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**Indice-Sommario**
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## Editoriale



## Saggi e Articoli



## FOCUS

### Convenzione europea dei diritti dell'uomo e delle libertà fondamentali e ordinamento italiano: nuovi sviluppi sostanziali e procedurali

*Il Focus contiene i testi rivisti di alcune delle relazioni tenute in occasione del Convegno internazionale organizzato presso l'Università degli Studi di Salerno (17 aprile 2023)*

## Commenti e Note

# FREE MOVEMENT OF LAWYERS BETWEEN THE EUROPEAN UNION AND THE UNITED KINGDOM

Umberto Aleotti*



## 1. Introduction

After Brexit European trade in services and cross-border establishment gave rise to specific regulatory problems, requiring international legal rules to be laid down by the European Union (E.U.) and the United Kingdom (U.K.)[1].

In view of their future economic relationships, obstacles and discrimination against natural or legal persons supplying services in the United Kingdom or the European Union should be prevented, creating a renewed economic integration based on mutual recognition and common legal standards.

In general terms, the freedom to provide services and the freedom of establishment are both essential for the development of economic activities and that is particularly true in reference to lawyers' activities, which have been doubtless affected by the United Kingdom exit from the European Union.

Therefore, it would be interesting to examine the freedom to provide services and the freedom of establishment from the perspective of legal services, focusing on free

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[1] On 29 March 2017 the United Kingdom, as a result of the outcome of a referendum held on 23 June 2016, notified to the European Council its intention to withdraw from the European Union and the European Atomic Energy Community (E.A.E.C. or Euratom), in accordance with Article 50 of the Treaty on European Union (T.E.U.) and Article 106a of the Treaty establishing the European Atomic Energy Community (T.E.A.E.C.). See on Brexit G. GEE, L. RUBINI, M. TRYBUS, *Leaving the EU? The Legal Impact of 'Brexit' on the United Kingdom*, in *European Public Law*, 2016, 22 (1), p. 51; S.B. HOBOLT, *The Brexit vote: a divided nation, a divided continent*, in *Journal of European Public Policy*, 2016, 23 (9), p. 1259; T. OLIVER, *European and International Views of Brexit*, in *Journal of European Public Policy*, 2016, 23 (9), p. 1321; C. TOBLER, *One of Many Challenges after Brexit: The Institutional Framework of an Alternative Agreement - Lessons from Switzerland and Elsewhere*, in *Maastricht Journal of European and Comparative Law*, 2016, 23 (4), p. 575.

movement of lawyers in Europe before Brexit and the recent changes which came out for legal professionals as of the date of entry into force of the Withdrawal Agreement on 1 February 2020[2].

The entry into force of the Agreement was followed by a transition period which ended on 31 December 2020[3]. During this time, negotiations took place between the Parties that eventually led to the conclusion of three partnership agreements: the Trade and Cooperation Agreement, the Agreement concerning Security Procedures for Exchanging and Protecting Classified Information and the Agreement for Cooperation on the Safe and the Peaceful Uses of Nuclear Energy[4].

Thus, like Switzerland, which is related to the legal system of the European Union through several bilateral agreements, the United Kingdom has preserved its role of close partner of the European Union by taking a similar approach[5].

Access to the European internal market and British national market is mainly regulated by the Trade and Cooperation Agreement (T.C.A.)[6] and, as regards the free

[2] The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community was signed on 24 January 2020 in Brussels and London and was ratified and implemented into British domestic law by the European Union (Withdrawal Agreement) Act, approved by the U.K. Parliament on 23 January 2020. The European Union concluded the Agreement carrying out the procedure enshrined in Articles 216, 217 and 218 of the Treaty on the Functioning of the European Union (T.F.E.U.), pursuant to which it was negotiated by the European Commission and ratified by the Decision (E.U.) 2020/135 of the Council of the European Union adopted, on 30 January 2020 with the prior consent of the European Parliament of 29 January 2020. After the Decision, the rules of the Agreement became directly enforceable (*self-executing*) in Member States.

[3] In the transition period, European Union law, as well as interpreted and applied by the Court of Justice and General Court of the European Union, produced in the United Kingdom the same legal effects as produced within the Union (Article 4 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community). Consequently, natural persons, citizens of the European Union or the United Kingdom, were still entitled to the recognition of professional qualifications in the State of work, maintaining the right to take up and pursue their activities therein (Articles 25 and 27 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community).

[4] The Agreements were signed on 30 January 2020 in Brussels and London and entered into force, provisionally, on 1 January 2021 and, fully and definitively, on 1 May 2021.

[5] A possible alternative would have been to become a Contracting Party to the Agreement on the European Economic Area (E.E.A.). The European Economic Area was established by the Agreement on the European Economic Area, signed on 2 May 1992 in Oporto and entered into force on 1 January 1994. Such an Agreement brings together the Member States of the European Union and three States of the E.F.T.A. (Iceland, Norway and Liechtenstein) in a single market. The European Free Trade Association (E.F.T.A.) is a European Organisation set up by the E.F.T.A. Convention, signed on 4 January 1960 in Stockholm and entered into force on 3 May 1960.

[6] The T.C.A. was ratified and implemented into British domestic law by the European Union (Future Relationship) Act, approved by the U.K. Parliament on 30 December 2020. The European Union concluded the Agreement carrying out the procedure covered by Articles 216, 217 and 218 of the Treaty on the Functioning of the European Union (T.F.E.U.), pursuant to which it was negotiated by the European Commission and ratified by the Decision (E.U.) 2021/689 of the Council of the European Union, adopted on 29 April 2021 with the prior consent of the European Parliament of 27 April 2021. After the Decision, the rules of the Agreement became directly enforceable (*self-executing*) in Member States.

movement of lawyers between the European Union and the United Kingdom, the Agreement sets out a new international legal framework[7].

This paper seeks to analyse the changes occurred by virtue of that international legal framework, concentrating on the free circulation of legal services, now subject to substantial restrictions pursuant to the Trade and Cooperation Agreement, with particular reference to the type of activities permitted to the European lawyers within the territory of each of the Contracting Parties.

Assuming as a starting point the dispute-settlement procedure applicable to the Contracting Parties, the relevant provisions adopt the traditional methods of settlement envisaged by customary international law, such as negotiation, conciliation and arbitration, without any resort to the courts and, hence, without giving any space to the activity of the European lawyers.

Secondly, comparing the rules on legal services of the T.C.A. with those provided for by the European Union, the opportunity for Continental and British lawyers to rely upon their home-country professional title, so as to represent and defend clients before the national courts of the other Contracting Party, turns out to be compromised under the Agreement and, moreover, as will be indicated, only for a few legal services the free circulation is allowed.

It is also clear from the wording of the Trade and Cooperation Agreement, that any freedom of establishment, for the Continental and British lawyers intending to perform legal services on a permanent basis, respectively, in the territory of the U.K. and the E.U., as set out by Union law, is currently precluded.

This is why, in the concluding remarks some specific problems, arisen from the international regulation of the T.C.A., are pointed out, offering small solutions, which could possibly be incorporated into the text of the Agreement by means of amendments brought about by the Parties, in order to strengthen the free circulation of legal services between the European Union and the United Kingdom.

## 2. Disputes concerning the breach of an obligation under the Trade and Cooperation Agreement (T.C.A.)

In so far as the breach of an obligation under the Trade and Cooperation Agreement is concerned[8], it is important to underline that the Court of Justice of the European Union

[7] On the "trading environment" between the European Union and the United Kingdom following Brexit, see I. FUSACCHIA, L. SALVATICI, L.A. WINTERS, *The consequences of the Trade and Cooperation Agreement for the UK's international trade*, in *Oxford Review of Economic Policy*, 2022, 38 (1), p. 27; E. FEÁS, A. ANCHUELO, *Las claves del Acuerdo de Comercio y Cooperación entre la UE-27 y el Reino Unido*, in *Análisis del Real Instituto Elcano (ARI)*, 2021, no. 5, p. 1; P. VAN ELSUWEGE, *A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law*, in *European Papers (A Journal on Law and Integration)*, 2021, 6 (1), p. 785.

[8] The aspects of this paragraph are entirely developed in S. FELLA, P. BUTCHARD, *The UK-EU Trade and Cooperation Agreement: governance and dispute settlement*, in *House of Commons Library*, 2021, 9139, p. 32.

has not specific jurisdiction on the interpretation and application of the Agreement and the disputes arising from it between the United Kingdom and the European Union have to be settled according to the mechanism laid down by the Agreement[9]. Notably, the Contracting Parties are to be settle any disputes by entering into consultation in good faith so as to reach a mutually agreed solution[10].

If a dispute is about the infringement of an obligation under the Agreement and of a substantially equivalent obligation arising from another international agreement to which both Parties are Contracting Parties, including the World Trade Organisation (W.T.O.) Agreement[11], the Party pleading the breach may have the alternative of the mechanism by which to resolve the dispute (choice of *forum*)[12].

As a consequence, a Party may not be precluded from suspending obligations under the Trade and Cooperation Agreement, where it is authorised to do so by the Dispute Settlement Body of the W.T.O. or in compliance with the dispute settlement procedures of another international agreement binding on the Parties[13].

The Party seeking consultations must deliver to the other Party a written request, identifying the subject-matter of the dispute and the national measures of the respondent Party infringing the Agreement, summarising the arguments in support of the claim and specifying the provisions considered applicable. The respondent Party has to reply to the request promptly and, in any case, within ten days from the date of its delivery, in person or by another means of communication. The consultations are to be deemed concluded within thirty days from the date of delivery of the request, unless the Parties agree to continue them[14].

They may be held, at the instance of the complaining Party and within the time period set out, in the framework of the Partnership Council, which may resolve the dispute by decision[15].

The Partnership Council is a body established by the T.C.A. and comprises representatives of the European Union and the United Kingdom. It is co-chaired by a member of the European Commission and a representative of the Government of the United Kingdom at ministerial level and meets at the instance of the Parties or at least once a year. Each Party may refer to the Partnership Council any question relating to the implementation, application and interpretation of the Agreement[16].

[9] Article 736 of the Trade and Cooperation Agreement.
[10] Article 738, paragraph 1, of the Trade and Cooperation Agreement.
[11] The World Trade Organisation (W.T.O.) Agreement was signed on 15 April 1994 in Marrakech and entered into force on 1 January 1995.
[12] Article 737, paragraphs 1 and 2, of the Trade and Cooperation Agreement.
[13] Article 737, paragraph 4, of the Trade and Cooperation Agreement.
[14] Article 738, paragraphs 2, 3 and 4, of the Trade and Cooperation Agreement.
[15] Article 738, paragraph 7, of the Trade and Cooperation Agreement.
[16] Article 7 of the Trade and Cooperation Agreement.

The consultations and the decision may also take place in the framework of one of the Specialised Committees set up by the Trade and Cooperation Agreement, in accordance with the subject-matter concerning the dispute[17].

If no mutual agreed solution has been reached within thirty days or within the different time period agreed upon by the Parties, the European Union or the United Kingdom may call for the establishment of an arbitration procedure. The procedure may be called for even when the respondent Party does not reply to the request for consultations within ten days from the date of its communication, or the Parties agree not to have consultations, or consultations are not held within the prescribed time periods[18].

The request for the establishment of an arbitration tribunal is to be made in writing and addressed to the other Party, identifying the national measures breaching the Agreement and explaining, in a way sufficiently clear, how they breach its provisions[19].

Not later than ten days after the date of delivery of the request, the Parties consult with a view to agreeing on the composition of the arbitration tribunal. The panel shall consist of three arbitrators[20].

In the event of disagreement by the prescribed time period of ten days, each disputant may appoint an arbitrator from among the persons who are part of the sub-list set up by the Partnership Council[21], at latest five days after the expiry of the time period provided for the agreed composition[22]. If a Party fails to nominate an arbitrator from its sub-list, the co-chair of the Partnership Council from the complaining Party is to select an arbitrator, by lot, from the sub-list of the Party which is at fault, not later than five days after the expiry of the previous time period.

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[17] The Committees established by the Agreement are: the Trade Partnership Committee, the Trade Specialised Committee on Goods, the Trade Specialised Committee on Customs Cooperation and Rules of Origin, the Trade Specialised Committee on Sanitary and Phytosanitary Measures, the Trade Specialised Committee on Technical Barriers to Trade, the Trade Specialised Committee on Services, Investment and Digital Trade, the Trade Specialised Committee on Intellectual Property, the Trade Specialised Committee on Public Procurement, the Trade Specialised Committee on Regulatory Cooperation, the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development, the Trade Specialised Committee on Administrative Cooperation in VAT and Recovery of Taxes and Duties, the Specialised Committee on Energy, the Specialised Committee on Air Transport, the Specialised Committee on Aviation Safety, the Specialised Committee on Road Transport, the Specialised Committee on Social Security Coordination, the Specialised Committee on Fisheries, the Specialised Committee on Law Enforcement and Judicial Cooperation, the Specialised Committee on Participation in Union Programmes (Article 8 of the Trade and Cooperation Agreement). The Partnership Council may establish, by decision, Trade Specialised Committees or Specialised Committees, other than those mentioned by the Agreement, dissolve any Trade Specialised Committee or any Specialised Committee and change the tasks assigned to them (Article 7, paragraph 4, g), of the Trade and Cooperation Agreement).

[18] Article 739, paragraph 1, of the Trade and Cooperation Agreement.

[19] Article 739, paragraph 2, of the Trade and Cooperation Agreement.

[20] Article 740, paragraph 2, of the Trade and Cooperation Agreement.

[21] The Partnership Council is to set up a list of fifteen individuals with expertise in all sectors covered by the Agreement, who are willing and able to serve as members of an arbitration tribunal. The list is based on three sub-lists, each composed of five members: one sub-list is of individuals proposed by the European Union, one sub-list is of individuals proposed by the United Kingdom and one sub-list is of individuals who are not nationals of either party and are intended to serve as chairpersons of the arbitration tribunal (Article 752, paragraph 1, of the Trade and Cooperation Agreement.).

[22] Article 740, paragraph 3, of the Trade and Cooperation Agreement.

Analogous procedure is to be followed if the Parties do not agree on the chairperson within ten days after the date of delivery of the request for the arbitration, because on this occasion the co-chair of the Partnership Council from the complaining Party is in charge to select, by lot, the chairperson of the panel of the arbitration tribunal from the sub-list of individuals eligible to serve in that role[23].

All the arbitrators chosen have to be persons whose independence is beyond any doubt, in possession of the qualifications required for appointment to high judicial offices in their respective countries or who are jurisconsults of recognised competence, with specialised knowledge of or experience in international trade law and any other matter laid down by the Agreement and, in the case of chairpersons, expertise in dispute settlement procedures. They have to serve in their individual capacities and not take instructions from either Party or from other organisations or governments with regard to the disputes to be decided [24].

The arbitration tribunal is to deliver an interim report to the Parties within one hundred days from the date of its establishment. Whether the deadline cannot be met, this time period may not overtake one hundred and thirty days[25].

Each Party may submit to the tribunal written requests in order to review specific aspects of the report within fourteen days from its delivery and may submit comments on the other Party's requests within the subsequent six days. If no requests to review are submitted, the interim report becomes the content of the ruling of the arbitration tribunal[26].

The final ruling may not be issued beyond one hundred and sixty days as of the date of establishment of the arbitration tribunal, it is mandatory for the Parties and whether it holds that the respondent Party has breached one or more obligations under the Agreement, that Party must take all necessary steps to comply with it immediately[27].

To this aim, the respondent Party is to notify, not later than thirty days after the delivery of the ruling, the complaining Party of the measures which it has taken or envisages taking and the time it considers reasonable for compliance, if immediate compliance is not possible. Where there is disagreement on the reasonable period of time, the complaining Party, within twenty days of the notification, may call for to the arbitration tribunal, in writing, to determine the length of that period of time. The decision on the period for compliance shall be released to the Parties at latest twenty days from the date of submission of the request[28].

[23] Article 740, paragraph 3 and 4, of the Trade and Cooperation Agreement.
[24] Article 741, paragraphs 1 and 2, of the Trade and Cooperation Agreement.
[25] Article 745, paragraph 1, of the Trade and Cooperation Agreement.
[26] Article 745, paragraphs 2 and 3, of the Trade and Cooperation Agreement.
[27] Article 746, paragraph 1, of the Trade and Cooperation Agreement.
[28] Article 746, paragraph 2, and Article 747 of the Trade and Cooperation Agreement.

## 3. The European Union legal framework

Activities of lawyers qualified or established in the European Union fall within the scope of two European Directives, Directive 77/249/EEC of 22 March 1977 and Directive 98/5/EC of 16 February 1998, entitling to free movement of legal services, by virtue of Articles 26, 49 and 56 of the Treaty on the Functioning of the European Union (T.F.E.U.)[29].

Pursuant to Article 288 of the Treaty on the Functioning of the European Union (T.F.E.U.) a Directive is binding on each Member State as to the result to be achieved, leaving to the national authorities the choice of form and methods[30].

A Directive may also have an atypical effect, referred to as a direct effect, when it has not been implemented into domestic law within the deadline laid down or it has not been implemented within that deadline correctly by a Member State.

In this respect, it is settled case-law of the Court of justice of the European Union, that, whenever some provisions of such a Directive are not only unconditional, because they cannot longer be implemented, but also sufficiently clear and precise, because they confer on legal or natural persons defined rights with certainty, they may be relied upon before the national courts or administrative authorities against the State which failed to implement them by the end of the time period prescribed in the Directive or failed to implement them correctly by that time period (*i.e.*, they have a vertical direct effect)[31].

Both the Directives concerning legal services are not directly enforceable (they are not *self-executing*) in Member States and they have not a direct effect, because their purpose is essentially to undertake harmonisation of national legislations, providing for the preliminary conditions which can facilitate the free movement of lawyers across Europe, giving rise to a mechanism for mutual recognition of the professional titles. Their rules therefore need implementation by Member States as regards the legal form of the

[29] The Treaty on the Functioning of the European Union (T.F.E.U.), together with the Treaty on European Union (T.E.U.), is included in the Treaty of Lisbon, signed on 13 December 2007 in Lisbon and entered into force on 1 December 2009. Articles 26, 49 and 56 of the T.F.E.U. lay down the so-called European internal market", that is an area without frontiers in which, among others, the free circulation of services is ensured in keeping with a dual configuration: a) freedom of establishment, which encompasses the right to take up and pursue activities as self-employed persons or to set up and manage undertakings (agencies, branches or subsidiaries) in the territory of another Member State; b) freedom to provide services within the territory of the European Union exercised by natural or legal persons established in a Member State which is different from that of the recipient of the service.

[30] See on the T.F.E.U. and Article 288 M. HORSPOOL, M. HUMPHREYS, M. WELLS-GRECO, *European Union Law*, Oxford, 2021, p. 12.

[31] Nevertheless, even clear, precise and unconditional provisions of a Directive, seeking to confer rights (or impose obligations), may not, of itself, apply in a dispute which concerns exclusively private persons (*i.e.*, they have not a horizontal direct effect). Court of Justice of the European Union, judgment of 5 February 1963, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, case 26/62; judgment of 5 April 1979, *Tullio Ratti*, case 148/78; judgment of 19 November 1991, *Andrea Francovich, Danila Bonifaci and others v. Italian Republic*, joined cases C-6/90 and C-9/90; Grand Chamber, judgment of 5 October 2004, *Bernhard Pfeiffer and others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, joined cases C-397/01 and C-403/01; Grand Chamber, judgment of 7 August 2018, *David Smith v. Patrick Meade and others*, case C-122/17; Grand Chamber, judgment of 24 June 2019, *Daniel Adam Popławski v. Openbaar Ministerie*, case C-573/17.

national measures adopted and the methods to follow, but always within the limits of the discretion left to the States and by the deadline set forth in the Directives themselves.

The two European Directives apply not only to lawyers who are established or qualified in the Member States[32] but also to lawyers established or qualified in Iceland, Norway and Liechtenstein, in the aftermath of Decision 85/2002 of 25 June 2002 of the Joint Committee of the European Economic Area (E.E.A.)[33], and also apply to Swiss national lawyers, as a result of the Swiss-European Union bilateral Agreement on the Free Movement of Persons (A.F.M.P.), signed on 21 June 1999 in Luxembourg and entered into force on 1 June 2002[34].

Under the first Directive, the so-called "Lawyers' Services Directive", a European Union lawyer can temporarily provide cross-border legal services using his professional home-country title, whereas under the second Directive, the so-called "Lawyers' Establishment Directive", a European Union lawyer can move to another Member State to practise his activity in this State permanently, using his professional home-country title[35].

In accordance with Article 1 of both Directives, a "Lawyer" is a person who is allowed to pursue his activities under the home-country professional title, that is to say the professional title adopted in the Member State where the lawyer obtained the right to avail of it[36]. The home-country professional title is to be expressed in the language, or one of the languages, of such a State.

As a whole, there are two ways to exercise the profession as a European lawyer within the meaning of the Directives, which are, notably:

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[32] European Union lawyers are legal professionals who are established or qualified in: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain or Sweden.

[33] The Joint Committee of the European Economic Area is one of the four joint bodies of the E.E.A., where there are representatives of the European Union and the European Free Trade Association (*supra* note 5).

[34] Switzerland is a Contracting State to the E.F.T.A. Convention but it is not a party to the E.E.A. Agreement.

[35] As stated by Article 15 of the Charter of Fundamental Rights of the European Union, every citizen of the Union has the right of establishment or to provide services in any Member State (paragraph 2) and nationals of third countries, who are authorised to work in the territories of the Member States, are entitled to conditions that are equivalent to those of the citizens of the Union (paragraph 3). It derives that a European Union lawyer within the meaning of the two Directives may be either a European Union citizen or a citizen of a third State, in so far as he is qualified as a lawyer in one of the Member States. About British nationals after Brexit, it should be born in mind that the Court of Justice of the European Union, dismissing three actions on appeal, declared that the loss of the *status* of citizens of the European Union and of the rights attached to that *status* is an automatic consequence of the sovereign decision taken by the United Kingdom to withdraw from the European Union and not of the Withdrawal Agreement concluded between the Parties or the decision of the Council of the European Union approving such an Agreement (*supra* note 2). Court of Justice of the European Union, judgment of 15 June 2023, *Joshua David Silver and others v. Council of the European Union*, case C-499/21 P; judgment of 15 June 2023, *Harry Shindler and others v. Council of the European Union*, case C-501/21 P; judgment of 15 June 2023, *David Price v. Council of the European Union*, case C-502/21 P. See generally on these topics, A. DI STASI, M.C. BARUFFI, L. PANELLA (eds.), *Cittadinanza europea e cittadinanza nazionale, sviluppi normativi e approdi giurisprudenziali*, Napoli, 2023, p. 11.

[36] The professional home-country title is, *e.g.*, "Avvocato" in Italy and "Solicitor" or "Barrister" in Ireland.

a) practising, under the home-country title, as a lawyer, on a permanent basis, in another Member State (freedom of establishment);

b) providing, under the home-country title, on a temporary basis, legal services in another Member State (freedom to provide services).

Each option permits the lawyers to work throughout the European Union.

The Directives also set out a third possibility, which implies:

c) practising as a lawyer or providing legal services under the host-country title, after acquiring the professional title in that country.

This is a national option and can make sense when a lawyer needs to work primarily pursuant to the law and in the territory of the host Member State[37].

## 4. Directive 98/5/EC

In order to benefit from the "Lawyers' Establishment Directive" (Directive 98/5/EC), legal professionals must register with the competent authorities in the host Member State, including, for example, the *Consiglio nazionale forense* (C.N.F.) in Italy, the *Conseil national des barreaux* (C.N.B.) in France or the *Law Society of Ireland* (L.S.I.) and the *Bar of Ireland*, respectively for Solicitors and Barristers, in Ireland[38].

As pointed out, the purpose of the Directive 98/5/EC is to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that where his professional qualification was obtained (freedom of establishment)[39]. To this end, the Directive requires every lawyer concerned to submit a certificate, not more than three months old, attesting to his national qualification and showing his registration with the competent authority of the home Member State[40].

The presentation to the competent authority in the host Member State of a certificate attesting to registration with the competent authority in the home Member State is the sole condition to which registration of a lawyer in the host Member State is subject.

In addition, securing the Directive a mechanism for the mutual recognition of the professional titles of migrant lawyers who wish to practise under the home-country professional title in another Member State and aiming to remove the differences in

[37] See on these issues B. NASCIMBENE, E. BERGAMINI, *La professione forense nell'Unione Europea*, Assago, 2010, p. 25; M.D. POLI, *Mobility in the legal profession*, in *Rivista Eurojus*, 2019, no. 3, p. 1.

[38] Article 3, paragraph 1, of the Directive 98/5/EC. The Court Justice of the European Union has recognised the obligation to register with the competent authorities in the host Member State as an appropriate and non-discriminatory requirement, as long as it must likewise be fulfilled by domestic lawyers. Court of Justice of the European Union, judgment of 19 January 1988, *Claude Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et Conseil de l'ordre des avocats du barreau de Saverne*, case C-292/86; judgment of 3 February 2011, *Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara*, case C-359/09. *In concreto*, the registration can be carried out by means of the local authority responsible for lawyers, having jurisdiction in the area where the independent professional intends to establish his activity.

[39] For a comment on the "Lawyers' Establishment Directive", see J. PERTEK, *L'Europe des professions d'Avocat après la directive 98/5 sur l'exercice permanent dans un autre Etat membre*, in *Revue de l'Union Européenne*, 2001, 445, p. 106.

[40] Article 3, paragraph 2, of the Directive 98/5/EC.

national rules on the conditions for registration with the competent authorities in that State liable to give rise to inequalities and obstacles to the free movement of lawyers, European Union lawyers are entitled to choose, in the light of its provisions, on the one hand, the Member State in which they intend to acquire their professional qualifications and, on the other hand, the Member State in which they want to practise their profession[41].

No abuse of freedom of establishment may, hence, be encountered whether a lawyer of a Member State, after successfully obtaining a university degree in his own country, travels to another Member State in order to acquire in that State the professional qualification of lawyer and, subsequently, returns to the Member State of which he is a national, with the objective of practising there his activity under the professional title attained in the host Member State[42].

Furthermore, to boost the practice of the profession of lawyer in a Member State different from that in which was obtained the qualification, the Court of Justice has specified that the registration of the legal professional with the competent authority of the host Member State cannot be subject to a prior examination of his proficiency in the language or languages of that State[43].

Before Brexit, pursuant to the Directive, it was possible for a European Union lawyer to register in more than one of the United Kingdom jurisdictions, namely, England and Wales, Scotland or Northern Ireland, on condition that he chose to register either with the authority responsible for the profession of Solicitors or with the authority responsible for the profession of Advocates and Barristers. Nowadays, the choice between the authorities responsible for the profession of Solicitors and Barristers is compulsory only for those European Union lawyers who want to pursue their activity in Ireland[44].

According to the Directive, the names of lawyers registered with the competent authority in a host Member State are to be duly published, along with all other registered lawyers, if the laws of that State so lay down for domestic professionals[45].

A Member State may, nevertheless, require, for a lawyer practising in its territory under his home-country professional title, that such a title be expressed in the official language of his own Member State, in order to avoid confusion with the professional title

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[41] Court of Justice of the European Union, judgment of 7 November 2000, *Grand Duchy of Luxembourg v. European Parliament and Council of the European Union*, case C-168/98; judgment of 19 September 2006, *European Commission v. Grand Duchy of Luxembourg*, case C-193/05; judgment of 23 October 2008, *European Commission v. Kingdom of Spain*, case C-286/06; Grand Chamber. See on the first case P. Cabral, *Case C-168/98, Grand-Duchy of Luxembourg v. European Parliament and Council of the European Union*, in *Common Market Law Review*, 2002, 39 (1), p. 129.

[42] Court of Justice of the European Union, Grand Chamber, judgment of 19 September 2006, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, case C-506/04; Grand Chamber, judgment of 17 July 2014, *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'Ordine degli Avvocati di Macerata*, joined cases C-58/13 and C-59/13. For a critical reading of this point, see R. MASTROIANNI, A. ARENA, *Free movement of lawyers and the Torresi judgment: a bridge too far?*, in *European Constitutional Law Review*, 2015, 11 (2), p. 373; F. CAPOTORTI, *Abogados senza limiti?*, in *Rivista di Diritto Internazionale*, 2014, no. 4, p. 1175.

[43] Court of Justice of the European Union, *Wilson*, *ibid.*; *European Commission v. Grand Duchy of Luxembourg*, *supra* note 41.

[44] Article 3, paragraph 3, of the Directive 98/5/EC.

[45] Article 3, paragraph 4, of the Directive 98/5/EC.

used in the host Member State, indicating, where necessary, the professional body of which he is a member or the judicial authority before which he is entitled to practise in compliance with the laws of his home State[46].

A lawyer exploiting his home-country professional title in another Member State following the Directive may carry on the same professional activities as a lawyer practising under the professional title used in the host Member State. He may, therefore, give advice on the law of his home Member State, on European Union law, on international law and on the law of the host Member State[47].

As regards the activities related to the representation and defence of a client in legal proceedings, he may be obliged to work in conjunction with a local lawyer who practises before the judicial authorities of the host Member State, so as to ensure his compliance with the rules of procedural law and professional conduct applicable in the national courts of that State[48].

This provision makes it possible for a lawyer established in another Member State to carry out the tasks entrusted to him by his client, having, at the same time, due regard to the public interest in the proper administration of justice. As a matter of fact, cooperation with a local lawyer provides him with the support necessary to act in a judicial system different from that to which he is accustomed and assure the judicial authority that, with this support, he is in a position to fully comply with the procedural and ethical rules applying to the proceedings.

For the purpose of ensuring the smooth operation of the justice system, Member States may also lay down *ad hoc* rules for access to supreme courts by lawyers practising under their home-country professional title, such us the use of specialist lawyers[49].

After at least three years of professional activity, namely, of effective and regular practice under his home-country title in the host Member State, a European Union lawyer who is established in a Member State may gain admission to the pursuit of that activity under the domestic professional title, without any further testing[50].

"Effective and regular practice" means actual and uninterrupted exercise of the profession of lawyer and proof of both conditions is to be provided by the lawyer concerned in the form of information and documentation, showing the number and nature of the matters he has dealt with[51].

The competent authority of the host Member State is responsible to verify all the relevant information and documentation given by the lawyer and, in this respect, it may take into consideration not only the effective and regular activity exercised during the three year period of practice under his home-country professional title but also any knowledge and pertinent experience about the law of the host Member State, as well as

[46] Article 4, paragraph 1 and 2, of the Directive 98/5/EC.
[47] Article 5, paragraph 1, of the Directive 98/5/EC.
[48] Article 5, paragraph 3, of the Directive 98/5/EC.
[49] *Ibid*.
[50] Article 10, paragraph 1, of the Directive 98/5/EC.
[51] *Ibid.*

any attendance at lectures or seminars on the national law and on the rules regulating professional activity and conduct.

This assessment involves an interview with the competent authority of the host Member State in order to verify the existence of regular and effective professional activity. The interview may also be employed so as to appraise the capacity of the lawyer to carry on his activity in the host Member State and the final decision is subject to appeal in keeping with national law[52].

The lawyer may, at any time, apply to have his diploma (or degree certificate) recognised with a view to gaining admission to the independent profession in the host Member State and accomplishing his activity under the host-country title[53].

A lawyer who is registered in a host Member State to practise under his home-country professional title may be taken on by another lawyer, an association of lawyers, a firm of lawyers, or a public or private enterprise as a salaried lawyer, if the laws of that State so permit[54].

Where joint practice is authorised in the host Member State, one or more lawyers who belong to the same grouping (*i.e.*, an association of lawyers or a firm of lawyers) in their home Member State may perform legal activities using their home-country professional title in a branch or agency of their grouping in the host Member State[55].

Two or more lawyers coming from the same grouping or the same home Member State, who already pursue their activities in the territory of the host Member State relying upon their home-country professional title, may have access to every form of joint practice set out in that State[56].

The host Member State can also allow the joint practice of several lawyers, exercising their activities under their home-country professional title, who come from various Member States, including the lawyers from the host Member State itself.

In any event, the way in which all independent professionals practise jointly in the host Member State is governed by the laws, regulations and administrative provisions of this State[57].

## 5. Directive 77/249/EEC

The "Lawyers' Services Directive" (Directive 77/249/EEC) prescribes a number of rules concerning lawyers providing services in a host Member State, by marking a distinction between representation and defence of a client before the courts or

[52] *Ibid.*
[53] Article 10, paragraph 2, of the Directive 98/5/EC.
[54] Article 8 of the Directive 98/5/EC.
[55] Article 11 of the Directive 98/5/EC.
[56] *Ibid.*
[57] *Ibid.*

administrative authorities of that State and other types of professional activities, such as giving advice, drafting contracts or managing buildings[58].

The purpose of the Directive 77/249/EEC is to facilitate the practice of the profession of lawyer by way of the provision of legal services on a temporary basis in a Member State other than that where the professional qualification was obtained (freedom to provide services).

To make effective the exercise of the freedom to provide services, the Directive is to be interpreted as applying both in the typical case of the lawyer travelling to a Member State different from that in which he is established with the aim of providing legal services and in the case where that professional does not travel but it is the recipient of the service who travels outside his Member State of residence in order to visit another Member State and avail of the legal services of a lawyer established therein[59].

In addition, the notion of the lawyer's activities, within the meaning of the Directive, comprises the legal services usually offered by lawyers and other kind of legal services, such as, for example, the authentication of signatures, which are not provided by lawyers in all Member States. This is possible because the Directive permits Member States to reserve to qualified categories of lawyers the preparation of formal documents for administering estates of deceased persons and creating or transferring rights to property (*e.g.*, in Ireland the drafting of some legal instruments in the matter of property law is a prerogative of Solicitors)[60], with the result that, relying upon its provisions, the States have the right to circumscribe the performance of certain activities even to specific categories of legal professionals (*e.g.*, the notaries), so legitimately forbidding national lawyers and lawyers from other Member States to pursue those activities within their territories[61].

The temporary nature of the activities of a lawyer in compliance with the Directive has to be determined in the light not only of the duration of the services but also of their regularity, periodicity or continuity and the temporariness does not mean that the lawyer may not equip himself with some form of infrastructure in the host Member State, such as an office, a chamber or a consulting room, in so far as that infrastructure is necessary to perform the legal services[62].

In other words, the legal services pursuant to the Directive have to be furnished with a foreseeable limit to their duration, occasionally and the lawyer's main centre of activities has to be located in a Member State which cannot be the host Member State but the Member State from which he comes from.

[58] See on the "Lawyers' Services Directive" F. FERRARO, *L'avvocato comunitario*, Napoli, 2005, p. 62.
[59] Court of Justice of the European Union, judgment of 9 March 2017, *Leopoldine Gertraud Piringer*, case C-342/15. See on this case M. MANFREDI, *La libera circolazione dei servizi legali nell'Unione europea: note a margine del caso Piringer*, in *Diritto Pubblico Comparato ed Europeo*, 2017, 31 (3), p. 713.
[60] Article 1, paragraph 1, of the Directive 77/249/EEC.
[61] Court of Justice of the European Union, *Leopoldine Gertraud Piringer*, *supra* note 59.
[62] Court of Justice of the European Union, judgment of 30 November 1995, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, case C-55/94.

The activities before judicial or administrative authorities are to be carried out under the same conditions laid down for the lawyers established in a host Member State (*supra* paragraph 4), excluding any condition relating to residence or registration with a professional authority[63].

Particularly, E.U. lawyers must observe the rules of professional conduct (ethical rules) of the host Member State, without prejudice to the professional obligations of the same nature arising from their own Member State and, in the event of a conflict between home and host State ethical rules, the ones of the host Member State are to prevail. This provision is especially meaningful in respect of the rules concerning: the incompatibility of the pursuit of professional activities with other kind of activities, such as entrepreneurial or salaried activities, professional secrecy, relations with other lawyers, publicity or prohibition on the same lawyer acting for parties with mutually conflicting interests[64].

As for activities relating to the representation and defence of a client in legal proceedings, a Member State may require that a lawyer be introduced, in accordance with the local rules or customs, to the presiding judge of the pertinent courts and to the president of the relevant Bar in the host Member State and he may also be required to work in conjunction with a local lawyer. A local lawyer is an independent professional, who practises before the judicial authorities of that State and who might be answerable to such authorities, where necessary[65].

The latter requirement may not, therefore, be imposed for the pursuit of activities before bodies or authorities which have not judicial function, such as administrative bodies or authorities, and may not be imposed when national legislation does not establish representation by a lawyer in judicial proceedings as mandatory[66].

Notably, with reference to the procedures before the courts, in all cases where the assistance of a lawyer is not a mandatory condition under the domestic legislation, because a Party is entitled to defend his own interests alone or is entitled to entrust that task to a person who is not a lawyer, a European professional providing legal services in that Member State may be allowed to represent or defend a client without working in conjunction with a local lawyer[67].

Cooperation with a local lawyer basically means for a European Union lawyer to receive the necessary support to enable him to offer his legal services within a judicial system different from that to which he is accustomed, so that, for this objective, neither the presence of the local lawyer throughout the oral proceedings before the courts nor the requirement that the local lawyer is himself to be the authorised representative or the

[63] Article 4, paragraph 1, of the Directive 77/249/EEC.
[64] Article 4, paragraph 4, of the Directive 77/249/EEC.
[65] Article 5 of the Directive 77/249/EEC.
[66] Court of Justice of the European Union, judgment of 10 July 1991, *European Commission v. French Republic*, case C-294/89.
[67] Court of Justice of the European Union, judgment of 25 February 1988, *European Commission v. Federal Republic of Germany*, case C-427/85. This case-law is also incorporated in the Directive 98/5/EC on freedom of establishment by virtue of recital 10 thereof.

defending lawyer and not even a detailed proof of work in conjunction are considered to be significant or essential[68]. As a result, a joint power of attorney is unnecessary and the requirement demanded by the Directive turns out to be a simple statement of address for service[69].

However, a Member State may exclude lawyers who are salaried employees of public or private undertakings from exercising activities relating to the representation and defence of those undertakings in legal proceedings, whether the lawyers of that State are not allowed to pursue equal activities[70].

As previously indicated, a lawyer providing legal services in a host Member State remains subject to the conditions and rules of professional conduct of this State, whatever may be their legal sources, especially those about the incompatibility with certain activities, professional secrecy, relations with other lawyers, publicity and the prohibition on the same lawyer acting for parties with mutually conflicting interests.

In the event of non-compliance with these obligations, which may derive from laws, regulations or administrative provisions, the competent authority of the host Member State is entitled to determine, in line with its own rules and procedures, all the appropriate measures and may obtain any professional information, deemed to be decisive for this purpose, from the competent authority of his home Member State[71].

Nevertheless, and this also affects the freedom of establishment alongside with the freedom to provide services, such national measures, as well as further internal measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed for lawyers both by the Treaty on the Functioning of the European Union and by the Directives, have to fulfil four specific conditions, *i.e.*, they are to be:

- applied in a non-discriminatory manner,
- justified by imperative requirements in the general interest,
- suitable for securing the attainment of the objective which they pursue and
- they have not to go beyond what is necessary in order to achieve that objective[72].

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[68] *Ibid*.

[69] See M.P. BELLONI, *La libera circolazione degli Avvocati nella Comunità Europea*, Padova, 1999, p. 56; A.Y. LE DAIN, A. WEHLAU, *La libre circulation des Avocats dans la Communauté européenne, les modalités de pratique et d'installation à l'étranger*, in *Revue Juridique de l'Ouest*, 1992, 3, p. 333.

[70] Article 6 of the Directive 77/249/EEC.

[71] Article 7, paragraph 2, of the Directive 77/249/EEC.

[72] Court of Justice of the European Union, *Reinhard Gebhard*, *supra* note 62. It should be observed that the Court of Justice has constantly held that the protection of consumers, recipients of legal services, and the proper administration of justice, are objectives which feature among those which may be considered overriding requirements in the public interest apt to justify restrictions on the freedom to provide services and freedom of establishment. Court of Justice of the European Union, Grand Chamber, judgment of 5 December 2006, *Federico Cipolla and others v. Rosaria Fazari, née Portolese, and Roberto Meloni*, joined cases C-94/04 and C-202/04; judgment of 18 May 2017, *Jean-Philippe Lahorgue v. Ordre des avocats du barreau de Lyon, Conseil national des barreaux (CNB), Conseil des barreaux européens (CCBE), Ordre des avocats du barreau de Luxembourg*, case C-99/16; judgment of 17 December 2020, *Adina Onofrei v. Conseil de l'ordre des avocats au barreau de Paris, Bâtonnier de l'ordre des avocats au barreau de Paris, Procureur général près la cour d'appel de Paris*, case C-218/19.

The competent authority of the host Member State may always invite the independent professional providing the legal services to give evidence of his qualification as a lawyer[73].

## 6. The new legal framework after Brexit

Legal services are explicitly regulated in Part Two (Trade, Transport, Fisheries and other Arrangements), Heading One (Trade), Title Two (Services and Investments), Chapter Five (Regulatory Framework), Section Seven (Legal Services), Articles 192-195, of the Trade and Cooperation Agreement (T.C.A.) between the European Union and the United Kingdom[74].

Article 192, paragraph 2, of Trade and Cooperation Agreement sets out the general principle according to which the Contracting Parties are free to regulate and supervise the supply of legal services in their territories, subject to non-discrimination.

The legal services under the Agreement are intended so as defined by international law and the Contracting Parties' national laws, namely, by the domestic law of the United Kingdom and domestic law of the Member State of the European Union concerned, thereby excluding European Union law[75].

As for the Contracting Parties' national laws, reference is to be made to the home-country law of the independent professionals who are interested in the supply of legal services and to the national law of the State where the legal services are to be delivered[76].

The independent professionals are essentially nationals who qualify as lawyers in one of the Member State of the European Union or in the United Kingdom. They are natural persons who are authorised, under their professional title, to perform legal services in their own State[77].

Pursuant to Article 193, g), of the Trade and Cooperation Agreement, legal services which fall within the scope of the Agreement are only the legal advisory services and legal arbitration, conciliation and mediation services, excepting services which involve legal representation before the courts, or any other official domestic tribunal, and administrative authorities or agencies, in addition to legal advisory and legal authorisation services carried out by means of a proxy or a power of attorney or documentation and

[73] Article 7, paragraph 1, of the Directive 77/249/EEC. To this end, a useful means of proof can be the "C.C.B.E. identity card", issued, upon request, to the lawyers by the national, regional or local professional authority of their home Member State, which verifies if the applicant is a licensed and a registered lawyer. The "C.C.B.E. identity card" is produced by the Council of Bars and Law Societies of Europe (C.C.B.E.), a recognised association based in Brussels, representing professional authorities of forty-six European countries before European and other international institutions. The Council delivers the identity card to the competent authorities of the Member States by virtue of licensing agreements. This card is also accepted by the Court of Justice and the General Court of the European Union.

[74] The European Atomic Energy Community (E.A.E.C.) is also a Contracting Party to the Trade and Cooperation Agreement.

[75] Article 193, a), of the Trade and Cooperation Agreement.

[76] Article 193, b), of the Trade and Cooperation Agreement.

[77] Article 193, e), of the Trade and Cooperation Agreement.

certification services when they are supplied by legal professionals charged with public functions in the administration of justice, such as notaries, bailiffs or other public officials appointed by an act of government[78].

It is also to be pointed out that the legal arbitration, conciliation and mediation services covered by the Agreement are restricted to the preparation of documents to be submitted to or in order to appear before an arbitrator, conciliator or mediator, in disputes involving interpretation and application of law, and do not include activity as an arbitrator, conciliator or mediator[79].

Each Contracting Party is to allow lawyers of the other Contracting Party to offer the above designated legal services in its territory under their home-country professional title, following the rules enshrined in Articles 128, 129, 135, 137 and 143 of the Trade and Cooperation Agreement on the "prohibition of quantitative restrictions" and "compliance with the principle of national treatment"[80].

The professional home-country title is, for a lawyer of the European Union, the professional title attained in a Member State authorising the supply of legal services in its territory (*e.g.*, "Rechtsanwalt" in Germany, "Avocat" in France or "Avvocato" in Italy), for a lawyer of the United Kingdom, the title of Advocate, Barrister or Solicitor authorising the supply of legal services in any of the three jurisdictions of the United Kingdom (England and Wales, Scotland or Northern Ireland)[81].

"Prohibition of quantitative restrictions" means that each Party to the Agreement may not adopt or maintain limitation on the number of lawyers or grouping of lawyers providing a specific legal service[82], on the total value of legal transactions or assets dealt with[83], on the total amount of legal operations performed or outbound legal services[84] and may not require particular types of legal entities, set the total number of natural persons

[78] Article 193, a) and g), of the Trade and Cooperation Agreement states that legal services relating to European Union law and legal representation before national courts fall outside the scope of the Agreement. Taking into consideration that with respect to the representation before the Court of Justice and the General Court of the European Union, Article 19 of the Statute of the Court of Justice, applicable to proceedings before the General Court by virtue of Article 56 of the Statute itself, sets forth two separate and cumulative conditions for a person to be admitted to represent a party before the European Union Courts, namely, that this person is a lawyer and is authorised to practise his activity before a court of a Member State (or of another State which is a Contracting Party to the E.E.A. Agreement), Solicitors, Advocates and Barristers from the United Kingdom may no longer represent or assist parties before the Court of Justice and the General Court of the European Union from 31 December 2020 (the end of the transition period). General Court (of the European Union), order of 7 December 2021, *Daimler AG v. European Union Intellectual Property Office (EUIPO) of the European Union*, case T-422/21; order of 20 June 2022, *Natixis v. European Commission*, case T-449/21.

[79] Article 193, g), ii), note 1, of the Trade and Cooperation Agreement.

[80] Article 194, paragraph 1, of the Trade and Cooperation Agreement.

[81] Article 193, d), of the Trade and Cooperation Agreement.

[82] In the form of numerical quotas, monopolies, exclusive rights or economic needs tests (Article 194, paragraph 1, read in conjunction with Article 128, a), i), of the Trade and Cooperation Agreement).

[83] Article 194, paragraph 1, read together with Article 128, a), ii), of the Trade and Cooperation Agreement.

[84] On the contrary, inbound legal services may be circumscribed in the light of Article 128, a), iii), note 2, of the Trade and Cooperation Agreement.

possibly employed or restrict the participation of foreign capital or its value, for providing professional services[85].

Compliance with the principle of national treatment implies the prohibition of discrimination on grounds of nationality. In other words, each Contracting Party's legal rules apply to all lawyers without distinction of citizenship, to the effect that a Contracting Party cannot subject lawyers from the other Contracting Party to a treatment which is less favourable than that allowed to its own lawyers[86].

The equal treatment has to be formally and substantially identical and shall be considered discriminatory if it modifies the conditions of competition in favour of lawyers of the Contracting Party which lays down the rules on legal services or on suppliers of legal services, regardless whether this happens at national, regional or local level of government[87].

In conformity with the European Directive 77/249/EEC and the European Directive 98/5/EC, there are two ways of exercising the legal profession under the home-country title in a host Member State, that is to say, by providing legal services on a temporary basis and by practising as a lawyer on a permanent basis in that State.

In the Trade and Cooperation Agreement, the first way to furnish legal services is defined "cross-border trade in services", so as to emphasise that it may not automatically involve the lawyer's presence in the territory of the host State (lawyers no longer enjoy the right to move and reside freely within the host States), whereas the second way to furnish legal services is defined "entry and temporary stay for business purposes", because, in accordance with the Agreement, the maximum length of stay for a lawyer in the host State may not exceed the duration of the service which is the subject of the contract or, at any rate, the cumulative period of 12 months for each contract as of the first access in that State[88].

If the host State calls for registration with the competent authority in its territory, as a condition for a lawyer to perform legal services under his home-country professional title, the relevant requirements and process may not be less favourable than those which apply to a lawyer of a third State who is supplying the same legal services under his home-country professional title[89]. In other terms, when the registration in the host State is a precondition, reference is to be made to the most favoured nation principle.

In this respect, it should be noted that Reservation No. 2, attached by the European Union to the Agreement and concerning professional services, as regards legal services supplied under the home-country professional title, makes clear that the requirement to register with a Bar in the European Union may include the further requirements to have

[85] Article 194, paragraph 1, read in conjunction with Article 128, a), iv), v), and b) of the Trade and Cooperation Agreement.
[86] Article 137, paragraph 1, of the Trade and Cooperation Agreement.
[87] Article 137, paragraph 3, read together with Article 129, paragraph 2, of the Trade and Cooperation Agreement.
[88] Article 194, paragraph 1, read in conjunction with Article 143, paragraph 4, of the Trade and Cooperation Agreement.
[89] Article 194, paragraph 2, a), of the Trade and Cooperation Agreement.

completed a training under the supervision of a local lawyer, to have an office or a postal address within the jurisdiction of a specific Bar or, for some services, to have obtained a law degree or its equivalent in the host State. The obligation to practice host-jurisdiction law may likewise be imposed by some Member States on natural persons who are shareholders or hold special positions in law firms, companies or undertakings.

The legal services may also be offered by a legal person with a branch established in the territory of the host country, without prejudice to this country to have the right to set out that a certain percentage of the shareholders, owners, partners or directors of the legal person concerned must be qualified or practise as a lawyer, accountant or other independent professional. The State in question may not in any circumstances limit the participation of foreign capital, in terms of maximum percentage of shareholding or the total value of individual or aggregate investments[90].

Even when a lawyer is to enter and temporarily stay in the territory of the host State for furnishing legal services, prohibition of quantitative restrictions and compliance with the principle of national treatment are applicable. As a matter of fact, each Contracting Party may not adopt or maintain restrictions on the number of independent professionals allowed to perform legal services in its territory and may not give them a treatment less favourable than that settled on its own lawyers[91].

Article 143, paragraph 3, of the Trade and Cooperation Agreement, however, points out that the number of lawyers is not to be more than that necessary to fulfil obligations arising from the legal service contract, if it is so prescribed by the law of the host State, giving indirectly to that State the possibility to set up a quantitative limit of foreign lawyers supplying legal services in its territory.

All the rules enshrined in Part Two, Heading One, Title Two, Chapter Five, Section Seven, of the Trade and Cooperation Agreement assume, on the one hand, that lawyers of the Contracting Parties may rely upon their home-country professional title and, on the other hand, solely for those legal activities strictly described in the Agreement.

Nonetheless, for greater certainty, the negotiators of the T.C.A. felt the need to provide that, in any event, the conventional rules on access to the market of legal services of each Contracting Party, by the lawyers of the other Contracting Party, do not entitle a lawyer to use the professional title adopted in the State where the legal services are delivered[92].

[90] Article 194, paragraph 4, read together with Article 128, a), iv), of the Trade and Cooperation Agreement.
[91] Article 194, paragraph 1, read in conjunction with Article 143, paragraph 1, of the Trade and Cooperation Agreement.
[92] Article 143, paragraph 2, read together with Article 194, paragraph 1, of the Trade and Cooperation Agreement.

## 7. Conclusions

With Brexit the dream of European lawyers who cross the English Channel is unfortunately over. Free movement of Continental lawyers stops on the north coast of France as well as free movement of British lawyers on the white cliffs of Dover.

European Union law and the two European Directives, namely the "Lawyers' Services Directive" (77/249/EEC) and the "Lawyers' Establishment Directive" (98/5/EC) are no longer in force in the United Kingdom of Great Britain and Northern Ireland.

What remains of the free movement of lawyers after Brexit is a few legal rules within an overall international trade and cooperation agreement, which entitle a European lawyer to use his home-country professional title in the British territory, if he is a European Union citizen, or in the European Union territory, if he is a British citizen, in a very restricted number of cases.

The limited number of legal services which may be supplied by the independent professionals from each of the Contracting Parties, as set forth in the Trade and Cooperation Agreement signed on 30 January 2020, makes the rules on "cross-border trade in legal services" and "entry and temporary stay for legal services" definitely inadequate to the needs of lawyers, especially comparing this new regulatory framework with that in force before Brexit, when the United Kingdom was in the European Union.

While having regard to all the legal services listed in Article 193, g), of the Agreement (*i.e.*, the legal advisory services and legal services before arbitrators, conciliators and mediators), they are not able to run out of the wide range of activities which ordinarily belongs to an independent professional[93] and, apart from that, they may not at any rate be furnished on a permanent basis in the territory of the host State.

What arises *de facto* from the provisions of the T.C.A. is that the local professionals or groupings of local professionals, who work as correspondent lawyers in the territory of the State where these services are to be supplied, will be, in practice, more often required by a foreign lawyer who wants to carry out activities which fall within the scope of Article 192 *et seq*. of the Agreement, inevitably engendering an increase in offer costs of such services.

More generally, the progressive growth in costs of legal services, due to the restrictions on free movement of professionals set out in the Agreement, will discourage individual lawyers from delivering cross-border services, which, as a result, return to be the exclusive prerogative of large international law firms, the only ones that, by including in their staff domestic legal professionals working *in loco*, as self-employees or even as salaried employees, and possibly by establishing legal offices abroad, are able to bear more easily the costs related to all that extensive variety of legal services which an individual lawyer could perform across the Channel before Brexit.

[93] Article 193, g), of the Trade and Cooperation Agreement disregards services which, in principle, could have been permitted to a lawyer despite Brexit, like the legal representation and defence of a client before the lower domestic courts or tribunals and national administrative authorities or agencies, in addition to the activity as an arbitrator.

Besides, by reason of the T.C.A., if in the short run national lawyers from both Contracting Parties can benefit from less competition, because of the lower presence of Continental or British independent professionals in their territories, in the long run, particularly the British lawyers will suffer from a market of legal services which turns out to be smaller than that of the European Union and can consequently bring about a decrease in the economic development of their legal activities.

Last but not least, the rules of the Agreement end up depriving consumers of a wider and effective choice of suppliers of legal services and this can make certain types of legal services more expensive in national markets, often also irrespective of their quality. Constraining the free movement of lawyers means, ultimately, to deny consumers, recipients of the legal services, of better and more convenient services, weakening the protection of their interests against injustices and increasing the social inequalities.

In the light of these considerations, it would be desirable for the Parties to meet again soon, in order to reword the Part Two, Heading One, Title Two, Chapter Five, Section Seven, of the Trade and Cooperation Agreement in different terms, with the aim of regulating the freedom to supply legal services more adequately, boosting to a higher extent the title of lawyer and any qualifications attained by the legal professionals in their relevant countries. The common legal ground built up over some forty-eight years of the European single market between the Continental and British lawyers should enable to take a step forward on those issues.

ABSTRACT: Activities of legal professionals in the European Union are regulated by Directive 77/249/EEC of 22 March 1977 and Directive 98/5/EC of 16 February 1998, implementing Articles 26, 49 and 56 of the Treaty on the Functioning of the European Union. After Brexit, these Directives are no longer in force in the U.K. and the trade in legal services and cross-border establishment of lawyers have required different international rules to be laid down by the European Union and the United Kingdom. In this perspective, access to the European internal market and British national market is now governed by the Trade and Cooperation Agreement, signed on 30 January 2020 and entered into force, provisionally, on 1 January 2021 and, fully and definitively, on 1 May 2021, setting out a new legal framework in the matter between the Parties. This paper seeks to highlight how the working life of legal professionals, and, particularly, of individual lawyers, has changed as a result of Brexit, drawing attention to several disadvantages that stem from the international regulation incorporated in the Trade and Cooperation Agreement.

KEYWORDS: The European Union – The United Kingdom – Brexit – Trade and Cooperation Agreement – Lawyers.