



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Cases C-47/08 Commission v Belgium;
C-50/08 Commission v France; C-51/08 Commission v Luxembourg;
C-53/08 Commission v Austria; C-54/08 Commission v Germany;
C-61/08 Commission v Greece and C-52/08 Commission v Portugal

In the view of Advocate General Cruz Villalón, in limiting access to the profession of notary to their nationals, six Member States have failed to fulfil their obligations under the Treaty

The fact that the profession of notary is connected with the exercise of official authority cannot provide justification for direct discrimination on grounds of nationality

In a significant number of Member States and, in particular, in the defendant Member States in these proceedings, the task of the notary is principally the authentication of legal transactions. Notaries act on the instruction of parties and, after ensuring that the parties have legal capacity and capacity to act and that all the conditions that may be required by law for the execution of the instrument have been met, carry out an examination of the legality of the instrument which they then authenticate. As a result of authentication, the instrument enjoys enhanced probative value and is at the same time rendered enforceable. A notary is a public official who represents the State, although his activity is also regarded as an independent profession.

The issue underlying these proceedings is whether the profession of notary is connected with the exercise of official authority¹. On the one hand, the Treaty provides that activities which are connected, even occasionally, with the exercise of official authority do not fall within the scope of the freedom of establishment. On the other hand, Directive 2005/36² affirms that the system of recognition of professional qualifications established in the directive is without prejudice to that exclusion, in particular in relation to notaries.

Cases C-47/08 Commission v Belgium; C-50/08 Commission v France ; C-51/08 Commission v Luxembourg; C-53/08 Commission v Austria; C-54/08 Commission v Germany; and C-61/08 Commission v Greece

By its first series of infringement proceedings, the Commission requests the Court of Justice to declare that, by limiting access to the profession of notary exclusively to nationals of their own country by means of a nationality clause, **Belgium, France, Luxembourg, Austria, Germany and Greece** have failed to fulfil their obligations under the Treaty and also, with the exception of France, those arising from Directive 2005/36 in failing to apply that directive to the profession of notary.

Up until now, in judgments concerning other professions, the Court of Justice has declared that they were not connected directly and actually with the exercise of official authority. None the less, and although the profession of notary is connected with the exercise of official authority, Advocate General Pedro Cruz Villalón considers, in today's Opinions, that it is also necessary to determine,

¹ There is currently another case pending before the Court of Justice concerning the same issue in infringement proceedings brought against the Netherlands (Case [C-157/09](#)).

² Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), which repealed Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

as regards the extent of the involvement of the notarial profession in the exercise of official authority, the extent to which such a nationality clause is necessary to attain the desired objectives.

Thus, first of all, the Advocate General examines whether the profession of notary is connected with the exercise of official authority. In that regard, he notes that only those activities which, taken on their own, are directly and specifically connected with the exercise of official authority may be excluded from the scope of the freedom of establishment, and that only in cases where the activities connected with the exercise of official authority are inseparable from the remaining activities may that exclusion apply to a whole profession. Moreover, in the Advocate General's view, the decisive criterion for assessing whether an activity is connected with the exercise of official authority is the nature of its relationship with the legal system of the State.

Hence, since it gives a special public status to documents, provisions and forms of conduct that would otherwise have no more legal value than the expression of a private will, and given that authentication constitutes the inseparable core of the functions performed by notaries in all the defendant Member States, the profession of notary, in general and taken as a whole, is connected directly and specifically with the exercise of official authority.

Second, the Advocate General analyses whether the connection with the exercise of official authority may justify the existence of a nationality clause limiting access to the notarial profession. In that regard, he notes that the fact that an activity is excluded from the scope of the freedom of establishment does not exempt the Member States from the obligation to comply with European Union law. In that context, given that it relates to the activity of notaries and, therefore, to a group made up of natural persons, that measure should be analysed in the light of European Union citizenship, which establishes the free movement of persons where the economic freedoms do not apply.

Consequently, in so far as a nationality clause uses citizenship as the decisive criterion, that is to say, the nationality of the State as a ground for preventing access to the activity, **such discrimination on grounds of nationality constitutes a serious encroachment in the sphere of European citizenship which would be permissible only after a strict examination as to its proportionality.**

In that regard, the Advocate General observes that **among the guarantees and special characteristics which surround the profession of notary, none of them justifies a measure as severe and drastic as direct discrimination on grounds of nationality.** In particular, as regards the oath taken by notaries before they take up their duties, the Advocate General considers that the concept of loyalty does not necessarily require a bond of nationality.

In conclusion, the Advocate General considers that, **in the specific circumstances of the profession of notary, the Treaty does not allow a national measure that discriminates on grounds of nationality against those who wish to gain access to that profession; the extent to which that activity is connected with the exercise of official authority renders such a measure disproportionate.** Therefore, he proposes that the Court of Justice declare that, **by limiting access to the profession of notary exclusively to their nationals, the six defendant Member States have failed to fulfil their obligations under the Treaty.**

Finally, **as regards the infringement of Directive 2005/36**, the Advocate General points out that, in an action for failure to fulfil obligations, it is for the Commission to demonstrate that the Member State has committed an infringement of European Union law. The Advocate General considers that **the Commission has not raised sufficient arguments in relation to the applicability of the directive to the profession of notary** and, therefore, the Court of Justice should dismiss the remainder of the action.

Case C-52/08 Commission v Portugal

By this action the Commission requests the Court to declare that **Portugal** has failed to fulfil its obligations but – in contrast to the cases referred to above – only in so far as a system exists in

that country for access to the profession of notary which is contrary to the requirements of Directive 2005/36. Even though Portugal does not impose a nationality requirement, access to the profession is subject to four conditions, including possession of a degree in law recognised by Portuguese legislation, completion of a period of training, and passing the competition for access to the profession held by the Notarial Council.

First, Advocate General Cruz Villalón applies to the case of Portugal the main lines of argument put forward in the cases referred to above. In addition, he considers it also to be the case, in respect of the profession of notary in Portugal, that authentication is directly and specifically connected with the exercise of official authority, and given that authentication constitutes the inseparable core of the functions performed by notaries, the profession of notary, in general and taken as a whole, is connected directly and specifically with the exercise of official authority.

Second, the Advocate General observes that the fact that Directive 2005/36 is without prejudice to the exclusion from the scope of the freedom of establishment of activities which are connected with the exercise of official authority means that the exception applies in those cases and that, consequently, the provisions of the directive are not applicable. **Since the profession of notary in Portugal is directly and specifically connected with the exercise of official authority, the Advocate General considers that Portugal was not required to apply Directive 2005/36 to the profession of notary and, consequently, did not fail to fulfil the obligations resulting from that directive.**

In conclusion, the Advocate General proposes that the Court of Justice dismiss the Commission's action.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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