

Position of the Bundesrechtsanwaltskammer (The German Federal Bar)

on the evaluation
of the Establishment Directive (77/249/EEC)
and the Services Directive (98/5/EC)
for lawyers

drafted by The German Federal Bar's European Law Committee

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The German Federal Bar is the statutory umbrella organisation of the 27 regional Bars and the Bar at the Federal Court of Justice. The Bars represent a total of currently approximately 157,000 lawyers admitted to the profession in Germany. The German Federal Bar represents the economic and legal interests of the German legal profession.

QUESTIONS FOR LAWYERS' COMPETENT AUTHORITIES

Please provide accurate statistic for each question where these are applicable and available, if possible for the last ten years.

You are not obliged to answer all the questions. Please feel free to provide any comments you may have on the EU legal framework for mobility of lawyers which are not directly linked to any question in this questionnaire.

I. General remarks

Since 9 March 2000 the implementation of Directives 77/249/EEC (in the following: „Lawyers' Services Directive“) and 98/5/EC (in the following: „Lawyers' Establishment Directive“) has been governed by one single comprehensive federal law, the Law implementing the Directives of the European Community pertaining to the professional law regulating the legal profession (*Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* - EuRAG). This law complements the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung* - BRAO).

The competence for the admission of lawyers as well as for professional disciplinary control lies with the regional Bars, not The German Federal Bar. Therefore, The German Federal Bar forwarded the questionnaire drafted by the European Commission to the regional Bars. All of the regional Bars answered the questionnaire as requested. The present position paper summarizes the responses received.

Regarding competence, we should like to point out that the competence for the aptitude test in accordance with Directive 2005/35/EEC lies with the State Examination Offices (*Prüfungsämter*) of the *Länder*. Their core responsibility is to conduct the two State Examinations in Law (*juristische Staatsexamen*) which are a condition for access to the legal professions in Germany. On the basis of interstate agreements (*Staatsvertrag*), the *Länder* have assigned the administration of aptitude tests provided for in Directive 2005/35/EC to a limited number of Examination Offices. The regional Bars do not have

any information about the Examination Offices' activities, thus they were unable to provide answers to questions targeted towards this area.

Before discussing the answers provided by the regional Bars in greater detail, we should like to point out the following:

1. As adviser and defender, the lawyer is one of the guarantors of the rule of law. The Federal Lawyers' Act qualifies the lawyer as an "agent in the administration of justice". As a member of a liberal profession he pursues an entrepreneurial activity, but at the same time he acts in the public interest, both as an individual and within the profession as a whole. Therefore, he is subject to special professional duties and enjoys specific rights. This has to be taken into account with respect to any rules affecting the lawyer's professional activity.
2. The two Lawyers' Directives are the result of intensive exchanges between the Commission and the European Parliament on the one hand and the CCBE as the European representative of the legal profession and the national lawyers' organisations on the other. The lawyer's aforementioned specific function in a community characterized by the Law was one of the main reasons for this close co-operation and for the adoption of sectoral Directives to regulate the lawyer's cross-border professional activity.
3. With the two Directives we have reached a level of free movement for the legal profession within the European Union which is (as yet) inconceivable in other parts of the world, even in the framework of federal structures. In the USA there is no free movement of lawyers between a large number of States, not even for an occasional provision of services. Switzerland only introduced comparable free movement when it came under pressure from developments in Europe. Therefore, cross-border free movement of lawyers in the European Union is a model and a goal for many lawyers outside the European Union. In a discussion paper of the American Bar Association on liberalisation models for the USA, the European Lawyers' Establishment Directive is described in great detail. The last sentence reads: „... there have been very few disciplinary complaints or problems associated with the new system.“¹

¹ The American Bar Association (ABA) represents the world's largest national legal profession. cf. ABA Commission on Ethics 20/20, Issues Paper Concerning Multijurisdictional Practice, 29. 03. 2011

4. The replies of the German regional Bars show that none of the Bars have an interest in 'slowing down' the implementation of free movement regulations. On the contrary: their answers attest to a liberal practical approach. The relatively small number of European lawyers established in Germany might come as a surprise at first; it is however not due to inadmissible access barriers. Establishment in another EU Member State only makes sense if it enables a lawyer to make a living. Even today, the Law has a largely national character and unless you speak the language of that particular country of establishment, efficient professional practice is unthinkable in most areas of legal activity. In addition, there is the competition on the German lawyers' market which is actually quite tough. Therefore, the largest numbers of European lawyers established in Germany are concentrated in Germany's economic centres, first and foremost Frankfurt am Main.

5. Free movement of lawyers must not undermine the legal profession's core duties. The European Court of Justice recognised that the Member States retain far-reaching autonomy with regard to shaping professional duties in the public interest. A lawyer who takes advantage of free movement must comply with the professional duties applicable in the host Member State. Safeguarding independence is one of the core elements of the lawyer's activity which The German Federal Bar and its member Bars are particularly committed to. This is why German professional law, quite rightly, contains strict rules regarding ownership of law firms. In this respect as well as in other areas the Lawyers' Establishment Directive has found a way of balancing the situation in such a way that, on one side, as much freedom of movement as possible is granted, while on the other side each individual Member State retains its due freedom to make regulations within the limitations set by EU law. The German Federal Bar would clearly fend off any attempt to water down the existing rule through the backdoor, via a reform of the Lawyers Directives.

6. From the answers provided by the regional Bars which are fully endorsed by The German Federal Bar, it can be concluded that both Lawyers' Directives have proven themselves very successful in the terms of European freedom of movement. Provided, of course, they are implemented and applied in the spirit of this freedom of movement. In Germany this is the case. We do not know if it is the case in all Member States, but it should be noted that no German regional Bar has

any knowledge of complaints in this respect. For these reasons we do not see a need for comprehensive reform of the two Directives. On account of the specific function of our profession in a state governed by the rule of law and by no means for reasons related to misunderstood interests of the profession we are decidedly against the abolition of the Lawyers' Directives in favour of a general horizontal provision which is neutral in terms of the professions covered.

II. Replies to the questionnaire

1. Lawyers' establishment: Directive 98/5/EC

1.1. How many requests for registration under Directive 98/5/EC do you receive annually from lawyers qualified in another Member State?

1.2. How many foreign lawyers are currently registered with you under Directive 98/5/EC to exercise the profession under their home Member State title (as of 1/1/2011)? Is there a separate bar register (e.g., a 'European list') for lawyers seeking to practice under their home Member State title?

As mentioned in our introductory remarks, admission of lawyers in Germany lies within the competence of the regional Bars. European lawyers mainly establish themselves in Germany's economic centres. It is therefore impossible to give one general answer that applies to all regional Bars.

The number of requests for registration per year varies greatly. While the Frankfurt Bar receives an average of 18 requests per year and the Berlin Bar reports an annual average of 6, most regional Bars receive between 1 and 3 requests per year.

The German Federal Bar's statistics (see attached table) on Bar members established under the EuRAG (Law implementing the Directives of the European Community pertaining to the professional law regulating the legal profession) show how many European lawyers are established with the individual regional Bars and which Member State they come from. The data provided is current as of 1 January 2010. On 01.01.2010 the total number of European lawyers in Germany was 350, out of which 111 were established in Frankfurt and 86 in Munich. No European lawyers have registered so far in Thuringia, Saxony-Anhalt, Brandenburg and Mecklenburg-Western Pomerania. The table does not make a difference between establishment under home title and establishment as fully integrated European lawyer. This is due to the fact that a fully integrated European lawyer is listed in the regional Bars' systems as German *Rechtsanwalt* and no longer as

European lawyer. The total number of 350 European lawyers does not include those European lawyers which are integrated via the aptitude test or the three-year “effective and regular” exercise of the profession since, as we have explained, they are no longer listed as European lawyers, but as German lawyers. This means that the total number of lawyers who have obtained their qualification in another Member State is actually higher than 350 European lawyers.

The data as of 1 January 2011 is not yet available. We shall send it to you as soon as it becomes available.

There is no separate register for European lawyers. However, some regional Bars provide a search function “*europäische Rechtsanwälte*” in their electronic members’ directory.

1.3. Is the scope of Directive 98/5/EC sufficiently wide to respond to market needs as regards the titles listed in Article 1.2?

The regional Bars unanimously stated that the scope of Directive 98/5/EC is sufficiently wide.

1.4. Who are the main users of Directive 98/5/EC (individual experienced practitioners, young graduates, members of large firms, members of small or medium-sized firms)?

The main users of Directive 98/5/EC are often young lawyers. The reasons for an establishment in Germany are often related to family. Other lawyers come as employed lawyers, working for big law firms. In some exceptional cases the applicants were born in Germany, have completed their legal education abroad and are now returning to their home country. Applicants come from large, medium-sized as well as small firms and are often individual practitioners.

1.5. What is the client base of these lawyers? Is it only/predominantly clients from their country of origin? Do they gain new clients in your Member State?

As far as we know, European lawyers often work for foreign clients who live in Germany and also represent these clients in their home Member State. Another area of activity is advising and representing businesses that have contractual relationships with the lawyer’s home Member State.

1.6. Can lawyers apply for registration by electronic means? Can they use the Point of Single Contact established under the Services Directive (Directive 2006/123/EC)?

Several regional Bars provide for electronic application. Bars which do not provide for electronic registration often provide a form for that purpose on their homepage. It is possible for the applicant to use the Point of Single Contact. However, all of the Bars replied that so far there had been no applications via the Point of Single Contact.

1.7. Do you require documents from lawyers qualified in other Member States who seek establishment in your Member State other than the ones suggested in the CCBE implementation guidelines for Directive 98/5/EC? Do you apply different procedures from those suggested in the guidelines in other areas? For what reason?

No, there are no further conditions or required documents.

1.8. How long does the registration procedure take on average for lawyers seeking to practice under their home Member State title?

With the majority of Bars, registration procedure averages between two and six weeks. Some of the Bars stated a duration of up to three months, noting that the registration procedure could be delayed if the applicant does not hand in the complete set of documents required.

1.9. What are the cost implications in relation to the registration? Are the fees for lawyers' qualified outside your Member State different from those applicable to applicants from your Member State?

The registration fee corresponds to the admission fee for applicants who gained their professional qualification in Germany. Fees vary from one Bar to the next, ranging from EUR 100 to EUR 300, with most Bars charging a fee between EUR 200 and EUR 250.

1.10. How many lawyers have sought to work in conjunction with a lawyer who practises before a judicial authority and who would, where necessary, be answerable to that authority, pursuant to Article 5 of Directive 98/5/EC?

The German legislator refrained from requiring a European lawyer to work in conjunction with a lawyer who practises before the judicial authority in question. The reason behind

this approach was that since an established European lawyer has a firm located in the respective Bar's district in the host Member State, he can be contacted easily by the Bar.

1.11. How many foreign lawyers per year apply for admission to the profession following three years of practice in your Member State pursuant to Article 10 of Directive 98/5/EC? What proportion of these applications is successful?

Here, too, the answers supplied by the regional Bars vary greatly. Overall, it can be observed that not every lawyer seizes the opportunity of integrating fully into the German legal profession pursuant to Article 10 of Directive 98/5/EC. Therefore, one cannot speak of an annual figure. For clarification purposes we are listing the replies received from the individual Bars below. The percentage given in brackets is the percentage of successful applications.

Rechtsanwaltskammer Berlin: 2 (100%)
Rechtsanwaltskammer Bremen: 5 (100%)
Rechtsanwaltskammer Celle: 3 (100%)
Rechtsanwaltskammer Düsseldorf: 1 (100%)
Rechtsanwaltskammer Frankfurt: 16 (90%)
Rechtsanwaltskammer Hamburg: 3 (100%).
Rechtsanwaltskammer Hamm: 1 (100%)
Rechtsanwaltskammer Karlsruhe: 1 (100%)
Rechtsanwaltskammer Koblenz: 1 (100%)
Rechtsanwaltskammer Cologne: 4-7 per year
Rechtsanwaltskammer Munich: 8 (50%)
Rechtsanwaltskammer Schleswig-Holstein: 1 (100%)
Rechtsanwaltskammer Tübingen: 1 lawyer every 2-3 years

1.12. How long does it take, on average, for a lawyer practicing under his/her home-country professional title for at least three years to obtain the right to use your Member State's professional title pursuant to Article 10.1 of Directive 98/5?

Many regional Bars left this question unanswered due to a lack of experience. There are great differences in the number of years after which a lawyer - who has been practising under his home professional title and then wants to integrate into the German legal profession in accordance with Article 10.1 of Directive 98/5/EC - submits an application. The time needed to process an application ranges from one to three months.

1.13. How do you interpret 'effective and regular pursuit' in Article 10.1 of Directive 98/5?

Interpretation is based on § 11 (1) sentence 2 of the EuRAG, taking into account legal literature and jurisprudence.

EuRAG § 11 (1) sentence 2 states:

„Effektive und regelmäßige Tätigkeit ist die tatsächliche Ausübung des Berufs ohne Unterbrechung; Unterbrechungen auf Grund von Ereignissen des täglichen Lebens bleiben außer Betracht.“

(“Effective and regular pursuit means actual exercise of the profession without any interruption other than that resulting from the events of everyday life.”)

The applicant has to provide proof regarding the number and the nature of the matters pertaining to German law he has dealt with in accordance with § 12 EuRAG as well as proof regarding the duration of his activity. In many cases, this requirement is fulfilled by providing a list of cases handled under German law. The same requirement to furnish proof applies to publications and continuing training. On the regional Bar's request, anonymised work samples may have to be submitted.

1.14. How many foreign lawyers opt for an aptitude test or an adaptation period, as foreseen under Directive 2005/36/EC, each year in order to exercise the profession under the professional title of your Member State, instead of using Directive 98/5/EC? For what reason(s)?

1.15. How often are aptitude tests for foreign lawyers wishing to register under your Member State's title organised?

The competence for the aptitude test in accordance with Directive 2005/35/EEC lies with the State Examination Offices (*Prüfungsämter*) of the *Länder*. On the basis of interstate agreements (*Staatsvertrag*), the *Länder* have assigned the administration of aptitude tests provided for in Directive 2005/35/EC to a limited number of Examination Offices. The regional Bars do not have any information about the Examination Offices' activities, thus these questions cannot be answered.

1.16. Have you received any complaints or are you aware of any problems in relation to professional liability insurance of migrating lawyers?

No.

1.17. Have you received any complaints or are you aware of any problems linked to compulsory pension or social security schemes?

No.

1.18. Do you assess the language knowledge of foreign lawyers? How?

No. Some of the Bars, however, conduct oral interviews (sometimes over the phone) with the applicants seeking to obtain the German professional title in accordance with Article 10 (1) of Directive 98/5/EC.

1.19. Do you authorise the practice by lawyers using their home country title as members of a firm, even if the firm itself would not be accepted within your jurisdiction (e.g. for reasons related to legal form).

So far there has not been reason to deny an applicant his professional activity.

2. Temporary provision of service: Directive 77/249/EEC

2.1. Who are the main users of Directive 77/249/EEC (individual experienced practitioners, young graduates, members of large firms, members of small or medium-sized firms)?

2.2. What is the client base of these lawyers? Is it only/predominantly clients from their country of origin? Do they gain new clients in your Member State?

2.3. Is the scope of Directive 77/249/EEC appropriate, in particular as regards the titles listed in Article 1.2?

Since foreign lawyers who provide legal advice in Germany in the form of a service on a temporary basis without establishing themselves in Germany are not required to get in touch with the regional Bar, the German regional Bars do not have any information

regarding Directive 77/249/EEC. Therefore, we are unfortunately unable to answer questions 2.1 to 2.3.

2.4. Do you require lawyers established in other Member States to be introduced to the judge or President of the Bar or to work in conjunction with a local lawyer for the purposes of representing a client in legal proceeding? Do lawyers seeking introduction incur any costs? Why are such provisions necessary? Do you foresee any other possibilities?

In proceedings before the courts as well as in administrative proceedings the European lawyer providing services must act in conjunction with a *Rechtsanwalt* (the so-called *Einvernehmensanwalt*). This is provided for by § 28 et. seq. of the EuRAG. In accordance with § 29 (1) EuRAG proof of work in conjunction must be submitted in writing when the first step vis-à-vis the court or the administrative authority is taken. There are no further formalities.

2.5. How many lawyers have sought introduction to the judge or the Bar in relation to the representation of a client in legal proceedings, pursuant to Article 5 of Directive 77/249/EEC?
How many lawyers have sought to work in conjunction with a lawyer who practises before a judicial authority and who would, where necessary, be answerable to that authority, pursuant to Article 5 of Directive 77/249/EEC?

Germany did not make use of the first alternative provided in Article 5 of Directive 77/249/EEC, i.e. to require lawyers providing services “to be introduced, in accordance with the local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State”. Therefore, European lawyers in Germany do not have to seek such introduction.

2.6. Are you aware of any difficulties with regards to a conflict between your rules of professional conduct and the rules of another Member State in relation to lawyers established in that other Member State and providing services in your Member State? Are you aware of the number of instances (if any) of disciplinary measures related to non-compliance on the part of lawyers’ established in another Member State and providing services in your Member State with the rules, whatever their source, which govern the profession in your Member State?

Within the framework of the regional Bars' professional jurisdiction and control, we are not aware of any cases involving foreign lawyers violating German professional rules and regulations since these lawyers considered themselves to be subject to their home Member State rules.

2.7. Do you see any particular challenges related to the provision of legal services online from another Member State?

We do not see any particular challenges.

2.8. Are there any circumstances under which you check or would consider checking the qualifications of a lawyer established in another Member State and providing services in your Member State (as per Article 7.1 of Directive 77/249/EEC)?

No. Neither Article 7.1 of the Directive nor the German EuRAG provide for such a check. Question 2.8. is based on the misleading English version of Directive 77/249/EEC. In fact, according to Article 7.1 the competent authority may only request the lawyer providing the services to prove that he is a lawyer ("*seine Eigenschaft als Rechtsanwalt*").

2.9. Have you sought to define 'temporary mobility'? How has this been applied in practice?

The principles developed by the European Court of Justice in the *Gebhard* case (C-55/94) provide sufficient guidance for legal practice. Thus, further-reaching definition is considered unnecessary.

3. Administrative cooperation

3.1. How do you assess the level of cooperation between lawyers' competent authorities in the EU?

As a rule, the respective Bars or competent authorities notify each other of the registration or removal from the register of a Bar member who is a European lawyer. Cooperation is unproblematic.

3.2. Are you registered with the Internal Market Information system (IMI)? What is your experience with the IMI?

Several regional Bars are registered with the Market Information System (IMI). However, none of the Bars have made any active experiences yet.

3.3. How do you exchange information about disciplinary matters with other competent authorities? Do you provide information to other Bars only upon request or do you alert them proactively?

Information regarding disciplinary matters is exchanged with foreign Bars in writing, provided there is reason to do so. The majority of regional Bars have not exchanged any information on disciplinary matters so far since they have had no knowledge of any cases of disciplinary misconduct of foreign lawyers providing legal services.

3.4. Are you aware of any difficulties experienced by lawyers moving from your Member State to other jurisdictions? Have you sought to assist any of your members facing difficulties in another Member State?

We have no knowledge of such difficulties.
