



Court of Justice of the European Union

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Judgments in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08
and C-52/08

Commission v Belgium, France, Luxembourg, Austria, Germany, Greece
and Portugal

Press and Information

Member States may not reserve access to the profession of notary to their own nationals

Even if the activities of notaries, as currently defined in the Member States concerned, pursue objectives in the public interest, they are not connected with the exercise of official authority within the meaning of the EC Treaty

The Commission brought actions for failure to fulfil obligations against six Member States (Belgium, Germany, Greece, France, Luxembourg and Austria) because they reserve access to the profession of notary to their own nationals, which in the Commission's opinion is discrimination on grounds of nationality, prohibited by the EC Treaty. The Commission also complains that Portugal, together with the Member States mentioned above other than France, does not apply the directive on recognition of professional qualifications¹ to notaries.

The principal issue in these cases is whether the activities of the profession of notary are connected with the exercise of official authority within the meaning of the EC Treaty. The Treaty provides that activities which are connected, even occasionally, with the exercise of official authority are excepted from the rules on freedom of establishment². The Member States concerned in these cases, while acknowledging that notaries generally provide their services in those States as members of a liberal profession, argue that a notary is a public office-holder connected with the exercise of official authority whose activities are excluded from the rules on freedom of establishment.

In the first parts of the judgments delivered today, the Court of Justice states that the actions brought by the Commission concern solely the nationality condition imposed by the national laws in question for access to the profession of notary, and do not relate to the organisation of the notarial profession as such.

In order to assess whether the activities of notaries are connected with the exercise of official authority within the meaning of the EC Treaty, the Court then analyses the powers of notaries in the Member States concerned, noting at the outset that only activities that are directly and specifically connected with the exercise of official authority can be excepted from the application of the principle of freedom of establishment.

The Court notes in this respect that the principal function of a notary, as a public official, is to authenticate legal instruments. When he does so – his intervention being compulsory or optional, depending on the nature of the instrument – he verifies that all the conditions laid down by law for the drawing up of the instrument are satisfied and that the parties have legal personality and capacity to enter into legal transactions. An authentic act also has enhanced probative force and is enforceable.

¹ 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 amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 (OJ 2001 L 206, p. 1), and/or 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).

² Article 45 of the EC Treaty (now Article 51 of the FEU Treaty).

The Court observes, however, that the instruments that are authenticated are documents and agreements freely entered into by the parties. They decide themselves, within the limits laid down by law, the extent of their rights and obligations and choose freely the conditions which they wish to be subject to when they produce a document or agreement to the notary for authentication. The notary's intervention thus presupposes the prior existence of an agreement or consensus of the parties. Furthermore, the notary cannot unilaterally alter the agreement he is called on to authenticate without first obtaining the consent of the parties. **The activity of authentication entrusted to notaries does not therefore involve a direct and specific connection with the exercise of official authority.** The fact that some documents and agreements are subject to mandatory authentication, in default of which they are void, cannot call that conclusion into question, as it is normal for the validity of various documents to be subject to formal requirements or even compulsory validation procedures.

Similarly, the fact that the activity of notaries pursues an objective in the public interest, namely to guarantee the lawfulness and legal certainty of documents entered into by individuals, is not in itself sufficient for that activity to be regarded as directly and specifically connected with the exercise of official authority. Activities carried out in the context of various regulated professions frequently involve an obligation for the persons concerned to pursue such an objective, without falling within the exercise of official authority.

As regards the probative force of notarial acts, the Court points out that that force derives from the rules on evidence of the Member States and thus has no direct effect on the classification of the notarial activity of drawing up those acts. As regards the enforceability of notarial acts, the Court observes that it is based on the intention of the parties appearing before the notary precisely to draw up the instrument and to make it enforceable, after its conformity with the law has been checked by the notary.

In addition to the activity of authenticating instruments, the Court examines the other activities entrusted to notaries in the Member States concerned – such as involvement in the attachment of immovable property or in connection with the law on successions – and finds that those too are not connected with the exercise of official authority. Most of those activities are carried out under the supervision of a court or in accordance with the wishes of clients.

The Court then observes that, within the geographical limits of their office, notaries practise their profession in **conditions of competition**, which is not characteristic of the exercise of official authority. They are also **directly and personally liable** to their clients **for loss arising from any default in the exercise of their activities**, unlike public authorities, liability for whose default is assumed by the State.

In those circumstances, **the Court finds that the activities of notaries as currently defined in the Member States in question are not connected with the exercise of official authority within the meaning of Article 45 of the EC Treaty.** Consequently, **the nationality condition required by the legislation of those States for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by the EC Treaty.**

Finally, in the second parts of the judgments, the Court finds that, in view of the particular circumstances of the legislative procedure, there was a situation of uncertainty in the European Union as to whether there was a sufficiently clear obligation³ on the Member States to transpose the directive on recognition of professional qualifications with respect to the profession of notary. For that reason the Court rejects the claim for a declaration that the Member States have failed to fulfil their obligations under that directive.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member

³ At the close of the period prescribed in the reasoned opinions sent by the Commission to the Member States concerned, inviting them to comply with the directive.

State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay. Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The full text of the judgments ([C-47/08](#), [C-50/08](#), [C-51/08](#), [C-53/08](#), [C-54/08](#), [C-61/08](#) and [C-52/08](#)) is published on the CURIA website on the day of delivery.

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