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Mr Julian Farrell  
Director, EU Economic Reform  
DTI  
1 Victoria Street  
London SW1H 0ET

30<sup>th</sup> May 2006

Dear Mr Farrell,

**Notaries Illegal barriers to work in Europe**

Thank you for your letter of 23<sup>rd</sup> March. I had not been under any illusion that SOLVIT would solve my case. Of course, it has not done so.

I predicted that France would simply waste time and give a two line brush off, saying that Article 45 applies. I will have to upgrade the crystal ball, since they took three lines, although the page was narrow.

My original question remains, what will the U.K. government do to help us? I say us, because as you know the Notaries Society, which represents 95% of all notaries in England and Wales, supports the position I have put to you, i.e. that we should be allowed to work in Europe, and that the barriers to trade should be removed.

At present, we have to spend lengthy periods in prison for the privilege of working abroad, since non-nationals are simply not allowed to act in most EU countries, even if the matter does not concern the law of the other country i.e. even if it only concerned English law.

You mention the Services Directive and the U.K.'s strong support for the inclusion of notaries. I am glad to hear of it. However, you will appreciate that even if the notaries, by some unlikely miracle, did get put in the Services Directive, nothing would change on the ground, either now or in the next 100 years, without legal action.

This is because, if notaries are right, and they are exempt from free movement under Article 39(4) or Article 45, then they are exempt. No Directive could ever change that, since the Treaty overrides both Directives and contrary provisions of national law.

We have seen this already with the Qualifications Directive, Directive 2005/36. Charlie McCreevy is right to suggest that the notaries are, *prima facie*, inside the

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Directive. But though they are not excluded in the wording, the Treaty does exempt activities covered by official authority from free movement. I have applied to Spain and Germany and Austria to work there on the basis of the Directive. They all chorus that it does not apply, basically because of Article 45.

The question is, are notaries covered by Article 45 or not?

The only entity that can decide this point is the Court of Justice. The Commission does not want to sue, since it has to get a vote past all the Commissioners, most of whom are appointed by governments sworn to protect notaries (and to make sure their taxpayers pay any damages bill!).

So the only candidates left for suing the notaries are the UK government and me. I think that the government has more resources than I have, both in expertise and cash. If I sue, I risk my funds for a benefit that accrues to everyone. In addition, the government, if it sues, can force the matter to go direct to the ECJ. I would be at the discretion of the local court, and might have to fight my way to the highest court in France, before I could get a referral to the ECJ.

I think the fair solution is for the UK to sue itself, or to fund me or a trade association for the purpose which will sue and get the decision.

I also want an end to the secrecy of the debates. I have only been able to find hints and guesses as to the position of the various countries, since as soon as you press them for reasons and statistics, they simply shut up, and not even my MEP can extract an answer. I want your department to demand, and obtain, full, detailed, written, public reasons for the exclusion of notaries by these governments, and publication in full of these on the Internet, for analysis, objective and full, by other lawyers. I think much merriment will be had, as the absurdity and the paucity of these arguments is made plain.

In short, I am asking for a yes or no answer to the following questions

1. Will the U.K. government sue to enforce free movement rights for UK notaries?
2. Will it demand full and open publication of all alleged arguments for the retention of these illegal barriers to trade?
3. If the UK government will not sue, will it assist English notaries by funding their legal actions to do so?
4. Do you accept that trying to get notaries into the Services Directive is essentially a waste of time, since we have seen that even if notaries are in a Directive they refuse to observe it, and that if they are exempt from free movement no Directive could change that?

I notice that Gerry Sutcliffe MP, who was and perhaps still is Minister for Employment Relations and Consumer Affairs, has been writing to MPs saying that notaries are not covered by Directive 89/48. As you know, this is incorrect, since this Directive merely had the same exclusion as in Directive 2005/36, i.e. **if** the activity was covered by official authority it was exempt, but since notary activities are not so

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covered, they are not exempt. I hope you will be able to put him right on that point. I also note from Mr Sutcliffe's letters that he seems to think all a State has to do is cry "official authority" and that is the end of the matter, in the absence of a Directive.

In fact, as you know, the fundamental point about the EU is that it is designed to further free movement, which is a basic right. No Directive at all is needed to allow us to work abroad, as shown by numerous cases such as *Reyners* and *Vlassapoulou*. What is needed is the will to enforce the rules we already have.

Does the UK have that will?

I look forward to hearing from you.

Yours sincerely,

Mark Kober-Smith

P.S. I have asked Celia Kissoon, twice, for the relevant Freedom of Information Act form to ask questions about SOLVIT. I want to ask about its success rate, and the other means you have at your disposal to put pressure on governments to drop illegal barriers such as these, and to supply adequate reasons.

I suspect that the answer will be that you have few successes, and that many cases simply waste time for the applicant, since the governments simply cry "official authority", fail to give arguments, and you then throw the case back to the applicants in any event. However, a form would be handy, and I look forward to receiving one.

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