The Court of justice and the conditions for access to the profession of notary

- News on legislation [1]

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on 24 May 2011 the Court of Justice of the European Union ruled concludes that notarial activities are not connected with the exercise of official authority within the meaning of the Treaty and that, as a consequence, the nationality requirement under these States' legislation to access the profession of notary constitutes discrimination on grounds of nationality prohibited by the Treaty.

After the European Commission had taken action against 6 Member States (Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal) for failure to comply with obligations, on 24 May 2011 the Court of Justice of the European Union ruled on the question of a nationality requirement for access to the profession of notary. The Commission contested the fact that, in the above mentioned Member States, access to the profession of notary is reserved for nationals. According to the Commission, this constituted discrimination on the basis of nationality and is prohibited by the Treaty. Therefore, it asked the Court whether notaries' activities are connected with the exercise of official authority in the meaning of the Treaty, insofar as the latter specifies that activities which, even occasionally, have a connection with the exercise of official authority are exempt from the application of the provisions regarding freedom of establishment and may be reserved for nationals.

In view of the case-law according to which only those activities which have a direct and specific connection with the exercise of official authority can fall under this provision, the Court states that, although the task of the notary is principally the authentication of legal transactions and the authenticated instrument enjoys enhanced probative value and is at the same time rendered enforceable, only instruments or agreements into which the parties have freely entered can be authenticated. The notary’s intervention thus presupposes the prior existence of an agreement or consensus of the parties. Furthermore, the Court states that the notary cannot unilaterally modify the agreement he is called upon to authenticate without first obtaining the parties' consent. The Court concludes that the activity of authentication by notaries does not have a direct and specific connection with the exercise of official authority.

The Court adds that the fact that notaries act in the general interest of ensuring the legality and legal certainty of transactions between individuals is not in itself sufficient for this activity to be regarded as having a direct and specific connection with the exercise of official authority. Regarding the probative value of notarised deeds, the Court states that this is the result of Member States' evidence systems and therefore has no direct impact on the qualification of the activity. Regarding enforceability, the Court states that, in this case also, enforceability depends on the wishes of the parties who appear before a notary in order to give the deed the power of being enforceable.

The Court then examines the other activities entrusted to notaries in the Member States in question, such as involvement in the attachment of immovable property or in connection with the law on successions. Similarly, the Court considers that these activities do not involve the exercise of official authority, to the extent that they are performed under the supervision of a court or in accordance with the client's wishes.

The Court thereby concludes that notarial activities are not connected with the exercise of official

authority within the meaning of the Treaty and that, as a consequence, the nationality requirement under these States' legislation to access the profession of notary constitutes discrimination on grounds of nationality prohibited by the Treaty.

Finally, the Court states that, within the geographical limits of their office, notaries practise their profession in conditions of competition, which, according to the Court, is not characteristic of the exercise of official authority. Along the same lines, the Court adds that notaries in the Member States in question are directly and personally liable to their clients for loss arising from any default in the exercise of their activities, whereas for public authorities, liability for default is assumed by the State.

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