Fordham International Law Journal

Volume 10, *Issue* 4 1986 *Article* 5

Securing a Lawyer's Freedom of Establishment Within the European Economic Community

Jacqueline Friedlander*

*

Securing a Lawyer's Freedom of Establishment Within the European Economic Community

Jacqueline Friedlander

Abstract

Part I of this Note discusses the right of establishment within the EEC and the difficulties facing foreign attorneys in their efforts to exercise their right of establishment. Part II will examine the reasons why directives advancing a lawyer's freedom of establishment have so far not been approved and will then evaluate three proposed solutions. Finally, Part III presents an alternative proposal to ensure a lawyer's freedom of establishment. This Note concludes that a directive which provides for simplified access requirements, is necessary to ensure foreign lawyers' competence and to place the foreign lawyer on an equal status with the national lawyer.

SECURING A LAWYER'S FREEDOM OF ESTABLISHMENT WITHIN THE EUROPEAN ECONOMIC COMMUNITY

INTRODUCTION

Freedom of establishment is a right guaranteed to any national of a Member State of the European Economic Community (EEC or Community) under article 52 of the Treaty of Rome[1] (Treaty). Nevertheless, obstacles to the lawyer's freedom of establishment continue to exist. The Council of the European Economic Community[2] (Council) has not issued any directives to coordinate national provisions and govern access to the legal profession. The absence of directives renders the lawyer's right of establishment totally dependent upon the conflicting practices of the various Member States.[3]

This Note argues that in order to achieve complete freedom of establishment for Community lawyers, Member States must eliminate their discriminatory practices and the Council must implement directives facilitating attorneys' right of establishment. Part I of this Note discusses the right of establishment within the EEC and the difficulties facing foreign attorneys in their efforts to exercise their right of establishment. Part II will examine the reasons why directives advancing a lawyer's freedom of establishment have so far not been approved and will then evaluate three proposed solutions. Fi-

---

1. Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmnd. 5179-II) (official English trans.), 298 U.N.T.S. 3 (unofficial trans.) [hereinafter Treaty]. The official English version of article 52 provides in relevant part:

> [R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period . . . .
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected . . . .

Id. art. 52.

2. The Council of Ministers consists of representatives from each of the Member States. *See* A. PARRY & S. HARDY, EEC LAW 28 (2d ed. 1981). It has been argued that the Council has a superior position to other institutional organs of the Community. 4 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 5-94, 5-95.

3. *See* Watson, *Case Comment, Case 107/83 Ordre des Avocats du Barreau de Paris v. Onno Klopp*, 22 COMMON MKT. L. REV. 736, 744 (1985).

nally, Part III presents an alternative proposal to ensure a lawyer's freedom of establishment. This Note concludes that a directive which provides for simplified access requirements, is necessary to ensure foreign lawyers' competence and to place the foreign lawyer on an equal status with the national lawyer.

I. *RIGHT OF ESTABLISHMENT WITHIN THE EEC*

The freedom of establishment[4] is a fundamental right guaranteeing citizens the right to settle in the territory of another Member State for the purpose of pursuing activities on a permanent basis as self-employed persons.[5] The goal of freedom of establishment is to advance economic and social development within the Community in the field of self-employed occupations.[6] Persons wishing to establish themselves in another Member State must be free to do so under the same conditions as nationals from that Member State.[7] The basic principle of the freedom of establishment is that the migrant professional and the native professional are to be accorded equality of treatment.[8]

A. *General Legal Structure of the Right of Establishment*

The Treaty provisions relating to the freedom of establishment[9] are directly applicable to the Member States.[10] They

---

4. "[F]reedom of establishment means the privilege to start and conduct non-wage-earning activities." U. EVERLING, THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET 46 (1964). "[It] includes the pursuance of an activity by an individual who has a right not to be discriminated against on the basis of nationality . . . ." D.D. Devine, *Establishment and Services in the European Community in the Light of Recent Case Law,* 9 IRISH JURIST 294 (1974). "The right of establishment . . . embraces all sectors of economic life: industry, commerce, finance, agriculture, public works, crafts, and the professions." 2 H. SMIT & P. HERZOG, *supra* note 2, at 2-538.

5. Treaty, *supra* note 1, art. 52.

6. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN PERSPECTIVES—THIRTY YEARS OF COMMUNITY LAW 304 (1981) [hereinafter COMMUNITY LAW].

7. Treaty, *supra* note 1, art 52. The freedom of establishment grants to such nationals the right to engage in a non-wage-earning activity on the same conditions as are laid down for the Member States' own nationals.

8. *See* COMMUNITY LAW, *supra* note 6, at 304.

9. Treaty, *supra* note 1, arts. 52-58.

10. *See* Reyners v. Belgian State, Case 2/74, 1974 E.C.R. 631, 652, para. 32, Comm. Mkt. Rep. (CCH) ¶ 8256 (right of establishment has been effective since the end of the transitional period, *i.e.*, since January 1, 1970, despite the absence of directives).

take precedence over national laws[11] and forbid Member States from discriminating between nationals of other Member States and their own nationals regarding freedom of establishment.[12]

In order to bring about freedom of establishment, the Treaty provides that existing restrictions on freedom of establishment shall be abolished[13] and that the introduction of new restrictions is prohibited.[14] According to the Treaty, freedom of establishment was to be implemented in two stages. The first stage involved the drafting of a general program to abolish existing restrictions.[15] This program, completed in 1961, contained a list of restrictions and a schedule for their removal.[16] The second stage, which included the issuance of directives[17] calling for the mutual recognition of diplomas, cer-

---

11. *See infra* note 20 and accompanying text.

12. *See* Regina v. Saunders, Case 175/78, 1979 E.C.R. 1129, 1134, para. 8, Comm. Mkt. Rep. (CCH) ¶ 8558. "Under article 7, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaty and without prejudice to any special provisions contained therein." *Id.*

13. Treaty, *supra* note 1, art. 52.

14. *Id.* The new prohibited restrictions are those which are discriminatory toward nationals from other Member States. Member States are free to issue requirements that apply equally to foreigners as well as their own citizens. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, FREEDOM OF MOVEMENT 34 (1981) [hereinafter FREEDOM OF MOVEMENT].

15. Treaty, *supra* note 1, art. 54.

16. General Programme for the Abolition of Restrictions on Freedom of Establishment, No. 2 O.J. 36/62 (1962), Comm Mkt. Rep. (CCH) ¶ 1351 [hereinafter General Programme]. The term "restrictions" is not confined to discriminatory provisions, but includes "[a]ny requirements imposed, pursuant to any provision laid down by law, Regulation or administrative action or in consequence of any administrative practice, in respect of the taking up or pursuit of an activity as a self-employed person where, although applicable irrespective of nationality, their effect is exclusively or principally, to hinder the taking up or pursuit of such activities by foreign nationals." *Id.* tit. III B. Restrictions on establishment include: special training requirements; special taxes and surety bonds; limited access to the courts to enter into contracts; to acquire or hold real property; to participate in local security plans; and restrictions of the right to hold certain corporate offices. E. STEIN, P. HAY & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 529 (1976).

17. The Council carries out some of its tasks by issuing directives. Directives are binding as to the result to be achieved upon each Member State to which they are addressed. The national authorities may select the form and method of implementing directives. Treaty, *supra* note 1, art. 189. Directives are not directly applicable to Member States in that they are generally not self-executing. Member States must adapt their national laws to comply with the directive. However, even in the absence of implementing legislation, directives may be relied upon by individuals before the

tificates, and other proof of fulfillment requirements,[18] has yet to be completed. Such mutual recognition would facilitate freedom of establishment and fulfill the goals of the Treaty.[19]

Despite the absence of directives,[20] the Court of Justice[21] in *Reyners v. Belgian State,*[22] has declared the direct applicability of the general right of establishment.[23] Mr. Reyner, a Dutch lawyer who had obtained his diploma in Belgium was denied the right to practice as an *avocat* in Belgium, because under its law, Belgian nationality was a condition governing access to the legal profession.[24] The Belgian and Irish Governments argued that the complexity of the right of establishment necessitated enactment of specific directives.[25] The Belgian Govern-

---

Courts of a Member State. Van Duyn v. Home Office, Case 41/74, 1974 E.C.R. 1337, 1348, para. 12, Comm. Mkt. Rep. (CCH) ¶ 8283, at 7226-27 (Council directive on the coordination of special measures concerning movement and residence of foreign nationals may be relied upon by the individuals before national courts). National Courts must give precedence to directives where national law is incompatible with duties imposed by such directives. Watson and Belmann, Case 118/75, 1976 E.C.R. 1185, 1198, para. 16, Comm. Mkt. Rep.(CCH) ¶ 8368, at 7777.

18. Treaty, *supra* note 1, art. 57. Evidence of qualifications includes not only diplomas but documents giving the right of admission to courses, certificates of courses completed, and certificates of experience. It does not include, however, documents unrelated to training, such as an authorization to practice, a professional title, a certificate of good character, or a certificate of age. *See* FREEDOM OF MOVEMENT, *supra* note 14, at 42.

19. *See* COMMUNITY LAW, *supra* note 6, at 305.

20. Presently, directives have been issued for the liberal professions of: doctors, 75/362, O.J. No. L 167/14 (1975), Comm. Mkt. Rep. (CCH) ¶ 1486.23; nurses, 77/457, O.J. No. L 233/1 (1977), Comm. Mkt. Rep. (CCH) 1486.27; dentists, 78/686, O.J. No. L 233/1 (1978), Comm. Mkt. Rep. (CCH) ¶ 1486.25; and veternarians, 78/1026, O.J. No. L 362/1 (1978), Comm. Mkt. Rep. (CCH) ¶ 1486.38. Proposals now before the Council include: pharmacists, architects and engineers. E. STEIN, P. HAY, M. WAELBROECK & J. WEILER, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 171-72 (Supp. 1985). A directive providing for a lawyer's freedom of establishment has not been issued. *See* Watson, *supra* note 3 at 747.

21. The European Court of Justice is empowered to "ensure that in the interpretation and application of . . . [the EEC] Treaty the law is observed." Treaty, *supra* note 1, art. 164. The Court of Justice also determines the validity of decisions of the Council of Ministers or the Commission. *See* A. WALSH & J. PAXTON, INTO EUROPE: THE STRUCTURE & DEVELOPMENT OF THE COMMON MARKET 52 (2d ed. 1972). A Member State, the Council of Ministers, the Commission, or any person affected by a Community decision may bring an action in the Court of Justice. *Id.* The Court consists of thirteen judges and six advocate generals. 4 H. SMIT & P. HERZOG, *supra* note 2, at 5-296.6, 5-290.

22. Case 2/74, 1974 E.C.R. 631, Comm. Mkt. Rep. (CCH) ¶ 8256.

23. *See id.* at 652, para. 32.

24. *Id.* at 633.

25. *See id.* at 643-44.

ment further argued that the legal profession in its entirety is excluded from the right of establishment on the grounds that an attorney's principal professional activities are involved with the exercise of official authority.[26] The Court disagreed on both counts, stating that article 52 of the Treaty[27] imposes an obligation upon the Member States to achieve the freedom of establishment without regard to the implementation of directives[28] and that the activities of an attorney fall directly within bounds of the Treaty.[29] However, without directives issued by the European Council, lawyers intending to practice in another Member State have to fulfill that Member State's particular requirements before they can be granted access.[30]

B. *Attorneys' Difficulties in Exercising Their Freedom of Establishment*

In the absence of any directives, lawyers are confronted with major obstacles in exercising their right of establishment.[31] Member States compel foreign attorneys to meet the varied sets of requirements before becoming full-fledged members of the legal profession.[32] While many requirements are legitimate, others clearly constitute arbitrary restrictions of the freedom of movement and therefore violate the Treaty.[33]

---

26. *Id.* at 653, para. 35. Member States are granted exceptions to freedom of establishment with respect to activities involving the exercise of official authority, Treaty, *supra* note 1, art. 55, and for activities relating to public policy, public security, or public health. *See* Van Duyn v. Home Office, Case 41/74, 1974 E.C.R. 1337, 1350, para. 21, Comm. Mkt. Rep. (CCH) ¶ 8283. "[T]he particular circumstances justifying recourse to the concept of public policy may vary from one country to another . . . and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty." *Id.* para. 18.

27. *See supra* note 1. "[R]estrictions on the freedom of establishment . . . shall be abolished by progressive stages in the course of the transitional period." *Id.*

28. Reyners v. Belgian State, Case 2/74, 1974 E.C.R. 631, para. 32, Comm Mkt. Rep. (CCH) ¶ 8256. "[T]he prohibition on discrimination in establishment . . . applies even where directives relating to the procedure for access to and pursuit of self-employed activities in another Member State have not yet been issued." COMMUNITY LAW, *supra* note 6, at 309.

29. Case 2/74, 1974 E.C.R. 631, 655, para. 52, Comm Mkt. Rep. (CCH) ¶ 8256. The Court stated that the main activities of a lawyer leave the discretion of the judicial authority intact. *Id.* para. 53.

30. *See* COMMUNITY LAW, *supra* note 8, at 309-10.

31. *See* Watson, *supra* note 3, at 747; *see also* Devine, *supra* note 4, at 314.

32. *See infra* notes 47-52 and accompanying text.

33. *See infra* notes 35-46 and accompanying text.

The Court of Justice has removed some of these restrictions. For example, the Court of Justice has declared that a national of a Member State cannot be denied the right to practice as an advocat in another Member State when the applicant possesses a diploma from his country of origin which has been recognized by the authority of the country of establishment as equivalent to a national diploma.[34]

In addition, the Court of Justice in *Ordre des Avocats du Barreau de Paris v. Klopp,*[35] stated that Member States cannot refuse to admit a lawyer to practice in their state solely on the basis that he or she is already established in another Member State.[36] This requirement denies the foreigner access to the legal profession.[37] It is clearly discriminatory and therefore incompatible with the Treaty.[38] Mr. Klopp, a German national and a member of the Dusseldorf Bar applied to register at the Paris Bar Association.[39] Mr. Klopp intended to practice in both Paris and Dusseldorf.[40] The Paris Bar Association refused to admit Mr. Klopp on the ground that according to the Internal Rules of the Paris Bar, an *avocat* can maintain only one chamber within the territorial jurisdiction of the regional court with which the *avocat* is registered.[41]

The French Government maintained that the above regulation was necessary to ensure the proper observance of the

---

34. *See* Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris, Case 71/76, 1977 E.C.R. 765, Comm. Mkt. Rep. (CCH) ¶ 8396. Jean Theiffry, a Belgian national, held a Belgian diploma in law. After obtaining recognition of the equivalence of his Belgian diploma with the French degree in law at the University of Paris and passing the qualifying certificate for the profession of avocate from the Institut d'Etudes Judicairies of the University of Paris II, he applied for admission to the Paris Bar. His application was rejected on the ground that he did not hold the necessary French diplomas. *Id.* at 767.

35. Case 107/83, 1984 E.C.R. 2971, Comm. Mkt. Rep. (CCH) ¶ 14,116.

36. *See id. See generally* Gormley, *Freedom of Establishment-Freedom to Supply Services*, 9 EUR. L. REV. 439 (1984); Watson, *supra* note 6.

37. *See* Case 107/83, 1984 E.C.R. at 2990, para. 22.

38. *See id.* at 2990, para. 22. "Article 52 of the EEC Treaty prevents the competent authorities of the Member States from denying, on the basis of the national legislation and the rules of professional conduct which are in force in that State, to a national of another Member State the right to enter and to exercise the legal profession solely on the ground that he maintains chambers simultaneously in another Member State." *Id.*

39. Case 107/83, 1984 E.C.R. at 2985, para. 2.

40. *Id.*

41. *Id.* para. 3.

professional Code of Ethics.[42] Therefore, not only is a national diploma required to ensure that the foreigner is acquainted with the legal system, but the foreigner must also practice exclusively in the host state to enable the state to guarantee that he or she is following the established Code of Ethics. The Court agreed that while these are legitimate interests of the Member States,[43] the methods employed in attaining them patently discriminated against foreigners.[44] Member States could meet their interests by other approaches rather than imposing capricious and arbitrary restrictions. For example, if the Member State wanted to ensure that foreigners conform to their Code of Ethics, it could stipulate that the foreign attorney be subject to disciplinary proceedings in the attorney's native country as well as at the bar of the host country.[45]

Although the Court has redressed several discriminatory practices, many restrictions remain. For example, foreign lawyers in Belgium can only act as legal advisors.[46] They are not treated in the same way as the *avocats* practicing in Belgium because they do not belong to an Order.[47] Membership in an Order is reserved to holders of a specific qualification in accordance with Belgian law.[48] Formal language exams are often viewed as a barrier to freedom of movement.[49] Under the

42. *See id.* at 2989, para. 16.

43. *See id.* at 2990, para. 21.

44. The Court of Justice requires that such methods be "objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics," Van Binsbergen v. Bedrijfsverenigning Metaalnijverheid, Case 33/74, 1974 E.C.R. 1299, 1310, para. 14, Comm. Mkt. Rep. (CCH) ¶ 8282, and "applied in accordance with the objective defined by the provisions of the Treaty relating to freedom of establishment." Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris, Case 71/76, 1977 E.C.R. 765, 778, para. 18, Comm. Mkt. Rep. (CCH) ¶ 8396.

45. *See* Ordre des Avocats du Barreau de Paris v. Klopp, Case 107/83, 1984 E.C.R. 2971, 2996-97 Comm. Mkt. Rep. (CCH) ¶ 14.116, (opinion of Advocate General Slynn).

46. *See* Written Questions to the Commission of the European Communities, No. 56/76, O.J. C 158/31 (1976) and No. 397/75 O.J. C 1/10 (1976). The Commission acknowledged that directives are needed to ban this infringement of a lawyer's right of establishment and that the injured party may seek redress from the Court of Justice. *See* No. 56/76, O.J. C 158/31, at 32; No. 397/75 O.J. C 1/10, at 11.

47. *See id.*

48. *See id.*

49. *See, e.g.*, Comm'n Directive (Doctors) No. 75/362, O.J. L 167/1 (1975), Comm. Mkt. Rep. (CCH) ¶ 1486.23, which provides in part: "Member States shall see to it that, where appropriate, the persons concerned acquire in their interest, and

Legal Practitioners (Qualification) Act of 1929, Ireland requires applicants to pass an examination in the Irish language in order to qualify as a barrister or solicitor.[50] Finally, another obstacle to the freedom of establishment is present in Greece, where it is necessary to be a Greek citizen to obtain a degree from a Greek law school or a recognized university.[51]

Until directives are issued, it will be extremely difficult for attorneys to establish practices in other Member States. The various qualifications required of attorneys severely restrict freedom of establishment.[52] A Member State may require a foreign lawyer to obtain a national law degree[53]and/or have a supervised practice for a number of years before he or she is granted permission to practice.[54] Moreover, many restrictions employed by Member States are clearly violations of the Treaty and, until a national seeks redress from the European Court of justice, remain in force.[55]

II. *PROPOSED SOLUTIONS TO FACILITATE THE EXERCISE OF THE RIGHT OF ESTABLISHMENT*

Clearly, mutual recognition of diplomas would most efficiently meet the goals of the Treaty.[56] It would allow for the complete freedom of movement while ending discriminatory

---

in that of their patients the linguistic knowledge necessary to the exercise of their profession in the host country." *Id.* art. 20, para. 3. The Commission maintains that this does not allow a Member State to introduce an examination but only to suggest to foreign doctors the advisability of studying the local language. FREEDOM OF MOVEMENT, *supra* note 14, at 83. This is not self-evident. *Id.* The United Kingdom introduced an examination and later dropped it after the Commission disapproved. *Id.*

50. 3 K. REDDEN, MODERN LEGAL SYSTEMS CYCLOPEDIA, 343 (1984); *see also* Boyd, *Mutual Recognition of Lawyers' Qualifications*, 7 BUS. L.R. 163 (1986).

51. 3 K.REDDEN, *supra* note 50, at 292.

52. *See* Devine, *supra* note 4, at 314.

53. *See, e.g.*, Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris, Case 71/76, 1977 E.C.R. 765, Comm. Mkt. Rep. (CCH) ¶ 8396. "It is debatable whether or not a stipulation requiring possession of a national diploma, which incontrovertibly hinders foreign nationals exclusively or principally constitutes a restriction. Some people have maintained that it does, notably in representation to the Court of Justice, but the Court has not accepted this view." FREEDOM OF MOVEMENT, *supra* note 14, at 36.

54. *See* COMMUNITY LAW, *supra* note 6, at 310.

55. *See supra* notes 46-51 and accompanying text.

56. *See* FREEDOM OF MOVEMENT, *supra* note 14, at 41; *see also* Devine, *supra* note 4, at 314.

practices.[57] However, under the present conditions within the EEC, it is improbable that mutual recognition of diplomas will be effectuated.[58] Mutual recognition of diplomas will be feasible only when the legal profession is unified under the umbrella of a centralized legal authority.[59] This unification will require the standardization of legal education in Europe.[60] Therefore, until the problem of mutual recognition of diplomas is settled, other directives aimed at improving a lawyer's freedom of establishment should be enacted.[61]

A. *The Recognition of Qualifications*

Before mutual recognition of diplomas can be realized, the Member States must have similar educational programs.[62] These programs have to be equivalent in terms of curriculum, as well as in length of study needed to acquire a degree. Only then would a country be willing to recognize the diploma obtained in another state.

Within the EEC, however, there are disparities in the time periods needed to complete academic training[63] and supervised practice.[64] The nature of the common and civil laws also

---

57. *See* U. EVERLING, *supra* note 4, at 97. The legal systems are deeply divergent, and, therefore, the attainment of freedom of establishment for lawyers is an extraordinary difficult task. *See* Watson, *supra* note 3, at 750. The systems have common principles but their differences far outweigh their similarities.

58. *See* Schneider, *Towards a European Lawyer*, 8 COMMON MKT. L. REV. 44, 47 (1971).

59. Kramer, *The Liberal Professions in the E.E.C.*, 122 NEW L.J. 648 (1972).

60. *Id.* at 649.

61. *See* Comm'n Communication to the Council on the Consequences of the Court of Justice of 21 June 1974, in Case 2/74, 1974 SEC (74) 4024 final (CCH) ¶ 9722. The Commission called for transitional measures facilitating the mobility of persons and services pending the achievement of full mobility. *Id.* at 3.

62. U. EVERLING, *supra* note 4, at 104-05.

63. *See generally* 3 K. REDDEN, *supra* note 58. For example, a law student in Greece must complete four years of law school. *Id.* at 289. In the United Kingdom, the undergraduate law degree courses continues for three years. *Id.* at 423. While in Germany, though the minimum length of study required is four years, the average student spends five to five and a half years at the university. *Id.* at 136.

64. *See generally* 3 K. REDDEN, *supra* note 58. In Greece a student must complete an exercise in practice for eighteen months within a lawyer's office. *Id.* at 292. In the United Kingdom, the student must complete one year pupilage in the form of unpaid apprenticeship under an experienced attorney. *Id.* at 425. In Germany, the state provides for two and a half years of supervised practice, part of which is spent with judges in the courts and part with a private attorney or public prosecutor. *Id.* at 136.

vary greatly[65] as do their respective curricula. Furthermore, the concept of a lawyer differs throughout the EEC. In Ireland and the United Kingdom attorneys are divided into two classifications, barristers and solicitors.[66] Barristers have the exclusive right of advocacy before High Courts as well as authorization to prepare pleadings and give advice on points of law.[67] Solicitors have the exclusive right to conduct all contentious[68] and non-contentious[69] business and draft certain documents.[70]

In addition, each country maintains its own Code of Ethics, adherence to which is an integral part of the legal profession.[71] The differences between legal systems reflect each country's culture, traditions, disciplines and practices and therefore, make the mutual recognition of diplomas extremely problematic.[72] Three recently proposed methods of solving this problem are discussed below.

B. *Proposed Solutions*

The Consulative Committee of the Bar and Law Societies of the European Community[73] (CCBE) formulated two pro-

---

65. Kramer, *supra* note 59, at 649.

66. 3 K. REDDEN, *supra* note 58, at 339-40, 414.

67. *Recent Developments—European Communities—Legal Profession—Council Passes Directive Allowing Lawyers to Provide Services Across National Borders,* 7 GA. J. INT'L & COMP. L. 723, 724 (1977). [hereinafter *Council Passes Directive*].

68. *Id.* at 724. Contentious business includes such activities as suing on writs, appearing on behalf of the client in lower courts and briefing counsel. It may be done as a solicitor or advocate, during proceedings before a court or an arbitrator. Solicitor's Act, 1957 § 86(1), *reprinted in* 32 HALSBURY'S STATUTES OF ENGLAND 86 (3d ed. 1969).

69. *Council Passes Directive, supra* note 67 at 724. Non-contentious business is the business of obtaining probate and administration where there is no contention as to the right thereto. It includes activities such as the preparation of documents in probate or administration proceedings. Supreme Court of Judicature (Consolidation) Act, 1925 § 175, *reprinted in* 13 HALSBURY'S STATUTES OF ENGLAND 110 (3d ed. 1969).

70. *Council Passes Directive, supra* note 67, at 724.

71. *See* FREEDOM OF MOVEMENT, *supra* note 14, at 19. Each Member State uses its Code to control and maintain a standard of professional conduct. *Id.*

72. *See* Kramer, *supra* note 59, at 649-50.

73. The CCBE is a liaison committee between the professions of avocat within the European Community. It consists of twelve delegations whose members are nominated by the Bars and Law Societies of the Member States. The CCBE's principal object is to study all questions affecting the legal profession in the Community and to formulate solutions designed to coordinate and harmonize professional practice. *See* CONSULTATIVE COMMITTEE OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY (descriptive pamphlet) (copy available at the office of the *Fordham International Law Journal*).

posals which deal exclusively with the legal profession's right of establishment. In contrast, the Commission of the EEC,[74] issued a proposal, that applies to all professions, requiring a higher education diploma as a condition of entry.

1. CCBE's Proposals

The draft directive by the CCBE[75] requires a Member State to accept a foreign lawyer's legal diploma as equivalent to the extent the legal systems permit.[76] If the qualifications are too diverse, a Member State may accord a national a partial exemption from exams, professional training or other requirements. Recognition of equivalence will be conditioned on such requirements as knowledge of the law, language and professional rules of conduct.[77] Member States may exclude a lawyer from preparing formal documents of title, administering estates of deceased persons, and the drafting of formal documents to create or transfer interests in land.[78] In addition, a lawyer may be excluded from the practice of and giving advice upon national law, and from activities in connection with legal proceedings.[79] This restriction may be lifted if a lawyer practices with an enrolled lawyer for a continuous period of five years under the authority of the host Member State.[80]

The CCBE's latest draft[81] provides that a lawyer wishing to practice in another Member State must undergo an adaptation course and professional training to be eligible for practice in the host state. The course is intended to enable the lawyer

---

74. The Commission of the European Communities is the executive arm of the Common Market. *See* A. PARRY & S. HARDY, *supra* note 2, at 16. It was created by the Treaty of Rome. For an outline of the functions and powers of the Commission, see Treaty, *supra* note 1, art. 155.

75. CCBE, Draft Directive on the Right of Establishment for Lawyers, Athens 5/82, (1983) [hereinafter Athens 5/82].

76. *Id.* art. 2(1).

77. *Id.* art. 2(2). An established attorney is also subject to the same "obligations, professional rules, incapacities and incompatibilities as an enrolled lawyer." *Id.* art. 7(1). The host state is allowed to determine the consequence of non-compliance according to their own professional rules of conduct. *Id.* art. 7(2).

78. *Id.* art. 5(1).

79. *Id.* art. 5(2)(1).

80. *Id.*

81. The CCBE's latest draft approved in principle last March is expected to be adopted by the CCBE in the near future. *See* Boyd, *supra* note 51, at 164.

to learn the host state's law, legal system, professional code and language.[82] This course will not exceed six months if the legal system in the applicant's home state does not differ substantially from that of the host state.[83] If the legal systems differ greatly, the course will not exceed twelve months.[84] An examination will be given at the end of the course. The professional training of a lawyer who is fully qualified should not exceed half the period for professional training in his or her host state.[85] If the applicant has practiced for six or more years, the training course will not exceed three months.[86]

2. Commission's Proposal

The Commission's proposal provides a general system for ensuring the equivalence of higher education diplomas to bring about the freedom of establishment within the Community.[87] Due to the vast differences in the Member States legal systems, objections were raised regarding the inclusion of lawyers, within the Commission's proposal.[88] However, until a separate directive for lawyers is approved, attorneys will be governed according to the existing proposal.[89] The proposal calls for an overall system of mutual recognition of diplomas or other evidences of qualification[90] without any preceding harmonization of training courses, diplomas, or rules governing access to professional activities.[91] The new system is based on

---

82. *Id.* at 164. Some examples of legal systems that do not substantially differ are England-Ireland, and France-Belgium. *See id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Proposal for a Council Directive on a General System for the Recognition of Higher Education Diplomas*, Com (85) 355 final. [hereinafter *Council's Proposal*].

88. *See* Boyd, *supra* note 51, at 163.

89. Com (85) 355 final, art. 2. "This directive shall not apply to professions which are the subject of a Directive establishing arrangements for the mutual recognition of higher education diplomas by Member States." *Id.*; *see also EEC Proposals on Interchangeable Professional Qualifications, Recognition of Higher Education Diplomas*, 31 J. L. Soc'y Scot. 181 (1986) [hereinafter *Higher Education Diplomas*].

90. Higher education diplomas are defined as "any diploma, certificate or other evidence of formal qualifications awarded by a university or other higher education establishment following a course of atleast three years study open, as a general rule, only to persons holding a certificate awarded on successful completion of a full course of upper secondary education." *Council's Proposal*, *supra* note 87, art. 1(a).

91. *Id.* at 2 (Explanatory Memorandum).

trust. A Community citizen who is considered capable of exercising a profession in one Member State is considered capable of exercising it in another Member State.[92]

However, because Member States vary significantly in their diploma requirements, under the Commission's proposal a host state may require: 1) evidence of professional experience where the length of higher education is shorter in the Member State of origin than in the host state, although it cannot require professional experience of longer than twice the difference in the length of two diplomas;[93] 2) a period of supervised practice of not more than three years in certain circumstances, such as where the range of work in the two states differ substantially;[94] 3) a period of supervised practice in addition to the grant of the diploma. The period of supervised practice should not exceed four years.[95]

These three proposals fail to satisfy the Treaty's goals of ensuring the facilitation of establishment by minimizing restrictive requirements[96] and according equal status to foreign lawyers.[97] In varying degrees they make access requirements difficult and deny equal status.

The CCBE's original proposal creates obstacles to a lawyer's freedom of establishment by making the process onerous and difficult. A lawyer must undergo retraining to compensate for educational deficiencies,[98] such as supervised practice for a period of five years[99] and the exclusion from practicing law in

---

92. *Higher Education Diplomas, supra* note 89, at 181. A host state may not refuse to authorize a professional from another Member State who has received a higher education diploma from his Member State on the same conditions as applied to their nationals. *Council's Proposal, supra* note 87, art. 3. The professional may use the occupational title of the host state. *Id.* art. 7(2).

93. *Id.* art. 4(1)(a).

94. *Id.* art. 4 (1)(b). Supervised practice is defined as "the pursuit of a profession in the host Member State under the supervision of a qualified member of that profession, it being understood that such supervised practice may be accompanied by a period of further training and shall be subject to the rules laid down by the host Member State. *Id.* art. 1(d).

95. *Id.* art. 4(2).

96. *See* Treaty, *supra* note 1, art. 57(1). "In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall . . . issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications."

97. *Id.* art. 52.

98. *See supra* note 82 and accompanying text.

99. *See supra* notes 83-85 and accompanying text. The requirement of super-

such basic areas as estate and property.[100] The Commission's and CCBE's second proposal force a lawyer to comply with the restrictive requirement of a supervised practice.[101] Supervised practice entails the duplication of training already completed in the state of origin[102] and prevents the establishment of a lawyer's practice for an extended period of time.

Moreover, all these proposals prevent a foreign lawyer from achieving equal status. The CCBE's first proposal clearly stigmatizes the foreign lawyer and accords him status subordinate to native lawyers. The proposal requires that the foreign attorney be designated an "established attorney" and that he retain the professional title of his state of enrollment.[103] This inequality is patently evident by the exclusion of foreign lawyers from administering estates and the transferring of interests in land, which are basic areas of legal practice in many countries.

While discrimination is not that egregious in the other proposals, it is nevertheless evident. In both the Commission's proposal, and the CCBE's second proposal, an extended period of supervised practice is required.[104] The net effect of this requirement is that foreign lawyers are subjected to more rigorous demands. The extended time for supervised practice hampers the freedom of movement.

Although the requirement of supervised practice is rigorous, by not demanding that the foreign lawyers pass a comprehensive test the host state creates an impression that the foreign lawyer is not as qualified as the national lawyer. A prospective client might be wary of a foreigner who has not passed a rigorous series of tests. Though the CCBE's latest proposal requires the attorney to take an adaptation course and pass a

---

vised practice is considered an "extraordinary exception" to the general right of establishment. *See* Watson *supra* 3, at 749.

100. *See supra* note 78 and accompanying text. According to the Danish delegation of the CCBE, any restriction on any subject of law which a lawyer can practice weakens the professional responsibility and the trustworthiness between the lawyer and his client. The established lawyer should not be excluded from activities for which he is qualified. *See* Athens 5/82, *supra* note 75 at 6(c) (Reservations and Alternative Texts Proposed by Certain Delegations).

101. *See supra* notes 94 and 95 and accompanying text.

102. *See supra* note 64 and accompanying text.

103. *See* Athens 5/82, *supra* note 75, art. 6.

104. *See supra* notes 94 and 95 and accompanying text.

final examination,[105] this does not meet the criteria of comprehensive testing necessary to ensure public confidence.

III. *PROPOSAL FOR A NEW DIRECTIVE TO PRESERVE AN ATTORNEY'S RIGHT OF ESTABLISHMENT*

A new simplified directive, less onerous and cumbersome than the existing proposals, is needed to facilitate freedom of establishment and accord the established attorney equal status. Moreover, this directive must assure the host state that legal standards and professional ethics will be maintained throughout the EEC.

The goal of the Treaty is to enable self-employed individuals "to take up and pursue activities."[106] Thus, the Treaty requires the formulation of a directive that simplifies the process, enabling an attorney in a short period of time to practice in a host state.[107]

Proposals that mandate lengthy periods or complex training requirements which vary from state to state do not satisfy the goals of the Treaty. The Treaty envisions that the established professionals and the national professionals have equivalent training requirements and professional privileges.[108] Freedom of establishment has little substance if it is not accompanied by equal status.[109]

The directive must also address legitimate concerns of the Member States that foreign attorneys meet the same standards as the national lawyers.[110] It should guarantee that the foreign attorney have an acceptable knowledge of the host state's legal system and its Code of Ethics.[111] The proposed directives de-

105. *See supra* notes 81 and 86 and accompanying text.

106. Treaty, *supra* note 1, art. 57.

107. *Cf.* Council Resolution, O.J. C 98/1 (1974) COMM. MKT. REP. (CCH) ¶ 1486.21 (a more flexible qualitative approach is needed to promote mutual recognition of diplomas).

108. FREEDOM OF MOVEMENT, *supra* note 14, at 42. The overall standards of performance demanded of students should be comparable to avoid foreign nationals from qualifying to practice in another Member State in a shorter time than it took the nationals of the same Member State. *Id.*

109. *See supra* note 16 and accompanying text.

110. FREEDOM OF MOVEMENT, *supra* note 14, at 42.

111. *Cf.* U. EVERLING, *supra* note 4, at 106 (where mutual recognition of diplomas is unattainable, additional tests should be administered testing knowledge of the language and the law of the receiving country).

tailed above fail to ensure equal status and equivalent training requirements between foreign and national lawyers.

An alternative solution would require that the applicant pass a comprehensive bar examination of the host country.[112] The scope of the examination would encompass the full range of the law curriculum including and highlighting courses dealing with the professional Code of Ethics. Foreign attorneys would have to pass the examination in the host country's native language.[113] For those states which presently mandate bar examinations, applicants would be required to pass the identical test as national lawyers. Hence, this would guarantee the applicants that the examinations were non-discriminatory and alternatively would ensure the host state that the foreign attorney meets the same standard as host attorneys. Those states that do not require a bar examination would formulate, under the aegis of the Community, a comprehensive examination for the foreign applicants. The EEC would supervise the examinations for comprehensiveness and objectivity, guaranteeing that Member States not use the tests improperly to exclude foreign lawyers.[114]

This solution has numerous advantages. Access requirements would be simplified and readily available to all Member States with minimal variation. Applications could be acted upon immediately without any protracted waiting period. Most importantly there would be no doubt concerning the established lawyer's competency. Their credentials would be validated by an objective and thorough examination. After establishment, the host country's Code of Ethics and any breach of conduct would also be noted in the established lawyer's native country.[115]

Immediately after passing the bar examination, the for-

---

112. *Cf.* Memorandum Commenting on the General Programme for the Liberalization of Establishment, *quoted in* FREEDOM OF MOVEMENT, *supra* note 14, at 49 ("In the absence of complete equivalence with the corresponding national qualification, an additional examination may be introduced for the subjects not covered . . ."); *see also* U. EVERLING, *supra* note 4, at 106. An additional test would not violate the prohibition of discrimination against foreigners.

113. *See* U. EVERLING, *supra* note 4, at 80. A language examination is not discriminatory because knowledge of the host states language is by its nature automatically met by the nationals of the state.

114. *See id.* at 106.

115. *See, e.g.*, Comm'n Directive, *supra* note 49, art. 12.

eign lawyer would have equal status with the national lawyer. By proving legal competency, the foreign attorney will be perceived as a qualified professional. With the removal of the difficult preconditions and the inequality between the foreign and national lawyer, the freedom of establishment of the Community lawyer will finally be realized.

CONCLUSION

For Community lawyers to exercise their freedom of establishment, discriminatory entry requirements must be eliminated and national regulations of the legal profession must be achieved.[116] Member States must be willing to forgo their unfair monopolistic practices and allow the free movement of lawyers. The prerequisite of a national bar examination will provide attorneys with a straightforward method to practice law in other Member States while ensuring the foreign lawyer's competence and adherence to each Member State's professional Code of Ethics.[117] With the full realization of a lawyer's freedom of establishment, the EEC will be one step closer to the development of an ever closer political and economic union.[118]

Jacqueline Friedlander *

116. Treaty, *supra* note 1, arts. 52, 57.

117. *See* Gormely, *supra* note 36, at 440.

118. *See also* U. EVERLING, *supra* note 4, at 31 (once it is possible for citizens of one Member State to engage in the same activity as nationals from another Member State, the feeling of solidarity that is the foundation of any political development of the Community will be implemented).

* J.D. Candidate, 1988, Fordham University School of Law.