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Freedom of Movement for Lawyers in the New Europe**

Since its founding by the 1957 Treaty of Rome (EEC Treaty),¹ the European Community (EC), has sought to achieve the unified growth and development of the economies of its Member States.² One of the most important methods for achieving this goal has been the abolition of internal obstructions to the free movement of persons, services, goods, and capital.³ This article focuses primarily on the success of the EC in abolishing obstacles to the free movement of persons by examining the ability of the EC to successfully integrate the legal professions of the twelve Member States.⁴

The debate over the pace and extent of European integration has been fundamentally altered in recent years. In 1986, the twelve Member States agreed to amend the Treaty of Rome with the Single European Act (SEA).⁵ The goal of the SEA is to accelerate drastically the establishment of a single, internal market for

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter EEC Treaty].

2. EEC Treaty, *supra* note 1, art. 2 reads as follows:

It shall be the aim of the community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

3. EEC Treaty, *supra* note 1, art. 3(c) reads as follows: "the activities of the Community shall include . . . (c) the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital."

4. The twelve Member States are the United Kingdom, Ireland, France, Spain, Greece, Italy, Germany, Holland, Luxembourg, Belgium, Denmark, and Portugal. On October 22, 1991, shortly before completion of this article, the European Economic Community and the European Free Trade Association (EFTA) (composed of Sweden, Finland, Norway, Liechtenstein, Switzerland, and Austria) agreed to form a new common market, to be known as the European Economic Area (EEA). The agreement would allow for the free flow of most goods, services, capital and people among the EEA's nineteen member nations and should go into effect just as the single market is formed in the EC on January 1, 1993. This should lead the way for several EFTA members to seek full EC membership. N.Y. TIMES, Oct. 23, 1991, at 1.

5. 1987 O.J. (L 169) 1; see also RICHARD OWEN & MICHAEL DINES, THE TIMES GUIDE TO 1992, at 49 (1989).

the EC to December 31, 1992.⁶ The SEA seeks to achieve, among other things, a "progressively realized" monetary union,⁷ the reduction of disparities between richer and poorer regions in the EC,⁸ strengthened environmental regulations,⁹ coordination in the foreign policy area,¹⁰ and a reduction in administrative and legal constraints on business.¹¹ By the end of 1988 the majority of the 279 proposals for the achievement of a single market, including a directive on the recognition of diplomas that will impact significantly on the legal profession, had been introduced by the European Commission.¹²

There are several important reasons for studying the process of integration in the legal profession. First, since the legal professions in the twelve Member States are so diverse, the process of development of a pan-European legal profession provides a good illustration of several of the obstacles on the path to unifying other professions and occupations. Second, since lawyers have been involved in several of the leading cases concerning freedom of movement for professionals, the legal profession provides a good illustration of the unification process.¹³ Third, the success in unifying the legal profession may significantly enhance EC goals for development and growth. Integration of the profession may reduce inefficiencies in providing legal services by decreasing the overlap of services, achieving economies of scale, speeding up deal-making, and increasing competitiveness with foreign firms (particularly large American firms). Fourth, a more unified legal profession will become necessary as EC laws affect more aspects of everyday life in western Europe. Finally, the legal community constitutes a significant political force. In the view of the pan-Europeans, a unified legal profession thus will be a strong force against internal division and for a united Europe.

An understanding of the institutional framework of the EC is helpful in analyzing the success of the harmonization of the legal profession. The major bodies of the EC government are the Council of Ministers, the Commission, the European Parliament, and the European Court of Justice.¹⁴

Delegates from each of the Member States comprise the Council of Ministers (Council).¹⁵ The Council serves to coordinate the economic policies of the Member States and to approve legislation, finance, and international treaties.¹⁶

6. OWEN, *supra* note 5, at 49. The Single European Act is usually referred to by the date "1992."

7. Single European Act, *supra* note 5, preamble.

8. CLIFFORD CHANCE, *THE CCH GUIDE TO 1993* (1989).

9. Single European Act, *supra* note 5, art. 18(3) (adding article 100a to the EEC Treaty): "The Commission, in its proposals . . . concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection."

10. See Single European Act, *supra* note 5, title III.

11. CLIFFORD CHANCE, *supra* note 8, ¶¶ 201-04.

12. OWEN, *supra* note 5, at 25.

13. See *infra* text accompanying notes 151-66, 203-07 and 209-32.

14. DOMINIK LASOK & J.W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITY* 33-34 (5th ed. 1991).

15. DAVID FREESTONE & J.S. DAVIDSON, *THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN COMMUNITIES* 66 (1988).

16. KLAUS-DIETER BORCHARDT, *THE ABC OF COMMUNITY LAW* 22 (Office for Official Publications of the European Communities, 1986).

The Commission is composed of seventeen commissioners who are appointed by the Council.¹⁷ Each commissioner is considered to be independent of his or her Member State.¹⁸ Each heads a specific policy area, and each is charged with carrying out the EEC Treaty's provisions.¹⁹ The Commission proposes to the Council regulations, which have a direct effect on Member States, and directives, which Member States are charged with enacting by their own legislation.²⁰ The Council, which may amend the proposal, then submits it to the European Parliament.²¹

The Parliament may pose questions to the Commission and the Council concerning the proposal and, if the proposal concerns the budget, it may amend the proposal.²² Its members are directly elected by each Member State. The body has received a higher profile as overall European integration has quickened.²³

The European Court of Justice (ECJ) is responsible for interpreting the EEC Treaty and, in addition, for interpreting international and customary law.²⁴ Article 173 of the EEC Treaty permits the ECJ to invalidate acts of the Council or Commission that violate Community law.²⁵ Article 175 permits the ECJ to review the failure of the Council or Commission to act.²⁶ The ECJ may review actions against Member States under articles 169 and 170,²⁷ and the ECJ may also be asked to interpret EC law under article 177.²⁸

17. FREESTONE, *supra* note 15, at 57-58.

18. LASOK, *supra* note 14, at 214.

19. FREESTONE, *supra* note 15, at 59-60.

20. *Id.* at 38-40. Regulations are of "general application and directly applicable." *Id.* at 38. Directives differ from regulations in three ways: They are not necessarily generally applicable to all Member States, they require specific implementation, and Member States are under a time limit for implementing their obligations. *Id.* at 39-40.

21. *Id.* at 76.

22. LASOK, *supra* note 14, at 254-57.

23. FREESTONE, *supra* note 15, at 72.

24. EEC Treaty, *supra* note 1, art. 164: "The Court of Justice shall ensure observance of law and justice in the interpretation and application of this [the EEC] Treaty.

25. *Id.* art. 173:

The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, [i]t shall be competent to give judgment on appeals by a Member State, the Council, or the Commission on grounds of incompetence, of errors of substantial form, of infringement of this [the EEC] Treaty or of any legal provision relating to its application, or of abuse of power.

26. *Id.* art. 175: "Any natural or legal person may submit to the Court of Justice . . . a complaint to the effect that one of the institutions of the Community has failed to address to him an act other than a recommendation or an opinion."

27. *Id.* arts. 169-70. *Id.* art. 169 states the following:

If the Commission considers that a Member State has failed to fulfill any of its obligations under this [the EEC] Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments. If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

Id. art. 170 states the following:

Any Member State which considers that another Member State has failed to fulfill any of its obligations under this [the EEC] Treaty may refer the matter to the Court of Justice. Before a Member State institutes, against another Member State, proceedings relating to an alleged infringement of the obligations under this [the EEC] Treaty, it shall refer the matter to the Commission. The Commission shall give a reasoned opinion after the States concerned have been required to submit their comments in written and oral pleadings. If the Commission, within a period of three months after the date reference of the matter to it, has not given an opinion, reference to the Court of Justice shall not hereby be prevented.

I. Definition of "Lawyer"

Perhaps the most difficult task the European Community must address in achieving integration of the legal profession is defining precisely what the term "lawyer" means. The legal professions of the Member States have widely divergent requirements for education and training, as well as for entrance examinations.²⁹ The various Member States divide their legal professions into an array of categories and branches.³⁰ The legal traditions of the countries often differ substantially.³¹ Restrictions on association between lawyers vary from nation to nation. Further, Member States have distinct rules of professional conduct.³² Consequently, even though the general goal of unification of the European legal profession has been agreed upon, the actual application of directives and agreements will be a tougher task. Clearly, each Member State's legal profession will have to relinquish some of its identity for the sake of achieving a united legal profession.

The educational requirements for becoming a lawyer vary substantially from state to state. The United Kingdom requires three years of university training³³ while Spain and Portugal each require five.³⁴ Some nations require postgraduate programs (normally offered by the bar and law societies, not the universities)³⁵ that are focused less on theoretical issues and more on the day-to-day questions a lawyer must face.³⁶ Some countries, like the United Kingdom, require different educational backgrounds for each branch of the legal profession.³⁷ And some of the countries do not require any type of university law degree as a prerequisite to entering the profession.³⁸

28. *Id.* art. 177:

The Court of Justice shall be competent to make a preliminary decision concerning:

(a) the interpretation of this [the EEC] Treaty;

(b) the validity and interpretation of acts of the institutions of the Community; and

(c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.

29. See *infra* text accompanying notes 33–51.

30. SPEDDING, *infra* note 42, at 88.

31. *Id.*

32. *Id.*

33. Dinah M. Jones, *The Legal System of England and Wales*, in MOD. LEGAL SYS. CYCLOPEDIA 3.230.55 (Kenneth R. Redden ed., 1984) [hereinafter Redden].

34. For Portugal, see Cynthia L. Hostetler, *The Legal System in Portugal*, *id.* at 4.110.25. For Spain, see George R. Martin, *The Legal System of Spain*, *id.* at 4.160.21.

35. For example, Belgium, which requires attendance at practical legal training courses conducted under the auspices of the Bar authorities. These courses focus on professional responsibility and trial practice. See Marc J. Taeymens, *The Legal System of Belgium*, *id.* at 3.20.41.

36. SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* 49, 63 (1987).

37. Jones, *supra* note 33, at 3.230.55.

38. Such is the case in the United Kingdom. LAGUETTE, *supra* note 36, at 37.

All legal professions require an apprenticeship or similar period of practical training prior to admission.³⁹ However, the character of these apprenticeships differs among the Member States. The length of the training period ranges from as short as one year⁴⁰ to as long as three⁴¹ or even five years.⁴² The training period may occur during the legal education itself⁴³ or upon completion of all academic requirements.⁴⁴ The programs among the Member States have unique demands. Germany requires a rotation through a number of practice areas.⁴⁵ Greece requires a potential member of the Bar to assist a supervisor in court at least thirty times.⁴⁶ The United Kingdom requires articulated clerks to provide general assistance to solicitors.⁴⁷ Holland allows the master to decide the structure of an apprentice's training.⁴⁸ Some of the Member States impose requirements limiting the persons permitted to act as mentors.⁴⁹

Entrance examination requirements also vary among the Member States. Some states have several examinations at various stages in a prospective lawyer's training.⁵⁰ Others have few entrance examination requirements, and still others have none.⁵¹

An area of distinction among the Member States that may be an obstacle to integration is the substantial difference in legal traditions under which lawyers in the EC operate. Most of the Member States have a civil law system,⁵² but the United Kingdom and Ireland retain a common law tradition.⁵³ The common law system is grounded in the idea that judges should construct law based on reason.⁵⁴ The judicial

39. *Id.*

40. See *supra* text accompanying note 34.

41. *Id.*

42. For example, barristers in the United Kingdom must serve a year's pupillage under the supervision of an established barrister. See LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* 97 (1987). France requires three to five years training for a conseil juridique. See Clifton A. LeVasseur, *The Legal System of France: Judges and Legal Professions*, in Redden, *supra* note 33, at 3.70.76.

43. This is the case in the United Kingdom. See Jones, *supra* note 33, at 3.230.56.

44. LAGUETTE, *supra* note 36, at 37.

45. Helmut Aldinger, *The Legal System of the Federal Republic of Germany*, in Redden, *supra* note 33, at 3.110.28.

46. LAGUETTE, *supra* note 36, at 48.

47. SPEDDING, *supra* note 42, at 97.

48. M.J. Meijer et al., *The Legal System of the Netherlands*, in Redden, *supra* note 33, at 3.330.17.

49. For example, Luxembourg supervises by committee (the matter is regulated by Grand-Ducal Regulations dated 21 January 1978 and 25 November 1983); Portugal requires a lawyer with ten years' experience to supervise. See Hosteller, *supra* note 34, at 4.110.25.

50. An applicant in Germany, for example, must have studied at a university for at least three and a half to five years, must first spend six months to a year on the State Examination, spend two and a half years in training, followed by the Second State Examination, also administered over six months to one year. See SPEDDING, *supra* note 42, at 223.

51. LAGUETTE, *supra* note 36, at 6.

52. SPEDDING, *supra* note 42, at 88.

53. Jones, *supra* note 33, at 3.230.8.

54. *Id.*

decisions of higher courts become precedents for lower courts in order to guarantee consistency and uniformity.⁵⁵ In contrast, the civil law systems are rooted in the Roman law, as codified by the Emperor Justinian in the sixth century A.D.⁵⁶ Civil law systems favor the promulgation of laws through written codes rather than through judge-made precedent because a code is thought to be the best way to reach the ideal of a logically consistent set of principles and rules.⁵⁷

Another area of divergence between the legal professions of the Member States is the array of restrictions on rights of association between lawyers. Several Member States limit or ban partnerships between lawyers.⁵⁸ Others allow partnerships to be formed with very few restrictions imposed by the State.⁵⁹ In addition, Member States differ on whether lawyers should be allowed to act as in-house counsel to corporations.⁶⁰

As one French commentator has observed, "[T]o describe the laws which govern the legal profession without discussing the rules of conduct that it has to observe would be like making a body without a soul."⁶¹ The differences and similarities between the rules of professional conduct adopted in each Member State are clearly important when determining what is a "lawyer." Several common characteristics may be recognized. A lawyer should accept only the cases that he or she considers to be just.⁶² Several Member States outlaw contingency fees.⁶³ And no Member State permits fees to be shared with third parties who are not lawyers.⁶⁴ Most of the Member States have conflict of interest regulations that forbid lawyers from simultaneously engaging in other professions.⁶⁵ In addition, all Member States have rules protecting professional secrecy.⁶⁶ The continental Member States impose this secrecy requirement on all professions.⁶⁷ In the United Kingdom and Ireland, case law and the rules of evidence govern professional secrecy, and a failure to observe the secrecy requirement may result in disciplinary sanctions and in a private cause of

55. *Id.*

56. NICHOLAS BARRY, *AN INTRODUCTION TO ROMAN LAW* 2 (1962).

57. *Id.* at 53.

58. For example, barristers in the United Kingdom are not permitted to enter into partnerships (although solicitors may). See Jones, *supra* note 33, at 3.230.57.

59. Germany probably has the most liberal partnership laws. See Aldinger, *supra* note 45, at 3.110.31.

60. Compare this to the United States where corporate legal departments are very common and often enormous in size. See Taeymans, *The Legal System of Belgium*, *supra* note 35, at 3.20.43; see also Aldinger, *supra* note 45, at 3.110.31.

61. LAGUETTE, *supra* note 36, at 123.

62. See, e.g., para. 130 of the Code of Conduct for the Bar of England and Wales which requires that a barrister "not knowingly deceive or mislead the Court."

63. See, e.g., art. 1957 of the Criminal Code of Luxembourg.

64. LAGUETTE, *supra* note 36, at 121.

65. See, e.g., arts. 437 and 438 of the Belgium Judicial Code which forbid lawyers from serving as a judge along with several other professions.

66. LAGUETTE, *supra* note 36, at 139.

67. See, e.g., art. 378 of the Fr. Crim. Code; art. 458 of the Belg. Crim. Code; art. 622 of the Italian Crim. Code; art. 272 of the Neth. Crim. Code; art. 371 of the Greek Crim. Code, and art. 300 of the German Crim. Code.

action for damages.⁶⁸ What emerges are professional rules that are largely similar but bear some significant differences.

One of the more serious obstacles to integration of the legal professions among the Member States of the EC is the substantial divergence in the very structure of the Member States' legal professions. Several civil law Member States divide the practice strictly along a transactional/litigation line.⁶⁹ Typically, an advocate handles all preliminary and actual trial matters⁷⁰ and advises clients on various points of law.⁷¹ The notary is responsible for conveyancing matters (for example, drawing up wills, contracts, deeds, and the like).⁷² Some states permit advocates to perform the traditional functions of a notary as well as those of an advocate.⁷³ In these states the notarial profession may be small, lacking in influence, and highly limited in its functions.⁷⁴

The common law Member States (United Kingdom and Ireland) as well as Spain and Portugal have more formal divisions that do not divide strictly along conveyancing/litigational lines.⁷⁵ While many perceive barristers and solicitors as being separated strictly by a litigation/conveyancing line, this is far from the entire story. In British litigation, solicitors and barristers are analogous to family doctors and surgical specialists.⁷⁶ Solicitors typically handle matters in front of lower courts, maintain direct contact with clients, and deal with most of the preparatory work in anticipation of litigation.⁷⁷ Barristers actually present cases in court.⁷⁸ They have no direct contact with clients (the solicitor must be present),⁷⁹ and they may not refuse the case provided the fee is proper and they are not already involved in the case.⁸⁰ Solicitors also handle administrative, nonlitigious matters such as drafting wills, administering estates, and conveyancing.⁸¹

II. The Provisions of the Treaty of Rome

The Treaty of Rome (Treaty) provides the necessary framework for integrating the European legal profession. Part I of the treaty outlines general principles, part III lays out specific provisions.

68. LAGUETTE, *supra* note 36, at 140.

69. SPEDDING, *supra* note 42, at 100.

70. LeVasseur, *supra* note 42, at 3.70.75.

71. *Id.*

72. *Id.* Belgium and Greece have such systems.

73. Such is the case with *Rechtsanwälte* and *Notar* in Germany. See SPEDDING, *supra* note 42, at 111.

74. E.g., Denmark. See Christel P.F. Vergauwen, *The Legal System of the Kingdom of Denmark*, in Redden, *supra* note 33, at 3.60.17.

75. All divide their legal systems on a barrister/solicitor line.

76. Jones, *supra* note 33, at 3.230.46.

77. SPEDDING, *supra* note 42, at 93.

78. *Id.* at 93-94.

79. *Id.*

80. Jones, *supra* note 33, at 3.230.50.

81. SPEDDING, *supra* note 42, at 93.

The goals of the treaty include promotion of the harmonious development of economic activities, continuous and balanced expression, increased stability, an accelerated increase of the standard of living, and closer relations between Member States.⁸² In order to accomplish these goals, article 3(C) of part I of the treaty calls for the abolition of obstacles to the free movement of persons.⁸³

A. PART I OF THE TREATY

Part I of the treaty lays out one of the treaty's recurrent principles—the principle of nondiscrimination.⁸⁴ The treaty simply states that “[w]ithin the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall . . . be prohibited.”⁸⁵ Articles 7's nondiscrimination language is at the root of the freedom of movement provisions outlined later in the treaty.

B. PART III OF THE TREATY

The goals of freedom for persons and services as well as the abolition of national discrimination are specifically dealt with in part III of the treaty.⁸⁶ Articles 48 through 51 provide that workers (those working for wages and salary)⁸⁷ must be given the right to move freely.⁸⁸ Numerous regulations and directives were passed in the 1960s facilitating movement for workers; now, generally, nationals of each Member State must be treated equally in the search for work and in working conditions.⁸⁹ They have the right to join local unions, to bring their families to the host state, and to enjoy similar rights to housing and training facilities as host state nationals.⁹⁰ The introduction of a European passport will likely accelerate this integration.⁹¹

Activities engaged in on an independent basis, which include many of the activities of the legal profession, are covered by articles 52 to 66 of part III of the treaty.⁹² The treaty divides these articles into two sections. Articles 52

82. EEC Treaty, *supra* note 1, art. 2.

83. *Id.* art. 3(c).

84. *Id.* art. 7:

Within the field of application of this Treaty, and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.

The Council may, acting by means of a qualified majority vote on a proposal of the Commission, and after the Assembly has been consulted, lay down rules in regard to the prohibition of any such discrimination.

85. *Id.*

86. *Id.* part II, title III.

87. F. BURROWS, *FREE MOVEMENT IN EUROPEAN COMMUNITY LAW* 119 (1987).

88. The treaty required setting up a transitional period which was subsequently set for December 31, 1969. EEC Treaty, *supra* note 1, art. 48.

89. Common Mkt. Rep. (CCH) ¶ 1000 (1988).

90. *Id.*

91. *Id.*

92. EEC Treaty, *supra* note 1, arts. 52-66.

through 58 call for the unrestricted right to become established in another Member State.⁹³ Articles 50 through 66 call for the end of restrictions on the freedom to provide services.⁹⁴

Generally speaking, the right to establish refers to "the right to engage in self-employed activities and the right to set up and manage undertakings within the jurisdiction of any other Member State, subject only to the same municipal restrictions as would be applied to the nationals of that Member State."⁹⁵ The provisions cover both individuals and companies.⁹⁶

The right to provide services refers to the right of persons who are citizens of a Member State, and who are established in that Member State, to provide services in another Member State.⁹⁷ These provisions cover movement of a temporary nature and, unlike establishment, issues of full accreditation and admission to the Bar in the host country are not involved.⁹⁸

1. *The Right to Establish*

The treaty calls for the abolition of restrictions on establishment⁹⁹ for individuals as well as companies.¹⁰⁰ A Member State may not impose a new obstacle to establishment on nationals of other States.¹⁰¹ However, the treaty excludes government activities from the sections requiring abolition of establishment limitations.¹⁰² Article 56 of the treaty permits restrictive treatment of foreign nationals on grounds of

93. *Id.* arts. 52-58.

94. *Id.* arts. 59-66.

95. Gordon, *Council Passes Directive Allowing Lawyers to Provide Services Across National Borders*, 7 GA. J. INT'L & COMP. L. 723, 727-28 (1977).

96. Common Mkt. Rep. (CCH) ¶ 1000 (1988); see EEC Treaty, *supra* note 1, art. 58.

97. Gordon, *supra* note 95, at 728.

98. Peter S. Wilson, Recent Developments, *EEC: Freedom to Provide Services for EEC Lawyers*, 19 HARV. INT'L L.J. 379, 380 (1978).

99. EEC Treaty, *supra* note 1, art. 52.

100. Article 52 of the EEC Treaty uses language such as "[The] progressive abolition shall also extend to restrictions on the setting up of agencies, branches or subsidiaries" and "Freedom of establishment shall include the right to . . . set up and manage enterprises and, in particular, companies." *Id.*

101. *Id.* art. 53. This type of provision is normally called a "standstill" provision. The duty not to install obstacles against establishing is direct and requires no implementing legislation. Article 53 reads as follows: "Member States shall not, subject to the provisions of this Treaty, introduce any new restrictions on the establishment in their territories of nationals of other Member States." *Id.*

102. *Id.* art. 55. The statute covers "Activities which in any State include, even incidentally, the exercise of public authority." This provision is based on the notion that a common market should not result in the consolidation of government functions, but, instead, enable states to preserve their autonomy and grow economically. HANS SMIT & PETER HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY* 2-603 (1976). The precise meaning of this provision was hotly debated in the early years of the Community. SPEDDING, *supra* note 42, at 169-71.

public policy, public security, and public health.¹⁰³ The ECJ, interpreting the provision narrowly, requires that the activities "taken on their own constitute a direct and specific connection with the exercise of official authority."¹⁰⁴

The treaty calls for the drawing up of a general program for the abolition of restrictions on establishment by the Council¹⁰⁵ and also provides for the Council to issue directives for the mutual recognition of diplomas, certificates, and other evidence of formal qualification.¹⁰⁶ The treaty also calls for coordination of the legislative and administrative provisions of the Member States concerning the occupations covered in the section.¹⁰⁷

2. *The Right to Provide Services*

The first of the services provisions, article 59 of title III, calls for the elimination of restrictions on providing services.¹⁰⁸ Like article 53 governing establishment, the treaty forbids Member States from imposing new obstacles to providing services.¹⁰⁹ Also, like the establishment provisions, the treaty calls for the drawing up of a general program for the abolition of restrictions on

103. *Id.* art. 56. The program may be very flexible and broad and is to be put into operation through directives issued by the Council. Article 56 states the following:

Before the expiry of the transitional period, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall issue directives for the co-ordination of the above-mentioned legislative and administrative provisions. After the end of the second stage, however, the Council, acting by means of a qualified majority vote on a proposal of the Commission, shall issue directives for coordinating such provisions as, in each Member State, fall within the administrative field.

Id.

104. *See Reyners, infra* note 139.

105. EEC Treaty, *supra* note 1, art. 53.

106. *Id.* art. 57. Mutual recognition is a form of reciprocal treatment where an individual qualified in one Member State is considered equal to that of a person possessing corresponding qualifications in another Member State. Article 57 states the following:

In order to facilitate the engagement in and exercise of non-wage earning activities, the Council, on a proposal of the Commission after the Assembly has been consulted, shall in the course of the first stage by means of a unanimous vote and subsequently by means of a qualified majority vote, act by issuing regarding mutual recognition of diplomas, certificates and other qualifications.

Id.

107. *Id.* art. 57.

108. *Id.* art. 59. The article limits itself to "nationals of Member States who are established in a State of the Community other than that of the person to whom the services are supplied."

Article 60 of the EEC Treaty defines "Services" as including activities of an industrial or commercial character, activities of craftsmen, and activities of the professions. *Id.* art. 60. The article also defines the scope of the section:

Without prejudice to the provisions of the Chapter relating to the right of establishment, a person supplying a service may, in order to carry out that service, temporarily exercise his activity in the State where the service is supplied, under the same conditions as are imposed by that State on its own nationals.

Id.

109. Article 62, a standstill provision, states the following: "Except where otherwise provided for in this Treaty, Member States shall not introduce any new restrictions on the freedom which has been in fact achieved, in regard to the supply of services, at the date of the entry into force of this Treaty."

Id. art. 62. The goal of this provision was to at least preserve the then existing provisions and bilateral interbar conventions and other ad hoc agreements that granted rights to provide services in these Member States. LAGUETTE, *supra* note 36, at 210. But as Laguette notes, the Commission proceeded very cautiously on this point, and it was not until the Services Directive that such arrangements could be enforced in all Member States. *Id.* at 210-11.

providing services.¹¹⁰ The treaty encourages the voluntary acceleration of the pace of the liberalization of services.¹¹¹ And the treaty contains a most-favored-nation clause stating that as long as restrictions on providing services remain, each Member State shall apply the restrictions without distinction on grounds of nationality.¹¹²

III. The Approach to Unification of the Legal Profession

A. INITIAL OBSTACLES

The approach to integration in the legal profession initially focused on the goal of abolishing restrictions on providing services. Progress had been made in this area even before adoption of the EEC Treaty.¹¹³ Specific *droits acquis*, or acquired rights, already existed in the EEC via certain interbar agreements relating to advocacy that allowed lawyers to work in Member States other than their own.¹¹⁴ For example, an agreement existed permitting French and Belgian *avocats* to provide services in each other's states.¹¹⁵ Yet, while some progress was made on the right to provide services in another Member State, no original Member State allowed nonnationals to formally enter its legal profession.¹¹⁶

The early 1960s saw considerable debate over the standstill provisions of articles 53 and 62.¹¹⁷ The question was significant since the provision could preserve the bilateral agreements already in effect for providing services. Opponents of integration questioned whether the articles precluded the introduction of any facially neutral restrictions that would make it more difficult for nationals and nonnationals to establish in a Member State.¹¹⁸ The ECJ held on July 25, 1969, in *Costa v. E.N.E.L.*,¹¹⁹ that restrictions that applied equally to nationals of the host state and nonnationals (including requirements for professional qualifications)

110. Article 63 of the EEC Treaty provides:

Before the end of the first stage, the Council acting by means of a unanimous vote on a proposal of the Commission and after the Economic and Social Committee and the Assembly have been consulted, shall lay down a general programme for the abolition of restrictions existing within the Community on the free supply of services. The Commission shall submit such proposal to the Council in the course of the first two years of the first stage.

Id. art. 63.

111. *Id.* art. 64. "The Member States declare their readiness to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 63(2), if their general economic situation and the situation of the economic sector concerned so permit." *Id.*

112. *Id.* art. 65. "As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 59." *Id.*

113. SPEDDING, *supra* note 42, at 164.

114. *Id.*

115. LAGUETTE, *supra* note 36, at 210.

116. Stephen Kramer, *The Liberal Professions in the E.E.C.*, 122 New L.J. 648, 649 (1972).

117. *Id.*

118. *Id.*

119. Case 6/64, *Costa v. E.N.E.L.*, [1964] E.C.R. 585, [1964] C.M.L.R. 425 (1964). (The ECJ ruled that a law nationalizing the Italian electricity industry was contrary to article 53).

were not affected by article 53.¹²⁰ The ECJ in *Costa* also held that article 53 had direct effect regardless of whether a Member State had supporting legislation.¹²¹

B. THE PROGRAMS TO ABOLISH RESTRICTIONS

In order to accomplish article 52's objective of abolishing restrictions on establishment, a General Program for the Abolition of Restrictions of Freedom of Establishment was adopted in 1961 by the Council under article 54.¹²² The Commission was to submit to the Council a certain number of proposals for directives, which were to be implemented under the timetable for several fields of activity, including the legal profession.¹²³ The end of this transition period was set for December 31, 1969.¹²⁴ Even though the Commission had proposed several directives relating to liberal professions, none were adopted prior to 1974.¹²⁵ Indeed, from the treaty's date of entry until 1974 virtually no advance had been made in adopting Community wide legislation concerning the freedom of establishment for the legal profession.¹²⁶

In 1961, as required by article 63, the General Program for the Abolition of Restrictions on Freedom to Provide Services (by December 31, 1969) was issued.¹²⁷ Title III of the General Program makes it clear that nondiscriminatory restrictions that effectively prohibit the providing of services by a foreign national should be eliminated.¹²⁸ Title IV provides that: "Until restrictions have been abolished, each Member State shall apply them . . . without distinction on grounds of nationality of residence, the most favorable treatment accorded under existing practices and bilateral or multilateral agreements, other than those establishing regional unions between Belgium, Luxembourg, and the Netherlands."¹²⁹ The provision sets forth the most-favored-nation principle contained in article 65.¹³⁰ While the Benelux countries are excluded in accordance with article 233 of the EEC Treaty,¹³¹ this provision seems to require countries like France and Belgium, which have bilateral agreements between their legal professions, to grant similar rights to lawyers of other

120. BURROWS, *supra* note 87, at 198.

121. *Id.* at 210.

122. Common Mkt. Rep. (CCH) ¶ 1322.01 (1988).

123. *Id.*

124. *Id.*

125. LAGUETTE, *supra* note 36, at 211-12.

126. Gordon, *supra* note 95, at 723.

127. Kramer, *supra* note 116, at 649.

128. Common Mkt. Rep. (CCH) ¶ 1548 (1988).

129. *Id.* ¶ 1549.

130. SMIT & HERZOG, *supra* note 102, at 2-680.

131. This is in accordance with article 233 of the EEC Treaty which reads as follows: "The provisions of this Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty." EEC Treaty, *supra* note 1, art. 233.

Member States by the program's 1969 enactment date.¹³² The basic establishment rule is that the traveling professional should be able to perform the service on an equal level with the domestic one, but the services provision shows that the abolition of restrictions is absolute in nature, irrespective of whether the rules are overtly discriminatory or discriminatory merely in their effects.¹³³ For lawyers who have major difficulties in establishing, this is very important.

C. RESOLVING THE DISPUTE OVER "OFFICIAL AUTHORITY"

Until 1974 integration of Europe's legal community was blocked largely by the application of articles 55 and 66 of the Treaty of Rome, which exclude government activities from the scope of the treaty.¹³⁴ Much of the debate over the two articles' application to the legal profession centered around the term "activities" as it applies to the exercise of official authority.¹³⁵ Can the term "activities" be legitimately equated with the meaning of the term "profession"? If it can, then the argument follows that the drafters intended to exclude from the Treaty of Rome an entire profession that has a direct connection with the exercise of official authority.¹³⁶ Because the lawyer sometimes exercises official authority, the rules mandating establishment and freedom to provide services would not apply to the legal profession.¹³⁷ In contrast to this broad interpretation of articles 55 and 66 espoused by some Member States, other nations, including Belgium, Italy, and the United Kingdom, argued that the term "activities" aims only at certain activities and not the whole profession.¹³⁸ Although the Council ruled that article 55(2) did not apply generally to the legal profession, the issue would still be debated until the ECJ addressed the issue.¹³⁹

D. THE INITIALLY PROPOSED SERVICES DIRECTIVES

On April 17, 1969, the Commission submitted to the Council an initial proposal for a directive calling for the freedom to provide services.¹⁴⁰ Unlike previous directives dealing with other professions, it did not combine services with

132. SMIT & HERZOG, *supra* note 102, at 2-681.

133. SPEDDING, *supra* note 42, at 178.

134. U.H. Schneider, *Towards a European Lawyer*, 8 COMMON MKT. L. REV. 44 (1971).

135. *Id.* at 46-67.

136. LAGUETTE, *supra* note 36, at 216.

137. Schneider, *supra* note 134, at 46. This view was particularly favored by Luxembourg. BURROWS, *supra* note 87, at 207.

138. BURROWS, *supra* note 87, at 207.

139. Kramer, *supra* note 116, at 649. The article 55 issue was resolved in Case 2/74, *Reyners v. Belgian State*, 1974 E.C.R. 631, Common Mkt. Rep. (CCH) ¶ 8256 (1974). See *infra* text accompanying notes 150-57.

140. Council Directive 77/249, 1977 O.J. (L 78) 17 [hereinafter *Services Directive*].

establishment because the Commission felt that an establishment directive first required an abolition of national restrictions and a mutual recognition of diplomas and qualifications.¹⁴¹ However, a series of obstacles delayed a service directive for nearly eight years until March 22, 1977.¹⁴²

As in the past, the debate over articles 55 and 66 was one of the obstacles. Early in the discussion, which the Council began in 1972, the German and Luxembourg Governments sent the Commission a memorandum in which they maintained that under article 55 the legal profession was a unified one that could not be divided according to the activities performed by the lawyers and that lawyers played an essential role in the administration of justice.¹⁴³

Supporters of the inclusion of lawyers in a services provision also objected to the proposed directive. The proposal was directed toward representation of the client in judicial proceedings, while members of the various bars felt that advising clients and providing extrajudicial services were ignored.¹⁴⁴ Hence, the scope of the directive needed to be broadened.

Entry of three new Member States into the European Community further delayed action on the directive. In 1973, the United Kingdom, Ireland, and Denmark joined the EC.¹⁴⁵ First, the Commission needed to take into account the fact that Ireland and the United Kingdom had a common law, and not a civil law, tradition.¹⁴⁶ Second, insofar as Ireland and the United Kingdom were concerned, the Commission needed to consider the fact that the structure and overall organization of the legal profession of the English-speaking Member States, as well as the lawyer's role in the administration of justice, differed from that of the continental Member States.¹⁴⁷

E. THE *REYNERS* AND *VAN BINSBERGEN* DECISIONS

In 1974, the ECJ went a long way toward putting the integration process back on track by deciding, pursuant to article 177, the cases of *Reyners v. Belgian State*¹⁴⁸ and *Van Binsbergen v. Bestuur*.¹⁴⁹

Reyners v. Belgian State dealt primarily with the legal profession, but, nonetheless, had a significant impact on the overall freedom of movement for a number of types of professionals in the European Community. *Reyners* was a

141. Schneider, *supra* note 134, at 48.

142. H. Bronkhorst, *Lawyer's Freedom Under the New Directive*, 2 EUR. L. REV. 225 (1977).

143. SPEDDING, *supra* note 42, at 185.

144. LAGUETTE, *supra* note 36, at 240.

145. 1 Common Mkt. Rep. (CCH) ¶ 101.07 (1988).

146. Wilson, *supra* note 98, at 382.

147. *Id.*

148. See *Reyners*, *supra* note 139.

149. Case 33/74, *Van Binsbergen v. Bestuur*, 1974 E.D.R. 1299, Common Mkt. Rep. (CCH) ¶ 8282 (1974).

Dutch national who held a Belgian law diploma. He was excluded from the profession because of his nationality after passage of a 1970 decree requiring Belgian nationality as a condition to joining the Belgian bar.¹⁵⁰ The *Reyners* court addressed two questions relating to articles 55 and 52: (1) What is meant by "activities which in that State are connected, even occasionally, with the exercise of public authority" within the meaning of article 55 of the Treaty of Rome? Must this article be interpreted in such a way that within a profession such as that of *avocat* the only activities covered are those connected with the exercise of official authority, or does article 55 apply to the profession in its entirety?¹⁵¹ And (2) is article 52 of the Treaty of Rome, since the end of the transitional period, a "directly applicable provision," despite, in particular, the absence of a directive as prescribed by articles 54(2) and 57(1) of the treaty?¹⁵²

In answering the first question, the ECJ held that article 55 refers only to activities and not to professions. The article only excludes activities that in themselves have a direct connection with the exercise of official authority and does not exclude the giving of legal advice or representing parties in court.¹⁵³ Indeed, the ECJ went so far as to respond to the Federal Republic of Germany's submission that "contacts, even regular and organic, with the courts, including even a compulsory cooperation in their functioning, do not constitute, as such, a connection with the exercise of official authority."¹⁵⁴ But activities relating the inner workings of the court (for example, issuing decisions) are left out because they are associated with the exercise of public authority.¹⁵⁵

In response to the second issue, the ECJ ruled that article 52 is a directly applicable provision despite the absence in a particular area of the directives called for in articles 54(2) and 57(1) of the treaty.¹⁵⁶ The ECJ held that the right to establish already existed since the end of the transitional period of 1969, but directives should be regarded as measures intended to facilitate the effective exercise of the right to establish.¹⁵⁷

The ECJ quickly followed *Reyners* with a similar case addressing the issue of the freedom to provide services. *Van Binsbergen v. Bestuur* dealt with a Dutch plaintiff who hired a lawyer of Dutch nationality to represent him in a court where representation by an advocate was not obligatory. During the proceedings, the lawyer transferred residence to Belgium and his capacity to represent the

150. *Reyners*, *supra* note 139, Common Mkt. Rep. (CCH) ¶ 8256, at 9161-31.

151. *Id.* at 9161-23.

152. *Id.*

153. *Id.* at 9161-37.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 9161-36.

plaintiff was challenged on the basis of a Netherlands law allowing only persons established in the Netherlands to act as legal representatives before the court.¹⁵⁸ The ECJ addressed two questions in order to resolve the matter: (1) Are articles 59 and 60 of the EEC Treaty directly applicable, and do they create individual rights that national courts must protect?¹⁵⁹ (2) If so, what is the meaning of articles 59 and 60?¹⁶⁰

In response to the first question, the ECJ mirrored the *Reyners* decision by holding that the first paragraph of article 59 and the third paragraph of article 60 have direct effect.¹⁶¹ In response to the second question the ECJ concluded that the restrictions to be abolished in articles 59 and 60 include any restrictions imposed on those persons not habitually residing in the State where service is provided.¹⁶² The ECJ did hold that specific requirements imposed on the person providing the service cannot be considered incompatible with the treaty if the purpose of a rule is the application of a professional rule justified by the general good.¹⁶³

Following the two decisions, the Council chose to withdraw directives that called simply for the abolition of restrictions on establishment and providing services since the directives had become superfluous.¹⁶⁴ The Commission, in recommending this course of action to the Council, noted that since "by its very nature, a directive has constitutive effect, the adoption of directives having only declaratory effect could only create confusion and protract the work of the Council unnecessarily."¹⁶⁵ But the cases did not affect the need to adopt directives intended to facilitate the taking up of activities liberalized by article 52 and that promote the effective exercise of the liberalized rights. The directives would be intended to ensure "cooperation between the competent authorities in the Member States" or to promote "the adoption of administrative procedures and practices."¹⁶⁶

F. THE FINAL SERVICES DIRECTIVE

A modified, expanded Services Directive was submitted to the Commission on August 19, 1975, and was eventually adopted in 1977 after the "official authority" question was resolved.¹⁶⁷ As a result of *Van Binsbergen* the new directive deleted references to the abolition of restrictions and emphasized the aspect of

158. *Van Binsbergen*, *supra* note 149, Common Mkt. Rep. (CCH), at 7210-11.

159. *Id.*

160. *Id.*

161. *Id.* at 7213.

162. *Id.*

163. *Id.* at 7211.

164. Commission Communication Document SEC (74); Common Mkt. Rep. (CCH) ¶ 9722, at 9601 (1974).

165. *Id.* at 9601.

166. *Id.* at 9604.

167. LAGUETTE, *supra* note 36, at 241.

the recognition of the *avocat* coming from another Member State as a lawyer.¹⁶⁸ The preamble of the directive implicitly recognized the *Reyners* and *Van Binsbergen* decisions.¹⁶⁹

The 1977 Directive (the Services Directive) allows for any legal service to be rendered on a temporary basis in any Member State.¹⁷⁰ This includes representing clients before courts in civil and criminal matters, giving advice on the law, and drafting legal documents.¹⁷¹ The directive permits Member States to reserve to their own legal professions certain activities, such as the preparation of documents relating to the administration of the estates of deceased persons and the drafting of formal documents creating or transferring interests in land.¹⁷² The reservation is designed to remedy the inequality arising from the fact that British and Irish solicitors normally engage in such work, whereas on the continent these activities must be performed by a notary (a category not covered by the directive).¹⁷³

For purposes of the Services Directive, article 1 defines the word "lawyer" as simply any person working under the title normally used in that person's Member State.¹⁷⁴ Hence, the Services Directive avoids defining a lawyer by the activities covered. Article 2 then goes on to state that each Member State will recognize any person listed in article 1(2).¹⁷⁵

168. Bronkhorst, *supra* note 142, at 225.

169. See *infra* note 173.

170. Services Directive, *supra* note 140.

171. Wilson, *supra* note 98, at 380.

172. Services Directive, *supra* note 140, art. 1(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.

Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land.

173. Bronkhorst, *supra* note 142, at 226.

174. Services Directive, *supra* note 140, art. 1(2); see, e.g., Belgium: *Avocat*; Ireland: Barrister, Solicitor.

175. Services Directive, *supra* note 140, art. 2: "Each Member State shall recognize as a lawyer for the purpose of pursuing the activities specified in Article 1(1) any person listed in paragraph 2 of that Article."

Article 1 states that: "Lawyer" means any person entitled to pursue his professional activities under one of the following designations:

<i>Belgium:</i>	<i>Avocat-Advocaat</i>
<i>Denmark:</i>	<i>Advokat</i>
<i>Germany:</i>	<i>Rechtsanwalt</i>
<i>France:</i>	<i>Avocat</i>
<i>Ireland:</i>	<i>Barrister</i>
	<i>Solicitor</i>
<i>Italy:</i>	<i>Avvocato</i>
<i>Luxembourg:</i>	<i>Avocat-avoué</i>
<i>Netherlands:</i>	<i>Advocaat</i>
<i>United Kingdom:</i>	<i>Advocate</i>
	<i>Barrister</i>
	<i>Solicitor</i>

Id. art. 1(2).

Article 3 requires that a visiting lawyer use only the title of the state where he or she is established since the directive does not contain provisions for the mutual recognition of qualifications.¹⁷⁶ Under article 3, a lawyer must also indicate the professional organization that has authorized him or her to practice law.¹⁷⁷

Article 4 lays down various conditions governing the provision of services. Activities related to representing a client in legal proceedings shall be pursued subject to the conditions established for lawyers in the host state, with the exception of rules requiring residence or local bar membership.¹⁷⁸ For example, a condition that a lawyer must have practiced for a specific length of time before being permitted to practice before a particular court would be acceptable.¹⁷⁹ The issue of professional conduct is addressed by requiring the lawyer representing a client in legal proceedings to observe the rules of the host state without prejudice to the lawyer's obligations in his or her home state.¹⁸⁰ A lawyer engaging in non-courtroom activities is governed by the rules of conduct of the lawyer's home state, without prejudice to the rules governing the profession in the host state.¹⁸¹ "Without prejudice" means that the stricter of rules will apply where conflict exists.¹⁸²

Article 5 permits Member States to require that a foreign lawyer work in conjunction with a local lawyer and to be introduced, in accordance with local rule or customs, to the presiding judge or the president, or both, of the relevant

176. *Id.* art. 3.

A person referred to in Article 1 [of the Services Directive] shall adopt the professional title used in the Member State from which he comes, expressed in the language, or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practice or the court of the law before which he is entitled to practice pursuant to the laws of that State.

Id.

177. *Id.* art. 3. Hence, a Dutch *Advocaat* practicing in Germany will be called an *Advocaat*, not a *Rechtsanwalt*. See Gordon, *supra* note 95, at 731.

178. Services Directive, *supra* note 140, art. 4(1).

Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.

Id.

179. Case 71/76, *Thieffrey v. Conseil de l'Ordre des Avocats à la Cour de Paris*, 1977 E.C.R. 7612, Common Mkt. Rep. (CCH) ¶ 8396 (1976).

180. Services Directive, *supra* note 140, art. 4(1). The 1977 Directive has special provisions specifying which set of rules apply in the United Kingdom and Ireland in 4(3). *Id.* art. 4(3).

181. *Id.* art. 4(4).

A lawyer pursuing activities other than those referred to in paragraph 1 [of Article 4] shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

Id.

182. Gordon, *supra* note 95, at 731.

host state bar.¹⁸³ Permission would be granted because of the variation between legal systems and rules of procedure, and restrictions are allowed only where it is necessary to protect the client or the standards of the legal profession.¹⁸⁴

In order to address the differing rules concerning corporate counsel in the various Member States, article 6 permits Member States to exclude salaried lawyers from pursuing activities related to the representation of employers in legal proceedings insofar as lawyers established in the host state are not permitted to pursue those activities.¹⁸⁵ But the wording of the article implicitly allows salaried lawyers to appear in legal proceedings if the salaried lawyer should happen to represent a party who is not the lawyer's employer.¹⁸⁶ Also, the Services Directive does not mention noncourtroom activities in relation to the in-house lawyer. But activities such as an in-house lawyer accompanying a client abroad to advise the client in the negotiation of a contract had occurred without objection prior to the issuance of the Services Directive.¹⁸⁷

Article 7 of the Services Directive covers disciplinary matters.¹⁸⁸ It permits the host bar to inquire into the qualifications of the visiting lawyer, and the host bar may adjudicate violations of article 4 of the directive.¹⁸⁹ The home bar would then be notified for further actions.¹⁹⁰

Article 8 of the Services Directive required Member States to implement consistent legislation within two years of notification.¹⁹¹ But several Member

183. Services Directive, *supra* note 140, art. 5.

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 [of the 1977 Directive] 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 practices before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avocat" or "procuratore" practicing before it.

Id.

184. Wilson, *supra* note 98, at 383.

185. Services Directive, *supra* note 140, art. 6. "Any Member State may exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to the activities to that undertaking in legal proceedings insofar as the lawyers established in that State are not permitted to pursue those activities." *Id.*

186. Bronkhorst, *supra* note 142, at 228.

187. Wilson, *supra* note 98, at 382.

188. Services Directive, *supra* note 140, art. 7; see *infra* notes 192, 193.

189. Services Directive, *supra* note 140, art. 7(1). "The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer." *Id.*

190. *Id.* art. 7(2).

In the event of non-compliance with the obligations referred to in Article 4 [of the Services Directive] and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.

Id.

191. *Id.* art. 8.

Member States shall bring into force the measures necessary to comply with this Directive within two years of its notification and shall forthwith inform the Commission thereof. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Id.

States took much longer: Italy, for example, did not implement the directive until February 9, 1982, and Belgium's law did not take effect until August 1983.¹⁹²

In order to make the Services Directive's provisions concerning professional conduct clearer and more effective, the Consultative Committee of the Bars and Law Societies of the European Communities (CCBE)¹⁹³ issued a text that sought to achieve some degree of harmonization of Member State professional conduct rules, especially concerning matters that arise the most often in practice.¹⁹⁴ Referred to as the Declaration of Perugia, the draft was adopted on September 16, 1977, and is a charter of the rules of conduct of the profession.¹⁹⁵ The Declaration contains eight articles covering such issues as confidentiality, advertising, and respecting the rules of other bars (in compliance with the Services Directive).¹⁹⁶ The Declaration, unlike the Services Directive, would not be binding or effective unless each Member State's bar adopted it as part of its regulations.¹⁹⁷ However, the Member States chose not to take much account of the Declaration of Perugia when drafting national measures implementing the Services Directive and, consequently, the EC still has no common code of professional conduct.¹⁹⁸ Recently, the CCBE passed a more comprehensive professional conduct code that is now being debated in the Member State legal communities.¹⁹⁹

G. POST-SERVICES DIRECTIVE JURISPRUDENCE

Though *Reyners* gave the treaty's right of establishment language direct effect, in the years following the decision, lawyers wishing to practice in other Member States continued to be confronted with serious obstacles. Lawyers still had to meet the requirements of the Member State before being permitted to join the host state's bar. Some of the restrictions were illegitimate, discriminatory requirements that the ECJ had sought to remove in the various cases brought before it. In *Thieffrey v. Conseil de l'Ordre des Avocats à la Cour de Paris*,²⁰⁰ Thieffrey,

192. LAGUETTE, *supra* note 36, at 249.

193. The CCBE is the representative body of the legal profession throughout virtually the whole of Western Europe. It represents the lawyers of the twelve Member States and fourteen jurisdictions of the European Community, and also certain other European States with interests similar to those of the Member States, which it has recognized as Observer States

Its working groups have undertaken substantial work, resulting in practical proposals, in such specialized areas as a code of ethics for the profession, conditions for the mutual recognition of diplomas in other countries, provision of cross border services, the possibilities for the establishment of lawyers within other European Community Member States, and the consideration of setting up of multidisciplinary or multinational partnerships. The fact that the working groups are composed of delegates who are themselves practitioners, gives the work of the group direct practical reference.

DOROTHY MARGARET DONALD-LITTLE, CROSS BORDER PRACTICE COMPLIANCE 3-1 (1991).

194. See *Declaration of Perugia*, in LAGUETTE, *supra* note 36.

195. *Id.*

196. *Id.*

197. LAGUETTE, *supra* note 36, at 248.

198. *Id.*

199. See *infra* notes 280, 281.

200. *Thieffrey*, *supra* note 179.

a Belgian national, held a Belgian law diploma that was recognized by French university authorities as equivalent to a French university law degree.²⁰¹ He also passed the French bar examination and received a certificate qualifying him for the profession of *avocat*.²⁰² His bar admission application was rejected on the ground that he did not hold the necessary French diplomas (even though a similar applicant with a French degree would have been virtually automatically accepted).²⁰³ The ECJ held that a national of one Member State cannot be denied the right to establish as a lawyer in another Member State if possessing a diploma that has been recognized by the authority of the host state as the equivalent of a host state diploma.²⁰⁴ Though Thieffrey won the case, the ECJ failed to lay down conditions for the mutual recognition of diplomas, leaving the matter to the Commission and the individual Member States.²⁰⁵

In the 1983 case of *Ordre des Avocats du Barreau de Paris v. Klopp*,²⁰⁶ the ECJ held that Member States are not permitted to refuse to a lawyer the right to practice because the lawyer is already established in another Member State.²⁰⁷ Klopp was a German national and Düsseldorf bar member who applied for registration with the Paris bar in order to practice in both Düsseldorf and Paris.²⁰⁸ The Paris bar refused his admission on the ground that an *avocat* could maintain only one chamber within the territorial jurisdiction of the regional court where the *avocat* is registered.²⁰⁹ France argued that in order to ensure compliance with the professional rules of conduct, the lawyer should practice exclusively in France.²¹⁰ While these concerns were considered to be legitimate, the ECJ ruled that the Paris bar's methods discriminated unfairly against foreigners.²¹¹ Other approaches, such as stipulating that the home state bar initiate disciplinary proceedings as well as the host bar, could be used instead.²¹²

In *Commission v. Federal Republic of Germany*,²¹³ the ECJ ruled that a Member State's national legislation implementing the Services Directive was too restrictive. The Commission's complaints concerned German legislation mandating a duty of working "in conjunction" with a German lawyer permitted under article 5 of the Services Directive. The case attempted to settle the issues

201. *Id.* Common Mkt. Rep. (CCH) at 7151.

202. *Id.*

203. *Id.*

204. *Id.* at 7159.

205. Rolf Waegenbaur, *Free Movement in the Professions: The New EEC Proposal on Professional Qualification*, 23 COMMON MKT. L. REV. 99 (1986).

206. Case 107/83, *Ordre de Avocats du Barreau de Paris v. Klopp*, 1984 E.C.R. 2971, Common Mkt. Rep. (CCH) ¶ 14,116 (1984).

207. *Id.* Common Mkt. Rep. (CCH) at 15,495.

208. *Id.* at 15,494-95.

209. *Id.* at 15,495.

210. *Id.* at 15,496.

211. *Id.* at 15,497.

212. *Id.* at 15,496.

213. EC Commission v. Federal Republic of Germany, 1988 E.C.R. 1123.

of the permissible scope of the "work in conjunction" requirement, the detailed rules governing "work in conjunction," and the restriction to a specific geographical area of the right to plead.²¹⁴

The ECJ declared that Germany failed to fulfill its obligations under articles 59 and 60 of the EEC Treaty and the Services Directive to facilitate the effective exercise by lawyers of the freedom to provide services by: (a) requiring the lawyer providing services to act in conjunction with a lawyer established on German territory, even where under German law there is no requirement of representation by a lawyer; (b) requiring that the German lawyer, in conjunction with whom he must act, himself be the authorized representative or defending counsel in the case; (c) not allowing the lawyer providing service to appear in the oral proceedings unless accompanied by the said German lawyer; (d) laying down unjustified requirements regarding proof of the coinvolvement of the two lawyers; (e) imposing the requirement, without any possible exception, that the lawyer providing services is to be accompanied by a German lawyer if visiting a person held in custody and is not to correspond with that person except through the said German lawyer; and (f) making lawyers providing services subject to the rule of territorial exclusivity laid down in paragraph 52(2) of the *Bundesrechtsanwaltsordnung* (which requires that lawyers be admitted to practice before the judicial authority in question).²¹⁵

The ECJ states that the Services Directive's intent to "facilitate the effective pursuit" of the activities of lawyers by way of the provision of service logically requires "the abolition of all discriminations against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided."²¹⁶ The ECJ further stated that the freedom to provide services "may be restricted only by rules which are justified by the general good and are imposed on all persons pursuing activities in the host state"²¹⁷

The case of *Claude Gullung v. Conseil de L'Ordre Des Avocats Du Barreau De Colmar*²¹⁸ ruled on issues related to both the freedom to provide services and the freedom of establishment for *avocats*. Gullung, a German-French dual national, practiced law in France, but resigned after the conclusion of disciplinary proceedings against him.²¹⁹ He obtained admission as a *Rechtsanwalt* in Germany and then sought to provide services (under the 1977 Directive) in France.²²⁰ The bar of the French district where Gullung sought to provide services adopted a decision prohibiting all member *avocats* of its bar from giving assistance under

214. *Id.* ¶ 4.

215. *Id.* ¶ 43.

216. *Id.* ¶ 11.

217. *Id.* ¶ 12.

218. Case 292/86, *Gullung v. Conseil de l'Ordre des Avocats du Barreau de Colmar*, Common Mkt. Rep. (CCH) 526 (1988).

219. *Id.* at 528-29.

220. *Id.* at 529.

the conditions laid down by the 1977 Directive to any *avocat* not fulfilling the specified conditions as to character.²²¹ Two other French local bars where Gul-lung sought to practice implemented similar rules.²²²

The first question the ECJ addressed was whether a person who is a national of two Member States of the European Community, and who has been admitted to the legal profession in one of these states, may rely on the Services Directive in order to provide services in the other Member State where access to the legal profession has been denied by a court in that state for reasons connected with character (for example, is the directive subject to requirements of national public policy?).²²³ The ECJ held that the Services Directive may not be relied upon by a lawyer established in one Member State with a view to pursuing activities as a provider of services in another Member State where the lawyer has been barred from access to the legal profession in the latter state for reason relating to dignity, good repute, and integrity.²²⁴ This holding is based upon the directive's article 4 provisions, which require that *avocats* providing services must comply with the rules of professional conduct in force in the host Member State.²²⁵

The second question considered by the ECJ was whether a lawyer who is a national of one Member State enjoys the right of establishment in another Member State only if he or she is a member of the bar in the host country, where such membership is required by the legislation of that country.²²⁶ If a lawyer so situated has no such right, then may a lawyer who is a national of one Member State and who is established in another without being a member of a bar in the latter state rely on the Services Directive?²²⁷ The ECJ held that article 52 of the EEC Treaty must be interpreted as meaning that a Member State whose laws require lawyers to register at a bar may impose the same requirements on *avocats* from other states who seek to establish in the first Member State.²²⁸ The purpose of such an obligation is to guarantee good character and observance of the rules of professional conduct as well as disciplinary control of the activity of *avocats*.²²⁹

H. THE DIPLOMA DIRECTIVE

In response to the Single European Act in 1986, and as mandated by article 57 of the EEC Treaty, the Council issued an ambitious new directive calling for the mutual recognition of diplomas (the Diploma Directive).²³⁰ Rolf Wagenbaur,

221. *Id.*

222. *Id.*

223. *Id.* at 530.

224. *Id.* at 549.

225. *Id.* at 547.

226. *Id.* at 545-46.

227. *Id.* at 546.

228. *Id.* at 549.

229. *Id.* at 548-49.

230. Council Directive 89/48, 1989 O.J. (L 19) 10 [hereinafter Diploma Directive].

Legal Advisor to the Communities of the EC, described the impact of the Single European Act on the pace of integration of the European legal professions:

Although the Community can certainly continue to proceed by directives following one of the patterns applied so far, the prospects are not very promising [T]he time-scale is such that it would ruin the chance of ever "completing the internal market" by 1992, if no alternative were available. The methods applied so far must therefore be changed.

. . . This is where the new draft directive on a "general system for the recognition of higher education diplomas" comes into the picture.²³¹

This new directive, issued in response to article 57's mandate, was formally issued by the Council of Ministers on December 21, 1988.²³² The Diploma Directive will govern all professions, including lawyers, where no existing directives are in place.²³³ The general goal of the Diploma Directive is to accelerate freedom of establishment by making it easier for qualified professionals within the EC to practice their profession in other Member States.²³⁴ A general system for the mutual recognition of professional qualifications will be established to improve access to locally regulated professions.²³⁵ The directive attempts to strike a balance between the need to facilitate free movement of lawyers and the public need for those who practice as members of the local profession to be properly qualified.

Because of the constraining 1992 deadline for European integration, the Council has had to take a different approach in structuring directives in order to expedite the process. In the past the delays between the Commission's submission of a draft and final Council adaptation have been extraordinarily long (for example, an architects' directive²³⁶ took eighteen years to complete even excluding the implementation period). Previous directives have required the harmonization of education and training prior to enactment of an establishment directive.²³⁷ However, the Diploma Directive's more flexible approach calls for mutual recognition of diplomas without previous harmonization (provided the persons concerned had acquired some relevant professional experience in their home or the host countries).²³⁸ The directive is also unique because it abandons the old vertical approach to integration where each profession was dealt with individually.²³⁹ This directive takes a horizontal approach; it tackles professional qualifications across the board.²⁴⁰

231. Waegenbaur, *supra* note 205, at 98-99 (footnotes omitted).

232. Diploma Directive, *supra* note 230.

233. Rebecca M.M. Wallace, *Freedom to Practice in the EEC*, 139 NEW L.J. 1004 (1989).

234. Bryan Harris, *Freedom to Provide Professional Services*, 139 NEW L.J. 164 (1989).

235. Diploma Directive, *supra* note 230.

236. Waegenbaur, *supra* note 205, at 99. Recall that it took eight years just to pass the Services Directive for lawyers.

237. Harris, *supra* note 234, at 164.

238. Wallace, *supra* note 233, at 1004.

239. Harris, *supra* note 234, at 164.

240. *Id.*

Article 1 of the Diploma Directive contains important definitions. A diploma is evidence of the formal qualifications awarded by a competent Member State authority, showing that the holder has completed a university postsecondary course of at least three years' duration (or an equivalent part-time amount).²⁴¹ Other significant terms defined in article 1 include "regulated professional activity,"²⁴² "professional experience,"²⁴³ and "aptitude test."²⁴⁴

241. Diploma Directive, *supra* note 230, art. 1(a).

[D]iploma: [A]ny diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:

- which has been awarded by a competent authority in a Member State designated in accordance with its own laws, regulations or administrative provisions;
- which shows that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and
- which shows that the holder has the professional qualifications required for the taking up or pursuit of regulated profession in that Member State, provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications were received mainly in the Community, or the holder thereof has three years' professional experience certified by the Member State which recognized the third-country diploma, certificate or other evidence of formal qualifications.

The following shall be treated in the same way as the diploma, within the meaning of the first subparagraph: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence awarded by a competent authority in a Member State, if it is awarded on the successful completion of education and training received in the Community and recognized by competent authority in that Member State as being of an equivalent level and it confers the same rights in respect to the taking up and pursuit of a regulated profession in that Member State.

Id.

242. *Id.* art. 1(d).

[R]egulated professional activity: [A] professional activity, insofar as the taking up or pursuit of such activity or one of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma. The following particular shall constitute a mode of pursuit of a regulated professional activity:

- pursuit of an activity under a professional title, in so far as the use of such a title is reserved to the holders of a diploma governed by laws, regulations or administrative provisions.
- pursuit of a professional activity relating to health, in so far as remuneration and/or reimbursement for such an activity is subject by virtue of national social security arrangements for the possession of a diploma.

Where the first subparagraph does not apply, a professional activity shall be deemed to be a regulated professional activity if it is pursued by the members of an association or organization the purpose of which is, in particular, to promote and maintain a high standard in the professional field concerned in which, to achieve that purpose, is recognized in a special form by a Member State and:

- awards a diploma to its members,
- ensures that its members respect the rules of professional conduct which it prescribes, and
- confers on them the right to use a title or designatory letters, or to the benefit from the status corresponding to that diploma.

Id.

243. *Id.* art. 1(e). "[P]rofessional experience: the actual and lawful pursuit of the profession concerned in a Member State." *Id.*

244. *Id.* art. 1(g).

[A]ptitude test: A test limited to the professional knowledge of the applicant, made by the competent authorities of the host Member State with the aim of assessing the ability of an applicant to pursue a regulated profession in that Member State.

In order to permit this test to be carried out, the competent authorities shall draw up a list of subjects which, on the basis of a comparison of the education and training required in the Member State and that received by the applicant, are not covered by the diploma or other evidence of formal qualifications possessed by the applicant.

The aptitude test must take account of the fact that the applicant is a qualified professional in the Member State of origin or the Member State from which he comes. It shall cover subjects to be selected from those on the list, knowledge of which is essential in order to be able to exercise profession in the host Member State. The test may also include knowledge of the professional rules applicable to the activities in question in the host Member State. The detailed application of the aptitude test shall be determined by the competent authorities of that State with due regard to the rules of Community law.

The status, in the host Member State, of the applicant who wishes to prepare himself for the aptitude test in that State shall be determined by the competent authorities in that State.

Id.

Article 2 provides that the directive will apply to any national of a Member State wishing to pursue a regulated profession in a host state in a self-employed capacity or as an employed person. However, article 2 does not apply the directive to professions already covered by separate directives providing for the mutual recognition of diplomas.²⁴⁵

Article 3 provides that if the host state requires a diploma, the state cannot deny authorization for a person holding the proper diploma to pursue the same activities as a host state national.²⁴⁶ The applicant must have pursued the profession for at least two of the last ten years and possess a diploma meeting the article 1 definition as well as have completed the prerequisite professional training in his or her home state.²⁴⁷

Article 4 permits a host Member State to require the applicant to provide evidence of professional experience of up to four years where the duration of the applicant's education and training is at least one year less than that required in the host state.²⁴⁸ It also permits a host state to require an applicant to complete an "adaptation period" not exceeding three years or to complete an aptitude test.²⁴⁹ The applicant would have the choice of either the training period or the examination unless the profession is one that "require[s] precise knowledge of national law and which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity. . . ."²⁵⁰ Therefore, the competent authorities governing the legal profession may specify which procedure will be required.²⁵¹

245. *Id.* art. 2.

The Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

This Directive shall not apply to professions which are the subject of a separate Directive establishing arrangements for the mutual recognition of diplomas by the Member States.

Id.

246. *Id.* art. 3(a).

Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorize a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals:

(a) if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State.

Id.

247. *Id.* art. 3(b).

Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorize a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals;

(b) if the applicant has pursued the profession in question full-time for two years during the previous ten years in another Member State which does not regulate that profession . . . and possesses evidence of one or more formal qualifications.

Id.

248. *Id.* art. 4(a). "The host Member State may also require the applicant: (a) to provide evidence of professional experience, where the duration of the education and training adduced in support of his application . . . is at least one year less than that required in the host Member State." *Id.*

249. *Id.* art. 4(b). "[T]he host Member State may also require the applicant: (b) to complete an adaptation period not exceeding three years or take an aptitude test." *Id.*

250. *Id.*

251. *Id.*

Article 5 details arrangements for enabling applicants to undergo part of their professional education and training in a host Member State.²⁵²

Article 6 covers ethics and professional conduct rules.²⁵³ If a host state requires proof of good character, it must accept the production of documents issued by competent authorities in the home state to show that these requirements are met.²⁵⁴ If the home state does not provide the documents, the applicant may take an oath before a competent judicial authority or notary of the home state.²⁵⁵

Article 7 requires host state authorities to permit qualified applicants to use the host state's professional title.²⁵⁶

Article 8 discusses proof of certificates and documents issued by competent authorities in the Member States, the procedure for reviewing an application to pursue a regulated profession, and review of competent authority decisions before a court or tribunal.²⁵⁷

Article 9 provides for the choice of competent authorities empowered to review applications and for the designation of an official to coordinate the activities of the authorities. It also calls for establishing a coordinating group

252. *Id.* art. 5.

[A] host Member State may allow the applicant, with a view to improving his possibilities of adapting to the professional environment in that State, to undergo there, on the basis of equivalence, that part of his professional education and training represented by professional practice, acquired with the assistance of a qualified Member of the profession, which he has not undergone in his Member State of origin or the Member State from which he has come.

Id.

253. *Id.* art. 6(1).

Where the competent authority of a host Member State requires of persons wishing to take up a regulated profession proof that they are of good character or repute or that they have not been declared bankrupt, or suspends or prohibits the pursuit of that profession in the event of serious professional misconduct or a criminal offense, that State shall accept as sufficient evidence, in respect of nationals of Member States wishing to pursue that profession in its territory, the production of documents issued by competent authorities in the Member State of origin or the Member State from which the foreign national comes showing that those requirements are met. Where the competent authorities of the Member State of origin or the Member State from which the foreign national comes do not issue the documents referred to in the first subparagraph, such documents shall be replaced by a declaration on oath—or, in States where there is no provision for declaration on oath, by a solemn declaration—made by the person concerned before a competent judicial or administrative authority or, where appropriate, a notary or qualified professional body of the Member State of origin or the Member State from which the person comes; such authority or notary shall issue a certificate attesting the authenticity of the declaration on oath or solemn declaration.

Id.

254. *Id.*

255. *Id.*

256. *Id.* art. 7(1). "The competent authorities of host Member States shall recognize the right of nationals of Member States who fulfill the conditions for the taking up and pursuit of a regulated profession in their territory to use the professional title of the host Member State corresponding to that profession." *Id.*

257. *Id.* art. 8.

1. The host Member State shall accept as proof that the conditions laid down in Articles 3 and 4 [of the 1988 Directive] are satisfied the certificates and documents issued by the competent authorities in the Member States, which the person concerned shall submit in support of his application to pursue the profession concerned.

2. The procedure for examining an application to pursue a regulated profession shall be completed as soon as possible and the outcome communicated in a reasoned decision of the competent authority in the host Member State not later than four months after presentation of all the documents relating to the person concerned. A remedy shall be available against this decision, or the absence thereof, before a court or tribunal in accordance with the provisions of national law.

Id.

under the Commission comprised of delegates from the twelve Member States.²⁵⁸

Articles 10 through 13 deal with Member State compliance with the directive.²⁵⁹ Deadlines and review procedures are set forth in these sections.²⁶⁰

While this directive is highly ambitious, and even revolutionary compared to previous directives, the Council's approach has pitfalls. The responsibility for the functioning of the system belongs to the authorities of the host Member States and careful implementation and effective coordination are vital. It may be possible, for example, for Member States to put obstacles in the way of nationals of other Member States when implementing requirements for an adaptation period.²⁶¹ The home state competent authorities also must act reliably by ensuring that educational standards are adequate and the lawyers they send out to the other states are competent. Two safeguards ensure this. First, each state has an obvious interest in producing competent lawyers since the vast majority are likely to practice in the home state. Second, the training and examination safeguards of article 4 should weed out exceptionally weak candidates. Also, many foreign lawyers may be discouraged from taking advantage of the directive if national authorities ask for an exceedingly long period of supervised training.²⁶² And finally, there is the issue of whether a go-slow, harmonization approach is, in the long run, better for the Community. A slower approach might allow for less confusion and a more diligent consideration of the methods for managing the potential pitfalls associated with greater integration.

The new directive has generally received wide praise from advocates of the Single European Act and from those favoring a pan-European legal profession. Although the directive, by itself, does not achieve complete freedom of establishment, it certainly could facilitate establishment in a very important way. Educational requirements have long been one of the most significant barriers preventing establishment.

The ECJ recently ruled in *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*²⁶³ that relevant na-

258. *Id.* art. 9(2).

Each Member State shall designate a person responsible for coordinating the activities of the authorities referred to in paragraph 1 and shall inform the other Member States and the Commission to that effect. His role shall be to promote uniform application of this Directive to all the professions concerned. A coordinating group shall be set up under the aegis of the Commission, composed of the coordinators appointed by each Member State or their deputies and shared by a representative of the Commission.

The task of this group shall be:

- to facilitate the implementation of this Directive,
- to collect all useful information for its application in the Member States.

The group may be consulted by the Commission on any changes to the existing system that may [be] contemplated.

Id.

259. *Id.* arts. 10-13.

260. *Id.* Article 12 sets a deadline of two years for implementation of the Directive. *Id.* art. 12.

261. Waegenbaur, *supra* note 205, at 108.

262. *Id.*

263. *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 1991 O.J. (C 145) 9 (judgment of May 7, 1991, unreported).

tional authorities may take into account diplomas, certificates, and other qualifications acquired by the applicant with a view to practicing the same profession. The case may have serious implications for the implementation of the Diploma Directive. Though the directive did not apply in the *Vlassopoulou* case since it had not then been implemented, the decision casts doubt on whether the Diploma Directive went as far as article 52 requires.

Irène Vlassopoulou was a Greek lawyer who was admitted to the Athens bar and held a doctorate in law from the University of Tübingen, Germany. For six years, she had been working as a legal advisor in a German firm offering advice on Greek law and EC law in accordance with the German restrictions on practice. In 1988, Vlassopoulou applied to practice as an attorney in Germany, but her application was rejected by the German Justice Ministry on the ground that she was not qualified under relevant German regulations on lawyers. Those rules required legal studies at a German university with success in the first national examination, a preparatory traineeship, and success in the second national examination. The Justice Ministry also stated that article 52 of the EEC Treaty does not confer a right to practice in Germany based on Vlassopoulou's Greek qualifications. These are conditions required by law that apply to both Germans and non-Germans and that were not met by the plaintiff. The plaintiff's experience at the German firm and her German law degree were held by the Justice Ministry not to be adequate. This was the case even though German legal doctorate programs have to recognize the equivalence of a foreign law diploma prior to admitting a non-German.²⁶⁴

The question referred to the ECJ by Germany's Federal Court of Justice was whether article 52 of the EEC Treaty is violated when a member of the bar of a Member State, who has been authorized to practice as a legal advisor in another Member State for five years, can be admitted to the bar of the host Member State only in accordance with the formal conditions governing admittance to the host Member State's bar for its own nationals.²⁶⁵

The ECJ ruled that article 52 of the EEC Treaty was to be interpreted as meaning that a Member State's governing authority is bound, in the case of a Member State national who has already been admitted into his or her home bar and who has acted as a legal advisor in the host state, to determine to what extent the knowledge and qualifications certified by the diploma acquired by the person concerned in his or her home Member State were equivalent to those required by the host state rules. If the similarity between the diplomas is not complete, the host state authorities may require the applicant to prove that he or she acquired the appropriate qualifications.²⁶⁶

264. For a discussion of the facts in this case, see Torsten Stein, *Case C-340/89, Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 29 COMMON MKT. L. REV. 625 (1992).

265. *Id.*

266. See *supra* note 263.

A key difference between this decision and the Diploma Directive is that under the directive, the host authority may automatically require an examination or adaptive period while *Vlassopoulou* requires an analysis of diploma requirements by the host state prior to the imposition of a test or adaptive period.²⁶⁷ Thus, the applicant is arguably worse off under the directive, which seems to be more restrictive than article 52 permits.

One cannot clearly conclude, however, that the Diploma Directive is history, or even seriously endangered. The facts in *Vlassopoulou* are rather unusual in that the plaintiff had a German diploma and had been serving as a legal advisor in Germany. The ECJ thus could hold that *Vlassopoulou* does not cover those who have not practiced or studied in the host state. Furthermore, the five years of serving as a legal advisor may be, in the ECJ's eyes, equivalent to an "adaptive period" and, thus, be reconcilable with the adaptation period requirement of the Diploma Directive. The ECJ may also simply rule that the Diploma Directive is valid since it expresses the will of the Member States. After all, the Council requires unanimous consent.

But there remains the serious risk that the Diploma Directive will be nullified and that an even broader mandate to recognize the equivalence of diplomas is already the law. And the impact on all domestic rules of the regulation of professions is still not certain. Until a postdirective case reaches the ECJ, this remains an open issue.

In another recent decision, *EC Commission v. France*,²⁶⁸ the ECJ echoed its earlier decision of *EC Commission v. Germany*. The ECJ stated that France, by depriving French nationals who practice law in a Member State other than France of the benefit of the provisions conferred on the providers of legal services by the Services Directive, and requiring such lawyers to act in conjunction with a member of the French bar when appearing before bodies that have no judicial functions and in situations where the law of the Member State does not require qualified legal representation, failed to fulfill its obligations under the EEC Treaty.²⁶⁹

I. Future Directives

Two more directives that may impact the legal profession are currently being discussed by the CCBE. Currently, no directive outlines provisions for permitting the establishment of a lawyer of one Member State in another under his or her home title without access to the legal profession of the host state.²⁷⁰ Such a lawyer would handle nonreserved matters openly or matters reserved for lawyers from his or her home state.²⁷¹ The CCBE has debated such a directive for many

267. Stein, *supra* note 264, at 633.

268. *EC Commission v. France*, [1991] O.J. (C 2032) 7 (Cur. C.J.—294/89, 10 July 1991).

269. *Id.*

270. See *Notes for Guidance: 1992* (Law Society of the United Kingdom), Sept. 1988, at 5.

271. *Id.*

years, but progress has been held up because of differences over whether there should even be a basic right of establishment under home title and the extent to which lawyers so established would remain subject to the disciplinary rules of either the home or the host state.²⁷² Britain has been particularly supportive of such a directive since several barristers and solicitors have established offices abroad to assist foreign clients on matters of British law.²⁷³ John Toulmin Q.C., a practicing barrister and leader of the U.K. delegation to the CCBE, commented on the discussion of such a directive:

The precise terms on which such a lawyer establishes an office in another Member State need to be resolved in the very near future. It is clear that it is in the interests of the consumer that barristers and solicitors (and all other lawyers in the EC) should continue to be able to establish chambers or offices in other Member States as established foreign lawyers to provide all reasonable assistance to clients who wish to instruct them. This need is not at all satisfied by a Directive on Mutual Recognition of Diplomas.²⁷⁴

For now, however, many Member States already allow such establishment for both firms and individuals provided they do not use titles or perform activities reserved to the local profession. But *Gullung* stated that, absent a directive, a host state could require membership of a local bar for those seeking to establish.²⁷⁵

The CCBE, at its October 1988 meeting in Strasbourg, France, unanimously approved a code of conduct for lawyers in the EC.²⁷⁶ The Code deals primarily with cross-border activities of lawyers in the EC and incorporates the main principles of the Declaration of Perugia.²⁷⁷ The CCBE debated the common code for many years and currently the various bars and law societies in each Member State are debating it.²⁷⁸ Resolution of the professional conduct issue should aid significantly in enacting the 1988 Directive and a future directive on home title establishment.

Another issue that must be resolved in order to establish a pan-European legal profession is the possibility of multistate partnerships. This issue has been under discussion for some time within the CCBE.²⁷⁹ Only three Member States (Germany, Italy, and the Netherlands) allow their lawyers to enter into partnerships with lawyers from another Member State who are not locally qualified.²⁸⁰ The 1988 Directive may ease this situation if more lawyers qualify outside their home states, but this will hardly lead to parity with the multijurisdictional partnerships

272. *Id.*

273. John Toulmin, *Freedom of Establishment of Lawyers in the European Community*, 85 L. SOCIETY'S GUARDIAN GAZETTE 28 (1988).

274. *Id.* at 28.

275. See *supra* notes 231-32.

276. Johnson, *Bar Council Chairman's Comments*, 85 L. SOCIETY'S GUARDIAN GAZETTE 38 (1988).

277. Adamson, *CCBE: Plenary Session*, 84 L. SOCIETY'S GUARDIAN GAZETTE 3662 (1987).

278. *Id.* at 3662.

279. *Reform of the Legal Profession: Some Key Issues*, 86 L. SOCIETY'S GUARDIAN GAZETTE 9 (1989).

280. International Committee of the Law Society, *Multi-national Partnerships*, 85 L. SOCIETY'S GUARDIAN GAZETTE 36 (1988).

that are so common in the United States. Under the general subject of partnerships one must also distinguish between types of partnerships. Partnerships exist between lawyers from different Member States, between lawyers from other legal profession branches and jurisdictions within the same Member State, with non-EC state lawyers, and with members of other professions.²⁸¹ Still, further legislation would be needed for partnerships with lawyers of other Member States who remain established in their home state.²⁸² The CCBE is currently debating how different categories of lawyers would be dealt with in the same firm if multinational partnerships were permitted.²⁸³ Protectionist considerations are being debated as well. Many states fear takeovers or domination of host state firms by more powerful foreign firms.²⁸⁴ Such fears might be abated by preventing foreign lawyers (or non-EC lawyers) from holding controlling interests in host state firms or by requiring multinational partnerships to be separated from the host state firm.²⁸⁵

V. Conclusion

It seems probable that the combined effects of the Services and Diploma Directives, as well as the liberalizing ECJ decisions, should produce a freer, more integrated legal profession in time for the December 31, 1992, deadline for integration. Currently, lawyers are free to temporarily assist clients in a wide range of matters and in various types of proceedings in other Member States. Practicing lawyers will be able to join other Member States' legal professions so long as they have a regular law diploma and demonstrate sufficient knowledge of the host state's law (either through an adaptation period or an aptitude test). Although there is no home title establishment directive at the present time, the majority of Member States now allow for this type of establishment. Also, a common code of conduct seems likely to take effect in the next few years.

A number of changes, both positive and negative, may result. As the level of protectionism drops, competition should certainly increase. The increasing prominence of European legislation as a result of the Single European Act should also increase competition for clients demanding knowledge of the trans-European and international implications of the new laws. The result should be the development of a more efficient legal profession that will provide better services to its consumers. Some have argued that if the legal professions do not adapt to the changes, the accountants, banks, and others who provide competing services in the area of unreserved activities will claim the business.²⁸⁶

281. *Id.* ¶ 14.

282. *Id.* ¶ 19.

283. *Id.* ¶ 26.

284. *Id.*

285. *Id.*

286. Simpson, *Lawyers in Europe: Protectionism Versus Free Establishment*, 84 L. SOCIETY'S GUARDIAN GAZETTE 3149 (1987).

Another potential result of the increasing unity of the legal profession is that the drive to achieve a united Europe by 1992 will be significantly furthered. The legal profession has been highly resistant to integration over the last three decades, and the achievement of a pan-European lawyer would be a powerful symbol demonstrating the success of the ambitious 1992 program.

A common code of conduct should reduce much of the tension between the various legal professions that has delayed directives. Lawyers will benefit by being able to look to a single code of conduct rather than having to follow two or more codes of conduct. This in turn should reduce the number of violations of professional conduct rules.

Nevertheless, obstacles to achieving greater integration remain. The problems with defining lawyers have still not been resolved. Still unclear is whether the Diploma Directive will sufficiently reconcile the problem of the wide disparities between the academic background of lawyers from the various Member States. Also, problems exist concerning jurisdictions with divided legal professions. Perhaps those problems will become less apparent as Member States, like the United Kingdom, unilaterally reduce the distinctions between their legal professions.²⁸⁷ A final consideration is whether the barriers to forming partnerships will prevent EC lawyers from becoming competitive with American law firms. Many international clients seek large U.S. firms that can take advantage of "economies of scale." Already, more than 100 U.S. firms have offices in Europe, and that number continues to steadily increase.²⁸⁸

The difficulty in accurately predicting the extent to which a truly pan-European legal profession will be achieved is nearly as difficult as predicting the eventual success of the overall goals of the 1992 program. Ultimately, the answer will come down to trust. It is simply not realistic to believe that integration will be achieved if the Member States are not strongly behind the program's objectives and are not trusting of one another. Also, it is too early to tell how the recent revolutionary events in Eastern Europe and the difficulties in passing the Maastricht Treaty on European Union will affect the pace of integration. The EC has suddenly been presented with major challenges, and it is questionable whether the EC can effectively deal with 1992 Eastern Europe, and implementing the Maastricht Treaty simultaneously. Lawyers in the European Community, and throughout the world, will be watching with anticipation to see what develops.

287. In 1989, the British Government issued a Green Paper offering sweeping proposals to do away with many of the distinctions between barristers and solicitors. Solicitors could, for example, become judges in courts where they are not now permitted, and barristers could practice in a solicitor firm rather than in chambers. See Raven, *The American Experience*, 86 L. SOCIETY'S GUARDIAN GAZETTE 15 (1989).

288. Not surprisingly, most have set up in London. There are now at least seventy-five American firms with a presence in the United Kingdom. See MARTINDALE-HUBBELL INTERNATIONAL LAW DIRECTORY: CANADIAN AND INTERNATIONAL LAWYERS 561-761 (1991).

