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DISCUSSION PAPER

LEGAL PRACTICE FRAMEWORK IN LIGHT OF EU LAW ON SERVICES AND FREEDOM OF ESTABLISHMENT

I. INTRODUCTORY CONSIDERATIONS

The role of legal profession and responsibility for interpreting and shaping law, provide lawyers with an important place in countries aspiring to join the European Union ("EU"). First and foremost, lawyers play an important role in the fight to respect human rights. Also, lawyers are one of the main driving forces of the economies of states aspiring to join the EU. They advise state bodies and companies navigating through the complex labyrinth of EU law composed of various rules and regulations relating to services, state aid, consumer protection, data protection and other areas that can be a novelty for countries which have not yet transitioned to a market economy and independent institutions. Under EU law, the provision of legal aid by a lawyer is qualified as a service, but under Serbian law¹ the work of a lawyer does not constitute a service, but legal aid, outside the scope of legal framework covering services². Such legal qualification might cause problems when the Republic of Serbia becomes a full member of the EU, as it could require subsequent harmonization of the full range of relevant legal sources in a very short period of time, with all the socio-economic effects related thereto.

The difficulties Serbia will face in regulating the legal profession will not only include drafting regulations, but also finding a compromise that includes several stakeholders - the Serbian Bar Association, the Ministry of Justice, the National Assembly of the Republic of Serbia and the European Commission. In a situation where these changes and compromises are not established during the negotiation process, the Republic of Serbia could face the same problems that Croatia is facing today, which concerns the avoidance of the application of EU rules on lawyers' qualifications³ and the ones regarding the right to provide legal services⁴.

Negotiating Chapter 3 covers issues of the right of establishment and the freedom to provide services. As one of the four elements necessary for the functioning of the EU internal market, the free movement of services is crucial for each of the Member States, but also for the candidate countries. Establishment is an issue covered by the freedom to provide services and represents the right to commence and conduct business in any EU Member State.⁵ It is the duty of the Member States to ensure that the right of establishment for EU citizens and legal entities in any Member State, as well as the freedom to provide cross-border services, do not encounter obstacles in national legislation, with the exceptions set out in the Treaty.⁶ The establishment of a single market, free from legal and administrative barriers, is a fundamental goal of the EU legal framework in this Chapter.

¹ Legal Profession Act ("Official Gazette of the RS", no. 31/2011 and 24/2012 - decision of the Constitutional Court), Article 2

² Constitution of the Republic of Serbia ("Official Gazette of the RS", no. 98/2006), Article 67

³ European Commission, „July infringements package – Part 2: other letters of formal notice“ (2017) [available here](#)

⁴ European Commission, „Commission takes action to ensure professionals and service providers can fully benefit from the EU Single Market for services“ (2019), [available here](#)

⁵ See Chapter 3 – Right of Establishment and Freedom to Provide Services, [available here](#)

⁶ See about Chapter 3 - Right of establishment and freedom to provide services, National Convention on the European Union (NKEU), [available in Serbian here](#)

II. LEGAL PRACTICE FRAMEWORK IN THE EU

1. Development of a legal framework related to the work of lawyers under the EU law

One of the main achievements of European integration is the creation of a European single market, designed to monitor structural changes within the European Union.⁷ The single market has a huge impact on the economies of the Member States since intra-market trade accounts more than a half of the total trade operated within a country when referred to the countries' GDP⁸. The rationale can be found in the absence of customs duties and the removal of regulatory barriers to the free movement of goods and services, which leads to an increase in cross-border business transactions and, consequently, to a greater trade. The rapid development of the European economy and trade has therefore created a demand for lawyers who are able to provide legal services beyond the national borders of their home countries.⁹ The creation of preconditions for practicing law and the provision of legal services within the European Union for lawyers from the Member States has been gradual and could be divided into several phases:

The first phase has existed since the adoption of the Treaty on the Functioning of the European Union¹⁰ („**Treaty**“), guaranteeing the freedom to "provide services"¹¹ and „business settlement“¹². In accordance with Article 21 of the Treaty, Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. In addition, Article 50 of the Treaty stipulates that, in order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of *directives*. The European Parliament, the Council and the Commission perform a wide range of duties in order to achieve this standard, *inter alia* by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade, ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned etc.¹³ Article 57 of the Treaty provides an explanation of what is considered a service in terms of the Treaty and the EU law. Thus, the services include the activities of an industrial character, of a commercial character, but also the activities of craftsmen and the activities of the professions.¹⁴ Also, this article stipulates that, without prejudice to the right of establishment, the person providing a service may temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.¹⁵

In the field of European Union legislation, the interpretation of law plays an important role in finding the exact meaning of the complex regulations that constitute EU law.¹⁶ Therefore, the role of the European Court of Justice (“**ECJ**”) is crucial in preventing Member States from interpreting provisions in a way that would restrict the right of establishment in order to provide services by nationals of other Member States. The ECJ took a

⁷ See Pascal Fontaine, Europe in 12 lessons, Brussels, 2011, p. 40, available in Serbian [here](#)

⁸ For more information on the meaning of EU single market see: Chris Allen, Michael Gasiorek, Alasdair Smith and Peter Birch Sørensen, “The competition effects of the Single Market in Europe” (Economic Policy 13, no. 27, 1998), available [here](#); Patrice Muller, Jenna Julius, Ashwini Natraj, Karen Hope (editor), “The EU Single Market: Impact on Member States” (AmCham EU, 2017) available: [here](#); Jacques Pelkmans, “The single market remains the decisive power of the EU” (CEPS, 2019) available: [here](#);

⁹ Katarzyna Gromek-Broc, “The Legal Profession in the European Union – A Comparative Analysis of Four Member States” (2002) available [here](#)

¹⁰ Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

¹¹ Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390, Articles 56-62

¹² Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390, Articles 49-55

¹³ See Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390, Article 50

¹⁴ See Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390, Article 57

¹⁵ Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390, Article 57 (3)

¹⁶ Rösler, H. (2012). Interpretation of EU Law. in J. Basedow, K. J. Hopt, & R. Zimmermann (editors.), The Max Planck Encyclopedia of European Private Law (p. 979-982) available [here](#)

standing which prevents the Member States to discriminate or impose restrictions on the free movement of goods and services. Such restrictions are also prohibited when it comes to lawyers, as can be seen in the cases of *Reyners* from 1974, *Van Binsbergen* from 1974 and 1976 *Thieffry* case.

The *Reyners*¹⁷ case iterates that any discrimination on grounds of nationality shall be prohibited.¹⁸ In this landmark case for lawyers in the European Union, the Dutch lawyer was denied the right to practice law in Belgium because he is a citizen of another country, although he fulfilled all the legal conditions and passed the necessary exams in Belgium. In the judgment, the ECJ explained that different treatment of domestic citizens and foreigners who are citizens of the EU Member States is not permitted.¹⁹ In addition, the Court took a position that only the activities which are connected to the exercise of official authority are excluded from the application of Chapter 2 of the Treaty when these activities are ancillary and perfectly separable from the normal practice of the profession.²⁰ The *Van Binsbergen*²¹ case is another significant verdict on this topic. In the present case, Mr Van Binsbergen sought to be represented by a Dutch lawyer resident in Belgium before a court in the Netherlands in a dispute regarding social security. Dutch law at the time stipulated that only lawyers based in the Netherlands could act as legal advisers. The ECJ ruled that the Treaty establishing the European Economic Community (EEC) shall be interpreted so that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.²² Other than the already referenced cases, the *Thieffry*²³ case includes issues of diploma recognition and legal qualifications. Mr. Thieffry was a Belgian citizen who earned a PhD in law in Belgium and wanted to pursue a legal career in France.

At first, the French authorities recognized his diploma as equal. However, most Member States apply an additional condition for practicing law in a given country, including France, despite the fact that the legislation of Belgium and France treat diplomas from these two countries as equal. The applicant referred to the French Bar Association, which refused his application, explaining that he did not obtain the title of lawyer at a French university. The ECJ concluded that the freedom of establishment had been violated, in particular taking into account the provisions on the equality of diplomas, and ruled in favor of the the applicant.²⁴

The Treaty on European Union establishes only a general framework for the free movement of goods and services in other Member States. However, the European Court of Justice upheld that the Member States are prohibited to discriminate directly or indirectly in their acts or otherwise restrict the freedom of movement of persons and services. In accordance with the legal acts of the European Union, a distinction is made between the temporary provision of legal services in another Member State without establishment on its territory, the permanent provision of legal services in another Member State which has exercised the right of establishment under the professional title the name of the lawyer of the host country or under the professional title of the home country and the host country.²⁵ According to statistics, the removal of all barriers to entry into the European Union legal services market has not created a large number of foreign lawyers in the countries.²⁶

¹⁷ *Reyners v Belgium*, ECLI:EU:C:1974:68, Judgment of the Court of 21 June 1974

¹⁸ *Reyners v Belgium*, ECLI:EU:C:1974:68, Judgment of the Court of 21 June 1974, p. 650

¹⁹ *Reyners v Belgium*, ECLI:EU:C:1974:68, Judgment of the Court of 21 June 1974, p. 650

²⁰ *Reyners v Belgium*, ECLI:EU:C:1974:68, Judgment of the Court of 21 June 1974, p. 642

²¹ *Van Binsbergen v the Netherlands*, ECLI:EU:C:1974:131 Judgment of the Court of 3 December 1974.

²² *Van Binsbergen v the Netherlands*, ECLI:EU:C:1974:131 Judgment of the Court of 3 December 1974, p. 1310

²³ *Thieffry v Conseil de l'ordre des avocats à la cour de Paris*, ECLI:EU:C:1977:65, Judgment of the Court of 28 April 1977.

²⁴ *Thieffry v Conseil de l'ordre des avocats à la cour de Paris*, ECLI:EU:C:1977:65, Judgment of the Court of 28 April 1977, p. 779

²⁵ See Jonathan Goldsmith, *European integration and advocacy: key issues and challenges*, preparatory document for the IPA Project "Policy and Legal Advice Center (PLAC)" workshop, organized in cooperation with the Ministry of Justice of the Republic of Serbia and the Bar Academy of the Bar Association of Serbia Bar Association, 19.04.2016. p. 2, available [here](#)

²⁶ CCBE Lawyers' Statistics 2018, available [here](#)

Directive 2006/123/EC of the European Parliament and of the Council adopted on 12 December 2006 on services in the internal market²⁷ (the "**Services Directive**") provides that legal services are covered by EU services regulations, including the provisions of the Directive itself. Although this is not explicitly stated in the mentioned directive, the implication is rather clear. Application of the Directive to lawyers is limited only if some of the provisions are in conflict with the provisions of Directive 77/249 /EEC, which deals with the freedom to provide services. Additionally, the Services Directive is limited by the Directive 98/5 /EC on the practice of law, which will be discussed later. In particular, the Services Directive states that Member States will accept a certificate, attestation or other document issued by another Member State as proof that a certain requirement has been met, except in the case of the legal practice, in connection with the application of Directive 98/5/EC on practicing law.²⁸ It also provides for additional derogations from the freedom to provide services, stating that the provisions of Directive 77/249 / EC on lawyers' freedom to provide services are excluded from the scope of Article 16 of the Services Directive.²⁹ Apart from these explicit exceptions, it can be concluded that the legal profession falls under the general range of services in EU law. Although at first glance this topic is more suited to be discussed within the framework of the negotiating Chapter 23, as it concerns justice and fundamental rights, the EU still classifies issues relevant to the practice of law as a part of Chapter 3. Guided by the same logic, the Serbian Bar Association stated that the status of legal practice should, according to its characteristics be treated within the framework of Chapter 23³⁰, however the competent Ministry noted that the legal practice is considered a service that is going to be covered by the Law on Services, which will be an umbrella law that would cover this area once implemented³¹ (in the way that, *inter alia*, the Services Directive does).

Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services³² was the turning point for the practice of law in other Member States. Article 1 of the Directive provides that the Directive shall apply, within the limitations and under the conditions laid down therein, to the activities of lawyers pursued by way of provision of services. The second paragraph of the mentioned Article defines the term "lawyer" as any person who is authorized to perform professional legal activities in the name of one of the determinants from the list of terms for a lawyer in different languages.³³

²⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [available here](#)

²⁸ Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market, Article 5 (4)

²⁹ Directive 2006/123 / EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 17 (4)

³⁰ Report of the Bar Association of Serbia from the meeting held on 8 December 2016 at the Ministry of Trade, Tourism and Telecommunications no. 895/2016, [available here](#)

³¹ Response of the Ministry of Justice to the Bar Association, no. 011-00-33/2017-06 of 10 February 2017, [available here](#)

³² Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, [available here](#)

³³ Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services provides the following list of names:

Belgium	Avocat — Advocaat
Denmark	Advokat
Germany	Rechtsanwalt
France	Avocat
Ireland	Barrister, Solicitor
Italy	Avvocato
Luxembourg	Avocat-avoué
Netherlands	Advocaat

Article 3 of Directive 77/249 provides that lawyers providing legal services in another Member State must use professional titles from the state of origin. In that sense, if an Italian lawyer would like to practice in Germany, he must present himself as *Avvocato* instead of *Rechtsanwalt*. Furthermore, a new lawyer in a host country must indicate the bar association of the home country as the association which issued them the license to practice law.³⁴ In that sense, an Italian lawyer in Germany, from the example above, would have to point out that the *avvocato* is authorized by a certain bar association from Italy (for example, from Milan), to perform legal services.

However, the provision of legal services in host countries does not come unconditionally. Representation of clients in proceedings or before public authorities is carried out only under the conditions established for lawyers in the host country, except for the conditions concerning residence or registration in a professional organization in the host country.³⁵ Lawyers performing the above activities must, in addition, adhere to the rules of professional conduct of the host country, without prejudice to the obligations of the Member State as the country of origin.³⁶ Article 5 of Directive 77/249 lays down additional rules concerning representation in proceedings in host countries. Member States may require, in accordance with local rules and customs, that the "guest" lawyer be introduced to a presiding judge, or to a single judge, and, where necessary, to the President of the relevant Bar Association.³⁷ In addition, depending on the Member State, the host country may require the "visiting" lawyer to work in cooperation with a local lawyer who provides services before the judicial authority in which the proceedings are instituted and who could, if necessary, be accountable to the judicial authorities or authorized persons to represent state entities.³⁸ The most important case related to this Directive is the Commission against Germany from 1985.³⁹ The German authorities have obliged foreign lawyers to work full time with a German lawyer, who would in all cases be the primary or "leading" lawyer before the German courts. This obligation also included the secondary role of foreign lawyers in cases where the representation of lawyers is not mandatory. The ECJ ruled that foreign lawyers should be allowed to practice law independently in cases where representation from a lawyer is not required.⁴⁰

Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained⁴¹ represents a supplement to the legal framework for the provision of legal services within the European Union for lawyers from Member States. This Directive allows lawyers qualified in one Member State to provide legal services in another Member State, on a permanent basis, under a professional title from their own country. The term "lawyer" is defined as any person who is a national of a Member State of the European Union and is authorized to pursue a professional activity under one of the professional titles listed in the

United Kingdom Advocate, Barrister, Solicitor

See Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Article 1 (2).

³⁴ Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Article 3

³⁵ Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Article 4 (1)

³⁶ Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Article 4 (2)

³⁷ Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Article 5

³⁸ Council Directive 77/249 / EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Article 5; The Directive uses the terms *avoué* and *procuratore*, inherent to the relevant legal systems.

³⁹ *Commission v Germany*, ECLI:EU:C:1988:98, Judgment of 25 February 1988

⁴⁰ *Commission v Germany*, ECLI:EU:C:1988:98, Judgment of 25 February 1988, p. 1163

⁴¹ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, [available here](#)

Directive in the various languages in official use of the Member States.⁴² Lawyers wishing to enjoy their rights under this Directive must register with the competent authority (usually a local bar association) in the Member State in which they wish to practice and are required to adhere to the rules of professional conduct of the host country.⁴³ Once registered, a European lawyer can provide legal advice on issues that arise from the regulations produced by their home country, on issues related to international and European Union law, as well as on issues related to the laws of the host country (under certain conditions).⁴⁴

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005, on the recognition of professional qualifications⁴⁵ applies to lawyers from Member States of the European Union who wish to be lawyers in another Member State without moving to that country, by recognizing their already obtained qualifications when applying for a new legal title in another country.

Therefore, the lawyer who is applying is obliged to pass the differential exams, i.e. certain key courses, or to spend a certain period of time (on average three years of practice) as a period of adjustment in the country where they submitted their application.⁴⁶ Having in mind the specifics of the legal profession, in some EU Member States⁴⁷ this Directive has a secondary application, so Directive 98/5/EC and Directive 77/249/EEC apply primarily.

III. THE CURRENT SITUATION AND POSSIBILITIES OF HARMONIZATION OF THE LEGAL REGULATION OF THE ADVOCACY IN SERBIA WITH THE EU LAW

1. Legal framework for the advocacy work in Serbia

The legal profession in Serbia dates back to the 19th century where lawyers played a key role in society, as legal education was a matter of prestige.⁴⁸ The practice of law in Serbia is regulated by the Constitution of the Republic of Serbia and sectoral regulations. According to the Article 67 of the Constitution, legal aid is provided by "legal practice, as an independent and autonomous service, and legal aid services established in local self-government units, in accordance with the law." The sectoral law that regulates the practice of law in Serbia is the Legal Profession Act from 2011. According to this Act, the legal practice is defined as "an independent and autonomous service of providing legal assistance to individuals and legal entities."⁴⁹ Therefore, according to the regulations of the Republic of Serbia, practicing law is not considered a service (as is the case in the European Union), but is seen as providing legal assistance.

Lawyers are organized within their professional association, the Bar Association of Serbia. As prescribed by the Legal Profession Act, it is an independent and autonomous organization which is authorized for certain

⁴² See Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, Article 2

⁴³ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, point 8

⁴⁴ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, Article 5 (1)

⁴⁵ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, available [here](#)

⁴⁶ Jonathan Goldsmith, *European Integration and Advocacy: Key Issues and Challenges*, Preparatory Document for the IPA Project "Policy and Legal Advice Center (PLAC)" workshop organized in cooperation with the Ministry of Justice of the Republic of Serbia and the Bar Association of Serbia, 19 April 2016, p. 2, available [here](#)

⁴⁷ For example, this is the case in Belgium and Switzerland, see the Base of regulated professions in the EU [here](#)

⁴⁸ Interesting and instructive in this sense is the work of Professor Zoran S. Mirković, PhD from the Faculty of Law, University of Belgrade: Zoran S. Mirković, "Belgrade Higher School (1808-1813) and Legal Education in Serbia" in *Annals - Belgrade Law Review* 3/2008 (Faculty of Law, University of Belgrade, 2008)

⁴⁹ Legal Profession Act ("Official Gazette of the RS", No. 31/2011 and 24/2012 - US decision), Article 2 (1)

public acts and activities of general interest, and it consists of nine local bar associations, with its main headquarters based in Belgrade. According to the Legal Profession Act, public power of bar associations include, among others, deciding on applications for registering in the directory of lawyers, directory of joint law offices, register A and register B, directory of trainee lawyers, but also the adoption of a professional code, etc.⁵⁰ The Legal Profession Act also regulates the issue of taking the attorney-at-law exam, which consists of assessing knowledge of relevant domestic and international regulations and legal acts, and can be taken by any individual who has passed the bar exam.⁵¹ Article 4 of the Law also allows for the possibility of foreign natural persons to be registered in one of the two types of lawyer's directories for foreign citizens - Register A and Register B and which provides them with an opportunity to practice law in Serbia. A foreign citizen, registered in the register A of the directory of lawyers, is limited to giving oral and written legal advice and opinions related to the application of the law of his home country and international law. On the other hand, a lawyer registered in the B register of lawyers is equated with a domestic lawyer, provided that they practice law together with a local lawyer for a period of three years from the day of registration.⁵² The right to practice law is acquired when the authorities deliver a decision of lawyers' registration and the lawyer's oath is taken, provided that the individual meets all the criteria that the Law exhaustively states in the initial provisions. There are currently more than 10,000 lawyers in the Republic of Serbia, and the impact of the practice of law on the society is not negligible.⁵³

2. Adoption of the law on services

The path of the Republic of Serbia towards its membership in the European Union implies harmonizing existing regulations and adopting new ones, in order to harmonize with the *acquis*. This process brings a large number of challenges and it is necessary to reconcile different interests and views, in order to reach the best possible solution. The successful harmonization of the legal framework in Chapter 3 "Right of establishment and freedom to provide services" requires the adoption of the Law on Services. From all the above, it is clear that legal activities are considered as a service under the European Union law. Current regulations in Serbia relating to the legal profession are not in line with the *acquis*.

It is very likely that the European Commission will request changes to the Constitution of the Republic of Serbia⁵⁴ and relevant legal provisions, including the already mentioned Article 2 of the Legal Profession Act, which defines the activity of a lawyer as an "independent and autonomous legal aid service", with the aim of harmonizing with the law of the European Union. The argumentation of the Bar Association of Serbia is based on these definitions and it is often cited as a challenge to amend the Legal Profession Act and to recognize the legal profession as a service.⁵⁵ The Bar Association of Serbia reacted to the Government's attempts to pass the Law on Services, which according to the available Draft⁵⁶ included the practice of law. Arguments of the Bar Association of Serbia against this Draft Law were presented at several meetings, first with representatives of the Ministry of Trade, Tourism and Telecommunications⁵⁷, and then with the representatives of the Ministry

⁵⁰ See Legal Profession Act ("Official Gazette of the RS", No. 31/2011 and 24/2012 – decision of the Constitutional Court), Articles 63, 64 and 65

⁵¹ Legal Profession Act ("Official Gazette of the RS", No. 31/2011 and 24/2012 – decision of the Constitutional Court), Article 87

⁵² Legal Profession Act ("Official Gazette of the RS", No. 31/2011 and 24/2012 – decision of the Constitutional Court), Article 25

⁵³ For example, strikes organized by lawyers for several years have paralyzed the work of the judiciary in the Republic of Serbia. One such example is from 2014, when lawyers protested with the aim of reducing their flat tax, more on this can be found [here](#)

⁵⁴ See Constitution of the Republic of Serbia ("Official Gazette of the RS", No. 98/2006), Article 67. This article defines the advocacy as legal aid

⁵⁵ Report of the Serbian Bar Association from the meeting held on 8 December 2016 in the Ministry of Trade, Tourism and Telecommunications no. 895/2016, [available here](#); see also Paragraph Lex, "The Serbian Bar Association requests that the draft Law on Services be withdrawn from the parliamentary procedure" (November 19, 2018) [available here](#)

⁵⁶ Draft Law on Services, see the Serbian version [here](#)

⁵⁷ Report of the Serbian Bar Association from the meeting held on 8 December 2016 in the Ministry of Trade, Tourism and Telecommunications no. 895/2016, [available here](#)

of Justice of the Republic of Serbia, but also in the announcements and decisions of the Association itself that can be accessed by the public.

Although the arguments of the Bar Association will be presented in more detail below, however it is important to mention several remarks in relation to the proposed text of the Law on Services:

- Practice of law is a service and lawyers are service providers, which is not in accordance with the Constitution, as the highest legal act of the Republic of Serbia, in which lawyers are defined as providers of legal aid, hence not in accordance with the Legal Profession Act either;⁵⁸
- Exclusion of participation of the legal practice from working on negotiating Chapter 23 and restrictions in Chapter 3⁵⁹
- Foreign individuals may practice law without having permanent residence in the Republic of Serbia;
- Foreign lawyers are not obliged to pay a registration fee for the Serbian Bar Association, but they are allowed to advertise their services in Serbia, unlike domestic lawyers,⁶⁰
- According to the Draft Law, lawyers can be subject to inspection.

In early 2017, representatives of the two sides agreed on the implementation of the Services Directive⁶¹ into the legal system of the Republic of Serbia and agreed that this Directive will be implemented exclusively within the law governing the practice of law, with the active participation of lawyers.⁶²

Representatives of the legal practice were, among other things, dissatisfied with the fact that the practice is solely discussed under Chapter 3 which is related to services, and not under Chapter 23, which deals with the issue of justice and human rights and freedoms.⁶³ Of course, it should be kept in mind that the content of the negotiation Chapters and issues covered are determined by the EU, and that it is not possible to influence the systematization of relevant topics of the *acquis*. In addition, it has been established that the relevant entity for negotiations is the Ministry of Justice, and not the Ministry of Trade, Tourism and Telecommunications, as initially proposed. According to the Serbian Bar Association report, this turnaround came after Jonathan Goldsmith's expert opinion was obtained⁶⁴ within the PLAC project⁶⁵, which determined that the necessary alignments of the Serbian legal framework with the relevant directives of the European Union can be achieved through the already existing Legal Profession Act.

⁵⁸ Draft Law on Services, see the Serbian version [here](#)

⁵⁹ Report of the Serbian Bar Association from the meeting held on 8 December 2016 in the Ministry of Trade, Tourism and Telecommunications no. 895/2016, [available here](#)

⁶⁰ See Čedomir Kokanović, Law on (Lawyer) Services, published on November 15, 2018. years, [available http://boljaadvokatura.com/zakon-o-advokatskim-uslugama/](http://boljaadvokatura.com/zakon-o-advokatskim-uslugama/)

⁶¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

⁶² Report no. 908/2016 from the meeting of the Serbian Bar Association with the representatives of the Ministry of Justice held on 13 December 2016, [available here](#); Response of the Ministry of Justice to the Bar Associations in the Republic of Serbia no. 011-00-33/2017-06 from 10 February 10 2017, [available here](#)

⁶³ Report no. 908/2016 from the meeting of the Serbian Bar Association with representatives of the Ministry of Justice held on 13 December 13 2016 [available here](#); See K. Živanović, *Serbian Bar Association: The decision to exclude the bar from the negotiations within Chapter 23, which refers to human rights, freedoms and justice, was made according to the directive of the European Commission. The Bar is dissatisfied with this decision, and as a last resort, they announce the suspension of work, Danas, January 31, 2017, available here and here*

⁶⁴ Jonathan Goldsmith's final report on the PLAC Project, as well as his suggestions for amending the Legal Profession Act can be found here: [Final Mission Report Jonathan Goldsmith SRB](#) and [Comments and proposal for changes to the Legal Profession Act](#); Other documents from this project can be found by clicking on the link [here](#)

⁶⁵ PLAC Project is a project to support accession negotiations with the EU, more about: [here](#); See EU Integration and the Legal Profession – Key Questions and Challenges, 1 October 2018, [available at: http://euinfo.rs/plac2/en/eu-integracije-i-advokatura-kljucna-pitanja-i-izazovi/](http://euinfo.rs/plac2/en/eu-integracije-i-advokatura-kljucna-pitanja-i-izazovi/);

See also the Report of the Serbian Bar Association from the meeting held on 8 December 2016. in the Ministry of Trade, Tourism and Telecommunications no. 895/2016, [available here](#)

In mid-November 2018, the Serbian Bar Association reacted to the Draft Law on Services, stating that it does not comply with the agreement reached in 2015 which ended the lawyers' strike, according to which it was agreed that in the future the legal practice will actively participate in drafting regulations which affect its work and position in Serbia.⁶⁶ Furthermore, the Bar Association of Serbia pointed out that the procedure for enactment of the Draft Law on Services was not respected as public hearings were not held and the Bar Association, as the representative of the legal practice in Serbia, and contrary to the agreement from 2015, was not consulted for an opinion on the matter.⁶⁷ Additionally, the Bar Association requested the renouncement of the Draft from deliberation, and possibly the amendment of the provisions concerning exceptions to the application of this act. The Bar Association of Serbia also requested for the removal of part of the provision on exemptions from the general prohibition of restrictions on freedom of cross-border provision.⁶⁸ In a statement that was published a few days later, the President of the Bar Association of Serbia informed the public that the Ministry of Justice has accepted their request and that it would launch an initiative to withdraw the Draft Law on Services from deliberation⁶⁹, which was confirmed by the adoption of the Conclusion of the Government of the Republic of Serbia on the withdrawal of the act from the procedure in early December 2018⁷⁰.

According to the legislative procedure, a working document is prepared.⁷¹ Often, a public hearing is organized, where all interested parties can contribute to the work on the draft by presenting their remarks and suggestions.⁷² A public deliberation is obligatory during the drafting process which significantly impacts the manner in which an issue is approached and regulated or how an issue of special interest to the public is being deliberated and regulated.⁷³ Based on the necessary opinions that are subsequently collected from other ministries and bodies, and the approval of its competent committee, the Government defines the draft law and forwards it to the National Assembly for adoption.⁷⁴ However, the state organ or the individual proposing the law reserves the right to withdraw it from the procedure at any time until the end of the debate at the session of the National Assembly.⁷⁵

In addition to these procedural reasons, the position of legal practitioners is that they cannot be classified as service providers, given that this institution was founded on the right to legal aid of citizens, as their human right.⁷⁶ In legal circles, it has been articulated that lawyers are in agreement with the Code of Professional Ethics⁷⁷ which states that they cannot advertise their services.⁷⁸ Arguments also include⁷⁹ provisions of the Legal Profession Act on the basic duties of a lawyer to essentially and permanently practice law, to provide

⁶⁶ Decision no. 860-01 / 2018 of the Management Board of the Serbian Bar Association from 17 November 2018, [available here](#)

⁶⁷ Decision no. 860-01 / 2018 of the Management Board of the Serbian Bar Association from 17 November 2018, [available here](#)

⁶⁸ The Bar Association requested an amendment to the provision of Article 3 (2) (6) and the deletion of the provision of Article 15 (1) (8) (4) of the draft Law on Services; see Decision no. 860-01 / 2018 of the Management Board of the Serbian Bar Association from 17 November 2018, [available here](#)

⁶⁹ Statement of the President of the Bar Association no. 882/2018 of 23 November 2018, [available here](#)

⁷⁰ Conclusion of the Government of the Republic of Serbia 05 No.: 011-11962/2018 of 6 December 2018, [available here](#)

⁷¹ Rules of Procedure of the Government of the Republic of Serbia ("Official Gazette of the RS", No. 61/2006 - consolidated text, 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013, 76/2014 and 8/2019 - other regulation), Article 38 (1)

⁷² Law on State Administration ("Official Gazette of the RS", No. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018 and 30/2018 - other law), Article 77; See Explanation of the notion of the draft law on the website of the National Assembly of the Republic of Serbia, [available here](#);

⁷³ Rules of Procedure of the Government of the Republic of Serbia ("Official Gazette of the RS", No. 61/2006 - consolidated text, 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013, 76/2014 and 8/2019 - other regulation), Article 41 (1); See also Law on State Administration ("Official Gazette of the RS", No. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018 and 30/2018 - other law), Article 77.

⁷⁴ Rules of Procedure of the Government of the Republic of Serbia ("Official Gazette of the RS", No. 61/2006 - consolidated text, 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013, 76/2014 and 8/2019 - other regulation), Article 37 (1)

⁷⁵ Rules of Procedure of the National Assembly ("Official Gazette of the RS", No. 20/2012 - consolidated text), Art. 159 (1)

⁷⁶ Report of the Bar Association from the meeting held on 8 December 2016 in the Ministry of Trade, Tourism and Telecommunications no. 895/2016, [available here](#)

⁷⁷ Code of Professional Ethics of Lawyers ("Official Gazette of the RS", No. 27/2012), Article 13.2

⁷⁸ See *Mirjana Milić Drvenica, Does a lawyer provide legal assistance or provide a service ?*, published on the Blog of the Bar Association of Serbia, March 2, 2016, [available here: https://blog.aks.org.rs/da-li-advokat-pruza-pruza-pravnu-pomoc-ili-vrsi-uslugu/](https://blog.aks.org.rs/da-li-advokat-pruza-pruza-pravnu-pomoc-ili-vrsi-uslugu/)

⁷⁹ See *Mirjana Milić Drvenica, Does a lawyer provide legal assistance or provide a service ?*, published on the Blog of the Bar Association of Serbia, March 2, 2016, [available here: https://blog.aks.org.rs/da-li-advokat-pruza-pruza-pravnu-pomoc-ili-vrsi-uslugu/](https://blog.aks.org.rs/da-li-advokat-pruza-pruza-pravnu-pomoc-ili-vrsi-uslugu/)

legal assistance professionally and conscientiously, to maintain legal secrecy, and to maintain a solid reputation that the legal practice has in their professional work and in their private affairs which are available to the public.⁸⁰ Finally, as an argument in support of the view that the practice of law cannot be considered a service, the provisions of the Legal Profession Act on the obligation to provide and refuse to provide legal aid were also used.⁸¹

If the practice of law were to be recognized as a service, the Legal Profession Act would remain a sectoral law regulating legal services in Serbia, while the Law on Services would be the umbrella law covering it. As stated in the introductory remarks, any avoidance of full application of EU rules related to the legal profession would provoke a reaction from the EU Commission and other relevant stakeholders and would be an obstacle in the process of negotiations on Serbia's membership in the European Union. In addition to the discussed issues, it should be kept in mind that, in the context of defining the legal practice as a service, and in order to improve the position of citizens in obtaining legal services, any contract between a client and a lawyer could eventually fall under consumer protection. As seen in the *Šiba*⁸² case, a legal services contract between a lawyer and a client should be treated like any other service contract that deals with unfair terms of consumer contracts⁸³ for the purposes of Directive 93/13 / EEC.⁸⁴ In this case, the dispute arose because the lawyer was not paid for the work performed, and the plaintiff considered that her rights should be protected by the Directive 93/13/EEC. As already mentioned, the court found that the contract between the lawyer and the client regarding the provision of legal services requires an equal treatment with other consumer contracts.⁸⁵

IV. THE PERSPECTIVE OF THE DEVELOPMENT OF THE SITUATION IN CHAPTER 3

All candidate countries for accession to the European Union must provide a legal framework for business settlement for citizens and legal entities from the European Union, which includes ensuring the freedom to provide cross-border services. *Acquis Communautaire* requires, in the field of legal practice, a recognition of qualifications and diplomas between Member States, while for other professions one must pursue a training program in order for their qualifications to be automatically recognized and accepted.⁸⁶ Furthermore, it should be noted that even though a certain candidate country is conducting negotiations for accession to the European Union, it does not mean that there is a possibility of selective harmonization with the law of the European Union. On the contrary, during this process, the candidate countries negotiate the dynamics of the harmonization of their legislative framework, and whether it will be harmonized with the EU framework before the accession of the candidate country, or the so-called transitional period or even exemptions for certain issues of the *acquis*.

According to the European Commission's report on Serbia from 2019⁸⁷, Serbia is still moderately prepared in the areas relating to the Chapter 3. The Commission's recommendations from 2018 have not been implemented and are still considered as valid and necessary.⁸⁸ The recommendations in question give special attention to: the adoption of the umbrella Law on Services, full harmonization of sectoral laws with the umbrella

⁸⁰ Legal Profession Act ("Official Gazette of the RS", No. 31/2011 and 24/2012 - US decision), Article 15

⁸¹ Legal Profession Act ("Official Gazette of the RS", No. 31/2011 and 24/2012 - US decision), Articles 18.19; See Mirjana Milić Drvenica, *Does a lawyer provide legal assistance or provide a service?*, published on the Blog of the Bar Association of Serbia, March 2, 2016, available here: <https://blog.aks.org.rs/da-li-advokat-pruza-pruza-pravnu-pomoc-ili-vrsi-uslugu/>

⁸² *Birutė Šiba against Arūnas Devėnas* (C-537/13), ECLI:EU:C:2015:14

⁸³ *Birutė Šiba against Arūnas Devėnas* (C-537/13) ECLI:EU:C:2015:14, Judgment of 15, January 2015, p.7, para. 35

⁸⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, available [here](#)

⁸⁵ *Birutė Šiba against Arūnas Devėnas* (C-537/13) ECLI:EU:C:2015:14, Judgment of 15 January 2015, p. 7, para. 35

⁸⁶ See Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications

⁸⁷ European Commission, Republic of Serbia Report for 2019, Brussels, May 29, 2019, *Serbian version available here*

⁸⁸ European Commission, Republic of Serbia Report for 2019, Brussels, May 29, 2019, section 6.3

Law and the *acquis communautaire* and the establishment of a single point of contact, as a portal that enables service providers to obtain information and conduct all administrative procedures online.⁸⁹ Also, the European Commission stated that the Republic of Serbia should adopt the Law on Postal Services and the relevant bylaws and consequently strengthen the capacities of the postal services inspectorate, as well as pass a new Law on mutual recognition of professional qualifications. The Law on Postal Services was adopted a few months later.⁹⁰

In the Republic of Serbia, the right of establishment which allows one to work is regulated by: The Companies Act⁹¹, the Law on the Procedure of Registration with Business Registers Agency⁹², the Law on Cooperatives⁹³, the Law on Public Services⁹⁴ and the Law on Employment of Foreign Citizens.⁹⁵

V. CONCLUSION

The problems of harmonization of Serbian law with the law of the European Union in the field of services are multi-layered, while the issues encountered in the field of legal profession are one of the key ones. The whole issue of transposing the rights of the European Union in the field of services into the legal order of Serbia is reflected in the case of the proposal of the Law on Services⁹⁶. Insight into the summary of the proposal of the negotiating position for Chapter 3⁹⁷, it was established that the Republic of Serbia has reached a high level of harmonization with the *acquis communautaire*, but that, in accordance with the European Commission Report, Serbia is obliged to submit a detailed strategy on harmonization of legislation in the field of professional qualifications. Consequently, it is recognized that alignment with the *acquis* is needed and that national legislation must implement Directive 2006/123/EC on services in the internal market.⁹⁸ The directive will be fully implemented in the text of the new Law on Services, which is currently being drafted. Furthermore, it was indicated that most of the provisions of the new Draft Law on Services will apply on the day of accession to the European Union. The provisions of the Draft Law on Services will not apply to the legal profession, which is regulated by the sector itself. Compliance with the Services Directive and the sectoral directives relating to the legal practice will be done exclusively through sectoral regulations. However, it should be emphasized that the content and impact of the Services Directive cannot be isolated or limited in this way. The practice of law falls under the regime of services, and cannot be excluded from the scope of Chapter 3. Finding a solution exclusively within Chapter 23, according to which the issues of the legal practice would be resolved, are contrary to the legal qualification that this activity has in the EU law.

The discussed negotiating position was adopted during the Government session at the end of 2019 and now the decision of the EU bodies on the opening of this Chapter is awaited.

⁸⁹ European Commission, Republic of Serbia Report for 2019, Brussels, May 29, 2019, section 6.3

⁹⁰ Law on Postal Services ("Official Gazette of the RS", No. 77/2019); see also the Assembly adopted the Law on Postal Services, RTS Portal, 30.10.2019, available [here](#)

⁹¹ Companies Act ("Official Gazette of the RS", No. 36/2011, 99/2011, 83/2014 - other law, 5/2015, 44/2018, 95/2018 and 91/2019)

⁹² Law on the Procedure of Registration with Business Registers Agency ("Official Gazette of the RS", No. 99/11 and 83/14 and 31/2019)

⁹³ Law on Cooperatives ("Official Gazette of the RS", 112/15)

⁹⁴ Law on Public Services ("Official Gazette of the RS", No. 42/91, 71/94, 79/2005 - other law, 81/2005 - amended other law, 83/2005 - amended other law and 83 / 2014 - other law)

⁹⁵ Law on Employment of Foreign Citizens ("Official Gazette of the RS", No. 128/2014, 113/2017, 50/2018 and 31/2019)

⁹⁶ Draft Law on Services, available [here](#)

⁹⁷ Summary of the proposal of the negotiating position of the Republic of Serbia for the Intergovernmental Conference on the Accession of the Republic of Serbia to the European Union for Chapter 3 Right of Business Settlement and Freedom to Provide Services, considered within the procedure of no. 337-8062 / 2013 ("Official Gazette of the RS" No. 84/2013, 84/2014 and 71/2015)

⁹⁸ Summary of the proposal of the negotiating position of the Republic of Serbia for the Intergovernmental Conference on the Accession of the Republic of Serbia to the European Union for Chapter 3 Right of Business Residence and Freedom to Provide Services.

The role of the Draft Law on Services within the legal framework of the Republic of Serbia is to regulate the issue of providing services on the Serbian market in an appropriate and complete manner, and to align the legal framework with the relevant EU legal framework. The list of services to which the Services Directive refers, and thus the future Law on Services that transposes it into our system, is not final. Among others, it includes legal services as well. Although the adoption of this Law is not an indicator of the opening of negotiating Chapter 3, it is nevertheless an important circumstance in the process of harmonization of Serbian legislation and will probably be one of the key issues in closing this negotiating Chapter. Currently, the latest Draft of the Law on Services is still waiting to be put up for deliberation. As future developments are still expected, from both domestic and EU bodies, it is up to the interested parties in this process to find satisfactory solutions and create a sustainable system in which the legal profession in Serbia will be clearly regulated in the future.



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