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25th November 2006

Jacques Delvaux,
President, CNUE

Email: info@cnue.be

Dear Mr Delvaux,

Notaries – A quick way to resolve the dispute over nationality barriers

Thank you for your letter of the 9th November, which I received by email on the 21st November at 16.45.

You argue, curiously, that I am asking for legal advice, and that, since the CNUE is a non profit making organization, it has no right to reply to me, and that I must look elsewhere for such help.

Luckily, this is incorrect. I am simply asking for clarification of the position of the CNUE and its notary members, and proposing a quick solution to a case which will otherwise drag on for years.

I would make the following points:

1. I am not asking for legal advice, and I am certainly not proposing to pay your organization for it. Therefore, it follows, as night follows day, that your organization would not be charging for or indeed even giving a legal consultation, and your non-profit making status is entirely unaffected. (I am surprised that your legal advisers have not this understood this simple point. Perhaps this lack of understanding pertains in other areas too, such as the question of the nationality requirement?)
2. I am simply asking the CNUE and the European notariats to explain themselves publicly and clearly. The CNUE can certainly do this. Indeed its very aim, as stated on its official website, is to promote the Notariat and its active contribution

in all decision making processes in European institutions and to assist in the correct application of national and community law. This is the very thing I am asking you to talk about.

3. Additionally, two of the Position papers on your site, namely: “Position des notaires européens en droit de la concurrence” and “Position de la CNUE relative à la “reglementation des services des professions liberals” specifically do enter the field of argument as to whether notaries should be subject to the usual rules of EU law on competition and free movement of services. This indicates that there is nothing at all which prevents you doing what I have asked, since I am simply asking for evidence in respect of arguments you have already made. (Indeed, if you cannot answer the points I have raised, since you cannot enter this area of debate, should these position papers themselves have been published?)
4. Let us remember, what did I ask for? Simply that you publish, in full and in detail, on the Internet, details of exactly what activities of notaries demonstrate coercive power over citizens as defined in the case law of the European Court of Justice.
5. As you know, notaries would have to demonstrate this coercive power if they were to have any chance of defending the current position i.e. that 19 states claim that only their own nationals can be notaries in their country. They would also have to show that this was a large part of their activity, and could not be separated from the rest of their activities.
6. If, as the CNUE states, it wishes to see the proper application of EU law, then I suggest it must insist that this nationality condition is dropped forthwith. As you know, nationality bars are basically almost never upheld by the European Court of Justice, since one of the key principles of the European laws (which you are bound to apply) is that there can be NO discrimination on the grounds of nationality.
7. It is therefore not up to me, or the Commission, to prove that such nationality conditions are unjustified, but for the CNUE, the European notariats and the governments who support the nationality rule to prove that such a condition is BOTH justified and in line with Community law
8. I do not believe that this is possible, and I suggest that the unwillingness of the CNUE and its members to put a detailed reply to the points I and the Commission have made suggests that the CNUE and its members do not think it possible either.
9. If I am wrong in this, there is a simple remedy, i.e. publish your arguments, in detail and in full, showing how notaries exercise coercive power. Web space is

cheap, and you can take just as much space in expounding the arguments as you like. As you know, this issue has been around for 50 years, since the beginning of the EU, and notaries have had plenty of time to get their arguments ready. All they have been shy about is making them public. These arguments have been prepared by the national governments and sent to the Commission, twice, in the 9 years or so since I raised the initial complaint in this matter.

10. Of course, even if you were barred from entering into debate with me, this would not stop the CNUE publishing its arguments on its own website as part of its mission to promote EU law. I note that you have published your objection the Commission's decision to issue reasoned opinions on your website, so you evidently agree that this is a fit matter for CNUE comment.
11. Furthermore, even if CNUE itself could not debate with me, that would not stop you asking each member notariat to publish its arguments on its own website, or using its influence (as I suggested in my earlier letter) with the French notarial members to agree to a quick court case which would reach the Court of Justice much faster than a Commission case, and save the consumers you serve a lot of wasted legal costs. Will you do this, or not? As they say, please give reasons for your answer.

To conclude, I would say that is nothing stopping you clarifying your position by doing what I requested in my letter to Clarisse Martin, nor indeed anything stopping you asking your members to explain their view, openly and publicly, immediately.

I have to say that I find the reluctance of European notaries to set out their alleged defence of the nationality condition both shameful and revealing.

Shameful, because highly skilled lawyers, bound to uphold the law, are failing to explain what seems clearly to be an illegal barrier to free movement. It is they who should be taking the lead in demanding the removal of the nationality requirement, not the Commission and myself.

Revealing, since I would suggest that when anyone attempts to reconcile the nationality condition with the consistent case law of the European Court of Justice, they cannot do it and find themselves calling for the end of the nationality bar.

I look forward to hearing from you, or indeed any European notary who is prepared to enter into open debate. Is there anyone out there who is?

Yours sincerely,

Mark Kober-Smith

P.S. I add a link to the advice given by the CCBE in respect of the need to comply with EU law in the recognition of experience and qualifications gained by lawyers in one jurisdiction who seek to work in another EU state.

As you know, the CCBE advises and represents lawyers across the whole of Europe. It is refreshing to see an organization determined to advise full compliance with EU law.

<http://elixir.bham.ac.uk/menu/FreeMovement/frameset.htm> Click on “Case Law” under 11th May 2004 and then “CCBE Guidance on Morganbesser”.
This can also be found at www.ccbe.org