

## **Conditions for cross-border activity of geodetic surveyors under European Law**

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### **A. Welcome/Introduction**

Dear Mr President, ladies and gentlemen,

I am pleased to be able to talk to you today about a topic that has been troubling geometers in Europe for some time now and which, in my view, has caused considerable uncertainty: the status of geometers under European law in light of the new services and professional qualifications directives. Let me reassure you at the outset that you are not alone with your worries and insecurities - almost all regulated professions are struggling with how to correctly assess the recent activities of the European lawmakers. I hope that my talk will lessen some of your worries and establish clarity in those areas in which the legal situation has to date been confusing.

The basis of my talk is an expert report of more than 100 pages that was drawn up as a joint research project conducted by Dr. Kilian and myself in recent months at the University of Cologne. It resulted from, as it is probably fair to say, a somewhat consolidated cooperation between our research team in Cologne and the German BDVI and Geometers Europe. As some of you will remember, several years ago I was involved in the preparation of another in-depth expert report. This report provided support to the German geometers contesting infringement proceedings threatened by the European Commission. Indeed, it is likely that the report played a significant role in the German geometers winning that battle against the Commission. In 2004, as some of you might recall, Dr. Kilian presented a speech to you in Brussels - and I had the opportunity to meet some of you in person during a conference of the BDVI in Magdeburg. Let me assure you that your profession really is close to my heart and I am delighted that

we have been able to build up special skills in researching the law of your profession over the past few years.

Of course, given the time available today, it is impossible to share with you in full the results of our report spanning more than 100 pages. Thus, I have to limit myself and can only highlight the main train of thought and summarize the main findings. Accordingly, my talk is divided into four parts. First, I would like to show how a profession, such as that of a geometer, should be methodically examined in terms of European law. Ultimately, it is not the *profession* of geometer, but rather the specific *activities* performed by him or her that is decisive. Next, I will outline which activities of a geometer are actually “mobilised” on a cross-border basis through European law. Once it has been defined on the basis of these considerations which activities a geometer may actually perform in other Member States, the next step is to show the legal standards that govern such cross-border activities. Finally, I will outline the relevance of recent European law-making for national laws governing the profession. The decisive keyword here is “norm screening”, a concept that has already developed into a real bugbear in many regulated professions.

## **B. The activities of geometers and European law**

Please allow me to share with you some introductory considerations about the methodology of European law, since my subsequent considerations are based on this. Due to the complexity of the nature of a profession in a member state, European law usually refers not to an abstract profession such as the “geometer” but instead to specific activities. So, when attempting to classify geometers under European law we must first identify various fields of activity. Whether these activities are covered by European law then has to be examined separately for each activity.

The first activity to be examined from the European point of view is the exercise of official authority by geometers. In some jurisdictions, the lawmaker assigns

official or quasi-official authority - that is, tasks originally performed by the state - to the geometer. In this area the question arises whether and to what extent these activities are subject to the fundamental freedoms on the free movement of persons in the internal market. The answer depends on whether the duties conferred on the geometer by the government fall within the exceptions pursuant to Art.45 EC, which a priori exempts certain sovereign activities from the scope of application of the fundamental freedoms.

The second field of activity to be examined in terms of its relevance under European law relates to the professional services that do not fall under Art.45 EC, but are monopolized by law to his benefit. This area refers to the belonging of the geometer to the so-called regulated professions. These are professions for which the Member State in question has set up rules on the training of the service providers, their professional organization, or the delivery of the services as such, for reasons of public interest. Thus, it has to be examined to what extent national access barriers to this profession can be justified under European law or to what extent Member States are required to permit professionals from other Member States to perform these activities on a temporary or permanent basis as a cross-border service in another Member State - subject to certain conditions.

The third field of activity that may potentially also be affected by European law, is the general commercial activity of the geometer, to the extent that the geometer, as a member of the regulated profession or as someone who exercises state authority is actually permitted to carry out such commercial activities akin to a "normal" tradesman. In principle, the geometer operates in this field of activity like any other tradesman in any other field of activity, so that the fundamental freedoms of the Treaty apply without restriction. Questions arising in this context do not have to be examined further in my talk.

The expert report drawn up for European Geometers analyzed the three fields of activity I have outlined in more detail. Based on the tripartite categorisation of the geometer's activities as a public official, as a member of a free profession and as

a tradesman, we first analyzed the relevance of each activity with a view to the fundamental freedoms of the Treaty. As far as those activities are covered by the fundamental freedoms, we then examined whether these activities are regulated under European law by regulations or directives specific to the profession. In a third step we explored the question of whether general directives or regulations not specific to the profession, such as Directive 2005/36/EC on the recognition of professional qualifications or Directive 2006/123/EC on services in the internal market, apply to the activities in question. As far as such directives apply, we then had to assess which specific requirements the directives place on the cross-border activity of a geometer and which general requirements Community Law places on the justification for national laws regulating the profession of geometers.

In general, national law that could impede or make unattractive the assertion of the fundamental freedoms guaranteed by the Treaty must meet the following four conditions according to the case-law of the European court of Justice.

- they must be applied in a non-discriminatory manner,
- they must be justified by imperative requirements in the public interest,
- they must be suitable for securing the attainment of the objective, and
- they must not go beyond what is necessary to attain this objective (test of proportionality)

An examination of national laws regulating the profession of geometers based on these standards may lead to objections under European Law that have not yet been discussed at the level of national law in the Member States. Every well-founded discussion about the impact of European Law on the exercise of the profession life of the geometer should therefore take into consideration that the evaluation of the geometer's activity based on the fundamental freedoms of the Treaty, secondary legislation and European competition law - which I cannot go into in any more detail here due to the limited time available - may lead to unwanted results from the point of view of the profession. Governance under

European law inevitably raises the question of to what extent Member State rules on the exercise of a profession in that Member States hinder the free movement of that professional service in the Common Market - and hence meet with objections under European law. Those who support the liberalisation of national rules governing the professions thus prima facie benefit more from scrutinizing national laws than those who prefer a more traditional concept of professional regulation – with regard for instance to monopoly rights, forms of organisation, advertising, remuneration and so on.

### **C. Professional Opportunities for Geometers on the Internal Market**

#### I. Introduction

Art. 43 of the Treaty enables a Geometer to provide cross-border services throughout the Common market by **permanently** establishing himself in a another Member State. Art. 49 EC permits the **temporary** provision of services

In contrast to the guarantees laid down in the primary law, Directive 2006/123/EC, often ambiguously referred to as the "Services Directive", regulates not only temporary cross-border services in a host Member State – while retaining a professional base in the home member state, but also permanent establishment in a Member State other than the home member state. The Services Directive basically aims to codify the case-law of the European Court of Justice regarding the freedom to provide services and the freedom of establishment. As a result of its codification, this case law becomes universally applicable. But the Services Directive also advances the case-law of the European Court of Justice regarding the freedom to provide services and the freedom of establishment, by limiting the grounds of justification for restrictions to the freedom to provide services and by setting up rules that, in essence, serve consumer protection. Furthermore, the Services Directive forces Member States to identify and remove impediments to the cross-border exchange of services caused by national regulations.

If a specific occupation can be qualified as a service, all service providers in principle fall under the Services Directive, irrespective of whether they exercise the same profession or belong to the same sector. This means that, in line with the liberal approach of the Directive, the cross-border activity *as such* is facilitated. Thus, as far as the provision of a specific service is not a reserved task in the host member state, a professional might also compete with service providers who are members of a profession that does not directly correspond to the same profession in the home member state.

## II. Exclusion of Official Authority (Art. 45 EC)

The Services Directive does, however, exempt certain service sectors and activities from the scope of application of the freedom of movement. It does not apply to activities associated with the exercise of official authority pursuant to Article 45 EC. I only want to touch briefly on this aspect, since my co-author, Dr. Kilian, discussed the issue of the official authority character of the geometer's activity in detail in 2004 at your conference in Brussels. A few pointers should suffice here: The starting point in assessing whether an activity performed by a geometer represents the exercise of official authority is the definition of the profession by the Member States in question. If it relates to the exercise of official authority pursuant to the particularities of the national legal system then one must next examine whether this national categorisation corresponds to the Community Law criteria developed by the European Court of Justice. According to the case-law of the European Court of Justice an activity must fulfil the following criteria in order to be qualified as official:

- The activity must exceed mere auxiliary functions that only prepare state actions without having a direct legal effect on citizens. In connection to the activity the person exercising official authority must have special rights that exceed general basic rights available to everyone.
- The conferred authority must not necessarily include restraint powers in a narrow sense. Such powers of restraint represent sufficient but not

necessary conditions for the exercise of official authority; to that extent, the view of the European Court of Justice corresponds to the literature.

- The activity has to be performed with external effect on citizens and it must not occur in the sole interest of a facilitation of an administrative process.
- If the performed activity is based on a civil law transaction and if the professional is free to enter into legal transactions with the citizen then this indicates that he is not exercising official authority.
- Finally, the activity intended to establish official authority must occur frequently.

In order to answer for yourself the question of whether you, as a geometer exercise “activity connected with the exercise of official authority” from the perspective of European law, you should review these five points taking into consideration the particularities of the legal system of your home jurisdiction; general statements are not possible.

If these conditions are fulfilled, the decision of the Member State to confer official authority on private bodies to perform certain state tasks is not objectionable under European Law. On the contrary: in that case, the state is free to choose whether to have its own civil servants or professionals in private practice perform these activities. A requirement to confer tasks directly on state entities would indeed be nonsensical from a European point of view, since one of the objectives of Europe is to run economic activities without the intervention of the state wherever possible. The alleged threat that a Member State could circumvent the fundamental freedoms of the Treaty by qualifying certain activities as the exercise of official authority does not exist in reality. Rather, the criteria discussed guarantee from the outset that only a very narrow area of genuine state powers can be considered for exceptions.

For all those Member States in which the provision of geometrical services to date has not been the exercise of official authority, an interesting question is whether the member states are required to maintain the status quo. The answer is: No! An activity not connected to date with the exercise of official authority in a Member State may be brought within the scope of Art. 45 EC and hence it may be exempted from the right to the freedom of establishment and services in the future. This decision must, however, be assessed based on the principle of proportionality, that is, the Member State must prove that the fulfilment of activities that were in the past not connected with the exercise of official authority must be shifted to the sphere of official responsibility for imperative reasons of public interest. The European institutions will scrutinise such a decision.

It is also possible that a Member State transfers tasks that it has performed itself to date to private professionals; this does not, however, alter the official character of the activity pursuant to Art. 45 EC. Thus, a member state that is currently providing geometrical services through its own agencies could decide to confer the relevant official authority on geometers in private practice.

What follows from all this? If a certain field of activity of geometers can be qualified as the exercise of official authority pursuant to Art. 45 EC (this is assumed for instance with regard to publicly appointed geometers in Germany), then the rights of freedom of establishment and the freedom to provide services guaranteed by the Treaty pursuant to Art. 43, 49 EC do not apply to this specific activity of the geometer. Simultaneously, Art. 2 of the Services Directive exempts any activities which are the exercise of official authority from the scope of the directive.

### III. Other Cross-Border Activities

#### 1. General

It also follows from the conclusions reached thus far that the activities of a geometer not connected with the exercise of official authority are basically covered by the freedom of establishment, the freedom to provide services and the more specific provisions of the directives. Since there are no directives specifically regulating the profession of geometer, the general directives, the Services Directive 2006/123/EC and the directive 2005/36/EC on the Recognition of Professional Qualifications apply. Both govern issues of permanent and temporary provision of services in another Member State.

The Directive on the Recognition of Professional Qualifications aims in particular to remove hindrances to the exercise of freedom to provide services and the freedom of establishment related to the qualification of the service provider, that is, market access. The Directive achieves this by defining a standard procedure for the mutual recognition of qualifications obtained in another Member State. Here, the Directive replaces existing regulations on the recognition of professional qualifications and serves primarily the consolidation and simplification of applicable law. Insofar as the Directive on the Recognition of Professional Qualifications also covers the non-official, but regulated activity of geometers, its relationship to the Services Directive has to be clarified. Basically, in simplified terms, the following applies:

**Temporary** cross-border activity, that is, the services of a geometer as a member of a regulated profession in another Member State, is governed primarily by the Directive on the Recognition of Professional Qualifications. It entirely supersedes the Services Directive in all questions of access to a profession in terms of the “if” of an activity. On the other hand, the Services Directive applies to all other questions of a temporary cross-border activity, in particular to the regulation of market conduct – that is, the “how” of activity.

Both the Directive on the Recognition of Professional Qualifications and the Services Directive apply in principle to **permanent** cross-border activity in the course of establishment in another Member State. In the case of contradictory provisions in the directives, the Directive on the Recognition of Professional Qualifications supersedes the Services Directive as the Qualifications Directive is more specific than the Services Directive.

## 2. Permanent Establishment in another Member State

Under these circumstances, the following applies: as regards cross-border establishment, the Directive on the Recognition of Professional Qualifications requires the Member States to mutually recognize the professional qualification of geometers based on the principle of equality of professional training (in different Member States). Even if in another member state a level of qualification one level lower than that demanded in the host member state is sufficient for entry into the profession, e.g. a degree from polytechnic rather than from a university, the professional qualification must be recognized. The recognition of professional qualification means that the holder of such qualification may establish himself in the host member state and practice the profession of the geometer there under his home title, provided this does not affect the exercise of official authority.

However, under certain conditions (shorter training period, different training syllabus) a Member State may require the holder of a professional qualification that has to be recognized on principle to undergo a process of adaptation in the form of a course of adaptation or an aptitude test. The extent to which the provision of services as an established geometer in another Member State can be made contingent on the successful completion of an aptitude test or course of adaptation can only be answered on a case-by-case basis by comparing the legal systems in question and the training requirements in each Member State.

Establishment may not be denied on the basis of the nationality of the migrant geometer or a lack of demand for the service offered by him. Thus, the number of geometers in a Member State can no longer be restricted based on the argument that there is no demand for additional service providers from an economic point of view. Consequently, a migrant geometer cannot be required to prove that the current number of geometers is not sufficient to meet the demands of the market. It would also be unlawful if the national laws governing a profession made the provision of services by a geometer from a different Member State conditional on the requirement that his personal residency is in the host state, that he performs his professional service predominantly in the host member state and not his country of origin or a third country, or that he organizes himself in a legal form of the host member state. However, it is permissible for a Member State to require that every geometer active on the territory of this state maintains professional indemnity insurance to protect his clients. A geometer who provides his services cross-border may not be required to secure such insurance by taking it out with a provider in the host member state.

### 3. Establishment or Temporary Provision of Services?

The aforementioned principles apply, as you will remember, only to established - that is, permanent - activity in a different Member State. Other principles apply to a temporary activity in another Member State. The distinction between a temporary service and an establishment cannot always be made with certainty. Whether an activity is still a temporary service or already a permanent establishment depends on many aspects. As a rule of thumb, it is generally accepted that the duration, frequency, regular recurrence and continuity of the activity have to be taken into account. Temporary activity does not become establishment simply because the service provider obtains certain infrastructure, such as offices, provided this is objectively necessary for the proper provision of the service. A service provider falls under the law of establishment only if he or she practices a profession "steadily and continuously" in the host member state,

for instance by running an office there and conducting targeted acquisition. The duration of the activity is not significant in this regard. The European Court of Justice ruled that a three-year activity could not be categorized as exercise of the right to freedom of establishment, since no minimal infrastructure had been established in the given case.

#### 4. Temporary Provision of Services in Another Member State

If the distinction shows that a service is of a temporary nature then it is also clear that **no formal recognition of the professional qualification** is required for this cross-border activity on the internal market. Instead, the principle of mutual trust applies here. This establishes the irrefutable assumption that an EU citizen who lawfully practices his profession in another member state may also practice this profession in a host Member State under his home title. The Directive provides a number of explicit prohibitions, aimed at guaranteeing that the Member States do not undermine the opportunities for the provision of services at national level. A geometer providing services on a temporary basis, for instance, may not be required to be or become a member of a professional association in the host member state. Further, national law may not require a geometer providing services on a temporary basis to set up an establishment in the host member state and/or maintain infrastructure there. The prohibition of the use of certain working materials would also be impermissible.

However, the provision of services is not permissible without restriction. National law may require that the foreign service provider must give written notice containing certain information to a registration office in the host member state before entering the market for the first time. The obligation to submit credentials that the service provider is established and entitled to practice the profession in a different EEA state, for instance, is unproblematic. Certification of professional qualification and proof of professional indemnity insurance can also be requested. Furthermore, geometers who perform services on a temporary basis

are obliged to furnish certain information to the receiver of their services in the same way as permanently established geometers must. This includes personal information, information on professional supervision and contents of the contract under which they render their services. The geometer must furnish some of this information unasked and some only on request. In principle the geometer is required to practice under the professional title of his home country. European Law considers this sufficient in the interests of consumer protection. The obligation to use a “foreign” professional title should draw the consumer’s attention sufficiently to the fact that the service provider does not hold a qualification under the law of the host member state.

As I have already mentioned, the Member States are neither prevented from nor are they obliged to require professional indemnity insurance for the activity of geometers to protect the client. In principle, national law of the Member States may not prohibit geometers from advertising their professional services in the area of those activities that do not amount to the exercise of official authority. Restrictions to the principle of freedom of advertisement are possible only if they are not discriminatory, justified by an imperative reason of public interest and proportionate. European Law requires the Member States to permit geometers to practice a second profession and to associate themselves with members of other professions. Restrictions are conceivable, but only if they serve to take account of particularities of the profession of geometer, specifically the independent and non-partisan provision of services.

#### 5. Applicable Law governing Professions in the Absence of Regulations under European Law

Despite the relatively detailed provisions of the two directives on the market conduct in the case of cross-border activity of a geometer, questions remain regarding professional practice, which is not regulated under European Law. Thus, the solutions cannot be derived directly from the Directive on the

Recognition of Professional Qualifications and the Services Directive. In such cases, the legal framework for cross-border activities follows from the principle of the state of destination. This principle applies both to permanently established activity in another Member State and to the temporary provision of services. Hence, the law governing the profession in the host member state applies in this area.

#### **D. Norm Screening**

Ladies and gentlemen, according my presentation thus far, the European lawmaker has created a fairly large number of quite detailed provisions for the law governing professions, as we have seen in my analysis of the two directives. These consist in part of positive requirements, which dispense with divergent national provisions and partly of lists of prohibitions that categorically prohibit certain national rules on market access and conduct on the market.

Additionally, the Services Directive provides a third control mechanism: pursuant to Articles 15 and 16, typical rules on market conduct require special justification. National rules governing the practice of a profession are not generally prohibited; these may be provided for under national law. However, they will be accepted under European Law only if they are non-discriminatory, justified by an imperative reason of public interest and proportionate. The Commission itself does not examine whether national law complies with these requirements, but rather delegates this task to the Member States. Thus, the Member States are required to systematically review their own legal system for restrictions that do not conform to European law in the course of a so-called “screening procedure”. If necessary, they are required to change their law to bring it in line with the requirements of the Directive. This procedure is intended to guarantee a more effective harmonisation of national regulations to the provisions under European Law than can be achieved through infringement proceedings, which have proven to be extremely time consuming and which furthermore work selectively, not

systematically. Despite the imposition of these obligations on the Member States, the rights asserted by the Commission, as the guardian of the fundamental freedoms, remain in place. These powers have a mere “destructive” character, to put it into exaggerated terms. The EU does not have the positive power to draft laws on the professions in the Member States. At most, it can prohibit certain national regulations. This leads to a perception of the EU as nothing less than a destroyer of national laws governing the professions. The delegation of the screening procedure to the Member States is a reminder for every national legislator and for every national professional association that one of the central obligations of lawmakers in the member states is to properly conceptualize and define the contents of the national laws governing the professions in the European context.

The norm screening requirement covers all levels of a national hierarchy of norms, that is, not only parliamentary legislation, but also legal provisions based on delegated rule-making powers - such as that of professional organisations. In the course of the norm-screening procedure, the Member States can justify national provisions governing the professions on the basis of public interest. In the area of the freedom of establishment, even norms setting quantitative or territorial restrictions on the provision of services, requiring a specific legal form for professional partnerships, enforcing special requirements for share-holders of professional partnerships, rules prohibiting branch offices or determining minimum and maximum prices are not objectionable across the board. Such restrictions can be justified if they are motivated by imperative considerations of public interest, whereby the Member States have broad discretion in assessing such considerations of public interest. As far as the freedom to provide temporary services is concerned, national law however cannot justify restrictions based on any public interest. Only maintaining public security, public order and health as well as the protection of the environment are public interests on which a restriction of the freedom of the temporary provision of services can be based. Thus, general considerations of consumer protection are not sufficient.

## **E. Outlook**

Ladies and gentlemen,

In summarizing my presentation let me reassure you once again: Don't be afraid of Europe! While European law does indeed force us to scrutinise longstanding national rules governing the professions, it also offers us sufficient opportunity and scope to lead the geometer's profession into a secure future. National regulations that are necessary in order to continue to guarantee high quality geometrical services under appropriate competitive conditions are and remain possible. However, I see a risk – a weakness even - that should not be underestimated, in the very inconsistent nature of the geometer's profession in the various EU Member States. Without a doubt, this lack of uniformity hinders the acceptance of regulations on professional practice by the European institutions; indeed, it raises the critical question of whether restrictions effective in only some of the Member States are really “necessary” in terms of the European provisions. The primary goal for the national professional associations of geometers and their international body, the “Council of European Geodetic Surveyors”, should therefore be to define consistent core values and quality standards for their profession. So I congratulate you for the new “code of conduct” that you accepted today. Such standards correspond to the objectives of the Services Directive. Other professions, such as lawyers, who have successfully laid down such principles, have succeeded in attaining acceptance at the EU level for professional regulations that help to protect these core values.

I would like to take this opportunity to wish the Council of European Geodetic Surveyors the best of luck in the pursuit of this important goal for all geometers!