



LEGAL ENVIRONMENT WITHIN THE EU: FREE MOVEMENT OF LAWYERS AND LEGAL SERVICES

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Abstract. Authors of the present article analyze legislation of the European Union on provision of legal services in another EU member state. This article also examines case law of the Court of Justice of the European Communities, consequently revealing problems of applying the analyzed legislation in practice. The authors pay special attention to the analysis of the norms, provided in the Law on Advocacy of the Republic of Lithuania, which are related to establishment and provision of services of other EU member states in the Republic of Lithuania, and critically evaluate the compliance of certain norms of the Law to the requirements of the European Union legislation.

Keywords: free movement of persons, free movement of advocates and lawyers, law of the European Union, freedom of establishment and freedom to provide services.

TEISINĖ APLINKA EUROPOS SAJUNGOJE: LAISVAS TEISININKŲ IR TEISINIŲ PASLAUGŲ JUDĖJIMAS

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Santrauka. Šiame straipsnyje autoriai analizuoja teisinę Europos Sąjungos aplinką ir jos poveikį teisinių paslaugų teikimui Bendrijos teritorijoje. Straipsnyje taip pat tiriamos Europos Bendrijų Teisingumo Teismo bylos, atskleidžiamos minėtų teisės aktų taikymo praktikoje problemos. Ypatingą dėmesį autoriai skiria Lietuvos Respublikos advokatūros įstatyme įtvirtintų normų, susijusių su kitų Europos Sąjungos valstybių narių advokatų kontorų įsteigimu ir paslaugų teikimu Lietuvos Respublikoje sąlygomis, analizei, kritiškai vertina kai kurių šio įstatymo nuostatų atitiktį Europos Sąjungos teisės aktų reikalavimams, siūlo konkrečius teisinės aplinkos tobulinimo būdus.

Reikšminiai žodžiai: laisvas asmenų judėjimas, laisvas advokatų ir teisininkų judėjimas, Europos Sąjungos teisė, įsisteigimo ir paslaugų teikimo laisvė.

1. Introduction

Issues related to introduction of principle of free labour force movement are widely discussed in scientific literature (Tvaronavičienė, Ginevičius 2005; Urbonavičienė, Tvaronavičienė 2008). This paper concentrates specifically on movement of lawyers within the European Union (EU), which is also the object of many scientific publications (Vêgêlé 2008; Katsirea, Ruff 2005; Schepel 2007, Dinovitzer, Hagan 2006; Gromek-Broc 2000; Schloh 1990).

The European Union law safeguards the possibility for lawyers from the Member States to undertake legal activity in the whole territory of the single market. The possibility to practice law beyond the borders of your own country in the whole European Union is important not only to lawyers, but their clients as well. Free movement of persons in the single market has created the necessity for people who have changed the place of residence to get legal services of quality in their native language within the legal framework of their country of origin or the host member state. By passing a number of legal provisions the European Union aims at synchronizing the conditions for service provision in the whole European Union.

The aim of the present article is to review the procedure for the provision of services in the European Union, reveal the main problems of the legal regulation and indicate the further development tendencies of the analyzed institution.

The object of the research – the Treaties establishing the European Union, directives on provision of legal services in the European Union, case law of the Court of Justice of the European Communities, legislation of the Republic of Lithuania, establishing the conditions for the provision of legal services by the European Union lawyers in Lithuania.

Methods of the research - empirical, comparative, systematic analysis, generalization, and logical.

2. The first stage of EU regulation for provision of legal services

Preparation of the current EU regulation for provision of legal services has been a long process which can be conditionally divided into 3 stages.

The first stage (1957–1977) began on 25 March 1957 when the Treaty establishing the European Community was passed, the Article 49 (former Art. 59) of which established “the freedom to provide services” and Article 43 (former Art. 52) – “the freedom of establishment” (the Treaty).

The exclusive feature of the EU internal market is the removal of obstacles to the free movement of goods, persons, services and capital among the Member States as well as the measures which prevent persons from entry and movement in the internal market (Article 3, Part 1, Points c and d).

A EU citizen has the right to move freely and settle in any of the Member States according to the limitations and conditions foreseen in the Treaty and other EU legal acts, which serve as additional means of implementation of the Treaty provisions (Article 18 of the Treaty (former 8a)).

Freedom to provide services is related to a temporary, episodic, sometimes even a single undertaking of professional activity in the Member State other than where professional qualification was acquired.

According to the Article 50 of the EC Treaty the term “services” covers: a) activities of an industrial character; b) activities of a commercial character; c) activities of craftsmen; d) activities of the professions. The same Article establishes that without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

The freedom of establishment refers to the de facto execution of economic activity in another EU Member State for an indefinite period and becoming a permanent part of the economic infrastructure of that country.

Attention needs to be drawn to the fact that the Treaty establishes only the general framework for the free movement of services and persons in other Member States and does not regulate the order of provision for different kinds of services. Seeking to implement the right of establishment when pursuing activity of certain profession, secondary law provisions complementing the EC Treaty are passed to regulate the service provision activities within certain professions in more detail (Article 44 (former 54) of the Treaty).

The rulings of the European Court of Justice (ECJ) are important when abolishing the ungrounded restrictions imposed by a Member State on persons willing to make use of their freedom of movement and establishment and to provide legal services in another Member State. Essential is that only ECJ has the competence to interpret the provisions of the EU law.

Reyners case (Case 2/74 1974), *Van Bisbergen case* (Case 33/74 1974) and *Thieffry case* (Case 71/76 1977) have received particular attention in the public. In the beginning there was an attitude that lawyer’s occupation needs to be exempt from the general liberal provisions on freedom to provide services and freedom of establishment. It is worth mentioning though that according to the EC Treaty exceptions from freedom to provide services and freedom of establishment may only be applied to activities which may have at least a temporary effect on implementation of the public policy. It is obvious that the activities of advocates cannot in anyway be ascribed to the sphere of public policy implementation.

In *Reyners* case (Case 2/74 1974), the plaintiff was a Dutch national who has received a doctorate in Belgian law. ECJ has recognised the Belgian rules which prevented him from becoming a practicing lawyer in Brussels to be unlawful. In its judgement the EJC established that lawyer's profession cannot be attributed to the implementation of public policy. In the latter Case Belgian authorities wanted to justify the rules which prevented foreign nationals from becoming members of the Belgian Bar referring to the fact that Belgian lawyers may be occasionally invited to sit on the Board of Judges. ECJ noted that typical lawyer's profession and the activities within it cannot be treated as the implementation of public policy despite the fact that national legislator delegates it with certain functions. In *Reyners Case* (Case 2/74 1974), the ECJ has established that the nationality clause applied to lawyers in Belgium is incompatible with the provisions of the Article 43 (former 52). ECJ has noted earlier that Article 49 (former 59) of the Treaty requires the abolition of both – any kind of discrimination of service provider on grounds of nationality and all the limitations of a different nature applied to the local service provider and another EU state's service provider which might hinder his/her ability to provide services.

In *Van Binsbergen case* (Case 33/74 1974) the plaintiff wanted the Dutch attorney resident in Belgium to defend him in the Dutch Court in the dispute on social protection. Dutch authorities have neglected the right of the attorney to represent his client in the court on the basis of the fact that under the Dutch legislation only the persons whose activity is registered in the Netherlands can act as legal representatives in the court. The ECJ has provided an interpretation favourable to the plaintiff and his representative noting that the provisions of the ECB Treaty abolish any kind of discrimination against the service provider on grounds of his nationality or of the fact that his country of establishment is different from the one where service needs to be provided.

The fact of unlawful indirect discrimination has also been established in *Thieffry case* (Case 71/76 1977). In this dispute the plaintiff was a Belgian lawyer who being educated as a lawyer in Belgium wanted to become a member of the Paris Bar. The application of the plaintiff was rejected despite the fact that France recognized the Belgian law degree as equivalent to the French one which is needed to be able to exercise the profession of the advocate. The Court held that the freedom of establishment would be unjustifiably restricted if a person covered by the Treaty would not be allowed to exercise his profession even though he has acquired a degree recognized to be equivalent to the relevant national diploma and who fulfils all the other conditions applied for lawyers in France.

ECJ decision in the *Klopp case* (Case 107/83 1984) stated that double establishment is allowed in the EU. The

ECJ recognized the right of every Member State to freely regulate the activities of advocates in its territory under the Article 43 (former 52) Part 2 of the Treaty. It stated though that the limitation of the right of establishment to only one place of establishment within the Community is in breach of Part 1 Point 2 of the Article 43 which allows self-employed persons to have more than one place of establishment in the EU. The right to apply prohibition on double establishment might be exercised within the Member State but does not apply to the whole territory of the EU.

To summarize, it must be said that ECJ has confirmed the prohibition on the Member State to undertake direct or indirect discrimination or apply other limitations which hinder the exercise of the freedom of movement of services and persons.

In order to escape different interpretations of the freedom to provide services and taking into consideration the liberal ECJ's position on the issue, the decision was taken to regulate the conditions for the execution of lawyers' professional activities across the borders of the country of his origin.

The first Directive to regulate the professional activity of lawyers was the Council Directive 77/249/EEC aimed at facilitating the effective exercise of freedom to provide services by lawyers (Services Directive), explicitly defined the term "lawyer" and established the conditions for temporary provision of services in another EU Member State (The Council of the European Communities 1977).

Since the freedom to provide services is of a temporary nature it had to be regulated less strictly than the freedom of establishment. The Preamble of the Services Directive states that this legal act solely concerns provision of services and does not contain provisions on the mutual recognition of diplomas. Thus until 1998 only the temporary provision of legal services in EU Member State was regulated, not covering the cases of permanent establishment in the other EU Member State. It has been recognized that a person who came to a Member State to provide services on a temporary basis is not obliged to follow all the internal regulations of the host Member State. The differences of legal systems of the Member States in regard to freedom to provide services do not have essential influence unlike the provisions concerning the freedom of establishment in a situation where a person seeks to pursue professional activity in another Member State.

Within the meaning of Services Directive "the lawyer" means any person entitled to pursue his professional activities under one of the designations referred to in the Article 2 of the Directive. It is noteworthy that the representatives of the advocate's profession are defined by different legal terms in different Member States, therefore free movement of lawyers and the provision of legal services in the EU mostly refers to persons to whom the professional title of the advocate has been granted in any of the Member States.

A Member State may not require a lawyer, who has an intention to provide temporary legal services in its territory, to register permanent residence in that State or with a professional organization (Part 1, Article 4 of the Directive).

On the other hand, the competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer aiming to secure the interests of the service consumers of the host country (Part 1, Article 7 of the Directive).

It has to be noted that a lawyer who came to another Member State to provide services on a temporary basis shall adopt the professional title used in the Member State from which he comes. On the one hand, implementation of such provision reveals the information on the service provider to the consumers; on the other hand, a non-misleading reveal of such information helps to preserve the rights of consumers.

Despite the fact that the Services Directive had introduced the regulation for conditions to pursue legal activities on the temporary basis, there were a number of cases in practice where lawyers had applied the Directive's provisions for temporary as well as permanent activities. Therefore the necessity to regulate the latter problem on the Community level became obvious.

3. The second stage of EU regulation for provision of legal services

The main document regulating the issue at this stage was the Council Directive 89/48/EEC 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 (Diploma Directive) (The Council of the European Communities 1988).

It is worth mentioning that the latter Directive regulates both lawyer's profession and other professions for the pursuit of which the appropriate degree is required.

The Diploma Directive unlike the Services Directive foresees a possibility for EU citizens to acquire the permanent recognition within relevant professional and state foreign institutions and to provide permanent legal service.

The Directive aims at abolishing the obstacles to movement of persons and the freedom to provide services and at facilitating the possibilities for nationals of EU Member States to pursue profession in the Member State other than that in which they acquired their professional qualifications. To achieve the latter goal a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration was created.

When choosing ways to implement the latter Directive the host Member State may require the applicant lawyer to complete an adaptation period not exceeding three years or

take an aptitude test ((Point b), Part 1, Article 4 of Diploma Directive). Should the host Member State make use of this possibility, it must give the applicant the right to choose between an adaptation period and an aptitude test.

From what has been said above the conclusion might be drawn that the Diploma Directive has provided lawyers of EU Member States with rather clear regulations, the observation of which creates a possibility to provide legal services having become a member of the relevant professional organization of the host Member State.

After the Diploma Directive came into force it was universally recognized that the Directive was not successful to solve all the problems in regard to the free movement of advocates. The main problem was the fact that the Member States have not appreciated the professional qualifications of the advocates and the test in some of the Member States was very difficult. There are opinions that the test has often been used as a protectionist tool to restrict the free movement of advocates rather than to facilitate it.

It should be noted that in 2005, the European Parliament and the Council adopted a directive on the recognition of professional qualifications, replacing, *inter alia*, the Diploma Directive No. 89/48/EEC (European Parliament and the Council of the European Union 2005).

The new directive on qualification recognition is also applicable to the professional recognition of lawyers, when a lawyer seeks to establish himself in another Member State under a professional title of the host Member State.

4. The third stage of EU regulation for provision of legal services

Long discussions have led to the Directive 98/5/EC of the European Parliament and of the Council 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 (Establishment Directive) (The European Parliament and the Council of the European Union 1998).

The Directive had 3 main objectives:

1. To entitle EU advocates pursuing professional activity under their home-country professional title.
2. To entitle EU advocates becoming full-fledged members of professional associations of the host Member State.
3. To authorize EU advocates carrying on a joint practice.

Thus, practice of the profession of lawyer on a permanent basis in a Member State other than that in which the professional qualification was obtained is possible in two ways:

1. Using their home-country professional title.
2. Becoming a full-fledged member of a professional association of the host Member State.

Article 2 of the Establishment Directive has opened wide possibilities for EU lawyers. Under the Article any lawyer is entitled to pursue professional activity in any other Member State under his home-country professional title with no time limitations. The latter Article has been at times criticised and raised wide discussions. At first the period of 5 years was suggested for the purposes of integration in the host country. An advocate would have had to acquire a professional title of the host country after the period had expired. That would have meant assimilation with the local lawyers. It was decided though that the latter procedure would not correspond to the needs of the globalising market.

Articles 64–67 of the Law on the Bar of the Republic of Lithuania regulate the permanent provision of legal services by EU lawyers in the Republic of Lithuania under their home-country professional title (Law on the Bar 2004). The provisions obligate the EU lawyer who wishes to provide legal services in the Republic of Lithuania on a permanent basis to register himself in the Lithuanian Bar Association which adds the lawyer to the list of lawyers from EU Member States who are entitled to provide permanent legal services in the Republic of Lithuania. A EU lawyer pursuing an activity under his home-country professional title possesses the same rights as Lithuanian lawyers apart from the fact that they are not allowed to represent in the legal proceedings of the Lithuanian Supreme Court. Moreover, in the cases when Lithuanian legislation foresees an obligatory participation of the advocate, an EU lawyer needs to participate in the legal proceedings in conjunction with a lawyer from the list of practicing lawyers of Lithuania. To our mind, the prohibition to represent a client in the legal proceedings of the Lithuanian Supreme Court is not sufficiently justified. As the provisions of the Advocates Act referred to earlier where draft account was taken from the relevant German legislation. German legal acts as well prohibit the EU lawyers, who act under their home-country professional title, from representing a client in the legal proceedings of the Land Court (*Oberlandesgericht*). It has to be noted though that all the advocates of this country need to have a record of 5 years experience to be able to represent a client in this court. As Lithuanian advocates are not required to fulfill a similar requirement, the requirement should not be applied to EU lawyers to pursue activity under their home-country professional title. A EU lawyer shall express his professional title in the official language or one of the official languages of his home Member State in such a way as to avoid confusion with the professional title of the host Member State and indicate the professional body of which he is a member in his home Member State. Thus there are proper conditions in Lithuania for EU lawyers to provide permanent legal services under their home-country professional title.

To summarize the provisions regulating the permanent activity of the EU lawyer under his home-country professional title it must be noted that the activity is not restricted in terms of time, that is a EU lawyer may not be forced to become a full-fledged member of the professional association and use the professional title of the host country.

The Establishment Directive foresees a possibility to become a full-fledged member of a professional organisation of the host Member State if a EU lawyer wishes so. Under the Establishment Directive to become a full-fledged member of a professional association the advocate must have effectively and regularly provided legal services in the host country for a period of at least **three** years. There is also a possibility to acquire the professional title of the host Member State in less than three years under the Establishment Directive.

The widest discussions were raised by the fact that a EU lawyer will not be subject to a knowledge test after the period of three years of an effective and regular provision of legal services. There were opinions that the latter provision referring to the fact that a 3-year practice does not guarantee a sufficient level of EU lawyer's knowledge in the field of host Member Country's law.

Article 68 of the Lithuanian Law on Bar establishes that a EU lawyer who has effectively and regularly provided permanent legal services within the national law of Lithuania (including the EU law) under his home-country professional title for a period of three years shall be granted a right to apply to be recognised as an advocate of Lithuania and to be added to the list of Lithuania's practicing advocates. An effective and regular provision of legal services for a period of three years implies a factual non-stop provision of legal services apart from the breaks necessitated by the events in everyday life (Law on the Bar 2004).

As it was mentioned before, one of the objectives of the Establishment Directive is to allow advocates to undertake a joint practice. As laid down by the Directive this form of legal services provision is only permitted when such activity is authorised by relevant legal acts in the host Member State. Article 65 of the Advocates Act of Lithuania states that a lawyer from a EU Member State who has a right to provide permanent legal services in the Republic of Lithuania is also granted a right to establish a branch office for the provision of legal services in the Republic of Lithuania. Article 8 of the Directive establishes a right to practice as a lawyer salaried on a permanent basis. In some EU countries (including Lithuania) a professional activity of an advocate cannot be remunerated on a permanent basis as it has been attributed to liberal professions since long ago. Thus Article 8 of the Directive is only applicable in cases when the practice is compatible with the national law.

The Establishment Directive has abolished all the barriers to entry into the legal market of the EU. Some EU

countries have feared to receive big numbers of foreign lawyers once the Directive is passed. These worries though did not come true. The data (Fig. 1 and 2) provided by CCBE (*Council of Bars and Law Societies of European Union*) in 2008 can serve as evidence for this:

allow advocates who have failed to successfully provide legal services in their own country to move to another EU Member State. References are also made to the possible questions of migrating advocate's control or application of liability; the quality of EU lawyer's qualifications in the field

Number of lawyers per 100 000 inhabitants

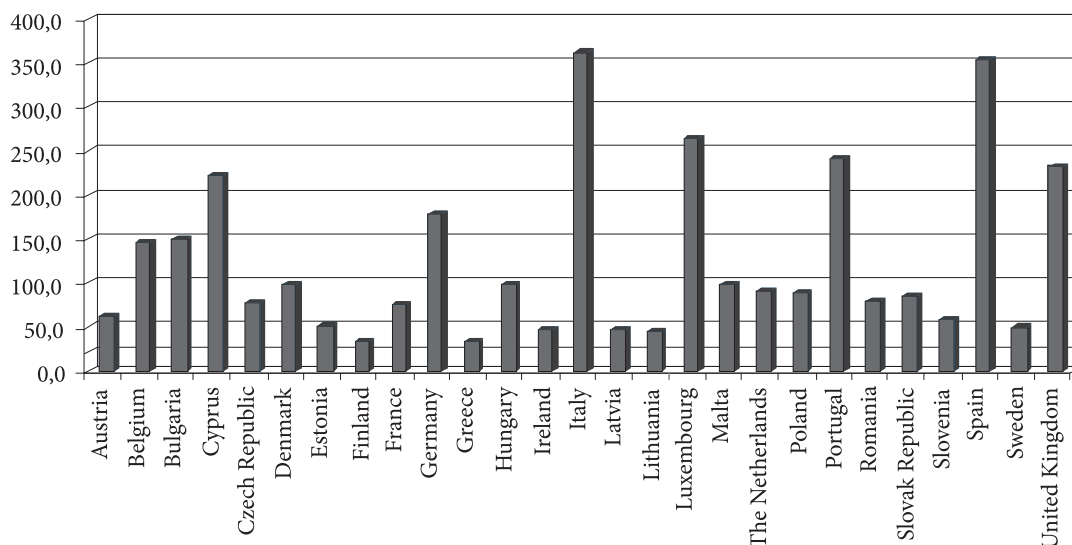


Fig. 1. Total number of lawyers per 100 000 inhabitants in the national bars of EU countries (Council of Bars and Law Societies of Europe)

According to the data provided by CCBE in 2008 in the European Union, in general, 874 237 lawyers were members of the national bars. The highest number of the registered lawyers per inhabitant is in Italy, Spain, Luxembourg, Portugal, United Kingdom, Cyprus, Germany. In these countries the number of the lawyers-members of the bar is more than 170 per 100 000 inhabitants. The lowest number of lawyers is registered in Estonia, Finland, Greece, Ireland, Latvia, Lithuania, Sweden and does not increase 50 lawyers per 100 000 inhabitants. In regard to the number of the EU lawyers registered under their home country professional title the statistic is different (Fig. 2):

The highest number of EU lawyers registered under their home country professional title per inhabitant provide legal services in Belgium, Cyprus, Greece, Slovak, France and Estonia. In general, in the European Union only 3137 EU lawyers are registered who are working under their home country professional title. It is only about 24 percent of total number of lawyers registered in the European Union member countries. As it can be noticed, the abolishment of all the barriers to entry into the legal market of the EU did not create big numbers of foreign lawyers in the countries.

Sceptics fear that the Establishment Directive might create conditions for uncontrollable market which would

of the application of the national law of another Member State raises doubts as well.

In the opinion of some Member States the implementation of the Establishment Directive will surely reduce the level of the lawyers' qualifications. Some countries objected to the permission for migrating advocates to practice activity in the field of host country's national law arguing that this would violate the client's rights and therefore it is necessary to make sure that the applicant possesses sufficient knowledge of the national law. The Community legislator though did not take the latter arguments into consideration in the name of the objective to implement entirely a free movement of advocates.

Article 15 of the Establishment Directive points out that ten years at the latest from the entry into force of this Directive, that is in 2008, the Commission shall report to the European Parliament and to the Council on progress in the implementation of the Directive. After having held all the necessary consultations, it shall on that occasion present its conclusions and any amendments which could be made to the existing system. Thus after the conclusions are presented we will have a possibility to see whether the permission for EU lawyers to freely provide legal services under their home-country professional title has reached its objective to create a single EU market for lawyers.

Number of lawyers registered under their home country professional title per 100 000 inhabitants

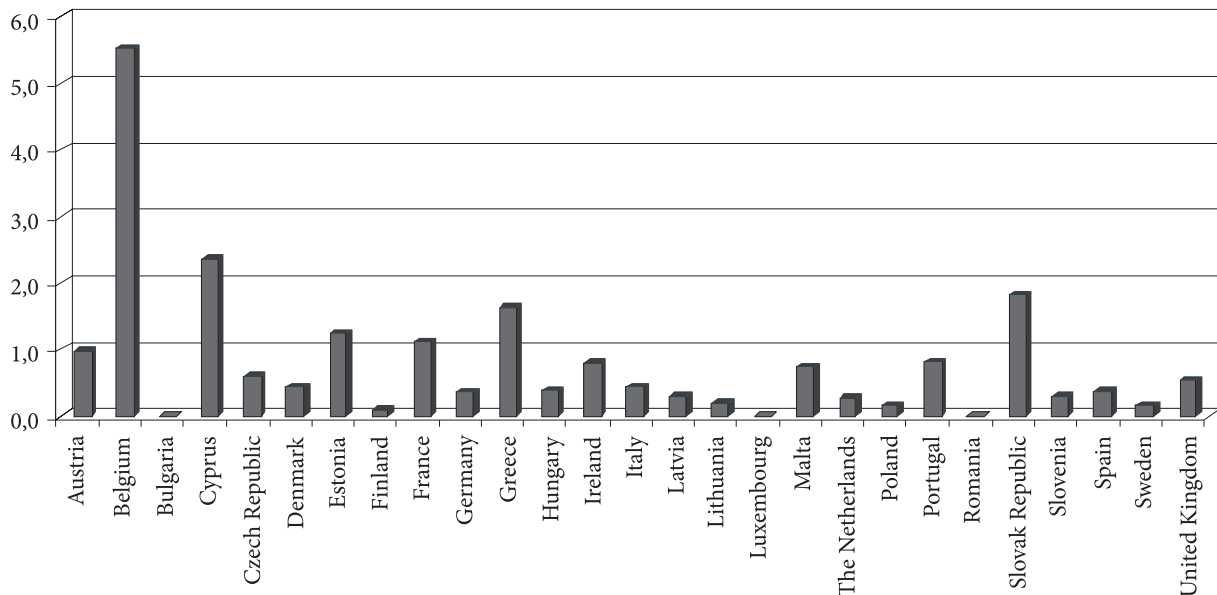


Fig. 2. Number of EU lawyers registered under their home country Professional title per 100 000 inhabitants (Council of Bars and Law Societies of Europe)

It is important to know that all the three Directives – on Services, Diploma and Establishment – are totally independent from each other and they foresee different procedures as well different ways to pursue legal activity. The Advocates Act of the Republic of Lithuania has implemented the provisions of all the three Directives.

When discussing the issues of the legal services market of Lithuania it is worth mentioning that it is still under development. There were some ungrounded fears that an obvious increase of competition in the field of legal services provision would be felt after Lithuania joins the European Union and this would have a negative impact on Lithuania's advocates. In our opinion, Lithuania's EU membership has created more opportunities for the Lithuanian lawyers and this should not significantly raise competition. There should not be a big flow of lawyers from other EU countries as well as the latter phenomenon was not observed in the countries which have earlier joined the European Union. Lithuanian Advocates Council has informed that only eight EU lawyers have so far expressed wish to undertake a permanent practice in Lithuania. Whereas Lithuanian lawyers have benefited a lot from EU membership as new opportunities were opened to them to practice in other EU countries, especially to those who specialize in the EU law. Thus the implementation of the freedom to provide services and the freedom of establishment should not bring any significant changes in Lithuania, it is natural though that the competition in the single market will increase. Lithuanian advocates who

wish to undertake practice beyond Lithuania's border will have to adapt themselves to the new competition conditions and this should be regarded as a positive development in terms of their qualifications.

5. Conclusions

The European Union Treaty established only the general framework for the free movement of services and persons in other Member States and does not regulate the order of provision for different kinds of services.

European Court of Justice has confirmed the prohibition on the Member State to undertake direct or indirect discrimination or apply other limitations which hinder the exercise of the freedom of movement of services and persons.

In accordance with the European Union legal acts the following forms of provision of legal services can be distinguished: 1) temporary provision of legal services in another Member State without establishment in its territory; 2) permanent provision of legal services in another Member State having implemented the right for establishment under the home-country professional title; 3) permanent provision of legal services under the host-country advocate's professional title or under the professional title of both the home-country and the host-country.

According to statistics the abolishment of all the barriers to entry into the legal market of the EU did not create big numbers of foreign lawyers in the countries. The main

legal service providers remained the lawyers working in their home country.

The EU lawyers pursuing an activity under their home-country professional title possess the same rights as Lithuanian lawyers apart from the fact that they are not allowed to represent in the legal proceedings of the Lithuanian Supreme Court. Moreover, in the cases when Lithuanian legislation foresees an obligatory participation of the advocate, a EU lawyer needs to participate in the legal proceedings in conjunction with a lawyer from the list of practicing lawyers of Lithuania. To our mind, the prohibition to represent a client in the legal proceedings of the Lithuanian Supreme Court is not sufficiently justified. As Lithuanian advocates are not required to fulfill a similar requirement, the requirement should not be applied to the EU lawyers to pursue activity under their home-country professional title.

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