Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 3 December 2020[1]

Case C-739/19

VK
v
An Bord Pleanála,
notice parties:
The General Council of the Bar of Ireland,
The Law Society of Ireland and the Attorney General

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Reference for a preliminary ruling – Freedom to provide services for lawyers – Directive 77/249/EEC – Article 5 – Requirement that lawyers established in another Member State who represent clients in legal proceedings before national courts work in conjunction with a domestic lawyer – Whether a party represented by a foreign lawyer in preliminary ruling proceedings may be represented by the same lawyer in the ensuing national proceedings)

I. Introduction

1. In the present case concerning a request for a preliminary ruling pursuant to Article 267 TFEU, the Supreme Court (Ireland) puts four questions to the Court of Justice for a preliminary ruling. Those questions concern the interpretation of Article 5 of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.[2] The request has been made in proceedings between the applicant in the main proceedings, VK, and An Bord Pleanála (Planning Appeals Board, Ireland) concerning the requirement that, in order to represent the applicant before the referring court, the applicant's foreign lawyer is required to work in conjunction with a lawyer registered with the Bar of Ireland.

2. Article 5 of Directive 77/249 does not specify exactly what the requirement to work in conjunction with a local lawyer implies for a lawyer established in another Member State who is providing services, thereby allowing the Member States a degree of discretion when transposing that provision. This case affords the Court of Justice an opportunity to define the extent of that discretion and, more specifically, to determine the circumstances in which such a requirement is justified. It will be necessary to dwell in particular on how to reconcile the freedom to provide services enshrined in Article 56(1) TFEU with the other legitimate interests which that article seeks to protect, such as the need to protect the litigant user of legal services and to secure the proper administration of justice.

1 Original language: French.
2 OJ 1977 L 78, p. 17.

II. Legal context

A. EU law

3. Article 1 of Directive 77/249 provides:

'1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services.

…

2. "Lawyer" means any person entitled to pursue his professional activities under one of the following designations:

…

Germany: Rechtsanwalt,

…'

4. Article 5 of Directive 77/249 provides:

'For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

– to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;

– to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.'

B. Irish Law

5. Regulation 2(1) of the European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979 ('the 1979 Regulations'), which transpose the provisions of Directive 1/249 into Irish law, defines a 'visiting lawyer' who is entitled to pursue activities before the courts of another Member State by reference to the list in Article 1(2) of Directive 77/249.

6. Regulation 6 of the 1979 Regulations provides:

'Where a visiting lawyer is pursuing activities in the State relating to the representation of a client in legal proceedings, he shall work in conjunction with a lawyer who is entitled to practise before the judicial authority in question and who would, where necessary, be answerable to that authority.'

III. The facts giving rise to the dispute, the main proceedings and the questions referred

7. The applicant in the main proceedings, VK, is a party in appeal proceedings before the Supreme Court (Ireland) concerning liability for the costs of judicial proceedings against planning permission granted for the construction of a fallen animal inspection unit close to his farm.

8. The background to this reference for a preliminary ruling is a dispute in which the Supreme Court made an earlier reference for a preliminary ruling which gave rise to the judgment of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833).

9. VK decided to represent himself before the Supreme Court.

10. Before the Court of Justice of the European Union, he had been represented by Ms O, a German lawyer (*Rechtsanwältin*) established in Germany.

11. Following the judgment of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833), the matter came back before the Supreme Court for it to rule on VK's appeal in the light of the interpretation of relevant EU law identified by the Court in its judgment.

12. VK wished to engage Ms O, a lawyer who is not qualified to practise in Ireland, to represent him in those proceedings before the Supreme Court.

13. The referring court is uncertain whether Regulation 6 of the 1979 Regulations is consistent with EU law in so far as it requires a 'foreign' visiting lawyer to work with a domestic lawyer in proceedings in which a party is entitled to appear in person.

14. Specifically, the referring court questions how it should interpret the judgment of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98), in which the Court of Justice examined the Member States' right to require lawyers providing services to work in conjunction with a domestic lawyer. The Supreme Court wishes to determine, in essence, whether that judgment invalidates the obligation to work in conjunction with a domestic lawyer where, according to the national legislation, the party whom the lawyer providing services wishes to represent would be entitled to appear in person.

15. The referring court states that the requirement to work 'in conjunction with' is limited. It appears that the domestic lawyer does not need to be the lawyer on record or the lawyer who presents the case in court. It is appropriate that the two lawyers concerned, namely the visiting lawyer and the Irish-qualified lawyer, should be left the task of defining the precise role which they are each to play. The role of the Irish-qualified lawyer is rather to be an identified lawyer who would be available to assist the visiting lawyer in the event that the proper representation of their client and the proper fulfilment of their duties to the court required knowledge or advice which might prove necessary precisely because the visiting lawyer might have limited knowledge of what might turn out to be relevant aspects of national law, practice and procedure or ethics. Accordingly, the extent to which such cooperation might be required is very much dependent on the circumstances of any individual case, on the understanding that there is a real risk that visiting lawyers might, inadvertently, fail in their duties to their client or their obligations to the court if they have not at least identified a lawyer qualified to practise in Ireland to assist on such matters.

16. Finally, the referring court makes reference to the fact that one of the ethical obligations which any lawyer representing a party before the Irish courts has placed upon him or her is a requirement to research all relevant areas of the law and to bring to the attention of the court any legal materials (whether legislative or to be found in the case-law) which may have a bearing on the proper resolution of the proceedings. That obligation applies even where the materials at issue are unfavourable to the case being put by the lawyer in question. That obligation is seen as typical of the position in proceedings in common law countries, whereby a principal part of the research necessary to permit a court to reach a proper conclusion on issues of law is conducted by the parties rather than by the court itself. The foregoing obviously does not apply where the parties are representing themselves. In such cases, the courts have to do their best to deal with legal issues without the assistance of a lawyer for one or other of the parties or even both.

17. In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is a member state precluded from exercising the option to be found in Article 5 of Directive [77/249] which permits a member state to impose a requirement on a lawyer who is engaged in the activity of representing a client in legal proceedings “to work in conjunction with a lawyer who practises before the judicial authority in question”, in all circumstances where the party whom the visiting lawyer wishes to represent in such proceedings would be entitled to self-represent?

(2) If the answer to question 1 is no, by reference to what factors should a national court assess whether it is permissible to impose a requirement to “practice in conjunction with”?

(3) In particular, would the imposition of a limited obligation to practice “in conjunction with”, in the manner described earlier in [the] order for reference, amount to a proportionate interference in the freedom of lawyers to provide services so as to be justified, having regard to the public interest involved being both the need to protect consumers of legal services and the need to secure the proper administration of justice?

(4) If the answer to question 3 is yes, does that position pertain in all circumstances and, if not, what factors should a national court take into account in determining whether such a requirement can be imposed in a particular case?’

IV. The proceedings before the Court of Justice

18. The order for reference of 4 October 2019 was received at the Registry of the Court of Justice on 8 October 2019.

19. VK, the General Council of the Bar of Ireland, the Law Society of Ireland, the Irish and Spanish Governments and the European Commission lodged written observations within the time limit under Article 23 of the Statute of the Court of Justice of the European Union.

20. By a measure of organisation of procedure of 14 July 2020, the Court put questions to the Irish Government to be replied to in writing. That government lodged its written observations on the questions to which those measures of organisation of procedure related within the time limit given.

21. At the hearing of 23 September 2020, the legal representatives of VK, the General Council of the Bar of Ireland, the Law Society of Ireland, the Irish and Spanish Governments and the Commission submitted observations.

V. Legal analysis

A. Preliminary observations

22. The EU single market is a cornerstone of European integration and a key driver for growth and employment and includes inter alia the freedom to provide services, enshrined in Article 56(1) TFEU. The provision of legal services – specifically the provision of legal advice and representation in proceedings before the courts – by lawyers, which is central to this case,[3] therefore belongs to the fundamental freedoms guaranteed by the Treaties.

23. The provision of legal services characteristically reflects peculiarities intrinsically linked to the diverse traditions of the Member States. Legal practice generally requires excellent knowledge of all the rules resulting from those traditions. Nevertheless, on account of its long and complex history, Europe is home to many traditions, attributable to the diversity of legal cultures, each of which has its own particular features.[4] Indeed, despite the various cultural exchanges that have taken place between the European nations[5] and the approximation of laws driven as part of the integration process, the legal and judicial systems of the Member States remain anchored in the tradition of each State, which is reflected not only in their institutions but also in their law and rules of ethics. As important as it may be to preserve that diversity of legal traditions, it is scarcely in doubt that doing so can create obstacles to the exercise of the legal profession. Lawyers are generally required to familiarise themselves with the rules in force in another Member State before they can provide their services in that state, which involves a certain amount of effort in order to adapt.

24. With the aim of enabling the cross-border provision of legal services in so far as possible and overcoming the obstacles arising from the differences between the national legal orders, the EU legislature has adopted several secondary legal acts, including Directive 77/249, intended to facilitate the effective exercise of the freedom to provide services by lawyers. That directive provides that the professional titles of lawyers who are qualified in their Member States will be automatically and mutually recognised and that, subject to certain conditions, they can practise in other Member States. The conditions which the Member States may impose under Article 5 of that directive include an obligation on the lawyer providing services 'to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority'.

25. This case gives the Court an opportunity to clarify the extent of the Member States' discretion as regards the arrangements for implementing that condition. It will be necessary to look closely at how to reconcile the freedom to provide services with the other legitimate interests enshrined in law in this field, such as the need to protect litigants who use those services and to secure the proper administration of the justice which that condition is, in principle, intended to protect.

26. From that perspective, the requirement to work in conjunction with a lawyer who practises before the judicial authority in question, which is intended to secure compliance with the applicable rules, could prove to be too restrictive in the light of the objectives pursued. It must be borne in mind that this requirement ultimately means that litigants must bear the costs of engaging the services of two lawyers in parallel, which could deter them from asserting their rights. Article 47 of the Charter of

3 The services at issue in this case need to be specified since the activities carried out by a lawyer can encompass a wide range of tasks. As Advocate General Léger stated in his Opinion in *Wouters and Others* (C-309/99, EU:C:2001:390, point 50), the activities carried out by lawyers are traditionally centred on two essential roles: the first, that of legal adviser (including consultation, negotiation and drawing up certain documents), and the second, that of assisting and representing the client before the judicial and extra-judicial authorities.

4 See, in that regard, Visegrády, A., 'Legal Cultures in the European Union', *Acta Juridica Hungarica*, volume 42, Nos 3-4 (2001), p. 203, which distinguishes, very broadly, between the families of Roman, Germanic, Nordic and common law.

5 The Geneva-born writer, philosopher and musician Jean-Jacques Rousseau wrote in the 18th century: 'there are no longer any Frenchmen, Englishmen, Germans or Spaniards, there are only Europeans'.

Fundamental Rights of the European Union protects everyone's right to be advised, defended and represented before a tribunal. That right guarantees effective access to justice, which is an essential element of the rule of law.[6] These preliminary observations are intended to highlight the implications that will flow from the Court's answers to the questions put by the referring court.

B. The first, second and third questions referred

27. By its first three questions, which it is appropriate to examine together, the referring court asks, in essence, whether a lawyer's right to represent a party in another Member State on the basis of Directive 77/249 may be made subject to a requirement imposed by that State, for that lawyer, to work in conjunction with a domestic lawyer, where the party whom the lawyer wishes to represent in proceedings is himself or herself entitled to appear before the court in question and, if that question is answered in the affirmative, what form that requirement may take.

1. The requirement to work in conjunction with a domestic lawyer is in itself a restriction on the freedom to provide legal services

28. Directive 77/249 was adopted on the basis of Article 59 of the EEC Treaty, now Article 56 TFEU. As I have already indicated in my preliminary observations, Directive 77/249 implements freedom to provide services since it seeks to facilitate the effective exercise of that freedom by lawyers. It can be seen from settled case-law of the Court of Justice that Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those from other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services.[7]

29. I believe it is worth noting here that any requirement to work 'in conjunction' with a domestic lawyer is in itself a restriction on the freedom for lawyers to provide services within the meaning of the Court's case-law since it obliges a litigant who wishes to engage a person providing services who is established in another Member State to bear additional costs associated with instructing a domestic lawyer in parallel. That circumstance might act as a deterrent to litigants, especially in cross-border cases which often require the application of EU law and law pertaining to several different legal orders. Not only are litigants prevented from engaging the services of 'foreign' lawyers, but those 'foreign' lawyers are also adversely affected, being unable to offer their services in a Member State other than their Member State of origin. It is worth noting that a lawyer established in a specific other Member State is not able, in contrast to the position under Article 57 TFEU, to pursue his activity on a temporary basis in the Member State where the service is provided under the same conditions as those which that State imposes on its own nationals.

6 See, to that effect, Opinion of Advocate General Cruz Villalón in *Samba Diouf* (C-69/10, EU:C:2011:102, points 37 and 39) and the judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraphs 31 and 59). As regards specifically the role of lawyers, Article 1.1 of the *Charter of core principles of the European legal profession and Code of conduct for European lawyers*, Council of Bars & Law Societies of Europe, 2019, provides that 'in a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society.'

7 Judgments of 19 December 2012, *Commission* v *Belgium* (C-577/10, EU:C:2012:814, paragraph 38); of 12 September 2013, *Konstantinides* (C-475/11, EU:C:2013:542, paragraph 44); of 18 March 2014, *International Jet Management* (C-628/11, EU:C:2014:171, paragraph 57); of 10 March 2016, *Safe Interenvíos* (C-235/14, EU:C:2016:154, paragraph 98); and of 26 February 2020, *Stanleyparma and Stanleybet Malta* (C-788/18, EU:C:2020:110, paragraph 17).

30. It should also be recalled that freedom to provide services, which is one of the fundamental principles enshrined in the Treaties, may only be restricted by rules that are *justified* by overriding reasons in the public interest which are appropriate to securing attainment of the objective pursued and *proportionate* having regard to that objective.[8] The fact that the EU legislature gave the Member States an option to introduce such a restriction under Article 5 of Directive 77/249 does not mean that the States have unfettered discretion when exercising that right. On the contrary, such a restriction must satisfy the requirements referred to, as the Court recalled in the judgment in *Commission* v *Germany*,[9] which is relevant for the analysis of the present case.

31. The case *Commission* v *Germany* concerned an action for failure to fulfil obligations brought by the Commission, in which the Court was called upon to examine in detail whether German legislation, pursuant to which lawyers established in another Member State who provided services relating to representing and defending a client in court proceedings could only work in conjunction with a German lawyer, was consistent with Articles 59 and 60 of the EEC Treaty and with Directive 77/249. In its judgment, the Court found that the Federal Republic of Germany had failed to fulfil its obligations under those provisions. The Court's examination in that judgment focused on whether the restriction imposed by the German legislation was justified and proportionate. Since secondary law, interpreted in the light of primary law, is the key criterion for determining whether the Irish legislation at issue is in conformity with EU law, I propose to structure my analysis in the established manner, as alluded to in the preceding point.

32. It is important to emphasise that, notwithstanding the similarities, this case can be distinguished from *Commission* v *Germany* in terms of procedure. The rules governing actions for failure to fulfil obligations under Article 258 TFEU, in particular the scope of the Court's jurisdiction, do not apply. By its request for a preliminary ruling, made under Article 267 TFEU, the referring court seeks an interpretation of EU law in order to apply it to the dispute before it. The Court of Justice can therefore rule only indirectly on whether the Irish legislation is compatible with EU law, confining itself to providing the referring court with the guidance on interpretation it needs in order itself to rule on that matter.[10]

33. In order to provide a detailed answer to the questions referred, it is necessary to determine at the outset the exact terms of the Irish legislation at issue, bearing in mind how it is interpreted by the national courts. As the Court noted in the case which gave rise to the judgment in *Commission* v *Germany*, Directive 77/249 does not explain the meaning of the expressions 'work in conjunction' and 'answerable to (the judicial) authority',[11] thereby giving the Member States a certain leeway when transposing the directive. It is apparent from the order for reference that the Irish legislation reproduces, in essence, the wording of Article 5 of Directive 77/249. According to the information provided by the referring court, which apparently refers to its 'practice directions' which set out the detailed procedural requirements for exercising the rights under Directive 77/249, the provision that imposes the requirement in question, that is to say, Regulation 6 of the 1979 Regulations, 'follows closely the language contained in Article 5 of [Directive 77/249]'.

34. Nevertheless, that provision generally appears to have been applied flexibly. According to the referring court, under the Irish legislation 'the minimal obligation is to have available an Irish-qualified lawyer to assist on matters of national law, national practice and procedure or ethics, should the need arise'. The referring court also states that 'the scope or scale of the obligation which existed in German law at the time of the decision of the Court of Justice in *Commission* v *Germany*

8 Judgment of 19 September 2017, *Commission* v *Ireland (Registration tax)* (C-552/15, EU:C:2017:698, paragraph 74).

9 Judgment of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98, paragraphs 12 and 13).

10 Judgments of 15 December 1993, *Hünermund and Others* (C-292/92, EU:C:1993:932, paragraph 8); of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraph 50), and of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 23).

11 Judgment of 25 February 1988 (427/85, EU:C:1988:98, paragraph 22).

was significantly more onerous than the obligation which would arise in Irish law should Ireland be entitled to impose the obligation to practice "in conjunction with" at all.' That information should inform this examination of the Irish legislation at issue in the light of Article 56 TFEU and of Directive 77/249.

35. Irrespective of the extent of any adverse effects that the requirement to work in conjunction laid down by the Irish legislation may have, the requirement is in itself undeniably a restriction on the freedom to provide services for the reasons that have been set out in this Opinion.[12] The fundamental issue that arises in this case is whether there are overriding reasons in the public interest that justify such a restriction and, if there are, whether that restriction is proportionate in the light of the objectives pursued by the national legislature. The extent to which the freedom to provide services is adversely affected is likely to play a significant role in my analysis of proportionality and must be determined on the basis of the arrangements for working in conjunction prescribed by the Irish legislation.

2. The proper administration of justice and the protection of litigants are overriding reasons in the public interest

36. In relation to overriding reasons in the public interest capable of justifying such a restriction, it is clear from the order for reference that the Irish legislation seeks to protect two interests: the proper administration of justice and the protection of litigants as consumers. It is necessary to ascertain, next, whether the EU legal order recognises those objectives as overriding reasons in the public interest.

37. In that regard, I note, first of all, that the Court stated in paragraph 23 of *Commission* v *Germany* that 'whilst [Directive 77/249] allows national legislation to require a lawyer providing services to work in conjunction with a [domestic] lawyer, it is intended to make it possible for the former to carry out the tasks entrusted to him by his client, *whilst at the same time having due regard for the proper administration of justice*'.[13] The Court further stated that 'seen from that viewpoint, the obligation imposed upon him to work in conjunction with a [domestic] lawyer is intended to provide him with the support necessary to enable him to act within a judicial system different from that to which he is accustomed and *to assure the judicial authority concerned that the lawyer providing services actually has that support and is thus in a position fully to comply with the procedural and ethical rules that apply*'.

38. I interpret that passage of that judgment, in which the Court sets out the legislative intention of Article 5 of Directive 77/249, as express acknowledgement that the proper administration of justice is an overriding reason in the public interest which can, in principle, justify requiring a visiting lawyer to work in conjunction with a domestic lawyer.

39. I would note that the interest consisting in protecting litigants as consumers overlaps to an extent with the interest relating to the proper administration of justice, since effectively defending and representing a client before the national courts likewise depends largely on the lawyer instructed having good professional qualifications. A lawyer who can demonstrate a thorough knowledge of the law and of the applicable ethical rules will certainly be able to satisfy the requirements of both the judicial system and the recipient of legal services.[14] Those interests are inseparable and are, in a

12 See point 29 of this Opinion.

13 Judgment of 25 February 1988 (427/85, EU:C:1988/98). Emphasis added.

14 Advocate General Wathelet stated in his Opinion in *Lahorgue* (C-99/16, EU:C:2017:107, point 56) that there is a common view of the role of the lawyer in the legal order of the European Union: that of a collaborator in the administration of justice required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest.

manner of speaking, two sides of the same coin, as can be seen in several cases in which the Court has ruled on the conditions governing the provision of legal services in the Member States. In those cases, both interests were relied upon simultaneously as overriding reasons in the public interest capable of justifying a restriction on that fundamental freedom, and were upheld by the Court.

40. First of all, I would draw attention to the joint cases which gave rise to the judgment in *Cipolla and Others*,[15] in which the Court established that 'the protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding requirements relating to the public interest capable of justifying a restriction on freedom to provide services'. Next, I would like to recall that in the judgment in *Reisebüro Broede*,[16] the Court observed that 'the application of professional rules to lawyers, in particular those relating to organisation, qualifications, professional ethics, supervision and liability, ensures that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience'. More recently, in the case giving rise to the judgment in *Lahorge*,[17] the Court stated that 'the protection of the litigant as the ultimate consumer of legal services and the proper administration of justice are linked, in particular, to the requirements of supervision of the person providing the service.' There is no special feature in the present case such as to warrant a different conclusion. Consequently, the principles arising from that case-law must apply to the case at hand.

41. It follows that in the EU legal order the proper administration of justice and the protection of litigants as consumers are overriding reasons in the public interest that can justify imposing a requirement on visiting lawyers to work in conjunction with a domestic lawyer.

3. Examination of the arrangements laid down by the Irish legislation for the requirement to work in conjunction, in the light of the interests relied upon

42. The question of whether the requirement to work in conjunction with a domestic lawyer is justified in practice in the light of the interests relied upon must be answered by examining the requirements laid down by the Irish legislation in the light of identified objective criteria. As stated above, Directive 77/249 gives no clarification of the concept of 'work in conjunction', thereby leaving the Member States a certain leeway in transposing it, in the event that they avail of their option under Article 5 of Directive 77/249. Various arrangements for working in conjunction with a domestic lawyer can therefore, in theory, be envisaged, some of which may restrict the provision of services more than others.

43. That being so, it becomes necessary to examine those arrangements in the light of objective criteria in order to ensure that no potentially insurmountable obstacles prevent that fundamental freedom from being exercised. The objective criteria established in the Court's case-law, and which seem to me to be relevant to the present case, include the requirements, which should be applied in what follows, that the restriction must be *consistent* and *proportionate*.[18] According to settled case-law, national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects

15 Judgment of 5 December 2006 (C-94/04 and C-202/04, EU:C:2006:758, paragraph 64).

16 Judgment of 12 December 1996 (C-3/95, EU:C:1996:487, paragraph 38).

17 Judgment of 18 May 2017 (C-99/16, EU:C:2017:391, paragraph 35).

18 Since, first, the observations of both the referring court and the notice parties address only the requirements for *consistency* and *proportionality* and since, second, no one is disputing that the Irish legislation is *appropriate* to achieving the objectives referred to in point 36 of this Opinion, I will focus on analysing those two criteria.

a concern to attain it in a consistent and systematic manner.[19] According to the principle of proportionality, restrictions on fundamental freedoms may not go beyond what is necessary in order to attain the objective sought.[20] I will in what follows examine a number of aspects of the arrangements established by the Irish legislation which are, in my view, arguably incompatible with EU law.

(a) Inconsistency of the requirement to work in conjunction with a domestic lawyer even though the litigant can appear unrepresented

44. One of the most striking aspects of the legislation at issue is the requirement that a visiting lawyer must work in conjunction with a domestic lawyer even though the litigant can appear unrepresented. It is apparent from the order for reference that the right to act in person derives from a fundamental right to have access to the courts, including to the highest appellate courts, enshrined in Irish constitutional law. Natural persons, unlike corporations, can act as 'litigants in person' in all proceedings; in all other cases a party who either has to (in the case of corporations) or wishes to (in the case of natural persons) be represented must instruct a lawyer in good standing.

45. It is clear that the Irish legislation is very similar in that respect to the German legislation which the Court examined in the case giving rise to the judgment in *Commission* v *Germany*, since, in certain situations, the national legal order allowed litigants to act in person before the courts of that Member State.[21] A further similarity which I consider noteworthy in this context is that under the German legislation it was mandatory, without exception, for litigants to engage a domestic lawyer where they waived their right to conduct their cases themselves and opted instead to use the services of a lawyer established in another Member State.

46. The Court held that, in those circumstances, there was no consideration relating to the public interest which could justify the obligation for a lawyer established in another Member State, who was providing his services in a professional capacity, to work in conjunction with a German lawyer.[22] Consequently, the Court ruled that a lawyer providing services, who was required in any event, by virtue of Article 4 of the directive, to observe in all proceedings before the German courts in which he was involved the professional rules applicable in that Member State, could not be obliged by the German legislation to work in conjunction with a lawyer practising before the judicial authority in question in proceedings for which that legislation did not make representation by a lawyer mandatory.[23] The Court held that, in so far as the German legislation, by the generality of its terms, extended that obligation to such proceedings, it infringed Directive 77/249 and Articles 59 and 60 of the EEC Treaty (now Articles 56 and 57 TFEU).[24]

47. It is worth noting that the Court reiterated that case-law in the case giving rise to the judgment in *Commission* v *France*,[25] which concerned French legislation according to which lawyers providing services were similarly required to work in conjunction with a lawyer who was a member of the French Bar in order to pursue activities for which the assistance of a lawyer was not mandatory under French law.[26] Put simply, the essential features that I have just mentioned and which drew the

19 Judgments of 19 July 2012, *Garkalns* (C-470/11, EU:C:2012:505, paragraph 37); of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 43); of 12 June 2014, *Digibet and Albers* (C-156/13, EU:C:2014:1756, paragraph 26); and of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 52).

20 Judgments of 6 November 2003, *Gambelli and Others* (C-243/01, EU:C:2003:597); of 27 October 2005, *Commission* v *Spain* (C-158/03, not published, EU:C:2005:642, paragraph 48); and of 19 December 2018, *Stanley International Betting and Stanleybet Malta* (C-375/17, EU:C:2018:1026, paragraph 76).

21 Judgment of 25 February 1988 (427/85, EU:C:1988:98, paragraph 13).

22 Judgment of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98, paragraph 14).

23 Judgment of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98, paragraph 15).

24 Judgment of 25 February 1988, *Commission* v *Germany* (C-427/85, EU:C:1988:98, paragraph 15).

25 Judgment of 10 July 1991 (C-294/89, EU:C:1991:302).

26 Judgment of 10 July 1991, *Commission* v *France* (C-294/89, EU:C:1991:302, paragraph 18).

attention of the Court in the case giving rise to the judgment in *Commission* v *Germany*[27] also existed in the French legal order. That being so, the Court could not have ruled differently. The Court referred to the grounds of the *Commission* v *Germany* judgment when it ruled that the French Republic had failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty (now Articles 56 and 57 TFEU) and Directive 77/249.[28]

48. The Court based its reasoning, quite clearly, on the fact that the national legislation at issue was inconsistent. It does indeed seem unreasonable to suggest that whilst the objective of consumer protection and the proper administration of justice does not preclude a litigant from appearing in person, he or she should nonetheless be precluded from procuring the services of a lawyer who has been admitted to practise in another Member State and is subject to all the ethical requirements connected with that professional status.

49. Accordingly, I suggest that the principles identified in the judgments of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98), and of 10 July 1991, *Commission* v *France* (C-294/89, EU:C:1991:302), should be applied in the present case and that the referring court should be instructed to examine the legislation at issue in the main proceedings rigorously from the perspective of the consistency criterion and be provided with the guidance on interpretation necessary to do so. The considerations set out in this Opinion are intended to assist the Court in elaborating precisely that guidance.

(b) The fact that under national law litigants cannot be represented by a non-lawyer is not a decisive factor in determining whether that law is consistent

50. Contrary to the assertions of some of the notice parties, namely, the Law Society of Ireland and the General Council of the Bar of Ireland, I am not persuaded that the fact that national legislation does not expressly provide that litigants can be represented by non-lawyers is a decisive factor in determining whether that legislation is consistent.

51. The argument invoked by those parties, according to which the principles identified in the judgment of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98), do not apply to the present case, is based on a reading of that judgment to the effect that the Court found it to be decisive that the German legislation allowed litigants either to appear in person or to be represented by a person with no legal training. According to that argument, those principles cannot be applied to the present case because the second scenario described is not permissible in Irish law. Litigants can only choose between appearing in person or being represented by a lawyer.

52. However, as I stated above,[29] it was instead the requirement to work in conjunction with a domestic lawyer despite the fact that litigants can appear unrepresented which led the Court to conclude that the German legislation infringed the consistency requirement. It is apparent from the grounds of the judgment in *Commission* v *Germany* that the fact that in German law litigants can be represented by non-lawyers was merely an additional factor which reinforced the Court's view.[30] The first characteristic is sufficient for it to be found that the rules in the national system are inconsistent.

27 Judgment of 25 February 1988 (427/85, EU:C:1988:98, paragraph 13).

28 Judgment of 10 July 1991, *Commission* v *France* (C-294/89, EU:C:1991:302, paragraphs 17 to 20).

29 See points 44 to 49 of this Opinion.

30 See judgment of 25 February 1988 (427/85, EU:C:1988:98, paragraph 13 and operative part), in which the Court states that under German law there is simply 'no requirement of representation by a lawyer' without specifying further.

53. That reading is moreover confirmed by the grounds in the judgment in *Commission* v *France*, from which it can be seen that the French legislation examined by the Court included, inter alia, the two features described above, lawyers providing services being required to work in conjunction with a domestic lawyer even though litigants could appear in person, and that moreover, the Court's attention was drawn to that latter feature. Indeed, the fact that the Court mentioned that characteristic of the French legislation several times indicates which factor was decisive in its analysis. [31]

54. The thesis advanced by those notice parties appears therefore to be founded on an interpretation of the Court's case-law which is incorrect and should be rejected. Consequently, the fact that the Irish legislation can be distinguished on that point from the legislation examined in the cases referred to above does not preclude the Court from applying the principles established in its case-law and finding, as a result, that the Irish legislation does not pursue the objectives referred to in point 36 of this Opinion in a consistent manner.

(c) The Irish legal framework seems to provide that a litigant can, exceptionally, be represented by a non-lawyer

55. Independently of the foregoing considerations, I would highlight the fact that the Irish legal framework seems not to be as clear as those notice parties describe it. Certain contradictions in the account given of that legal framework, as regards the ability of litigants to be represented by non-lawyers, suggest to me that this feature can also be taken into account when examining whether the national legislation at issue is consistent.

56. First, it is apparent from those parties' written observations that lay litigants can receive limited assistance since, for example, a person who is not entitled to represent them in court could provide advice or take notes. However, that person, who is known in Irish law as a 'McKenzie friend', is not entitled to act as an advocate or to conduct the case. That is borne out by the information provided by the referring court, to the effect that the person in question acts only as an administrative assistant to enable the party concerned to present his or her case as best he or she can. A 'McKenzie friend' does not, in particular, have a right of audience before the Supreme Court as a representative of a party. Nevertheless, a 'McKenzie friend' can appear, in limited circumstances, but only where the self-representing party has a disability which prevents him or her from articulating his or her case.

57. Second, the applicant in the main proceedings submits that a lay litigant can in fact be represented by a lay person in Ireland, although this is an exception to the general rule. Specifically, it seems that leave for such representation may be given in rare situations, where the litigant in person applies to the court hearing the case. According to the applicant in the main proceedings, the ability to do so is not established in the legislation and is rather a matter for the court's discretion. I would note that the foregoing observations are based on information provided by the Attorney General in his capacity as one of the notice parties in this case. I would also emphasise that the Irish Government explicitly confirmed this information relating to the Irish judicial system in its written answer to the question put by the Court in the context of the measures of organisation of procedure. [32] Those observations should therefore be assumed to correctly represent the Irish legal framework.

31 See judgment of 10 July 1991, *Commission* v *France* (C-294/89, EU:C:1991:302, paragraphs 18 and 19 and operative part), in which the Court states that French law 'does not make the assistance of a lawyer compulsory' but does not specify the characteristics of that assistance.

32 Both the applicant in the main proceedings and the Irish Government refer to the judgment of the Irish Supreme Court in *Coffey v. The Environmental Protection Agency* [2014] 2 IR 125. The fact that a lay litigant can be given leave to be represented by a lay person appears to be discernible from paragraph 38 of that judgment.

58. In the light of the foregoing, I am minded to share the view of the applicant in the main proceedings who draws the Court's attention to the circumstance that under Irish law, no differently from the situation in the case which gave rise to the judgment of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98), litigants can be represented by non-lawyers. The fact that in Ireland they can do so only exceptionally does not mean that the national legal orders are not comparable. On the contrary, as the applicant in the main proceedings correctly highlights, representation by persons who are not legal professionals is likewise an exception to the rule in Germany, and there too is only allowed where the public interest consisting of the proper administration of justice does not require the litigant to be represented by a legal professional. [33]

59. Accordingly, subject to assessment by the national court, which it is for the referring court to carry out, it should be found that the potential ability of litigants to be represented by a non-lawyer is a factor that can also be taken into account when examining whether the Irish legislation is consistent.

(d) The relevance of the rules of procedure in the common law system for the purposes of examining compatibility

(1) Summary of the arguments submitted by the referring court and some of the notice parties

60. The referring court raises the question of whether, as some of the notice parties submit, the Irish judicial system, which is predicated on common law, prevents the principles identified in the judgment of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98), from being applied to the present case. The referring court explains that, under the Irish judicial system, it is for the parties' lawyers to carry out the necessary legal research and bring to the attention of the court hearing the case the aspects of law favourable (and unfavourable) to the litigant whereas the court's role is, by contrast, rather passive. In other words, under the rules of procedure, a key part of the legal research is the responsibility of the parties, as appears to be the practice in common law countries. Where a litigant is not represented by a lawyer, by contrast, that task falls to the court hearing the case. The referring court mentions in that context the difficulty that the latter situation poses for the court hearing the case and expresses reservations as regards whether it is possible to allow litigants to waive their right to be represented by a lawyer, either by appearing in person or by relying on a non-lawyer.

(2) Response to the arguments alleging a peculiarity in the Irish legal order

(i) Summary of the findings of the case-law analysis

61. I would note at the outset that this thesis, which draws on an alleged peculiarity in the Irish legal order, is in reality seeking to cast doubt on precisely what the analysis of the Court's case-law in this Opinion has just proven. It is plain to me that the Irish legislation has the same fundamental characteristics as those which led the Court to find that the German and French legislation in the cases referred to above were inconsistent, that is to say, they required a lawyer providing services to

33 German civil procedure law draws a distinction between *Bevollmächtigte* and *Beistand*, governed by Paragraph 79(2) and Paragraph 90 respectively of the Zivilprozessordnung (German Code of Civil Procedure). Their function consists, generally speaking, of representing and supporting litigants before the courts, and both can make statements on behalf of the litigant, although there are indeed a number of significant differences in relation to their powers. They are not necessarily legal professionals. The legislation expressly provides that adult family members can act in those roles. Only a *Bevollmächtigte* must be a lawyer where the legislation so requires. A *Beistand* is generally a person close to the litigant who has the litigant's full trust and is capable of setting out the case. The court may refuse to allow those persons to act where they do not satisfy the criteria laid down by the legislation or where they are not able to present the case properly (see Krüger, W., and Rauscher, T. (dir.), *Münchener Kommentar zur Zivilprozessordnung*, sixth edition, Munich, C. H. Beck, 2020). Other codes of procedure contain similar provisions, for example in Paragraph 67(2) and (7) of the Verwaltungsgerichtsordnung (German Code of Administrative Procedure) and Paragraph 22(1) of the Bundesverfassungsgerichtsgesetz (Law on the Federal Constitutional Court (see Posser, H., and Wolff, H.A. (dir.), *Kommentar zur Verwaltungsgerichtsordnung* [Posser/Wolff], 54th edition, Munich, C. H. Beck, 2020).

work in conjunction with a domestic lawyer even where litigants were entitled to appear unrepresented.[34] In addition, I cannot identify any peculiarity in the Irish legal order compared with the others such as to justify a finding different from that in the cases referred to above as regards compliance with the requirement for consistency.

62. I also note that those arguments seek in essence to emphasise that under the Irish legislation there is no option for litigants to be represented by non-lawyers. It is sufficient to recall here that, as has already been shown, first, that fact is not decisive in determining whether the national legislation is consistent,[35] and, second, contrary to what is claimed, the Irish legal framework does appear to provide for such an option, on an exceptional basis, like the German legal order.[36] Since those arguments do not undermine the findings I have made in the context of my analysis, they must be rejected. To avoid repetition, I refer to my observations on those arguments.

(ii) The alleged peculiarities of the common law judicial system

63. Next, I note that the referring court seems to be suggesting that the maxim *iura novit curia* does not apply at all in the common law judicial system or is, at the very least, of limited scope compared with the continental European legal system where a lawyer is required to act in proceedings. However, I do not believe that such a categorical thesis can stand up. I therefore consider it necessary to make a few brief observations in that respect.

64. As Advocate General Jacobs stated in his Opinion in the joint cases C-430/93 and C-431/93, *van Schijndel and van Veen*,[37] 'it might be tempting to suggest that there is a basic distinction between two fundamentally different types of procedure within the Member States: a distinction between, broadly speaking, the continental systems on the one hand and the English, Irish and Scottish systems on the other. On that view, the court in the continental systems is deemed to know the law ("*jura novit curia*" or "*curia novit legem*"); it must apply the appropriate legal rules to the facts as they are presented to the court by the parties ("*da mihi factum, dabo tibi jus*"); and if necessary it will engage for that purpose in its own legal research. In the English, Irish and Scottish systems, on the other hand, the court has a less active, or even a passive, role: the procedure is generally based on the assumption that the court has no independent knowledge of the law, that it is dependent upon the submissions advanced by counsel for the parties, and that its function essentially is to adjudicate on the exclusive basis of their submissions. According to one commentator, "perhaps the most spectacular feature of English procedure is that the rule *curia novit legem* has never been and is not part of English law".'[38] It appears to me that the referring court's thesis that the court hearing the case cannot rely on its own legal knowledge in proceedings on account of its rules of procedure is based on precisely that premiss.

65. However, I would point out that Advocate General Jacobs concluded that 'such contrasts between different categories of legal system often prove on closer examination to be *exaggerated*'. He stated that 'even in the case of civil proceedings, where the contrast is least inaccurate – it may have very little application in criminal proceedings, or in administrative courts, where different principles apply – *the distinction between the two approaches can hardly be sustained*'.[39] Advocate General Jacobs gave a number of specific examples to that effect, thereby refuting the arguments based on the alleged differences between the common-law judicial system and the continental judicial systems.

34 See points 46 to 49 of this Opinion.

35 See points 50 to 54 of this Opinion.

36 See points 57 and 58 of this Opinion.

37 Opinion of Advocate General Jacobs in the joint cases *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:185).

38 Opinion of Advocate General Jacobs in the joint cases *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:185, point 33).

39 Opinion of Advocate General Jacobs in the joint cases *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:185, point 34). Emphasis added.

66. Addressing the alleged specific features of the Irish judicial system in general terms, I would recall that the legal orders of all the Member States have their own specific characteristics. I refer here to my preliminary observations in which I invoke Europe's rich cultural heritage, including its legal traditions.[40] In view of the obligation on the European Union to respect its rich cultural diversity, enshrined in the fourth subparagraph of Article 3(3) TEU, I believe it would be inappropriate to seek to give one national judicial system 'privileged' status compared with the others. To do so would clearly conflict with the principle of the equality of Member States before the Treaties which the European Union is required to uphold, in accordance with Article 4(2) TEU.

67. Nor do I believe that such an approach is necessary in the present case, since the EU legislature has already taken into account the challenges that this diversity poses in terms of achieving the internal market for the provision of legal services, by enabling the Member States, by means of Article 5 of Directive 77/249, to require lawyers providing services and established in other Member States to work in conjunction with a domestic lawyer. The purpose of legal professionals from different Member States cooperating in that way is precisely to ensure that the requirements imposed by the judicial systems of each State are satisfied whilst enabling freedom to provide legal services to be effectively exercised so far as possible. Indeed, the fact that a lawyer providing services and established in another Member State is able – if necessary and where it appears to be objectively justified – to call upon the advice of a domestic lawyer with the requisite knowledge of the judicial system in question is a benefit which can make it easier for that lawyer to adapt to the new professional environment and, accordingly, facilitates the cross-border provision of legal services.[41] This means that, since Article 5 of Directive 77/249 effectively introduces a mechanism by means of which any specific features associated with national legal traditions can be sufficiently taken into account, I believe the concerns expressed by the referring court and some of the notice parties to be unjustified.

68. In the light of the foregoing considerations, it is in my view wrong to give undue weight to the alleged differences between the judicial systems of the Member States at issue. That is especially true in a case such as that before the Court, in which it has been established that the procedural rules examined display the same inconsistencies. I believe that the Court should focus instead on whether the Irish legislation at issue is consistent and proportionate.

(e) The Irish legislation may place litigants in a precarious position likely to infringe the right of defence and the right of access to justice

69. Furthermore, considerations connected with the criterion of proportionality cause me to doubt whether the Irish legislation at issue is compatible with EU law. Specifically, I note that litigants face an unavoidable choice between either appearing in person or engaging a domestic lawyer. Indeed, it cannot realistically be denied that litigants are prevented from using the services of their trusted 'visiting' lawyer (without having to engage a domestic lawyer). In practice, it is highly likely that the requirement to bear the costs of engaging two lawyers at the same time forces litigants to act in person. It is not inconceivable that this leads to situations which are intolerable in terms of the right of defence and access to justice. As can be seen from the circumstances of the present case, that is to say, the fact that the applicant cannot conduct his own defence or pay two lawyers, litigants may be placed at a serious disadvantage, especially in administrative proceedings where their adversary is the State with its considerable resources.

40 See point 23 of this Opinion.

41 See points 23 and 24 of this Opinion.

70. I subscribe to the thesis advanced by the applicant in the main proceedings to the effect that litigants are in a particularly precarious position in terms of the protection of consumers of legal services if, because they are unable in practice to receive services from a cross-border service provider, they are forced to represent themselves and to face all the challenges that litigating in person entails. As the applicant in the main proceedings correctly states, such litigants are in a difficult position in the context of countries with a common law judicial system which places particular emphasis on oral argument before the court. [42]

71. If a lay litigant is faced with a choice between having to represent himself or herself or being represented by a lawyer whom he or she trusts and who has given him or her full satisfaction in the past, there is no question as to which choice affords greater protection. It is manifest that both the interest of protecting the consumers of legal services and that of the proper administration of justice are better served where a court can have the benefit of an advocate – whether a domestic lawyer or a lawyer established in another Member State – who is best able to make clear and pertinent legal submissions and to be satisfied that the appropriate information is brought to the attention of the court. [43]

72. Against that background, it seems clear to me that the ideal situation which best safeguards the interests referred to above is one in which litigants can use the services of the lawyer of their choice. In that scenario the principles underlying the special relationship that exists between lawyers and their clients, that is to say, their freedom to contract and above all mutual trust, are upheld. [44] If that lawyer is not a domestic lawyer, that is to say, he or she is established in another Member State, which can occur in cross-border cases, it should, in principle, be sufficient if it is ensured that the lawyer satisfies objective criteria from which it is possible to infer that he or she is capable of representing the litigant in proceedings. I believe such a measure is much less restrictive, in terms of proportionality, than the obligation on visiting lawyers to work in conjunction with a domestic lawyer. I will return in greater detail to the subject of proportionality. Since that domestic lawyer will often be a complete stranger to the litigant and the visiting lawyer, the obligation to work in conjunction will require them to undertake a considerable amount of coordination which is likely to become a burdensome and costly administrative fetter on all the parties, one which may in some cases prove excessive. The right to effective judicial protection must not depend on an individual's financial resources.

73. It can be seen from the foregoing that the Irish legislation at issue could have a harmful effect on the objective it theoretically pursues. Instead of securing effective access to justice, it may in fact restrict that access by limiting a litigant's options and thereby potentially infringing the right of defence.

42 See, to that effect, Bakshi, P.M., 'Pleadings: role and significance', *Journal of the Indian Law Institute*, vol. 34, No 3 (July-September 1992), p. 355, which states that in England, in early times, the manner of pleading acquired a special degree of importance and attracted a great deal of attention from judges and lawyers; Clark C.E., 'History, Systems and Functions of Pleading', *Virginia Law Review* (1925) 11, p. 525 et seq., which describes how the system of pleading was established in England after the Norman Conquest and became a veritable 'science' worthy of being cultivated; Thornburg, E.G., 'Defining Civil Disputes: Lessons from Two Jurisdictions', *Melbourne University Law Review*, vol. 35, no. 1, November 2011, p. 211, which explains that initially, proceedings in the English common law system had only an oral phase. Only from the 15th century have proceedings also had a phase in which the parties can submit written observations.

43 As Advocate General Bobek stated in his Opinion in *Uniwersytet Wrocławski and Poland* v *REA* (C-515/17 P and C-561/17 P, EU:C:2019:774, point 103), 'legal representation plays a crucial role in the sound administration of justice. Without proper legal representation, the applicant might not be able to put forward, and the judge take cognisance of, all the necessary arguments in the applicant's favour.' See, to that effect, *Charter of core principles of the European legal profession and Code of conduct for European lawyers*, op. cit., note 11, p. 7, paragraph 6, in which lawyers are described as, inter alia, 'indispensable actors in the sound administration of justice'. See also, p. 9, principle (i), 'upholding the rule of law and contributing to the sound administration of justice'.

44 As Advocate General Bobek recalled in his Opinion in *Uniwersytet Wrocławski and Poland* v *REA* (C-515/17 P and C-561/17 P, EU:C:2019:774, point 111), 'if any common theme emerges from … the practice in the Member States, it is that legal representation is primarily a matter of private choice and (two-sided) contractual freedom. *The client is free to choose his lawyer, and the lawyer is free, in principle, to choose his clients*. The *relationship is based on trust*. Any intervention in that relationship should be founded on serious reasons which reveal a clear and imperative need to "protect the applicant from his lawyer". Moreover, if any problematic issues are detected, they are more properly dealt with by the respective regulatory bodies in disciplinary or other proceedings.' Emphasis added.

74. Admittedly, whether such a situation arises depends on the circumstances of each case. A decisive factor is how the national courts apply the Irish legislation. It is therefore impossible to establish with certainty whether the Irish legislation does in fact infringe the right of defence. It is for the referring court to examine this in the light of that consideration also.

(f) The Irish legislation is general in scope and does not take sufficient account of the specific circumstances of each case

75. It is also a feature of the Irish legislation at issue that it is *general in scope* since it does not seem to establish *any exceptions* to the obligation to work in conjunction with a domestic lawyer. It could be problematic in terms of the proportionality criterion if the legislation itself or its implementation by the national courts was *unduly rigid*. That aspect calls for a thorough examination.

76. According to the information supplied by the referring court, the visiting lawyer has to provide the national courts with the name of an Irish-qualified lawyer who would be available to assist him or her should that lawyer require help on matters of national law, national practice and procedure or ethical rules. It would appear that the legislation leaves it to the visiting lawyer and the domestic lawyer to define their roles in each case, and the professionals in question therefore have a degree of flexibility in arranging how they will cooperate. In that context, it does not appear that freedom to provide services is harmed more than is necessary to attain the public interest objectives sought.

77. A further argument can be inferred from the Court's case-law to support the thesis that national legislation such as that at issue is proportionate, since it allows the cooperation between the visiting lawyer and the domestic lawyer to be *managed flexibly*. It emerges from the judgments in *Commission* v *Germany*[45] and *Commission* v *France*[46] that 'the lawyer providing services and the [domestic] lawyer, both being subject to the ethical rules applicable in the host Member State, must be regarded as being capable, in compliance with those ethical rules and in the exercise of their professional independence, of *agreeing upon a form of cooperation appropriate to* their client's instructions'. I interpret that passage as meaning that the Court fundamentally favours adopting a national regulatory framework that upholds both the traditional autonomy of the legal profession and the interests of litigants. Even so, safeguarding those interests requires a considerable degree of flexibility in order to accommodate the specific features of each situation. The legal issues in each case, the specialist expertise and experience of the lawyers and the trust that the litigant places in them will require appropriate intervention tailored to the situation in hand.

78. Even though the Court added that 'that does not mean that it would not be possible for the national legislatures to lay down a general framework for cooperation between the two lawyers', it should be noted, first, that this relates only to the 'general framework for cooperation' and, second, that when exercising those powers, they are subject to the condition that 'the resultant obligations must not be disproportionate in relation to the objectives of the duty to work in conjunction'.[47] Since the Irish legislation seems to refrain from governing the detail of such cooperation between lawyers, leaving the task of doing so to those lawyers, I believe it is unnecessary to examine that legislation in the light of those conditions.

45 Judgment of 25 February 1988 (427/85, EU:C:1988:98, paragraph 24). Emphasis added.

46 Judgment of 10 July 1991 (C-294/89, EU:C:1991:302, paragraph 31).

47 Judgments of 25 February 1988, *Commission* v *Germany* (427/85, EU:C:1988:98, paragraph 25), and of 10 July 1991, *Commission* v *France* (C-294/89, EU:C:1991:302, paragraph 32).

79. It should be found as a preliminary conclusion that, *in general terms*, the Irish legislation satisfies the requirements of the principle of proportionality. Indeed, it implements precisely what the Court had previously found to be the *best possible approach*, leaving to the lawyers the task of agreeing upon a form of cooperation appropriate in the context of their client's instructions, in compliance with those ethical rules and in the exercise of their professional independence.

80. Even though the legislation at issue is applied flexibly, I share the view expressed by several of the notice parties, including the applicant and the Commission, that there may be *circumstances in which the obligation on the visiting lawyer to work in conjunction with a domestic lawyer becomes redundant*. I am thinking in particular of the situation where the 'foreign' lawyer, by dint of training or professional experience, has the necessary knowledge to represent the litigant in proceedings before the national courts. It is also possible to imagine non-complex cases which the 'foreign' lawyer is able to handle alone.

81. I believe that requiring a litigant to have recourse to the services of a domestic lawyer in those situations amounts to making that lawyer play a purely 'token' role, that is to say, one which is completely unnecessary to the needs of justice and of litigants. The financial and practical drawbacks for the litigant and the visiting lawyer, already referred to in this Opinion, are nevertheless the same. Since such a requirement, in the circumstances described above, would clearly go beyond what is necessary to serve the legitimate interests protected by the Irish legislation, it must be found to be disproportionate.

82. That is particularly so in circumstances such as those of the case in the main proceedings, in which it is common ground that the lawyer representing the applicant, despite the fact that she received her professional training in Germany, has practised as a lawyer in Ireland for more than 10 years in exercise of rights under 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 .[48] It is worth noting that Directive 98/5 is intended to implement the right of establishment enshrined in Article 57 of the EEC Treaty, now Article 53 TFEU. In contrast to the freedom to provide services according to which persons providing services can *temporarily* pursue their activity in the Member State in which the services are provided, under the same conditions as those which the Member State imposes on its own nationals, the right of establishment includes the right to take up and pursue self-employed activities and the right to manage undertakings with a view to carrying on a *permanent* activity in a stable continuous context, under the same conditions as those laid down by the law of the Member State of establishment for its own nationals.

83. It seems to me that, in those circumstances, it is reasonable to expect that a 'foreign' lawyer will acquire a certain familiarity with the legal order of the host Member State, including the national law and rules of ethics. It can therefore be assumed that such a person will be capable of practising as a lawyer with a reasonable degree of independence.

84. I would emphasise in that context that recital 14 of Directive 98/5 confirms that view, since it is clear from that recital, first, that 'the host Member State must take into consideration any professional experience gained in its territory' and, second, that 'after effectively and regularly pursuing in the host Member State an activity in the law of that State including [EU] law for a period of three years, a lawyer [originating in another Member State] may reasonably be assumed to have gained the aptitude necessary to become fully integrated into the legal profession there'. Assuming that the applicant's lawyer has met the conditions laid down by Directive 98/5, there should be no doubt that she has become integrated into the legal profession in Ireland.

48 OJ 1998 L 77, p. 36.

85. It should also be borne in mind that this lawyer has already represented the applicant before national courts and before the Court, where the substance of the case related to EU law[49] rather than national law, and where the matters to be determined concerned costs and possibly compensation for infringement of provisions of EU law, that is to say, matters which do not require significant support from a domestic lawyer.

86. Accordingly, subject to the factual findings which it is for the referring court to make, the circumstances of the case in the main proceedings appear to warrant a more nuanced approach. The referring court must determine whether the Irish legislation at issue does in fact take into account the circumstances of the case at hand and, where applicable, whether, in the light of those circumstances, the legislation should be applied more flexibly and there should be an exemption from the obligation to work in conjunction.

87. The specific criteria which the referring court should apply in order to determine whether the obligation to work in conjunction may be imposed in a particular case form the subject matter of the fourth question referred for a preliminary ruling. In the interests of clarity, therefore, that matter can appropriately be explored in depth in the analysis of that question.

88. At this stage in the analysis, it is sufficient to note that the obligation to work in conjunction appears not to be disproportionate provided it is limited to requiring that the national courts be provided with the name of an Irish-qualified lawyer who will be available to assist the visiting lawyer if necessary, leaving the professionals to agree on their respective roles in each specific case.

89. Nevertheless, I am uncertain whether that obligation would be proportionate were it to prove too rigid to take sufficient account of various aspects of the particular case, such as those I have mentioned in my earlier observations. By interpreting the Irish legislation in accordance with the principle of proportionality, the referring court can help prevent its incompatibility with EU law.

4. Answer to the first, second and third questions referred

90. In the light of the foregoing considerations, my view is that a Member State may only avail of the option under Article 5 of Directive 77/249 if the restriction imposed on a party under that directive is justified by an overriding reason in the public interest and is appropriate and proportionate to attaining that objective. Although it is for the national court to determine whether that is so, where a party falling under Directive 77/249 wishes to represent a person who would be entitled to act in person before the court hearing the case, the restriction appears not to be a consistent means of achieving that objective.

91. I am also of the view that, where it is prima facie appropriate to exercise the option under Article 5 of Directive 77/249, a system such as that existing in Irish law, which merely requires the national courts to be provided with the name of an Irish-qualified lawyer who will be available to assist the visiting lawyer if necessary, leaving the visiting lawyer and the domestic lawyer to agree on their respective roles in each specific case, is a proportionate interference in the freedom to provide services.

49 I would observe that *Klohn*, C-167/17, in which the lawyer represented the applicant in the main proceedings before the Court of Justice, concerned a request for a preliminary ruling from the Supreme Court, that is to say, the referring court in this case, and related to the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

C. The fourth question referred

1. The national legislation must be interpreted in conformity with EU law in order to comply with the principle of proportionality

92. By its fourth question, the referring court seeks clarification in relation to the requirement on a lawyer providing services who is established in another Member State to work in conjunction with a domestic lawyer. It wishes to know whether, in the light of EU law, such an obligation may be imposed in all circumstances and, if not, what factors a national court should take into account in determining whether such a requirement may be imposed in a particular case.

93. As set out in my analysis of the first three questions referred, in view of the arrangements for the requisite work in conjunction, a system such as that under the Irish legislation is a proportionate interference in the freedom to provide services. I need to make clear nevertheless that this finding is based on the premiss that it is absolutely necessary to exercise the option under Article 5 of Directive 77/249 in order to achieve the objectives pursued by the legislation at issue, namely, to ensure that litigants are protected and to secure the sound administration of justice.

94. Doubts arise as regards whether the Irish legislation transposing Article 5 of Directive 77/249 and imposing the requirement to work in conjunction is proportionate, since it appears to apply in all cases and not to take sufficient account of the circumstances of each case. I have already highlighted that in some circumstances that requirement may become devoid of purpose. In view of the degree to which such a measure interferes in the exercise of the freedom to provide services, it seems clear to me that it must be found to be disproportionate and, accordingly, incompatible with Article 5 of Directive 77/249, as interpreted in the light of Article 56 TFEU, if it must be applied strictly, with no possibility of exceptions where the services provided by a visiting lawyer who wishes to advocate in the case unaccompanied by a domestic lawyer do not jeopardise the applicable overriding reasons in the public interest.

95. Those circumstances include in particular the situation where the lawyer providing services, by dint of training or professional experience, has the necessary knowledge to represent the litigant in proceedings before the national courts. I would also mention non-complex cases not requiring the intervention of a domestic lawyer. All those situations share the characteristic that the visiting lawyer will generally be capable of himself or herself representing the litigant whilst also serving the legitimate interests referred to above.

96. I believe it is essential to set out a series of objective criteria underpinned by the foregoing considerations so that the referring court can determine with certainty which situations require it to apply the requirement to work in conjunction more flexibly or to allow an exemption from it, according to each case. The referring court will in that way be able to apply the principle of proportionality where it appears necessary. By interpreting the national legislation in accordance with EU law as a result of applying those criteria, the court will ensure that it is in conformity with EU law.

2. The criteria to be applied by the referring court when determining whether it is appropriate to require a lawyer to work in conjunction

97. A first category of criteria on the basis of which the referring court can determine whether an obligation to work in conjunction is proportionate to the legitimate interests pursued by the national legislation relates to the *training* and *professional experience* of the lawyer providing services in Ireland. Any studies and periods of training undertaken in the law of that Member State can be useful indicators of the lawyer's professional competence in substantive and procedural law, legal terminology and rules of ethics. The fact that other courts in the same Member State have already given the lawyer leave to represent the litigant in the case at hand (or in connected cases) may also be helpful.

98. A second category of relevant criteria includes the *nature of the proceedings*, the *complexity of the case* and the *applicable area of law*. Cases which are not particularly complex and do not necessarily require the involvement of a domestic lawyer can in my view be entrusted to the visiting lawyer alone. Similarly, cases concerning international law or EU law may not necessarily require a domestic lawyer to act, since those areas of law inherently go beyond the purely domestic context. By contrast, a case concerning exclusively Irish law and which may require a certain degree of specialisation, could require significant intervention by a domestic lawyer.

99. This list of objective criteria is not at all exhaustive, but serves to illustrate the circumstances which may justify a more flexible approach when determining whether an obligation to work in conjunction should be imposed in a particular case. It should also be emphasised that the criteria to be applied are indicative only, since the referring court will have to exercise its discretion in order to identify itself the circumstances of the case before it. I believe that the competent national authorities should be entrusted with the task of regulating the implementing arrangements. Subject to its powers under Irish law, I believe the referring court should be capable of devising a procedure similar to that developed in its case-law where a lay litigant requests to be represented by a non-professional. [50]

100. In addition, the proposed approach has the advantage that it takes due account of the referring court's concerns that it may have to give leave to act to a person who does not satisfy the requirements of the proper administration of justice and the effective protection of litigants. By itself verifying that the lawyer providing services who is established in another Member State does in fact satisfy the criteria capable of attesting to sufficient competence to take charge of representing the litigant in proceedings before it, the referring court will be able to satisfy itself that the legitimate interests referred to are duly upheld.

3. Answer to the fourth question referred

101. In the light of the foregoing, I conclude that, even if the Court were to find that, in the context of the Irish system, the requirement under Article 5 of Directive 77/249 may be imposed, it seems nevertheless that such an approach would be disproportionate if it were applied strictly, with no possibility of exceptions where the services provided by a visiting lawyer who wishes to advocate in the case unaccompanied by a domestic lawyer do not jeopardise the applicable overriding reasons in the public interest. On the contrary, the system must be capable of taking into account the specific circumstances of the case, including the training and specific experience of the person providing the services and the nature of the proceedings in which that person wishes to participate, the complexity of the case and the applicable area of law.

50 See point 57 of this Opinion.

VI. Conclusion

102. In the light of the foregoing, I propose that the Court of Justice should answer the questions referred by the Supreme Court (Ireland) for a preliminary ruling as follows:

– A Member State may only avail of the option under Article 5 of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services if the restriction imposed on a party under that directive is justified by an overriding reason in the public interest and is appropriate and proportionate to attaining that objective. Although it is for the national court to determine whether that is so, where a party falling under Directive 77/249 wishes to represent a person who would be entitled to act in person before the court hearing the case, the restriction appears not to be a consistent means of achieving that objective.

– Where it is prima facie appropriate to exercise the option under Article 5 of Directive 77/249, a system such as that existing in Irish law, which merely requires that a lawyer be indicated who is authorised to appear before the national court hearing the case and has agreed to participate in the proceedings, is a proportionate interference in the freedom to provide services.

– It would nevertheless be disproportionate to apply that approach strictly, with no possibility of exceptions where the envisaged provision of services does not jeopardise the applicable overriding reasons in the public interest. On the contrary, a system, such as that established in Irish law, must be capable of taking into account the specific circumstances of the case, including the training and specific experience of the person providing the services and the nature of the proceedings in which that person wishes to participate, the complexity of the case and the applicable area of law.