitor is entitled by law to do in other countries all those things which he would regard as a normal part of his work at home.

(2) The list of ‘lawyers’ covered by the Directive (Article 1 (2))

It will be remembered that the April 1975 text limited the application of the Directive to barristers and advocates ‘practising at the bar’ and solicitors ‘in private practice’. It was forcefully contended by salaried lawyers in industry and commerce that this restriction would discriminate against them, or might at least be used as an excuse for preventing them doing their normal work abroad. Support for this argument was found in the doctors’ directive which applies to salaried as well as self-employed practitioners. On the other hand, it was argued that to admit salaried lawyers would produce ‘discrimination in reverse’, since in many countries a lawyer is not entitled to represent his employer in court. Thus, an incoming lawyer might be permitted to do for his employer-client something which was forbidden in the host country.

In order to get over this problem, Article 6 of the Directive now provides that ‘any member state may exclude lawyers
who are in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings in so far as lawyers established in that state are not permitted to pursue those activities. Otherwise, lawyers employed by public and private undertakings are in the same position as lawyers in private practice, subject to two important qualifications.

In the first place, the Directive only applies to 'any person entitled to pursue his professional activities under the designation 'advocate' or 'solicitor'. An advocate employed in industry, commerce or elsewhere remains a member of the Faculty of Advocates, but the fact of his employment prevents him carrying on professional activities qua advocate. Equally, a solicitor is only entitled to carry on professional activities qua solicitor if he holds a practising certificate. The test applied by the Directive is whether a lawyer is entitled to practise, rather than whether he has qualified, as an advocate or solicitor. In the second place, Article 4 of the Directive may place further limits on the extent to which employed lawyers are entitled to act for their employer-clients in other countries. The difficulty here is that neither the meaning nor the scope of Article 4 is clear.

(3) 'Double Deontology and Double Discipline' (Article 4)

The idea that a visiting lawyer should be subject to the rules and discipline of his own professional organisation and of those of another appeared to be acceptable to the original Six. Subsequent examination of the actual rules which apply in those states suggests that the scheme may have been based more on optimism than reality. The scheme presupposed a non-existent uniformity of rules and discipline, and did not face up to the possibility that the professional authorities in different countries might genuinely disagree about their meaning and enforcement.

The UK professional bodies argued that 'double deontology and double discipline' is an unworkable scheme and would, moreover, have the practical effect of introducing new restrictions. At present, apart from court work, lawyers from different countries provide services in other countries without it even being suggested to them that they might be subject to the local rules of professional conduct. To apply those rules to them might have the effect of restricting activities which are, at present, carried on without restriction. This would therefore be a violation of the 'standstill' and a new obstacle to free movement.

The solution adopted by the Commission in July 1975 was that, in the case of court work, the incoming lawyer should be subject to the rules of the host country but, in the case of all other activities, he should be subject only to the rules of his own professional organisation. The subsequent history of Article 4 of the Directive shows a progressive retreat from this straightforward position back in the direction of 'double deontology and double discipline'.

As far as court work is concerned, the rules of the host state are to apply as before (Article 4 (1) and (2)). But as regards other activities, there was a basic difference of view as to the effect of the Treaty. On the one hand, there was the argument mentioned above, that the imposition of local rules would be a breach of the 'standstill'. On the other hand, it was argued that 'co-ordination of legislative, regulatory and administrative provisions' is bound to involve the introduction of new restrictions in some areas unless the least restrictive rule is always adopted on principle. In addition, Germany in particular was able to point to severe restrictions on the activities of incoming lawyers dating from well before the Treaty.

Various attempts were made to define the rules which could reasonably be applied to incoming lawyers. The Consultative Committee of the Bars and Law Societies of the European Community suggested by way of compromise that the incoming lawyer should be subject to the rules of his own state but should be required to respect the principles underlying the professional code of conduct of the host state. (This is not as evasive a compromise as it may seem at first sight because, although there are wide divergences between the national rules, the principles on which they are based are identifiable and, within limits, compatible.) This solution was supported by the Economic and Social Committee of the Community.

The final text reflects a much more complicated approach, but it is very doubtful what it means. In the first place, under Article 4 (1) and (2), the rules of the host state apply, not only to court work, but also to 'representation before public authorities'. This reflects the important distinction between public and private law in the Continental countries. Because the actions of public authorities are subject to review by administrative courts, those authorities have to be more 'judicial' in their dealings with the citizen than the public authorities of the United Kingdom. Bearing in mind also that Continental court procedure relies extensively on written submissions, there is a basic similarity between court work (as we know it) and dealings with public authorities.

The extension of local rules to cover 'representation before public authorities' will mean that a British lawyer going to another country to deal on behalf of his client with, say, the local tax authorities may find himself subject to restrictions and obligations which are entirely new to him and which, indeed, he may find it very difficult to discover.

In the second place, Article 4 (4) now reflects a multiplication of compromises, the effect of which is only likely to appear in the national implementing legislation. Broadly speaking, for all activities apart from court work and representation before public authorities the visiting lawyer remains subject to the rules of his home state. But he may also be required to 'respect' local rules if the application of those rules to an incoming lawyer is both possible and 'objectively justified'. The particular types of rules mentioned in Article 4 (4) include the rules of 'incompatibility', 'rules of professional secrecy', rules regulating relations with other lawyers, rules prohibiting representation of clients with conflicting interests and rules relating to 'advertising'. It is important to appreciate what application of these rules may involve.

The rules of 'incompatibility' are the rules which define what other activities a lawyer may engage in concurrently with his practice as a lawyer. For example, an English solicitor may not be an estate agent. In many other countries, these rules exclude a much wider range of activities—eg, 'commercial' activities, company directorships and membership of Parliament. The extent to which other member states seek to impose these rules on incoming lawyers will have to be carefully watched. If applied strictly, they may impose severe limitations on the work of British solicitors abroad.

The rules of professional secrecy are those which govern the confidentiality of communications by the client to the lawyer. In all the Six, it is in principle a criminal offence for a lawyer to disclose to anyone any 'secret' communicated to him by his client, but there are important differences of detail in the application of this general principle. The application of
these rules may give rise to difficult problems, for example, for the lawyer who is called upon to produce documents or information to the courts or tax authorities in another country.

The rules regulating relations with other lawyers raise an important conflict of principle. British solicitors are the agents of their clients. Clients are, strictly speaking, entitled to know what passes between their respective solicitors in discussion or correspondence, although in practice much discussion and correspondence is conducted on a confidential basis between solicitors. Also, the extent to which correspondence between solicitors can be withheld from production to the court is limited. In five states out of the original Six (all except Germany), all communications before commissions are subject to a confidentiality undertaking by solicitors. Also, the extent to which such communications may be divulged to the court or produced to the court is strictly limited. The relationship between lawyer and client is different in law and, since the courts are obliged, or a sheriff when acting on behalf of a sheriff, to ascertain the truth and are not confined to judging cases on evidence (in our sense of the word), they cannot and will not ignore what is stated in a confidential or without prejudice letter if it is produced. Again, application of different rules is bound to create problems to which there is no easy answer. On the other hand, this is an example of the difficulty which could be created by the simple 'home rules only' solution.

The rule against representation of conflicting interests is, by contrast, universal. Its detailed application may, however, be different, particularly in the early stages of a transaction and in relation to the definition of what constitutes a conflicting interest.

Last, the general rule against lightly and advertising is, at the moment, also universal. But the situation may change if the United Kingdom government insists on implementing the recommendations of the Monopolies Commission in relation to advertising by solicitors. Also, the general rule is applied in different ways, not only by different member states, but by different professional bodies within them. The British lawyer going abroad will probably be entirely safe if he uses the letter-paper and visiting cards which he uses at home. Beyond that, he should be very careful. Professional advertising is, in most circumstances, a criminal offence in France!

(4) Court work (Article 5)
The UK professional bodies argued that a foreign lawyer coming to plead in our courts should always be subject to the 'control' or 'supervision' of a local lawyer. The reason for urging this point of view was not protectionism but a growing recognition that Continental and British court procedures are so different that the interests of both clients and the courts may be seriously prejudiced if court work is undertaken by lawyers unfamiliar with the appropriate rules of procedure and evidence. The differences are both deep and difficult to identify. For example, if one explains to a German lawyer that British court procedure is different from his because evidence and argument are presented orally, he will reply, quite correctly, that the 'principle of orality' is also a basic principle of German procedure. What he is not likely to say (because he takes it for granted) is that in German civil proceedings evidence is normally taken 'on commission', the judge asks the questions, it is (in most cases) improper for a lawyer to precognize a witness, and the 'oral' submissions usually consist in saying, 'I rely on my written submissions'. It is not difficult to see how a lawyer accustomed to that type of procedure could get lost in the maze of British procedure, and vice versa.

However, because most of the Continental systems are basically similar, the Commission refused to accept the British argument. It is in fact relatively easy, for example, for a Dutch lawyer to represent a client before a German court, and the Commission regarded the opening of national courts to lawyers from other countries as being one of the main objectives of the Directive. The argument was that the client is entitled to be represented by the lawyer whom he knows and who knows his business best, and should not be forced to employ another lawyer whom he does not know and who knows nothing of him. (The argument will be familiar to advocates of fusion in our own profession.)

The compromise solution eventually adopted (Article 5) is that member states may, but are not bound, to require a visiting lawyer to 'work in conjunction with a lawyer who practises before the judiciary authority in question and who would have necessary, be answerable to that authority'. It is virtually certain that the United Kingdom will implement this provision. But it should be noted (i) that lawyers from other member states will be entitled as of right to appear in our courts and (ii) that, while they may be required to 'work in conjunction with' a Scottish lawyer, the Scottish lawyer will not necessarily be entitled to direct the conduct of the case. Obviously, in 99 per cent of cases, the two lawyers would agree on the line to be taken, and the incoming lawyer would follow the Scottish lawyer's advice on questions of procedure, strategy or tactics. In the event of serious disagreement, however, the only remedy available to the Scottish lawyer would be to withdraw his co-operation, leaving the visiting lawyer to find someone else to work with. The solution is not wholly satisfactory and it raises interesting questions for the future.

What is, perhaps, more interesting is that the argument was never accepted that the first and fundamental necessity is that a lawyer should be qualified to perform the service which he offers to perform—qualified, that is, not just as a 'lawyer' in some general sense, but qualified by training and experience to do what he claims to do. A French problem of testate succession is not comparable with a Scottish problem of testate succession in the same way as a French tonic is comparable with a Scottish tonic. 'Soliciot = avocat' is essentially different, as a proposition, from 'ear, nose and throat specialist = oto-rhino-laryngologist'. How far Community procedures and thinking are capable of accommodating this conceptual distinction is too large a question to be discussed here. What is certain is that, in the not too distant future, the Scottish legal system will have to face challenges which are quite different in character from the challenge to which we are accustomed from England. It will be necessary, not simply to assert the merits of our system, but to be sure what they really are in order to preserve them.

It would be wrong to conclude this article without saying that, if the Directive has achieved nothing else, it has established a degree of friendly co-operation which never existed before between the six professional bodies in the United Kingdom, the Lord Advocate's Department and the Lord Chancellor's Office. This, and a growth of mutual understanding between ourselves and lawyers bred in systems which have influenced half the Western world, are positive results of Community membership.

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