

KOBER-SMITH & ASSOCIATES
NOTARY PUBLIC

6 CARLOS PLACE LONDON W1K 3AP
TELEPHONE: 020 7499 2605 FAX: 0207 907 9939
E-MAIL: notary@notarypublicinlondon.com
WEBSITE: www.notarypublicinlondon.com

Charlie McCreevy
EU Commissioner for the Internal Market
200 rue de la Loi
B-1049 Brussels
Belgium

22nd May 2006

Dear Sir,

Notaries Illegal Barriers to Trade Inaction by the Commission

Thank you for the reply to my MEP, Mr John Bowis, which you sent on the 10th May 2006.

I see that you say that you think asking Member states who are not applying the Directive on recognition of diplomas to publish their arguments on the Internet is “beyond the remit of the Commission”.

I disagree. The remit surely is to ensure that Community law is obeyed, and that free movement is enforced. The problem you have in enforcement is that your department have delayed so long enforcing the matter (perhaps deliberately) that you now have a large number of States who do not wish the law to be applied.

Although these States profess confidence in the notaries being outside the Treaty, (thanks to Article 39(4) or Article 45), they are reluctant to either publish their arguments or have the case decided by the Court of Justice. One would have thought that such states would be delighted at the opportunity to prove, in the Court, that they are right. Oddly, this does not appear to be the case.

It may be that you are saying that you do not have the power to compel States to publish these arguments. If this is so, then you could always request them to do so, and publish the reply. You could, even more simply, publish all the arguments in summary form on the Internet yourself. There is, to my knowledge, nothing whatever in the Treaty which could prevent you from doing this. The pros and cons of different positions and possible courses of action are frequently spelled out on the Europa site and there is no reason whatever why these arguments should not be.

The alternative, if there were to be any public discussion of these points, would be

Principal: Mark Kober-Smith

- (a) for the countries to willingly publish these arguments themselves. Since they have had fifty years since the beginning of the Common Market to do this, and have not done so, it would seem very unlikely that they will start now.
- (b) for private individuals, such as myself, to drag these arguments out of governments unwilling to disclose them. I have tried to do this, with the help of my MEP, but Italy, for example, simply refuses to answer. It is one of the “successes” of your department in that Italy has allegedly dropped the nationality condition. Italy refuses, however, to even acknowledge my application to work there, let alone reply. Spain, to take another example, keeps alleging official authority applies, when everyone knows that once the bond of nationality has been dropped this argument cannot be used. Germany has replied to me simply to say that official authority applies, but will not answer my questions as to how it allegedly applies, or whether I could do work there as an English notary.

The whole process is characterised by bad faith, going slow (or not going at all!), and I would have to say that one is forced to draw a conclusion of deliberate dishonesty on behalf of the States. They simply do not wish, on any account, to allow UK notaries to work on their soil and refuse to engage in debate on the issue. Since I am not one of their nationals I do not have any rights to extract this information. Only you can do this, and I suggest that by your complicity in keeping their arguments secret, you are not only making a mockery of democracy and open debate, but you are violating my rights as an EU citizen.

Indeed there is a very pressing reason for your own department, and for the process of this investigation, why these arguments should be made public. It is very clear that France, to name one country, has not been open and frank with you about the situation regarding notaries. It forgot to mention that its own Cour de Cassation has specifically ruled that notaries do not exercise public authority.

This fact was not uncovered by your department, despite years on the case and two chances for France to disclose the point. Please note that I am not necessarily criticising any individual in your department directly. I am sure all of them have far too many cases, and not enough time. I also note that Mr Visée, who is your official in charge of this file, thought that notaries in France have separate areas as territories in which they alone can practise. This was the case, but the rule on territories was abolished in 1996.

The clear concern is that all the work, painfully slow though it has been, over far too many years, has been largely wasted, since you do not have the relevant facts. I was also told by Mr Visée that the Spanish sea captains’ cases posed a problem for the Commission in respect of this file. This is not at all the case. The so-called “notarial functions” mentioned are those of registering births, deaths and marriages. None of these are notarial functions. But if we think a moment about what notarial acts could be done on board a ship, we can see that captains are not competent to draw up transfers of land (since they do not have the legal expertise or access to the Land Registry to check title, nor is there any point in them certifying documents (since the documents cannot be used until the ship gets to port). The only conceivable function

would be keeping wills of dying passengers, and evidently this is not a matter where the captain imposes his will on anyone.

This is of course why public discussion of these points is vital. So long as notaries and the States know that those investigating them will not know as much about the profession and the law of the country as the notaries and the State do, they are under no pressure to prepare a good case. Indeed, they can lie and deceive, with the likelihood that they will not be found out.

Putting arguments on the Web will vastly increase the number of those who can review the arguments and facts presented by notaries, and help your staff win the legal and factual battle. The secrecy you defend would only be justified if there were full disclosure by the States and notaries, and your staff had the time to independently review these arguments. Neither is the case.

Let us take one specific reminder from a Mr Redoutey, a French notaire who now works as an avocat. He points out that the court in *Reyners* stated that the activities which a State could reserve to its nationals had to have a “direct and specific connection with the exercise of official authority”. This is not the same as the authority French notaires claim, which is an indirect authority to authenticate documents. This point alone would be enough to defeat the French claim for exclusion.

Additionally, I made it clear in my initial complaint that you would need to get precise statistics from the States as to how much time was spent by their notaries on each and every separate legal activity and their explanation, in each case, of exactly how the authority existed and was exercised in respect of each activity.

This is because the Article 45 exemption only excludes **activities** not professions.

The facts are easy to find, since each notarial act is charged at different rate. It is very easy for each State to work out how much notarial activity is

1. Transfers of Land
2. Authentication of the signing of documents
3. Drawing up and storing wills
4. Supervising lottery draws
5. Giving advice
6. Writing letters
7. Setting up companies
8. Administering estates

However, I suspect that you have not received any breakdown at all of these activities. This will be the case, since notaries only hope is to claim that all their activities are inseparably linked and that all involve official authority. Once they admit that even one of their activities does not involve such authority, the game is over.

Have you got a breakdown of these activities and such an explanation, or have you simply been sent, as I predicted at the beginning of my complaint, simply a lot of general waffle about how the notaries have been appointed by the State?

Principal: Mark Kober-Smith

To exercise official authority, as defined by the Court of Justice, notaries would have to be exercising coercive power over citizens in the general interests of the State. One can see from a list of the above activities, (which are basically what notaries do) that none of them appears to involve either coercive power nor the interests of the State.

The simple truth is that if anyone was forced to sign or do anything as a result of the power of the notary the contract or document would be void for duress. It is indeed a key professional rule that we do not seek to impose ourselves or our will on others, but seek instead to put the intentions of the contracting parties into effect.

We carry out the will of others, and the much touted example of bailiffs being called in when a debt signed in front of a notary is not paid is simply an example of this. If the parties do not agree to such an enforcement clause, then one cannot be added. If they do agree to such a clause, then the notary, by signing off the enforcement, is again carrying out the will of the parties. Again, I am sure that statistics as to the frequency of use of this remedy will be lacking, though they are essential to decide the issue. If, as the Court of Justice mentioned in the sea captains' cases, the amount or frequency of times a claimed activity is vital, then you need to have exact figures or how many times this remedy is used. (It is worth noting in this context that the remedy, if it excludes the jurisdiction of the courts and hence a fair trial of the issues, is probably a breach of human rights. The Spanish courts have ruled that this type of extra judicial remedy is indeed unconstitutional).

So I ask, again, for you to publish the arguments you already have (since whatever you remit you certainly **can** do this), and the statistical breakdowns, so that others can see what else, if anything, the notaries have up their sleeve. To do so is simply to move a smidgin towards some kind of fairness in debate, instead of the current furtive, and completely undemocratic, hiding of arguments and views, by supposedly articulate lawyers.

For completeness, I attach a summary of the issues. Of course, for a proper debate, one needs full evidence, and full disclosure, the very thing your department is denying. I am happy to publish my arguments, or for you to do so, provided this is part of open debate. You will see mine are already viewable on the Internet. Unlike continental notaries, I am open to debate.

The matter must be resolved, since, if the notaries are right, and are exempt from EU law, there is no point wasting time putting them into Directives like that on Recognition of Qualifications or indeed the Services Directive. Such Directives could never override a Treaty exemption.

Yours sincerely
Mark Kober-Smith

Principal: Mark Kober-Smith

Why do Notaries defend putting other notaries in prison for working abroad?

It is for those who seek to avoid compliance with the law to justify their exemption, not the reverse.

The reverse is perversely true of the debate about notaries.

Notaries should, in all logic, be treated in exactly the same way as other professionals. Doctors and architects, and solicitors and avocats, can work all over Europe, taking extra examinations where needed, why not notaries. The right to free movement is one guaranteed by the EU Treaty.

Notaries refuse to allow such movement, and claim that no-one other than a French national can work as a notary in France, nor can anyone but a German work as a German notary and so on for 17 of the 25 EU States.

Notaries refuse to explain themselves, or engage in open debate, simply claiming that they exercise official authority under Article 39(4) or Article 45 of the EU Treaty.

These articles exempt from free movement those activities which are connected with the exercise of official authority. The first applies to jobs in the public service, the second to services provided by professionals.

The reader will note immediately the first illogicality, i.e. that these articles refer to two different situations, so the notaries cannot all fall under the same exemption even by their own admission.

However, we will look at both Articles and see the common and separate points.

Article 39(4)

This section gives States the right to restrict “employment in the public service” to its own nationals. Since the exemption is wide there have been many cases where the States have tried to interpret this as broadly as possible and the Court has tried to restrict the meaning.

In *Commission v. Belgium (re Public Employees)* (Case 149/73) the Court decided that the wide words of 39(4) had to be confined to cases where the job involved the exercise of official authority and safeguarding the general interests of the State. It would thus not apply to most jobs in the public service.

In *Bleis v. Ministère de l'Education Nationale* (Case C-4/91) the Court stated that the idea of public service « presumes on the part of those occupying the posts the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality ».

It is not clear why notaries quote this clause. It is probably because they are hedging their bets, but it is immediately clear that legal advice and work on transferring property have no intrinsic element which requires them to be done by a Belgian in

Belgium or a French person in France. Anyone competent can do the job, and, in any event, most notaries are not employed by the State at all, so the clause is irrelevant.

Additionally we can see:

- Freedom of movement of persons is a key EU freedom and any exemption must be tightly construed. We do not have this, simply a blanket ban on any and all activities undertaken by notaries being done by non nationals
- There is no reason why suitably qualified and insured lawyers cannot work in other EU countries than the one in which they qualified. Solicitors and avocats can, why not notaries?

Article 45

This exempts those activities connected with exercise of official authority, a term helpfully not defined by the EU Treaty. Key cases on the question have established that this “official authority” exemption must be interpreted very narrowly, and that it is not for the States to define what it means, since otherwise each State could simply say all its citizens exercised such authority and free movement would be at an end.

But in any event:

1. The Court of Justice has clearly ruled that professions as a whole cannot be excluded from free movement, only activities, so the proposed amendments are in fact contrary to EU law (*Reyners*)
2. Notaries seek exclusion from free movement on the basis of an argument (“official authority”) which has almost never succeeded in the Court of Justice, and which was rejected when similar arguments were produced in respect of other lawyers in the case of *Reyners* [Case C-2/74]
3. The French Cour de Cassation (the highest court in France) has stated that French notaries definitely do not possess official authority [(N° de pouvoir : 98-83514)]
4. Since the notarial profession in Europe was largely modelled on the French notarial system, it is very likely that exactly the same arguments will apply in many other EU countries.
5. The exercise of official authority needs to be the exercise of powers beyond the general law and powers of constraint and coercion over citizens. This is something notaries do not do.

To quote the Cour de Cassation: “dès lors qu’un notaire, qui n’est pas investi de prérogatives de puissance publique, n’a pas la qualité d’agent de l’autorité publique” [since a notary, who is not someone invested with the prerogatives of official authority, does not have the status of an agent of public authority]

So French notaries, who still claim this exemption with regard to Europe, are not even believed by their own national courts!

Principal: Mark Kober-Smith

This is indeed old law and to quote from the court again:

« - les officiers ministériels : les notaires ne peuvent être considérés ni comme des fonctionnaires publics, ni comme des dépositaires ou agents de l'autorité publique, ni comme des citoyens chargés d'un service public ; ils n'exercent leur ministère que dans les intérêts privés (Crim., 5 janv. 1935, *D.H.*, 1935, p. 165) ; »
{ Translation: notaries cannot be considered either as civil servants or agents of public authority, nor as agents put in charge of a public service, they do their work only for private interests }

Of course, the fundamental question is, what is so special about what a notary does that only a national can do it?

There is no answer to this question save one word : Nothing

Amusingly, the official authority excuse seems only to be quoted when it suits the interests of certain groups. For example, in Germany you can be the Head of Police, and arrest, or indeed shoot anyone in the line of duty, but you do not have to be German to do the job. To be a German notary, you have to be German. Which profession is more likely to use coercive force in the general interests of the State?