Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice

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Abstract

This Article will cover the following topics: I The Context of Community Law on Lawyers’ Rights; II The Rights of Professionals; III Rules on Lawyers’ Freedom to Provide Services; IV Lawyers’ Right of Professional Establishment; V Mutual Recognition of Higher-Education Diplomas; VI The Role of the Council of the Bars and Law Societies of the European Community; VII The State of Progress Toward Community-wide Rights of Practice; and VIII Reflections on U.S.-E.C. Cross-Border Practice.
LAWYERS IN THE EUROPEAN COMMUNITY: PROGRESS TOWARDS COMMUNITY-WIDE RIGHTS OF PRACTICE

Roger J. Goebel*

The winds of change are blowing in the legal profession in the European Community ("E.C.") , and they are blowing in the direction of enhanced cross-border practice rights. There is unmistakable progress toward an integrated market for the practice of law throughout the Community.

The tangible evidence of change comes in a variety of forms. The underlying roots are economic. As the European Community moves with increasing dynamism toward achievement of its goal of an integrated internal market, the need for sophisticated legal assistance to commercial and financial enterprises operating on a Community-wide scale becomes ever more apparent. Client needs and desires drive the legal market, as they do other markets.

In the last half-dozen years there has been a manifest trend toward national law firms expanding into a cross-border practice within the Community and elsewhere in Europe. National law firms have increased their in-house competence both in Community law itself and in corporate and commercial practice in other states, encouraging some of their lawyers to specialize in these fields and acquiring added expertise by recruiting competent personnel both at the partner and employee level. Large firms have aggressively expanded their European market service capabilities by opening new branches and expanding existing ones in other states, and/or by mergers, joint ventures or close association with law firms in other states.

The expansion of cross-border practice by law firms parallels that of international accounting firms. Major multinational clients find it increasingly convenient to deal with the same legal or accounting firm on a European-wide basis. The client seeks in this way to satisfy its desire for easier communication.

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with key advisors, for the application of uniform standards of service, and for reliable assurances of quality control. Transnational legal and accounting firms can also claim to offer more rapid and larger scale efforts to resolve complicated corporate, financial or tax issues that transcend national boundaries.

Although the focus of this Article is on developments in the European Community, this phenomenon has, of course, a global character. U.S. law firms were among the first international practice specialists, opening branches in Europe and throughout the world. Correlatively, New York and a growing number of other U.S. states have permitted access to their legal markets to foreign law firms engaged in practice as legal consultants. As central and eastern European states move toward capitalism, they have been impelled to seek sophisticated

1. The developments in recent years have been so rapid that most of the prior legal literature is outdated in part. Excellent surveys of European Community ("E.C.") law and the national rules of its Member States are SERGE-PIERRE LAGUETTE, LAWYERS IN THE EUROPEAN COMMUNITY (1987) and LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES (1987). The CCBE CROSS BORDER PRACTICE COMPRENDUM (Dorothy Donald-Little ed., 1991) is intended ultimately to describe the rules of practice in all Community states, but thus far has up-to-date coverage only of Belgium, Denmark, and the Netherlands. An earlier general reference work on the status of the legal profession in 30 countries is TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES (D. Campbell ed., 1982). The American Bar Association's Section of International Law and Practice has published a valuable short book on the status of foreign lawyers in selected states in the United States and foreign countries, edited by its co-chairman, Sydney Cone. See SYDNEY M. CONE, THE REGULATION OF FOREIGN LAWYERS (3d ed. 1984); see also LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK (Alan N. Katz ed., 1986) (discussing legal system, courts, and legal profession in selected countries).

For a law review survey, see Roger J. Goebel, Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap, 63 TUL. L. REV. 443 (1989). The International Financial Law Review is the best source of ongoing news on international business law practice in centers around the world, regularly providing short reviews on selected countries. Lawyers in Europe is a journal containing useful articles on developments in the legal profession throughout Europe.


legal assistance and hence to open their borders to transnational legal practice. To a significant degree, local barriers to international legal practice have also been reduced in the Far East and other parts of the world.

Apart from economic forces driving legal practice, there have also been major (and on-going) changes in the regulatory environment. Although mention will be made of recent legislation governing lawyers in Belgium, France, Germany, and the United Kingdom, the focus of this Article will be on the evolution of the European Community rules affecting lawyers' right of practice. The Council of the Bars and Laws Societies of the European Community ("CCBE") has been an important factor in promoting Community legal practice, and its role will also be reviewed in this Article. Finally, this Article will consider developments in U.S.-E.C. cross-border practice.

In its structural review of the development of European Community rules relating to the right of practice by lawyers, this Article will cover the following topics: I The Context of Community Law on Lawyers' Rights; II The Rights of Professionals; III Rules on Lawyers' Freedom to Provide Services; IV Lawyers' Right of Professional Establishment; V Mutual Recognition of Higher-Education Diplomas; VI The Role of the Council of the Bars and Law Societies of the European Community; VII The State of Progress Toward Community-wide Rights of Practice; and VIII Reflections on U.S.-E.C. Cross-Border Practice.


I. THE CONTEXT OF COMMUNITY LAW ON LAWYERS' RIGHTS

At the outset, it is desirable to make four preliminary comments in order to place the review of substantive Community rules in a broader context.

A. The Effect of the Internal Market Goal

First is the relation between the current expansion of lawyers' rights of practice and the internal market goal. As is now well known, the European Community is close to achieving an integrated internal market by December 31, 1992. This goal was initially stated in a major Commission study, the June 1985 White Paper on Completing the Internal Market ("White Paper"). The White Paper proclaimed the need to eliminate legal and economic barriers among the Member States in order to create a single integrated market, and urged the adoption of 279 measures intended to remove these barriers.

In the fall of 1985, the Community adopted a major series of amendments to the 1957 European Economic Community Treaty ("EEC Treaty" or "Treaty"), called the Single European Act ("SEA"), which went into effect on July 1, 1987. One of the crucial amendments constituted the adoption of


this goal. A new Treaty Article 8a mandates "establishing the internal market over a period expiring on 31 December 1992," and defines this internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."

The internal market goal has directly affected lawyers' rights, because eliminating barriers to the exercise of professions in general constituted a major element in the White Paper program. The program's most significant achievement thus far has been the 1988 Council directive on recognition of higher-education diplomas, discussed later in Part V, which is intended to facilitate the ability of persons engaged in professional activity to acquire rights of practice in a Member State other than that in which they have been educated.  

The indirect effect of the internal market goal has been perhaps even more significant. Commercial and financial interests, the media, and the public at large have enthusiastically embraced the internal market goal. This enthusiasm has created a psychological attitude favoring the market integration of fields, such as the practice of law, that have not yet been fully integrated by Community legislation.

As the Community wave of legislation to achieve the internal market has advanced in such complex and important fields as banking, insurance, securities, telecommunications, intellectual property, public procurement, environmental protection, consumer protection and social rights, the need for Community law expertise has become manifest in all major commercial centers. This both facilitates the ability of firms to carry on cross-border practice in those centers and reduces the tendency to see law practice exclusively in terms of competence in a particular local law system. In a sense, what is gradually developing is a certain "federalization" of law in the Community and the emergence of an informal bar specialized in Community law.

Moreover, there is no question that the internal market goal has influenced the national legislators in those states that

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have recently revised their regulation of the legal profession. Likewise, it has influenced lawyers and law firms in states that have traditionally been reticent toward cross-border law practice to change their attitude to one of acceptance of Community rights of practice in one form or another.

B. The Trend Toward Liberalization of National Rules

The second preliminary comment thus relates to the first: it is that dramatic changes have occurred in the last few years in the rules of practice in Belgium, France, Germany, the United Kingdom, and other states, which in most cases will facilitate cross-border practice. Regrettably, space considerations preclude any substantial coverage of these developments, but a quick description is possible and occasional reference will be made to the new national rules when relevant in later parts of this Article.

Thus, since 1984 the Brussels Bar Councils (both Flemish and French) have allowed qualified foreign lawyers relatively easy access to a B-list of avocats (courtroom lawyers), so that they can become both employees of, and partners in, Belgian avocat firms. The Bar Councils' rules were further liberalized in the late 1980s to allow Belgian avocats and avocat firms to form cost-sharing alliances, joint venture associations, and even partnerships with foreign law firms whose partners are B-list avocats. Belgian avocat firms may also form associations with foreign law firms for specific areas of practice, notably Community law. These rules have enhanced Brussels' role as a center for the practice of Community law. Over 100 foreign lawyers are registered on the B-list, over 50 foreign firms have offices in Brussels, and several leading Belgian firms have entered into associations with foreign firms.

In 1990, the United Kingdom adopted the Courts and

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Legal Services Act that radically revised the rules governing its legal professions. Among other developments, the act permits solicitors to form inter-disciplinary partnerships with other professionals, allows Community lawyers easier admission to solicitor status, and enables solicitors to form partnerships with foreign lawyers, including non-Community lawyers, such as U.S. lawyers. The act does not change the traditional U.K. rule that barristers and solicitors have exclusive rights to plead before courts and to prepare documents transferring title to real estate or administering estates, but do not otherwise have a monopoly on legal advice or activities. In view of the U.K.'s traditionally liberal attitude toward foreign law firm practice, it is not surprising that there are estimated to be over 120 law firms with offices in London.

On December 13, 1989, Germany revised its Federal Attorneys Act governing the practice of law by Rechtsanwälte (courtroom lawyers). The law formally permits Rechtsanwälte for the first time to have offices abroad (section 29a) and qualified foreign lawyers to practice under their home title in Germany (section 206). Community lawyers may practice their own country's law, Community law, and international law. Non-Community lawyers, including U.S. lawyers, may practice their own country's law (and probably international and Community law by implication), provided that their home country


offers reciprocal rights to German Rechtsanwälte. Since January 1990, many German law firms have merged or opened branches in other cities, a wave of foreign law firms have opened offices in Frankfurt, Berlin and other centers, and several German firms have formed joint venture associations with foreign firms.

The Paris Bar Council in 1985 adopted rules enabling Community lawyers to become French avocats (courtroom lawyers) after eight years of professional experience and the passage of a moderately difficult special examination. Approximately 100 Community lawyers have thus become fully qualified French avocats. These French rules are currently being revised to bring them into accord with the 1988 Council directive on the recognition of higher-education diplomas, discussed later in Part V.

More important is the French law of December 31, 1990 that has just merged, as of January 1, 1991, the professions of avocat and conseil juridique (legal advisor). The French law affects foreign lawyers, because those already registered as conseils juridiques will become avocats, while in the future any foreign lawyers must gain admission to the profession of avocat through the mode laid down for Community lawyers noted above, or through arrangements based on reciprocity for non-Community lawyers. Moreover, in article 54 of the December 31, 1990 law, France granted the new merged profession a monopoly on providing legal advice and activities. Many foreign law firms whose lawyers were previously conseils juridiques thus will be effectively converted into avocat firms (with the possibility of associations or partnerships with French avocat firms). However, some U.K. solicitor firms that have practiced in Paris under their home state title, rather than having their lawyers qualify as conseils juridiques, may have their right to practice challenged under the new grant of a legal monopoly to avocats (see Part VII.B).

In addition to the above-described revisions in rules in

Belgium, the United Kingdom, Germany and France, other states have either modified their rules, or the interpretation of prior rules, usually, but not always, in the direction of facilitating cross-border practice. Unfortunately, space constraints do not permit discussion of these changes, although it should be noted that Luxembourg’s new law of August 10, 1991 contains potentially serious restrictions on cross-border practice.

C. The Importance of Law Firm Practice

Although the European Community legislation and case law has been addressed to the subject of the rights of practice of individual lawyers, it is no longer possible to ignore the importance of appropriate coverage of the extent of rights of law firms to carry out practice in other Member States.

International or cross-border practice of law is carried on principally by law firms rather than by individual practitioners. This is not surprising, because individual practitioners are limited in their capacity to develop expertise in many legal systems and in their capability to provide sophisticated advice rapidly on complex international or cross-border issues. Multinational clients increasingly seek to rely on their customary law firms to provide assistance on transactions throughout the international commercial world. If the customary outside counsel firm is incapable of providing the legal assistance itself, the multinational client is apt to seek out another law firm with greater international or cross-border expertise for this purpose.

In recent years, a decided trend toward multi-country law firm practice has become manifest. Many national law firms now have a network of branch offices in leading commercial centers outside their home country, or have joint venture or


affiliated relations with law firms in other countries. This trend is particularly manifest in the European Community. Moreover, the initial quasi-monopoly of international U.S. and U.K. law firms operating in this fashion has been broken. Increasingly, Belgian, Dutch, French, German, Italian, Spanish, and other firms are opening foreign branch offices or developing joint venture or affiliated links abroad.

Consequently, in evaluating the course of progress in the Community toward cross-border and Community-wide practice rights, it is necessary to consider those rules that are desirable not only for individual lawyers, but also for law firms.

D. State Interests as a Limitation on Lawyers' Practice Rights

Even though we may start from the premise that the cross-border practice of law is desirable from a number of policy viewpoints, such as the promotion of a client's free choice of qualified counsel, helping clients to bridge social and cultural differences in the conduct of international business affairs, the promotion of freedom of services in international trade, and the further premise that an integrated market in legal services should be a constitutive feature of an overall integrated Community market, nonetheless we must recognize that states have legitimate concerns as to the character and quality of legal services that foreign lawyers and law firms may provide on their territory.

Thus, states have a genuine interest in the appropriate consumer protection of clients, particularly unsophisticated clients, when foreign lawyers or law firms attempt to provide services in fields of law that have strong national public policy features, such as criminal law, family law, and the administration of decedents' estates. Moreover, states have a legitimate concern that lawyers practice law in an ethical fashion and in consonance with imperative professional responsibility rules.

Although reference to such legitimate state interests can occasionally be a pretext when a state's real concern is to pro-

14. Examination of the entries in the 1992 Martindale-Hubbell Law Directory for leading commercial centers in the Community and around the world gives a picture of the branch office networks of prominent law firms based in Belgium, Canada, France, Germany, Italy, the Netherlands, Spain, Sweden, the United Kingdom, the United States, and other countries.
tect the economic interests of local lawyers and law firms, nonetheless these state interests have real merit and deserve respectful consideration in the development of any system of cross-border or Community-wide practice.

These four preliminary comments will be particularly relevant later in Part VII when evaluating the state of progress toward Community-wide rights of practice. It is also useful to keep them in mind as we review and analyze the substantive rules in Parts II to VI.

II. THE RIGHTS OF PROFESSIONALS

In all Member States of the European Community, persons occupied in legal affairs are regarded as engaged in the conduct of a profession, usually licensed or authorized by the state or a self-governing professional body acting with authority delegated by the state. Therefore, in terms of Community law, lawyers are generally treated as falling within the generic category of professionals.

To properly understand the origin and basic character of the right of professionals licensed or authorized in one Member State of the E.C. to practice in other states, we must begin with the fundamental principles of the EEC Treaty. Article 3, which defines the field of activities of the Community, gives a pre-eminent place to the so-called four fundamental freedoms, which are the freedom of movement of goods, persons, services and capital.

The right of professionals to practice occasionally in other states is founded on the right of freedom to provide services, while the right of professionals to practice while residing in another state is founded on the right of establishment. As we shall see later, it is because these rights are so fundamental in the Treaty framework that the Court of Justice has been willing to go far in its Treaty construction to protect them in individual cases.

Further chapters of the EEC Treaty contain specific articles concerning the rights of establishment and the free movement of services, but before turning to them, a word on the free movement of workers. This topic is relevant for two reasons. First, many lawyers, like other professionals, are employees (as opposed to being self-employed or partners in a firm)
and are therefore governed in part by the rules on the free movement of workers. Second, the rules and case law applying the free movement of workers tended to develop earlier in Community history and have influenced the later evolution of rules in the areas of establishment and the free movement of services.

The attainment of the right of free movement of workers has been one of the great successes of the European Community. Article 48 of the EEC Treaty broadly defines the right and has been supplemented by a detailed coverage in Council Regulation No. 1612/68 of October 15, 1968 on freedom of movement for workers within the Community. This regulation specifies a worker's right to move to any Member State (often called the host state) in order to take up employment, change to new employment in the same state, and stay on after the employment ends (which includes the right to retire in the host state, under certain conditions). Article 48 also prescribes the "abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment," and this principle of non-discrimination is further elaborated in Regulation No. 1612/68.

Furthermore, Regulation No. 1612/68 grants a worker’s spouse and immediate family derivative rights to live with the worker in the host Member State, as well as to be treated on a non-discriminatory basis in obtaining access to education or social benefits.

The Court of Justice has consistently defined the scope of the rights of workers and their families in the broadest possible fashion. The Court held early that Article 48 had "direct effect," and was thus immediately binding in Member States regardless of the existence of any national legislation, providing immediate rights to individuals that may be vindicated in national court or administrative proceedings.16

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The White Paper expressed general satisfaction with the success in achieving the free movement of workers, but, in contrast, observed that the field of the free movement of professionals had remained an area of "little progress." 17

The EEC Treaty chapters on the right of establishment and the freedom to provide services are concerned principally with corporate, commercial, and financial enterprises and activities, which are beyond the scope of this Article. 18 We will deal with these Treaty articles only insofar as they concern professionals. Article 52 of the EEC Treaty calls for the progressive elimination of restrictions on the right of establishment for professionals (i.e., the right to reside in another Member State, the host state, and exercise the profession there), whether self-employed or in an association or firm of professionals. Similarly, Article 59 mandates the progressive elimination of restrictions on the right to provide professional services in other Member States. Article 59 is supplemented by Article 60, which allows a right of temporary residence in the state in which the service is provided (the host state), and requires the service provider to receive national treatment as regards any host state conditions in providing the service. Both Articles 52 and 59 anticipated the complete removal of restrictions by the end of the initial EEC Treaty transition period, December 31, 1969.

The Treaty did permit restrictions on the right of professional establishment for reasons of "public policy, public security or public health" in Article 56, as well as for "activities . . . connected, even occasionally, with the exercise of official authority" in Article 55. Article 56 made both of these Articles' limitations applicable to the provision of services.

Article 54 directed the Council of Ministers to set up a general program "for the abolition of existing restrictions on
freedom of establishment” (which thus was intended to achieve freedom of professional establishment as well as commercial or financial establishment) and then to implement this program by directives. Similarly, Article 63 directed the Council of Ministers to set up a general program to achieve the freedom to provide services (including professional services), again to be implemented by directives. (Directives are a form of legislation by which Member States receive binding instructions to take specific legislative or regulatory measures.  

Given the scope of these Treaty articles, it may seem surprising that they did not result in the same level of success as that achieved for the free movement of workers. At least in part, this has resulted from the impact of another article, Article 57. This article states that “in order to make it easier” for professionals to exercise the right of establishment, the Council shall “issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.” Although Article 57 was obviously intended to facilitate the right of establishment, it was initially thought to require a system for the recognition of diplomas as a virtual pre-condition to the right of professional establishment. For many years, the Commission and the Member States viewed the right of professional establishment as essentially non-existent unless and until a directive recognizing professional diplomas and qualifications should be adopted.

Little progress occurred from 1957 to 1975. It is true that the Council of Ministers issued on December 18, 1961 the General Program for the removal of restrictions in freedom to provide services and the General Program for the removal of restrictions on freedom of establishment, required respectively by Articles 54 and 63. These were useful to a limited extent in indicating the areas in which directives were to be adopted before December 31, 1969 and in forbidding various types of discriminatory national rules. In fact, however, the

19. Under Article 189 of the EEC Treaty, directives do not have immediate legal effect within Member States, but the states are legally bound to enact legislation, issue regulations, or otherwise take action that fully effectuates directives. If Member States do not implement directives, or do so incompletely or improperly, the Commission may sue the Member State pursuant to Article 169.


Council directives adopted in the 1960s and early 1970s dealt principally with agricultural, corporate or commercial activities. Although the Commission proposed many draft directives for professions, these languished at the stage of examination by the Council because of perceived serious differences among the Member States as to the proper levels of professional education or training and the scope of professional activities.

A pair of influential Court of Justice judgments in 1974 broke this log-jam. In Jean Reyners v. Belgium, the Court surprised the Commission and the Member States by holding that Article 52 on the right of professional establishment was directly effective in part and hence granted some rights that professionals could enforce. In Johannes Henricus Maria vanBinsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid ("van Binsbergen"), the Court likewise held that Article 59 on the right of professional services had direct effect.

Mr. Reyners, a Dutch national, had successfully obtained a Belgian legal diploma and the other credentials necessary to acquire the status of an avocat in Belgium. Nonetheless, the

22. Council Directive No. 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, 7 J.O. 850 (1964), O.J. Eng. Spec. Ed. 1963-1964, at 117, limited the power of Member States to deny residence permits or to expel self-employed persons and employees on the grounds noted above. The directive has principally been applied in cases involving employees, notably, Roland Rutili v. Minister for the Interior, Case 36/75, [1975] E.C.R. 1219, [1976] 1 C.M.L.R. 140. Also important is the Council Directive No. 73/148 of May 21, 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States in regard to establishment and the provision of services, O.J. L 172/14 (1973). In addition to adopting these general directives, the Council adopted a large number of directives addressed to rights of establishment or the supply of services in the fields of agriculture, handicrafts, hotels and restaurants, mining, motion picture production, and the retail trade. The Council also passed initial directives in the important fields of company law, banking and insurance. See generally Kapteyn & Verloren van Themaat, supra note 16; Lasok, supra note 18; Smit & Herzog, supra note 18, art. 54 ann.


Brussels bar declined to admit Mr. Reyners on the grounds that a Belgian law required Belgian citizenship as a condition for the status of avocat. The Belgian Conseil d'État (supreme administrative court), to which Mr. Reyners appealed his unsuccessful application, referred several questions to the Court of Justice in an Article 177 proceeding.\(^\text{26}\)

The Court’s opinion in *Reyners* deals with two issues in response to questions posed by the Conseil d'État: first, whether Article 52 is directly effective, giving immediate rights to members of professions; second, whether there is a basis to except the profession of avocat from Article 52 by virtue of Article 55’s “official authority” limitation. As this second question relates specifically to lawyers, we will reserve it for discussion in Part IV hereafter.

The Court of Justice took its starting point in Article 7 of the Treaty, which is part of the Treaty’s chapter on basic principles. Article 7 states that in any specific application of the Treaty, “any discrimination on grounds of nationality shall be prohibited.” The Court observed that Article 52 contained a clause enabling professionals to be self-employed in another Member State “under the conditions laid down for its own nationals,” obviously an application of the principle of non-discrimination. The Court then concluded that, to the extent it incorporated the basic “rule of equal treatment with nationals,” Article 52 could be deemed directly effective, giving immediate rights to all professionals.\(^\text{27}\)

The Court held that the references to implementing directives under Article 54 and directives for the mutual recognition of diplomas under Article 57 did not make the adoption of such directives a precondition to the direct effect of Article 52. The Court stated that “the rule of national treatment” is effective even if the Council had failed in its obligation to pass these implementing directives. Directives are still desirable, however, because they can “promote the effective exercise of the

\(^{26}\) Under EEC Treaty Article 177, any Member State court or tribunal may refer questions concerning the Treaty or secondary Community legislation to the Court of Justice whenever an answer is relevant in a proceeding before that court or tribunal. The Court of Justice’s responses are not only binding on the court or tribunal which referred the question; they are also guidelines for the interpretation of Community law binding on all other courts or tribunals.

right of freedom of establishment.”

It is thus obvious that Mr. Reyners could rely upon the Treaty principle of non-discrimination to obtain his admission to the Brussels bar, because a requirement of Belgian citizenship violates that principle.

By a felicitous coincidence, later in the same year in van Binsbergen the Court of Justice had to answer questions raised by a Dutch administrative tribunal with respect to the direct effect and scope of Article 59 on the right to provide services. Mr. van Binsbergen’s lawyer was Mr. Kortmann, not a Dutch advocaat, but rather a Dutch legal representative authorized to handle matters before administrative authorities. However, he moved to Belgium. Solely on the basis that Mr. Kortmann was no longer a Dutch resident, the Dutch authorities refused to permit him to continue legal representation of his client in Dutch administrative proceedings.

In an analysis of Article 59 essentially parallel to that made of Article 52 in Reyners, the Court held that the principle of non-discrimination incorporated in Article 59 made that article also directly effective. The reference in Article 63 to implementing directives in no way conditioned the direct effect of Article 59. Hence, the Netherlands could not require an otherwise qualified legal representative to be a resident (thus “depriving Article 59 of all useful effect”), any more than Belgium could require an avocat to be a citizen.

The doctrinal importance of Reyners and van Binsbergen is great indeed. If the application of the doctrine of direct effect had been rejected by the Court, Articles 52 and 59 in essence would have remained only abstract theoretical provisions, and professionals would have acquired rights only as and when the Council of Ministers might pass directives. Instead, the Court’s holdings meant that every professional within the Community has, by direct effect of these Treaty articles, at least the right to be treated without discrimination by host state authorities.

Still, this is only a limited application of Articles 52 and 59. Before claiming a right either to perform services or to

30. Id. at 1309, [1975] 1 C.M.L.R. at 312.
practice as a resident in a host state, the Community professional must prove that his or her other qualifications or credentials are substantially equal to those required for the comparable host country professional.

Obviously, this makes the passage of implementing directives under Articles 54, 57 and 63 still crucial for most professionals. However, the opinions in Reyners and van Binsbergen served as a catalyst for Commission and Council action. The Commission first withdrew its draft directives for re-examination in the light of these opinions. It then made new proposals and the Council finally started passing directives of major importance to specific professions.

The breakthrough came for the medical profession with two directives of June 16, 1975. One directive established minimum standards for medical education and the awarding of medical diplomas in all Member States. The second directive then required the mutual recognition of these diplomas and granted a right of free movement for services and establishment to medical doctors who possess the diplomas. Because it was estimated that the Community had over 500,000 doctors at the time of passage of these directives, they obviously had a major impact. The Council adopted similar directives subsequently with regard to nurses, dentists, and veterinarians in the late 1970s and pharmacists in 1985. A further success was the 1985 directive granting mutual recognition of educational diplomas for architects, with the consequent right of performance of services and establishment throughout the


32. Council Directive No. 75/362 concerning the mutual recognition of diplomas, certificates, and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, O.J. L 167/1 (1975).

The basic approach of these directives (except that for architects) is first, to harmonize the professional education and training standards throughout the Community, thus making it relatively easy for Member States to accept foreign Community professionals. The directives effectively set a basic floor of qualifications for all members of the profession in question. The principle of non-discrimination then enables their eligibility to practice on a permanent basis in any E.C. country.

For example, the first directive for the medical profession set forth the basic fields of study and training essential to becoming a doctor, and then set a minimum educational and training period of six years or 5500 hours of theoretical and practical instruction, including hospital experience. The directive went on to specify additional requirements for specialties such as neurosurgery, orthopaedics, and internal medicine.

The second directive for the medical profession required Member States to accept the diplomas of higher educational institutions in other Member States, thus permitting a foreign-trained doctor to practice freely as a permanent resident in a host Member State. It is worthy of note that this directive does not permit the host state to require proof of fluency in the host language—it is pragmatically assumed that the foreign professional will not be able to successfully attract clients or deal with them without such fluency.

Although this bifurcated approach first used for the medical profession was employed successfully for nurses, dentists, veterinarians and pharmacists, it suffers from two serious problems. First, it requires a very long period of time for the Commission to elaborate a commonly accepted course of studies and training for any particular profession, and then to obtain the Council's acceptance of the standards (e.g., for pharmacists, this process took fifteen years from the initial Commission draft directive).

34. Council Directive No. 85/384, O.J. L 223/15 (1985). The directive on architects is much less precise concerning minimum standards for education and training of architects than those directives governing the various medical professions. Although article 3 does list some general fields of study and article 4 requires a minimum of four years of full-time studies at the university level, each Member State is required to recognize the diplomas of other Member States on a basis of mutual trust.
Second, for some professions the substantive materials covered in the education, training, and scope of professional activities vary widely from state to state. This is notably true for the legal profession, given the obvious fundamental differences between the common law and civil law systems, and the profound differences in approach even within the civil law world. Moreover, the nature and scope of the various branches of the legal profession is quite diverse within the E.C.

Thus by the early 1980s, the pace of progress in attaining the rights of professionals to practice freely throughout the E.C. was seen to be too slow. A new approach was necessary.

This issue was caught up in a broader movement. In the early 1980s a feeling of “Europessimism” had developed as a result of sluggish progress in many fields, as well as frequent controversies and stalemates in the legislative process.

Responding to this situation, the European Council of Heads of Government at Fontainebleau in June 1984 adopted the “People’s Europe Program” that, among other things, urged the development of a method for universally recognizing higher education diplomas. The European Council requested the Commission to prepare a study on attaining the goals of the “People’s Europe Program.”

The Commission’s response came in a section of the White Paper. The Commission proposed a draft directive for a general system of recognition of higher education diplomas. This measure then became one of the key parts of the “People’s Europe Program,” itself now subsumed into the goal of completing the internal market by 1992.

The directive’s final passage, somewhat modified, on December 21, 1988 represents one of the major achievements of the “People’s Europe Program.” However, because the focus of this Article is on lawyers’ rights, we will defer coverage

35. See the summary of the June 25-26, 1984 Fontainebleau meeting and the “People’s Europe Program” in 17 EUR. COMM. BULL., No. 6, at 11 (1984). The European Council of Heads of Government of the E.C. countries has met at least twice annually since 1972 and addresses major long-term policy and political issues. The status of the European Council was formally recognized in Title I of the Single European Act, supra note 6.

36. White Paper, supra note 5, ¶ 93.

of this directive until Part V and turn instead to lawyers' rights to provide services.

III. RULES ON LAWYERS' FREEDOM TO PROVIDE SERVICES

The 1974 Court of Justice judgment in van Binsbergen established the rule that Articles 59 and 60 had direct effect, so that lawyers and other professionals have a right to provide services in other states (host states) on a basis of national treatment.\(^\text{38}\) Prior to van Binsbergen, the Commission had been working on a draft directive to enable lawyers to provide services throughout the Community. The Commission modified the draft text to accord with certain aspects of the van Binsbergen judgment and the Council of Ministers adopted the directive after a relatively short review.

The directive on lawyers' freedom to provide services was adopted on March 22, 1977.\(^\text{39}\) The directive constitutes the legal framework which governs Community lawyers' rights to provide services in other states.

The directive first defines the class of legal professionals entitled to perform services throughout the Community. In article 1, the directive lists, state by state, the regulated legal profession that customarily provides courtroom services, such as the avocat in France, the Rechtsanwalt in Germany, and the avvocato in Italy. For the United Kingdom and Ireland, the list includes not only barristers, who plead before higher courts, but also solicitors, who can plead before some lower courts, but who chiefly provide general corporate and commercial services.

It is noteworthy that the directive does not define the nature of the legal services that a lawyer may perform in a host state. Article 1(1) does expressly enable host states to “reserve

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to prescribed categories of lawyers the preparation of formal
documents" in the administration of decedents' estates or the
transfer of real estate interests. By implication, this would sug-
gest that lawyers from the listed classes may perform any other
legal services in the host state, whether courtroom or adminis-
trative agency practice, or corporate or commercial counsel-
ing, negotiation, or drafting.

Presumably, article 1(1) allows states to reserve estate ad-
ministration and real estate title transfers to "categories of law-
yers" because in most civil law states these activities are the
monopoly of a separate legal profession, known as notaries (in
France, the notaire, in Germany, the Notar, etc.). Note that arti-
cle 1(2) does not include notaries in the list of lawyers entitled
to provide cross-border services. Although notaries are per-
haps less apt to be interested in transactions outside their own
state than are commercial lawyers, that is not always true: con-
sider, for example, a notary who would like to handle an estate
with assets in several states, or the sale of all of an entity's real
property located in several states. The omission of notaries
from the scope of the directive is accordingly curious and ap-
ppears to be without objective justification.

Another surprising omission is the legal profession of con-
seil juridique, in France, especially because it became a regulated
profession by law in 1971. A conseil juridique is extensively en-
gaged in commercial practice and might well want to provide
cross-border services. The issue as to the French conseil juridique
has become moot, because the 1990 French law has
merged the professions of avocat and conseil juridique. However,
there exist professional legal advisors equivalent to the conseil juridique in Belgium, Germany, the Netherlands, and other
states, and these are also not listed in article 1(2). This omis-
sion also does not appear to be objectively justified because legal advisors can claim rights to perform certain cross-border
services under Article 59—recall that in van Binsbergen, the pro-
fessional involved in the Dutch administrative proceeding was
a Dutch legal representative, not an advocaat.

Article 3 of the directive states an important rule: in per-
forming the cross-border services, the lawyer must use his or

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40. For a description of the French conseil juridique law of December 30, 1971,
see Goebel, supra note 1, at 464-69.
her home title. This article was clearly intended to prevent both inadvertent confusion with a host state professional, and any lawyer's attempt to deceive clients by passing himself or herself off as a local lawyer.

Article 5 sets a limit on cross-border practice in "legal proceedings" (this is not a defined term, but it apparently refers to civil and criminal litigation before courts). The host state may require the foreign lawyer to be formally introduced to the presiding judge and the president of the local bar and "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."

By implication from article 5, a lawyer providing any other form of cross-border services, such as negotiation assistance, drafting of commercial, financial or other documents, or counseling on legal or tax matters, need not be associated with a host state lawyer.

Under article 6, if the host state does not permit its domestic house counsel to engage in "activities relating to legal proceedings," the host state can likewise exclude foreign house counsel from such litigation activities.

The directive does not attempt to set any time limit on the duration of the services provided in the host state. Presumably, the limit is set by the nature of the services provided. A lengthy court administrative proceeding, negotiations and drafting of a major acquisition or a complex financial arrangement might require a lawyer's temporary residence in the host state for months—remember that Treaty Article 60 permits temporary residence. However, at some point the regular provision of services without a specific time duration from a local residence or office would constitute a local establishment, and become subject to Article 52, not Article 57. We will return to this topic in Part VII.A below.

Article 4 of the directive sets out a complicated formula to determine the rules of conduct applicable to the lawyer providing services. Article 4(2) states that if the services involve legal proceedings or proceedings before public authorities, the rules of professional conduct of the host state are to be observed, but "without prejudice" to those of the home state of the foreign lawyer. For all other legal services (e.g., standard com-
merical or corporate practice), the rules of the home state are to apply, albeit "without prejudice" to the application of several important host state rules, notably those on "professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity." However, these latter home state rules only apply if they meet an objective necessity standard: "their observance [must be] objectively justified to ensure, in that [host] state, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility."41

Article 4's complexity is an attempt to apply certain principles of van Binsbergen. The Court there said that the host state could require the person providing a cross-border service to follow "professional rules justified by the general good—in particular, rules relating to organization, professional ethics, supervision and liability."42 (The concept that cross-border providers of services can be subjected to host state rules "justified by the general good" also applies to commercial and financial services.)43

Although, fortunately, no conflicts between host and home professional rules have been brought thus far to the Court of Justice, there is certainly a significant risk of such conflicts. Member State professional rules for lawyers vary considerably as to the permissibility of contingent fees; the application of fixed fee rates to various services; the right to sue for fees; the handling of client funds; the necessity for professional insurance and its scope; the permissibility of advertising or other public relations; the extent of the attorney-client privilege or professional secrecy; and the nature and extent of conflict of interest rules.44

The Council of the Bars and Law Societies of the Euro-

41. For a discussion of the complexity and uncertainty of the text in article 4, see Laguette, supra note 1, at 246-47, and Spedding, supra note 1, at 187-90.
44. See Laguette, supra note 1, at 78-90 (reviewing differences in national rules of professional conduct and ethics, notably concerning conflict of interest); id. at 139-56 (concerning confidential communications and professional secrecy); id. at 157-67 (concerning fees).
pean Community, a coordinating group for all the national bar
associations in the Community, adopted on October 16, 1977
the Declaration of Perugia on the Principles of Professional
Conduct. This Declaration was meant to be a starting point
with respect to the choice of law rules to apply in case of con-

flict. For example, as to the duty of confidentiality, it suggests
that the stricter rule should be applied, while with respect to
the rules of publicity, it suggests that the host state rules
should apply.

In the 1980s, the CCBE continued its efforts to establish
certain basic principles which would be common to all national
professional rules of conduct and ethics when applied to cross-
border practice. These efforts were crowned with a notewor-
thy achievement, the Code of Conduct for Lawyers in the Eu-
ropean Community of October 28, 1988 ("CCBE Code" or
"Code of Conduct"). The CCBE Code is appropriately the
subject of analysis by a CCBE expert, John Toulmin, later in
this special issue. The CCBE Code should reduce apprecia-
ably the risk of serious conflict between host and home state
rules as applied to a lawyer providing cross-border services.
Further comments on the CCBE Code are made in Parts VII.A
and VIII.

The 1977 Lawyers Directive has been the subject of three
Court of Justice judgments. In two cases, the Commission
brought an action against a Member State under Article 169 of
the Treaty because the state had improperly implemented the
directive. The more important judgment is Commission v. Ger-
many, a 1988 decision.

The German practice in implementing the 1977 directive

45. The Declaration of Perugia is set forth in full and analyzed, section by sec-
tion, in LAGUETTE, supra note 1, at 255-58, and is discussed in SPEDDING, supra note 1,
at 195-200.
46. A CCBE plenary session unanimously adopted the Code at Strasbourg, 
France. CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY (1988) [here-
inafter CCBE CODE]. The full text is set out at John Toulmin Q.C., A Worldwide Com-
47. Toulmin, supra note 46.
sor Julian Lonbay in Cross-Frontier Provision of Services by Lawyers, 13 EUR. L. REV. 347
(1989) and Valerie Pease in Commission v. Germany, 22 INT’L LAW. 543 (1988)); see
Horst Eidenmüller, Deregulating the Market for Legal Services in the European Community: 
Freedom of Establishment and Freedom to Provide Services for EC Lawyers in the Federal Repub-
had been to require that the foreign lawyer providing services in litigation or in certain administrative proceedings always collaborate with a German lawyer, and that the German lawyer assume the primary role of "authorized representative or defending counsel." Moreover, the local German lawyer had to be present at all times during the court or administrative proceedings or when the foreign lawyer sought to visit a client in jail.

The Court initially held that there was no obligation for a foreign lawyer to work "in conjunction with" a host state lawyer in any judicial or administrative proceeding if the host state law did not mandate that a party be represented by a lawyer in that sort of proceeding.49 This ruling effectively eliminated the need for a client to pay the expense of a host state lawyer when the client chooses to be represented solely by a foreign lawyer in such proceedings.

The Court of Justice then ruled that the above-described German requirements were excessive and were not necessary when a foreign lawyer seeks to work "in conjunction with" a host state lawyer. The Court specifically held that article 5 of the 1977 directive, which refers to the local lawyer as being "answerable" to the host state court, did not imply that the local lawyer had to be the "authorised representative or defending counsel" or that he or she must take the leading role in drafting pleadings or in oral argument, or necessarily be continuously present during the court proceedings.50 The foreign and local lawyer should decide upon their respective roles in a "form of co-operation appropriate to their client's instructions."51

The Court also rejected the German contention that foreign lawyers acting without the full cooperation of host counsel might have an insufficient knowledge of the rules of substantive and procedural law. The Court referred to knowledge of German law as "part of the responsibility of the lawyer providing services vis-à-vis his client, who is free to entrust his interests to a lawyer of his choice."52 This is a particularly inter-

51. Id. at 1161, [1989] 2 C.M.L.R. at 706.
52. Id. at 1162, [1989] 2 C.M.L.R. at 706.
esting point, as it appears to imply that a host state may not compel a foreign lawyer engaged in standard commercial practice to be associated with a home state lawyer when the foreign lawyer provides an opinion on host state law, even when, as in Germany, the national law grants a monopoly on counseling on domestic law to local lawyers.\textsuperscript{53}

The final issue concerned Germany’s ability to apply its long-standing rule that only lawyers who reside within a specific territory may plead before certain higher courts in that territory. Germany contended that to allow foreign lawyers to plead in such courts (as opposed to association with a locally admitted lawyer who would plead) would allow foreign lawyers greater rights than German lawyers from other areas of Germany and thereby constitute reverse discrimination. Although the directive did not cover this point, the Court held that the “rule of territorial exclusivity cannot be applied to activities of a temporary nature” by the foreign service-providing lawyer, because a contrary view would frustrate the goal of Articles 59 and 60.\textsuperscript{54}

In \textit{Commission v. France}, a 1991 judgment, the Court came to the same conclusion in striking down French rules requiring foreign lawyers to work “in conjunction with” French \textit{avocats} in proceedings in which a client was not required by French law to be represented by an \textit{avocat}, as well as in forbidding the French limits on foreign lawyers’ services based on French rules on territorial admission to practice before certain courts.


\textsuperscript{53} Rolf Waegenbaur, \textit{supra} note 23, at 96, considers that the 1977 directive enables a foreign lawyer to advise clients on the host state law as well as home state law or Community law. Philippa Watson in a note on \textit{Klopp}, 22 \textit{COMMON MKT. L. REV.} 736, 750 (1985), comes to the same conclusion. Foreign lawyers who provide advice on complex issues of host state law without consulting an expert host state lawyer may, of course, run a risk of malpractice liability in case of error.


Mr. Gullung, a French and German dual national, was a notaire in France from 1947 to 1966, but resigned after a disciplinary proceeding. Mr. Gullung later applied to become a conseil juridique and an avocat, but was unsuccessful in both applications because the respective professional associations found that he lacked "the guarantees of dignity, good repute and integrity necessary to practice as an avocat." Mr. Gullung then became a Rechtsanwalt in Offenburg, Germany in 1979. Shortly thereafter, he opened an office in Mulhouse, France, describing himself with the unusual title of jurisconsulte, and apparently practiced for several years without incident.

In 1985, after Mr. Gullung attempted to appear in a Colmar court in conjunction with a Colmar avocat, the Colmar bar council forbid any of its avocats from "lending assistance" to anyone who had been denied registration as an avocat on the grounds for which Mr. Gullung had been denied registration. Mr. Gullung sued to set aside the Colmar bar action, which ultimately resulted in the Colmar Court of Appeal's referral of questions to the Court of Justice in an Article 177 proceeding. One of the questions related to the right of establishment and will be covered in Part IV, but the other related to the provision of services.

The Court of Justice cited article 4 of the 1977 directive and approved its language requiring that a lawyer providing services in "legal proceedings" in a host state observe the professional rules of conduct in that state. The Court then held that a person who had been denied access to the profession of courtroom lawyer in the host state "for reasons relating to dignity, good repute and integrity" must be considered to lack the "capacity" to satisfy the host state's professional rules. The Court rejected an argument that the directive only required the foreign lawyer to satisfy the host state's professional rules in connection with the legal proceeding in which the foreign lawyer seeks to provide services.

The Court's rationale is not totally satisfying. The issue in this part of the case involved the provision of services, not establishment. The German bar in Offenburg presumably had

58. Id. at 138, [1988] 2 C.M.L.R. at 73.
59. Id.
decided that Mr. Gullung was of the requisite good character to become a Rechtsanwalt. Accordingly, so long as he complied with the French rules of conduct in the course of providing services temporarily in France, why should he be denied the right to provide the services? Recall that Mr. Gullung attempted to appear in French court in conjunction with a qualified French avocat, who is supposed to "be answerable" to the French court, in terms of article 5 of the 1977 directive. Would not the French avocat serve as an effective guarantor that Mr. Gullung would satisfy the French rules during the court proceeding? The Court's statement that Mr. Gullung lacked the "capacity" to satisfy French professional rules amounts to a conclusion that his character is somehow permanently tainted, which hardly seems to be a psychologically justifiable conclusion.60

Moreover, if the Colmar bar council suspected that Mr. Gullung had somehow misled the Offenburg authorities as to his past when applying to become Rechtsanwalt, the Colmar bar council should so advise the Offenburg authorities, which could make their own investigation and take any appropriate disciplinary action. One wonders if sufficient respect has been given to the autonomous decision of the Offenburg bar concerning Mr. Gullung's capacity to be a Rechtsanwalt.

If the Court had an underlying concern that Mr. Gullung was not simply trying to perform services temporarily, but was trying to establish himself in France while evading the French rules (as his title of jurisconsulte and office in Mulhouse might suggest), then the Court needed only to refer to part of its opinion in van Binsbergen. The Court there held that a host state could prevent a foreign lawyer's activities when these are

60. It is interesting to note the Court's treatment of analogous issues in the sector of the free movement of workers. Directive 64/221 of February 25, 1964 requires that Member States take actions restricting rights of entry and residence based "exclusively on the personal conduct of the individual concerned" and forbids action based exclusively on past criminal convictions. See Council Directive No. 64/221, supra note 22, art. 3, O.J. Eng. Spec. Ed. 1963-1964, at 118. In Regina v. Secretary of State for Home Affairs, ex parte Mario Santillo, Case 131/79, [1980] E.C.R. 1585, 1602-03, [1980] 2 C.M.L.R. 308, 329, the Court accordingly held that the United Kingdom could not deport a Community national who had been convicted of rape and imprisoned for five years without holding a new hearing at the time of his release from prison to consider any new factors, because the original deportation order had occurred at the time of the penal conviction.
entirely or principally directed toward its territory" and designed "for the purpose of avoiding the professional rules of conduct that would be applicable to him if he were established within that [host] state."61

This concludes the review of a lawyer's right to provide services. It is clear that the 1977 directive, together with the Court's generally expansive interpretation of Articles 59 and 60, go a long way toward facilitating the temporary provision of legal services throughout the Community. The two Article 169 judgments demonstrate that Member States must enable the provision of legal services to be carried out in a liberal manner. The principal problem area that remains is that of potential conflicts between the rules of professional conduct of home and host states, and the CCBE Code at least alleviates the problem. We will, however, return to certain unresolved issues in connection with the provision of services in Part VII.A.

IV. LAWYERS' RIGHT OF PROFESSIONAL ESTABLISHMENT

The right of establishment is obviously more far-reaching than the right to provide cross-border services. Article 52 sets forth explicitly three different aspects of the right of establishment: (1) the right to set up "agencies, branches or subsidiaries," (2) "the right to take up and pursue activities as self-employed persons," and (3) the right to "set up and manage undertakings, in particular companies or firms."

Article 52 contains a fundamental condition, namely that the foreign person or entity receive national treatment, i.e., be subject to whatever conditions are laid down for comparable national persons or entities of the host state. Because these conditions tend to be quite diverse and often difficult for the foreign person or entity to satisfy, this can prove to be a serious barrier to free establishment in many fields, notably the corporate and financial sectors.

As a result, the Community has undertaken major programs for the harmonization of national laws in the corporate, securities, banking and insurance sectors. These programs

have received added impetus in the context of completing the internal market, and each program is now close to completion.\textsuperscript{62}

For professional activity, as indicated before, there is an additional hurdle in seeking to obtain establishment rights, because states usually require an educational diploma and frequently completion of a professional training period before a license to practice a profession is conferred. For this reason, the Community undertook its program to harmonize national laws on higher education and training and to achieve the mutual recognition of diplomas and certificates for certain professions, discussed in Parts II and V.

For lawyers, all three aspects of the right of establishment in Article 52 are of interest. We turn initially to the Court of Justice case law dealing with the first aspect (the right to set up a branch) and the second aspect (the activity as a self-employed person).\textsuperscript{63} The Court has not had occasion to deal with the third aspect, the right to set up firms or companies, but there is no reason to doubt that a foreign lawyer or law firm may set up or join a professional partnership or civil or commercial company for the practice of law in the host state on the same conditions that prevail for host state lawyers.

\textsuperscript{62} As of the end of 1991, the Community had adopted over 30 harmonization directives in the corporate and financial services sector. Most of the company and securities law directives were in fact adopted before the launching of the internal market program, but little progress was made before 1985 in the banking and insurance fields. In paragraphs 101 to 107 of the White Paper, supra note 5, the Commission stressed the need for financial integration and proposed that further harmonization be based on the principle of "mutual recognition" of standards and "home country control" of financial institutions engaged in cross-border services, especially through branch establishments. A number of important directives, notably the second Council Directive No. 89/646 of December 15, 1989 on the coordination of laws ... relating to ... the business of credit institutions, O.J. L 386/1 (1989) [hereinafter Second Banking Directive], were based on the approach of "home country control" and "mutual recognition." For a general overview, see WINTER ET AL., supra note 6. See also Manning Warren III, Global Harmonization of Securities Law: The Achievements of the European Communities, 31 HARV. INT'L L.J. 191 (1989); George Zavvos, Banking Integration and 1992: Legal Issues and Policy Implications, 31 HARV. INT'L L.J. 463 (1990).

The landmark 1974 judgment, *Reyners*, already discussed in Part II regarding its holding that Article 52 has direct effect, remains the seminal opinion for a lawyer's right of establishment. Belgian law had required Belgian citizenship as a prerequisite for the status of Belgian *avocat* (a common prerequisite in many states). The Court held that such a condition would frustrate the right of establishment and that Article 52, read together with Article 7's basic principle of non-discrimination on the basis of nationality, forbids such a condition.

Another important aspect of the judgment dealt with the interpretation of Article 55's exception to the right of establishment for "activities . . . connected, even occasionally, with the exercise of official authority." Belgium, supported by Germany and Luxembourg, argued that *avocats*, in their role as the only persons authorized to plead in litigation before Belgian courts, were so connected.

The Court initially held that Article 55, as an exception to a fundamental Treaty right, must be read narrowly, and should not remove an entire profession from the right of establishment. It then held that the most typical activities of the profession of *avocat*, such as consultation and legal assistance and also representation and the defense of parties in court, even when the intervention or assistance of the *avocat* is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.

It is generally assumed that Article 55's exception would cover judges, public prosecutors, and others involved in the administration of justice, as well as *avocats* when acting temporarily as judges or prosecutors. On the other hand, if the typical activities of *avocats* are not connected with the "exercise of official authority," it is incontestable that neither are the typ-

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68. Advocate General Mayras contended in his opinion that judges, lawyers employed by the state, and lawyers acting temporarily as judges should be considered as exercising "official authority." *Id.* at 667-68, [1974] 2 C.M.L.R. at 322-23. For a careful analysis of the concept of "official authority," see *LAGUETTE, supra* note 1, at 215-26.
ical activities of solicitors, legal advisors or representatives, notaries, tax consultants, patent or trademark agents, and so forth.

A striking parallel to *Reyners* is the U.S. Supreme Court opinion in *In re Griffiths*, which held that Connecticut could not make U.S. citizenship a prerequisite for the status of attorney, rejecting the argument that this condition was justified because attorneys are "officers of the court." *Griffiths* was, in fact, decided only a few months before *Reyners*, and the Supreme Court's reasoning may have influenced the Court of Justice.

*Reyners*'s impact was substantially enhanced by the Court of Justice's 1977 judgment in *Jean Thieffry v. Conseil de l'ordre des avocats à la cour de Paris*. Mr. Thieffry was a Belgian avocat, who practiced in Brussels from 1956-1969, and then moved to Paris. In 1974, the University of Paris recognized Mr. Thieffry's Belgian law degree as the equivalent of a French law degree, apparently for the purpose of establishing his capacity to take the French bar examination (the CAPA). He then successfully passed the French bar examination in 1975. Based on the University of Paris recognition of equivalency and his passage of the bar examination, Mr. Thieffry applied to the Paris bar council for admission to the Paris bar. The Paris bar council denied him admission on the basis that he had not received any French law degree, as required by the French law regulating the profession of avocat. On appeal, the Paris Court of Appeal referred questions under Article 177 to the Court of Justice.

The Court held that France could not require a French law degree as a prerequisite to becoming an avocat whenever an applicant has received an equivalent legal education in another Community state. The Court reasoned that, because freedom of establishment is a principal Community goal, Member States have a duty under Article 5 of the Treaty, which requires states to take "all appropriate measures . . . to ensure fulfillment of [Treaty] obligations," to place restrictions on the free-

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70. For an interesting discussion of the parallels between *Griffiths* and *Reyners* and the cross-fertilization of ideas involved, see *Transnational Legal Practice*, supra note 1, at 7-11 and *Spedding*, supra note 1, at 211-13. Ms. Spedding also states that *Griffiths* may have influenced the 1974 amendment to the United Kingdom Solicitors Act, which eliminated the citizenship requirement for solicitors. *Id.* at 213.
dom of establishment only when "justified by the general good." 72

In that perspective, to require a French law degree is an "unjustified restriction" when an appropriate university authority has determined that a law degree from an institution in another Community state can be regarded as the equivalent of a French law degree. 73 Note that the Court went rather far in its conclusion, because it denied the Paris bar council any discretion to second-guess the determination by the University of Paris which, of course, has no customary role in the process of passing on qualifications for an avocat.

A European university often recognizes foreign law diplomas as equivalent to domestic ones for the purpose of permitting a student to enroll in a postgraduate degree program. Hence a foreign law student or lawyer who pursues postgraduate education in a host state can usually escape an obligation for an undergraduate law degree in that state as a prerequisite to applying to become a lawyer, provided that he or she obtains a host state university decision that the foreign law degree is equivalent to the host state degree. Although the substantial differences in legal education among the various Community states might appear to be a matter of legitimate concern for a host state in such a case, Advocate General Mayras pointed out that an applicant's proof of the "more specific and technical knowledge" necessary for practice comes through the successful passage of the bar examination. 74

The Thieffry judgment has implications that go beyond the specific facts. The Court notably declared that "freedom of establishment, subject to observance of professional rules justified by the general good, is one of the objectives of the Treaty." 75 The implication of this declaration is that national rules limiting the right of establishment of lawyers (or other professionals) will be allowed only if they are objectively "justified by the general good." If they are not, the host state has a duty under Article 5 to abandon the national rule or its limiting effect. It is certainly possible that some national rules re-

72. Id. at 777-78, [1977] 2 C.M.L.R. at 403-04.
73. Id. at 778, [1977] 2 C.M.L.R. at 404.
74. Id. at 789, [1977] 2 C.M.L.R. at 394.
75. Id. at 777, [1977] 2 C.M.L.R. at 403.
lating to the practice of law, even though of long date, are no longer objectively justified by the general good in terms of modern legal practice.

The next significant Court of Justice judgment, *Ordre des Avocats au Barreau de Paris v. Onno Klopp,* a 1984 decision, illustrates this point. Mr. Klopp, a German Rechtsanwalt practicing in Düsseldorf, had obtained a doctorate from the University of Paris in 1969. He passed the French bar examination in 1980 and sought to open a second law office in Paris, intending to reside and practice in both Düsseldorf and Paris. Under Paris bar rules established in accordance with French legislation, an avocat in Paris may not have an office outside of the territorial jurisdiction of the French court for the Paris region. The issue presented by the French Supreme Court to the Court of Justice was whether this long-standing French rule could prevail over the right of establishment. The Court held that it could not.

The Court relied on the fact that the right of establishment in Article 52 included specifically the right to open a branch, which the Court interpreted as also meaning the branch office of a member of a liberal profession. The Court concluded that a Member State could not effectively nullify a right to establish branch offices by requiring a foreign lawyer to close the office in his or her home state as a precondition for opening an office in the host state. The Court stipulated that the host state could require the foreign lawyer “to maintain sufficient contact” with local clients and local judicial authorities, but added that this would be easy, because “modern methods of transport and telecommunications facilitate” such contacts.

The Commission, Denmark, the Netherlands, and the United Kingdom had all argued in favor of a lawyer’s right to set up a branch office in another Member State when properly qualified locally, and even France admitted that French lawyers were not prohibited by French rules from having offices in

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78. Id. at 2989, [1985] 1 C.M.L.R. at 113-14.
79. Id. at 2990, [1985] 1 C.M.L.R. at 114.
other states.\textsuperscript{80} It should also be observed that nothing in the Court's opinion would make a branch office a personal right of a self-employed lawyer. It seems apparent that a law firm may also open a branch office in a host state if staffed by lawyers qualified in the host state. (We will return to this topic in Part VII.C).

An interesting question is whether Mr. Klopp could open a third office in France outside the Paris region. The broad principle of \textit{Thieffry}, that host state rules restricting establishment must be justified by the "general good," would suggest that the answer should be yes, because modern transport and telecommunications would enable Mr. Klopp to carry on the necessary on-going contacts with clients and the local court at the site of the third French office, just as he could at the Paris office. This would amount to reverse discrimination, because French avocats at the time of the \textit{Klopp} judgment could not have offices outside the territorial jurisdiction of the court in which they were admitted. However, reverse discrimination was not regarded by the Court as a sufficient argument to justify limitations on the provider of cross-border services in \textit{Commission v. Germany} and \textit{Commission v. France}, discussed in Part III.\textsuperscript{81} Doubtless the impact of \textit{Klopp} influenced France and Germany to enable law firms to have branch offices in other regions in their respective recent laws revising the rules governing the legal profession.\textsuperscript{82}

The most difficult issue in \textit{Klopp} was the question whether he should follow in his Paris practice the German professional rules and ethics, or the French rules, or both. The Court requested the parties and intervenors to supply separate observations on this issue. The Commission, Denmark, the Netherlands, and the United Kingdom suggested that both states' rules should apply, but did not present views on how conflicts might be settled.\textsuperscript{83} France stated that French rules must gov-

\textsuperscript{80} \textit{Id.} at 2983, [1985] 1 C.M.L.R. at 103.
\textsuperscript{81} See \textit{supra} text accompanying notes 48-55.
\textsuperscript{82} See \textit{supra} notes 10-11 and accompanying text.
\textsuperscript{83} Ordre des Avocats au Barreau de Paris v. Onno Klopp, Case 107/83, [1984] E.C.R. 2971, 2977-84. The Commission suggested rather sanguinely that "there is no reason to suppose" that Mr. Klopp's status as Rechtsanwalt would ever make it "impossible to comply with the French rules of professional conduct." \textit{Id.} at 2981.
ern, even as to French lawyers practicing abroad. Advocate General Sir Gordon Slynn concluded that both states' rules should be applied, recognizing that "difficulties could arise," but maintaining that the risk of such difficulties should not prevent the Court's recognition of a lawyer's right to practice in a branch office in a host state.

The Court of Justice stated somewhat tersely that the foreign lawyer must "abide by the rules of the [host state] profession," and that "the existence of a second set of chambers in another Member State does not prevent the application of the rules of ethics in the host Member State." It could be argued that this implies that, in case of conflict, the host state rules should prevail over those of the home state. It is equally likely, however, that the Court, just as Sir Gordon Slynn in his opinion, did not mean to resolve this issue. If, as the author believes, the latter view is correct, it is unfortunate that the Court did not expressly state that this issue was not being decided at the time.

The adoption of the CCBE's 1988 Code of Conduct, discussed in Part VI, by all the Member States fortunately will reduce the likelihood of conflict, because the Code does achieve a minimal harmonization of some basic rules and provides a resolution of conflicts for certain other rules. Nonetheless, there remains a definite risk that difficult questions will arise when some host and home state rules are in conflict. We will return to this topic in Part VIII.

The final important Court judgment in this area is Gullung, whose rather extraordinary facts were set out in Part III. It will be recalled that Mr. Gullung, after becoming a German Rechtsanwalt, opened a branch office in Mulhouse and practiced under the curious title of jurisconsulte for several years. This certainly represented an establishment under Article 52. It will also be recalled that Mr. Gullung had challenged the Colmar bar council's decision to bar avocats from cooperating with him, based on his earlier resignation from the status of French notaire after an ethical proceeding against him.

84. Id. at 2983, [1985] 1 C.M.L.R. at 103.
85. Id. at 2997, [1985] 1 C.M.L.R. at 109.
86. Id. at 2990, [1985] 1 C.M.L.R. at 113-14.
The Colmar Court of Appeal asked the Court of Justice whether a foreign lawyer had to be a "member of a Bar in the host country" in order to establish himself or herself there.\(^8\)

The Court responded that

\[\text{\textit{It should be added that the requirement that lawyers be registered at a Bar laid down by certain Member States must be regarded as lawful in relation to Community law provided, however, that such registration is open to nationals of all Member States without discrimination. The requirement seeks to ensure the observance of moral and ethical principles and the disciplinary control of the activity of lawyers and thus pursues an objective worthy of protection.}}\(^9\)

Implicit in this statement is the view that any limitation on a foreign lawyer's admission to a local bar must be objectively justified by the "general good," but that the "general good" in this case represented the host state's need for observance of ethical standards by lawyers and disciplinary control of them.

Note, however, that the Court treated the case as involving only the issue of a foreign lawyer's right to practice in the same manner as French \textit{avocats}.\(^9\) Advocate General Darmon suggested that this was the only issue before the Court, because Mr. Gullung's lawsuit challenged the prohibition of assistance by French \textit{avocats} to Mr. Gullung in any court proceedings.\(^9\)

This limitation of the scope of the Court's judgment is of great importance. Mr. Gullung, the Commission, and the United Kingdom had raised a different issue, namely, whether

\(^8\) Gullung, [1988] E.C.R. at 135, [1988] 2 C.M.L.R. at 71. The Colmar court also raised the interesting question of whether a foreign established lawyer in a host state, who is not a member of the host state bar, can rely on the 1977 directive on freedom to provide services, which was precisely what Mr. Gullung claimed to be able to do. \textit{Id.}, [1988] 2 C.M.L.R. at 70-71. The Court of Justice unfortunately considered it unnecessary to answer this question. See infra text accompanying notes 130-37.


\(^9\) \textit{Id.} at 139, ¶ 27, [1988] 2 C.M.L.R. at 74. Later the Court specifically referred to Member States' legislation requiring that "any person wishing to establish himself in their territory as a lawyer within the meaning of their national legislation [to] be registered at a bar" and stated that host states can apply such legislation to Community lawyers who seek establishment rights "in order to benefit from the same status." \textit{Id.} at ¶ 30, [1988] 2 C.M.L.R. at 75 (emphasis added).

a foreign lawyer may establish himself or herself in the host state and practice under the home state title, such as Rechtsanwalt or solicitor, presumably engaging in any practice before courts in the manner set out in the 1977 directive on lawyers' provision of services. The United Kingdom expressly argued that the right of establishment protects such practice under the home state title.

The Court deliberately stated in paragraph 27 that this was not the issue before it. This is unusual, because the Court, generally speaking, does not indicate issues which it is not resolving. Advocate General Darmon argued that allowing lawyers to establish themselves under their home state title without admission to the local bar would create "uncertainty and confusion and, indeed, a disintegration of the rules governing the profession." A U.K. professor, Julian Lonbay, maintained in a case note on Gullung that the Court of Justice had "left the clear impression" that lawyers could establish themselves under their home state title and home state professional rules in a host state, although he noted Advocate General Darmon's contrary viewpoint.

It seems prudent to take the Court's paragraph 27 literally and to conclude that this important issue remains very much an open one. We will return to it in Part VII.B.

In summary, it is evident that the Court of Justice has substantially advanced the freedom of establishment for lawyers. Yet, overall, only a few lawyers (those who can qualify for membership in the host state's legal profession) can easily rely on the doctrines embodied in the Court's case law to date in

92. Id. at 120-21.
93. Id. at 121.
94. Id. at 139, ¶ 27, [1988] 2 C.M.L.R. at 74. Practice as an established lawyer under the home state title "does not form part of the question referred to the Court." Id.
95. Id. at 127, ¶ 21, [1988] 2 C.M.L.R. at 73. The Advocate General argued later that allowing an establishment right to practice under the home state title would create "a very dangerous lack of supervision [because] thorny problems would not fail to arise once it came to imposing sanctions for even the most elementary breaches committed in the state of establishment." Id. at 129, ¶ 29, [1988] 2 C.M.L.R. at 74.
96. Julian Lonbay, Note, 13 EUR. L. REV. 275, 278 (1988). Professor Lonbay came to this conclusion because of the Court's careful wording of paragraphs 27 and 30 of its judgment, but he modestly observed that his view should "be considered a suggestion rather than a certainty." Id. at 278 n.11.
order to establish themselves in another Community state. It is time, therefore, to turn to the 1988 directive on the mutual recognition of higher-education diplomas in order to review its impact on the legal profession.

V. MUTUAL RECOGNITION OF HIGHER EDUCATION DIPLOMAS

In Part II we indicated that by the 1980s the process of harmonization, profession by profession, first of educational and training standards and then of the requirements for professional status was seen to be simply too slow and laborious. In the June 1985 White Paper on Completing the Internal Market, the Commission instead proposed a general approach to cover all professions where the rules had not yet been harmonized.97 This approach, borrowed from the sphere of the free movement of goods, was to be one of mutual trust and mutual recognition: each state would trust the quality of higher education in every other state and recognize the other state’s diplomas as being essentially equivalent to its own.

This was the basis of the draft directive of July 9, 1985,98 one of the earliest proposals in the internal market program, which, with some significant modifications, was adopted on December 21, 1988 as the directive on a general system for the recognition of higher-education diplomas, commonly known as the Diploma Directive.99 The directive’s capital importance can be seen from the long list of professionals covered, including, for example, engineers, surveyors, accountants, insurance


agents, bankers, brokers, physicists, chemists, biologists, for-
esters, and librarians. Naturally, we will only be concerned
with the directive's impact on the legal profession.

The heart of the directive is the obligation placed on
Member States to recognize any diploma or certificate awarded
by a university, or similar higher education institution, in any
other Member State after a course of at least three years dura-
tion (article 1(a)). Such a diploma must, generally speaking, be
recognized as equivalent to a state's own higher-education di-
plomas when these are required for persons seeking access to a
regulated profession (article 3).

The directive will apply to any Member State “national
wishing to pursue a regulated profession in a host Member
State in a self-employed capacity or as an employed person”
(article 2). The limitation of scope to nationals should be un-
derlined: a Brazilian, Canadian, U.S., or any other non-Com-
munity national cannot benefit from the directive, even if he or
she has obtained a diploma from a university within the Com-

munity. However, the 1992 treaty for a European Economic
Area between the Community and the European Free Trade
Association (EFTA) states will require the EFTA states to im-
plement this directive in their own internal legislation, so that
ultimately the mutual recognition of diplomas will apply
throughout the European Economic Area.¹⁰⁰

Once a foreign applicant has fulfilled all the conditions for
admission to the host state's regulated profession, he or she
will be fully integrated into that profession, using the host state
professional title (article 7). In effect, this means no “second-
class citizenship” status for the foreign lawyer thus admitted in
the host state. In addition to the applicant’s diploma, the host
state must accept documents attesting to such factors as good
character, non-bankruptcy, and the absence of a criminal rec-

¹⁰⁰. As of early 1992, the text and annexes of the European Economic Area
Agreement were not available, but secondary sources suggest that EFTA states will
be obligated to adopt as internal legislation all relevant Community legislation in the
field of services and establishment. See EC, EFTA Foreign Ministers Reach Accord on New
European Economic Area, BNA 1992 THE EXTERNAL IMPACT OF UNIFICATION, NOV. 4,
tion shall have the right of appeal to a host state court or tribunal (article 8(2)).

There are, however, partial exceptions to the general recognition of diplomas, and in the case of the legal profession, the exceptions are expected to be the rule.101

The first exception arises either when the areas of study in an applicant’s home state education and training leading to a diploma “differ substantially” from those covered in obtaining the corresponding diploma in the host state, or when the scope of fields of practice in the host state is broader than the scope of fields of practice of the corresponding profession in the home state (article 4(1)(b)). It is expected that education and training in a common law state will always be seen as substantially different from that in a civil law state. Moreover, even among civil law states, the legal codes and traditions vary greatly, so that it is likely that the education and training in each will usually be seen as substantially different from that in any other (except, perhaps, in very closely related systems, such as Belgium and France, or Austria and Germany).

In the event that a substantial difference in education and training is found, the host state authorities may require the foreign applicant either to take an “aptitude test” or to complete an “adaptation period not exceeding three years” (article 4(1)(b)). The host state has the option between the two alternatives.102

An “aptitude test” is designed to assess the applicant’s “professional knowledge” required for the host state’s profession, but the test is only supposed to assess knowledge of those subjects that the host state does not consider adequately covered in obtaining the home state’s diploma (article 1(g)).103

101. “Whereas” clause 9 of the Diploma Directive’s preamble states that “in particular, the differences between the legal systems of the Member States . . . warrant special provisions since, as a rule, the education or training . . . in the Member State of origin does not cover the legal knowledge required in the host Member State with respect to the corresponding legal field.” Diploma Directive, supra note 7, O.J. L 19/16, at 17 (1989).

102. This option granted to host states exists only with regard to the legal profession; article 4(1)(b) allows the applicant the option to select between the two alternatives for all other professions. Id. at 19.

103. Under article 1(g), each host state is supposed to 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 [applicant’s]
Quite sensibly, the host state may add to the aptitude test the "knowledge of the professional rules" of the host state.

The alternative "adaptation period" is defined as a "period of supervised practice" under a qualified host state lawyer, with some form of assessment of the quality of the applicant's performance during this period (article 1(f)). Supervised practice before becoming a lawyer is customary in most Community states and may last from one to three years, so that this approach is not an unusual one (as it would be in the United States).

Finally, another exception can occur when the home state's combined period of education and training is at least one year less than that of the host state (article 4(1)(a)). This may well happen, because some states require a minimum of three years for a law degree, while others require four or more, and because some states do not require probationary supervised training at all, whereas others require up to three years of such training. If the exception does occur, the host state may require a period of professional experience (but not supplementary education) to compensate for the difference in total time of education and training. There is a complex formula to limit the host state's additional required period of professional experience, with a maximum of four years. There is no need to summarize this formula, because the directive declares in article 4(2) that a host state cannot cumulate a required period of professional experience with the adaptation period or aptitude test of article 4(1)(b), and it is expected that for the legal profession all states will make use of article 4(1)(b).

The directive's success will be determined to some degree by the leniency or rigor with which a host state decides to compensate for a perceived substantial difference between its education and training and that of the home state, or the difference in scope of fields of practice between the two states. It now appears that most, if not all, states will opt for an aptitude test rather than for an adaptation period. The directive was supposed to have been implemented by legislation in the diploma." Id. at 18. This suggests that host states should have different aptitude tests for applicants from different home states, but in fact it appears that the states that have thus far implemented the directive with regard to the legal profession are adopting a single aptitude test for applicants from all other Member States.
Member States by January 4, 1991. By early 1992, nine states had implemented the directive, but not all have dealt specifically with the legal profession.\textsuperscript{104}

The first state to implement the directive was Germany, which did so on July 6, 1990.\textsuperscript{105} Germany chose an aptitude test and has set up stringent standards for it, requiring that it encompass two written examinations and one oral examination covering several complex substantive law fields in addition to the German professional rules.\textsuperscript{106} Some states will undoubtedly follow Germany's stringent approach, but others are expected to require examinations that are comparatively less difficult in character.

After this review of the 1988 directive on recognition of higher-education diplomas, it is helpful to discuss briefly a recent judgment that states the rules that are applicable pending the implementation of the directive, and that may also suggest how the Court would interpret the directive if called upon to do so.

In *Irene Vlassopoulou v. Ministerium für Justiz Bundes-und Europaangelegenheiten Baden Württemberg*,\textsuperscript{107} a 1991 case, a Greek lawyer applied to become a German Rechtsanwalt. She possessed a doctorate in law from a German university, had worked for five years in a German law office, and already had

\textsuperscript{104} The author was informed by the responsible personnel in Commission Directorate General III, The Internal Market, that Denmark, France, Germany, Ireland, Italy, Luxembourg, Portugal, Spain, and the United Kingdom notified the Commission that they have implemented the directive. Apparently all plan to opt for an aptitude test, but the nature of that test is not yet established in several of the states.


\textsuperscript{106} Each written examination will last five hours. A compulsory topic for one written examination will cover the contract and property parts of the German civil code, along with related civil procedure. The second topic is to be chosen by the applicant from either (1) public and administrative law and procedure, (2) criminal law and procedure, (3) family law and procedure, (4) corporate and commercial law and procedure, or (5) labor law and procedure. The oral examination will last one hour and will cover professional rules as well as substantive law. All examinations, of course, will be in German.

the status of a Rechtsberater (legal adviser). The German authorities stated that she must first obtain an initial German law degree, pass the two usual state exams for lawyers, and finally fulfill the supervised training period. Her appeals led to a German Supreme Court reference in 1989 under Article 177 to the Court of Justice.

Citing Thieffry, the Court of Justice held that a state is bound to facilitate a foreign lawyer's right of establishment under Article 52. \(^{108}\) As a consequence, when a host state examines the application for admission to its legal profession made by a person who is already a lawyer in another state, the host state must compare both the educational qualifications and the professional experience of the applicant with that usually required of host state nationals. To the extent that the applicant’s knowledge and experience are comparable, credit must be given for them; moreover, the applicant must be given the opportunity to prove that he or she has the knowledge and qualification that appears to be lacking on the basis of the comparison. \(^{109}\) Finally, the Court observed that a dissatisfied applicant must have a right of appeal. \(^{110}\)

In applying these standards, the German authorities certainly must give Mrs. Vlassopoulou considerable credit for her German doctorate and practice experience in Germany, as well as for her Greek legal education and training. However, the authorities can presumably still require an appropriately calculated amount of further German education and/or supervised training.

Vlassopoulou is of considerable importance because it provides a standard for foreign applicants for admission to the legal profession in host states pending the implementation of the 1988 directive. Moreover, the Commission can use Vlassopoulou as a basis for examining the requirements laid down by a host state in implementing the Diploma Directive to verify whether they are appropriate or excessively stringent. \(^{111}\)

\(^{108}\) Vlassopoulou, slip op. ¶ 14.

\(^{109}\) Id. ¶¶ 16-22. Advocate General Van Gerven had strongly urged this proportionality approach to the Court.

\(^{110}\) Id. ¶ 22.

\(^{111}\) The examination requirements set for the aptitude test for lawyers in Germany and some other states are certainly stringent; it remains to be seen whether their effect in practice will prove to be acceptable, or whether there will be a chal-
We have now completed examination of the 1988 directive on the recognition of higher education diplomas and related legal principles, and turn to the useful role played by the CCBE in furthering Community cross-border practice.

VI. THE ROLE OF THE CCBE

The CCBE is an umbrella organization that groups all of the Community national bar associations that represent lawyers engaged in courtroom practice, as well as the law societies representing U.K. and Irish solicitors. The CCBE does not include associations of notaries, legal advisors or house counsel.

Founded in 1960, the CCBE has become increasingly active since the late 1970s. The role of the CCBE is to provide a forum for the interchange of views and information among its member bodies, as well as to represent the legal profession to the EEC Commission and before the Court of Justice. The CCBE’s Secretariat is in Brussels. Its member bodies, grouped in national delegations, with one vote per state, meet in plenary session semi-annually. The CCBE does not have any binding delegated authority, legislative or otherwise, though its recommendations naturally have great influence.

The CCBE has produced one major achievement, the Code of Conduct, and is actively working on another, the draft directive on establishment, both to be discussed below. In addition, the CCBE has working groups engaged in studies of current issues such as multi-disciplinary partnerships, advertising, client protection through guarantee funds and insurance, and developments in the legal profession in Eastern Europe. These may give rise to future proposals or projects. Over the years, the CCBE undoubtedly has influenced national bar as-

112. The CCBE history and internal structure is described in CCBE CROSS BORDER PRACTICE COMPENDIUM, supra note 1, ch. 3. The European Lawyers’ Institute in Copenhagen is producing this compendium with the intention of describing the rules of the legal profession in each Community state. As of 1991, it described the rules of Belgium, Denmark, France, Germany, and the Netherlands, but the coverage of France and Germany does not reflect their recent legislative revisions of rules.

113. The CCBE Secretariat address is 40, rue Washington, B-1050, Brussels.

114. Some of the working groups are described in the CCBE CROSS BORDER PRACTICE COMPENDIUM, supra note 1, at 3-18 to 3-21.
associations to take a broader Community viewpoint toward the practice of law, combatting the more chauvinistic attitudes that previously prevailed in some states.

On October 28, 1988, the CCBE annual plenary session meeting in Strasbourg adopted the Code of Conduct for Lawyers in the European Community. This Code of Conduct is analyzed elsewhere by a leading CCBE expert, the English barrister John Toulmin, but a few observations can appropriately be made here.

First, the Code of Conduct is not a purely advisory document. It is intended to be adopted in all Community states by legislation, regulation, judicial authorization or bar association rules, as appropriate (Rule 1.3). Indeed, most Community states have already adopted the Code of Conduct. It thus constitutes a sort of minimum harmonization of professional conduct rules. Incidentally, six states that have observer status in the CCBE (Austria, Czechoslovakia, Finland, Norway, Sweden and Switzerland) are likewise in the process of adopting the Code of Conduct and it is quite possible that other European states will do so as well.

Second, its scope covers all cross-border practice (Rule 1.4), which would certainly appear to include not only the performance of temporary services in the context of Article 59, but also the activities of a lawyer established in a host state who is not, for whatever reason, admitted to practice by a host state bar association. Thus, the Code of Conduct should govern the conduct of a U.K. barrister or solicitor, or a German Rechtsanwalt or a French avocat established in practice in another state under his or her respective home state title.

Third, to the extent that the Code of Conduct's specific rules do not cover a particular issue, a lawyer engaged in cross-border practice is "bound to observe the rules of the Bar or Law Society to which he belongs" (Rule 1.3.2), which ensures, as a final safeguard, that a lawyer is subject to home state professional rules and discipline. Of course, this does not alter the legal obligation to observe host state rules in the circum-

115. The Code text is an appendix to Toulmin, supra note 46. The CCBE Working Group on Deontology issued an Explanatory Memorandum in May 1989, which is available at the CCBE Secretariat.
116. Toulmin, supra note 46.
stances described by the 1977 directive on lawyers’ services discussed in Parts III and VII.A.

Fourth, the application of the specific rules of the Code of Conduct in cross-border practice will modify the present rules in many states, usually in the direction of greater care in the protection of client’s interests, such as, for example, Rule 3.2 on conflicts of interest, Rule 3.8 on client funds, and Rule 3.9 on professional indemnity insurance. In some instances, this may influence national bar associations to introduce similar rules for domestic national practice, if they do not already exist. For example, several Community states do not have rules governing the segregation of client’s funds or requiring malpractice insurance.

Finally, the Code of Conduct’s harmonization of some rules and choice of law approach to other rules is cast in the form of relatively short and simple principles. This means that the Code is relatively easy to understand, which has obvious merit, but it also means that the Code is only a starting point, because many issues of potential conflict between home and host rules are not resolved or only partially resolved. Nonetheless, the Code of Conduct is quite valuable in promoting the resolution of some significant differences among national rules of professional conduct. We will return to certain specific provisions of the Code of Conduct when considering the issue of applicable professional rules in Part VIII.

The second major initiative of the CCBE is the draft directive on the right of establishment for lawyers. This is a project which has been under way for over a decade, commencing with the 1982 Athens draft 5/82 bis. The current working draft, an April 1990 version, was produced by four CCBE officials designated as experts (“wise men”) for this purpose: Michel Gout, John Toulmin, Heinz Weil and Niels Fisch-Thomsen. This is the subject of analysis in a separate com-

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mentary by Heinz Weil,119 but again some observations are useful.

The CCBE recognizes that the 1988 directive on the recognition of diplomas provides only some assistance in developing the right of establishment for lawyers, because it is limited in nature to facilitating the ability of law students and lawyers (usually young lawyers) to become members of a host state bar. Many lawyers have no desire to do that. Moreover, there is no present coverage of the establishment rights of law firms.

Hence, the CCBE is attempting to produce a draft directive which, if approved by ten of its twelve Member State delegations, can be proposed to the Commission as the basis for a possible directive. The responsible officials at the Commission have followed the evolution of the draft with interest and may be expected to review it carefully for possible adoption, provided it is first endorsed in a quasi-unanimous fashion by Member State national associations. However, it is important to emphasize that the Commission, if it picks up the endeavor, will produce its own draft, doubtlessly inspired by the CCBE proposal, but consonant with the Commission’s views as to what is legally required by the case law of the Court and as to what represents the soundest policy for the European Community.

The CCBE draft directive expresses two major policy attitudes. The first is the enunciation of the right of lawyers (defining “lawyers” as the same classes of legal professionals set out, state by state, in the 1977 directive on lawyers’ services) to establish themselves in practice in host states under their home state title, without becoming members of the host state bar (articles 4 and 7).

Now, this certainly represents a shift in the traditional view of some national associations which have felt that they ought to enjoy a monopoly or quasi-monopoly on legal services, and that all foreign Community lawyers ought to be able to exercise a right of establishment only by full integration into the host state legal profession. To promote acceptance of its policy approach, the CCBE draft directive makes two concessions to the host state legal professions. First, the foreign law-

119. Weil, supra note 117.
yers may be excluded by host states from three specified types of practice: administration of decedents' estates, transfers of real estate title interests, and litigation in court or administrative proceedings (except to the extent occasional services are provided under the terms of the 1977 directive on lawyers' services) (article 6).

The second concession to the host state legal professions is that the foreign lawyer must be registered in the host state and subject to the host state professional rules, except as modified by the CCBE Code of Conduct, and except to the extent that the host state rules are not "objectively justified by the public interest" (article 8). The latter exception is a highly desirable reference to the Court of Justice's doctrine as developed in Thieffry, van Binsbergen and Klopp.

Not only are the host state rules binding on the foreign registered lawyer, but the host state authorities shall carry out any disciplinary proceedings and impose sanctions as necessary (article 10). The home state authorities are provided with minority representation on the disciplinary panel (three representatives from the host state, two from the home state).\footnote{120 Article 9 of the draft directive, which deals with disciplinary proceedings of foreign lawyers established as members of the host state legal profession, makes the disciplinary panel one composed only of host state lawyers, but allows the home state profession to have representatives to express its views.}

There is no formal co-decision requirement. Although article 10 states that the "mixed" panel is to endeavor to reach a unanimous decision, it also states that the panel acts by majority vote. A final noteworthy point is that the "mixed" panel is intended to have the status of a "court or tribunal" under Article 177 of the EEC Treaty, which would give it the power to refer to the Court of Justice difficult issues of Community law arising during its proceedings (article 9(6)).

The second important policy aspect of the draft directive is that it provides express rights to law firms. Law firms may establish themselves in host states either directly through branch offices or in association with host state lawyers (article 11). The term "association" presumably covers partnerships, joint ventures or formal mergers of firms.

Because the draft directive would create a much broader right of establishment for lawyers than presently exists, and
because it represents a careful balancing of interests between home and host state, it is to be hoped that it will be adopted in its present or a slightly modified form. However, as of late 1991, the CCBE, acting in plenary session, has only been able to muster a majority of eight Member State delegations in favor of the draft, not the ten required by CCBE internal procedures.\textsuperscript{121} We will further consider the draft directive when relevant to unresolved issues in Part VII.B and C.

We now turn to an evaluation of the state of progress represented by Community law as above described, and to a consideration of some important unresolved issues.

\section*{VII. THE STATE OF PROGRESS TOWARD COMMUNITY-WIDE RIGHTS OF PRACTICE}

The purpose of this section is to evaluate the Community legislation, Court of Justice case law, and CCBE initiatives in order to try to ascertain the level of progress toward attaining a lawyer's freedom to provide services and right of establishment on a Community-wide basis, as well as to identify issues that still need to be resolved. The following topics will be considered: (a) freedom to provide services; (b) establishment rights for individual lawyers; and (c) establishment rights for law firms.

\subsection*{A. Freedom to Provide Services}

It is clear that great progress has been made through the combined effect of favorable Court judgments and the 1977 directive on lawyers' freedom to provide services. In large measure, there is no serious obstacle to cross-border legal services. Nonetheless, some issues remain.

First, the 1977 directive's scope is limited to the categories of lawyers identified in article 1(2), i.e., the national legal professions which provide courtroom services, plus U.K. and Irish solicitors. Although van Binsbergen recognizes the right of legal representatives to provide services under Article 59,\textsuperscript{122} the directive does not cover legal advisors or counsellors, even when organized in national professional associations with their own

\textsuperscript{121} Weil, \textit{supra} note 117, at 709.

\textsuperscript{122} See \textit{supra} text accompanying notes 29-30.
rules of conduct. The directive likewise does not cover notaries. This is an unfortunate gap in coverage. Just as the 1988 directive on mutual recognition of diplomas covers all legal professions, the 1977 directive ought to be amended to cover, in some appropriate fashion, cross-border services provided by all legal professions.\textsuperscript{123}

Second, the interplay between host and home state rules in article 4 of the 1977 directive is not very satisfactory, both because article 4 is not very clearly expressed, and because the formula that one set of rules governs "without prejudice to" the other does not finally determine which rules deserve priority in case of irreconcilable conflict. The CCBE Code of Conduct reduces the number of potential conflicts between home and host state rules, but does not eliminate them.

The Court of Justice has consistently stated that professional rules are a factor that may limit cross-border services to the extent that they are objectively justified by the "general good."\textsuperscript{124} This formula definitely should be applied in any resolution of conflict between home and host state rules. However, the specific application in a given case requires careful analysis and earnest reflection. It is quite likely that some states' professional responsibility rules are no longer essential to protect modern clients' interests or to achieve valid goals in the modern administration of justice, and are accordingly no longer justified by the "general good." We will return to this subject in Part VIII when considering applicable rules of conduct.

Third, the line of demarcation between providing a service and establishment is not clearly drawn, although it is generally assumed that such a line exists.\textsuperscript{125} The point is significant, be-

\textsuperscript{123} This proposal is perhaps too idealistic. The Commission and the Council of Ministers have limited time and resources to devote to amendments of prior legislation. Amendments to this directive may not seem to warrant a high priority. Moreover, notaries are notoriously jealous of their prerogatives. National associations of notaries may oppose any effort to enable cross-border services in that profession.


\textsuperscript{125} In \textit{Gullung}, the Commission, France, and Spain all contended that there exists a distinction between providing a service and establishment: establishment im-
cause the right to provide legal services in a host state under a home state title is certain, whereas the right to establishment under a home state title, without integration in the host state bar, is in dispute.

Article 60 permits the provider of legal services to do so "temporarily" in the host state. In view of the Court of Justice's expansive interpretation of service rights, "temporarily" should not connote any brief time period, but rather should enable a stay commensurate with the scale of the service. In commercial services, the Court of Justice recently held in Rush Portuguesa Lda. v. Office National d'Immigration that a foreign contractor may spend a period of time in a host state to work on a large project (in that case, a railroad), and may bring to the host state all the appropriate manpower resources needed "for the duration of the works in question." By analogy, a lawyer or law firm should be able to spend substantial time, even months, in a host state during the course of a contested takeover bid, or a protracted criminal, civil or arbitration proceeding, or a complex joint venture or syndicated loan negotiation.

plies that "the activities will be pursued permanently," while providing services involves "occasional or temporary activities." Gutting, [1988] E.C.R. at 121. However, Wyatt & Dashwood, supra note 16, observe that "the provision of services from one State to another on a regular basis, accompanied by temporary residence in the host State, may shade imperceptibly into establishment." Id. at 198; see Kapteyn & Verloren van Themaat, supra note 16, at 429 (contending that difference between providing services and establishment is "economically arbitrary and moreover fluid in practice").

126. Cf. Commission v. Italy, Case 63/86, [1988] E.C.R. 29, 53, [1989] 2 C.M.L.R. 601, 619 (holding that person providing services may do so "for such an extended period that he needs to have housing there," and accordingly that Italy must grant such person low-interest housing loans available to its nationals); Lasok, supra note 18, at 7 (stating that "[t]he freedom to provide services entails the right to enter the territory of the recipient and to stay there till the operation has been completed, for example a plumber established in France installing sanitary facilities in a house situated in Belgium").

127. Case C-113/89, [1990] E.C.R. 1499, 1445, ¶ 19, [1991] 2 C.M.L.R. 818, 843 (noted by Lawrence Gormley in Workers and Services Distinguished, 17 Eur. L. Rev. 63 (1992)), held that a Portuguese contractor had a right to take a large work force (68 workers) to France to provide services in construction on the high speed TGV railroad system. Although the Court made no reference to the length of time needed for the project, construction on a railroad may take months or even years. Since both Wyatt & Dashwood, supra note 16, and Kapteyn & Verloren van Themaat, supra note 16, cited contractors' work on major projects as demonstrating the shading between the provision of services and establishments, the result in Rush Portuguesa may prove them wrong: a long-term large scale provision of a service appears to continue to fall under Article 59, and not to become establishment under Article 52.
Likewise, the foreign lawyer or law firm should have the ability to make use of a local office base during this time, adequately staffed for the affair in process.

Moreover, there is no reason to believe that a foreign lawyer or law firm cannot come "temporarily" to a host state on a repeated or regular basis to provide services without being deemed to be established in the host state. For example, a Dutch Community law specialist should be able to travel regularly to Brussels or Luxembourg to deal with Community officials or advise clients; a German arbitration practitioner should be able to repeatedly visit Paris to handle ICC arbitrations; and a French patent law expert should be able to travel regularly to Munich for European patent affairs.\(^{128}\)

Arguably, only the conduct of legal activities in a host state for an indefinite period of time should be considered establishment rather than the provision of services.\(^{129}\) Presumably, whenever a lawyer or law firm opens an office in a host state for the representation of a number of clients in a variety of matters for an indefinite term, this should be considered establishment rather than an extensive provision of services.

The fourth and final issue relating to Article 59 and the 1977 directive is whether a lawyer established under the home title in a host state may occasionally provide services in civil or criminal litigation or administrative proceedings. (We will assume for the moment that a Community lawyer does have the right of establishment under the home title, as opposed to being obliged to become a member of the host state legal profession in order to enjoy establishment rights—which view is correct is an issue discussed in section B below.)

This was the final question referred by the Colmar Court

\(^{128}\) Cf. M. Sager v. Dennemeyer & Co. Ltd., Case C-76/90 (Eur. Ct. J. July 25, 1991) (not yet reported) (summarized in WEEKLY PROC. OF THE COURT OF JUSTICE 15/91, at 26). The Court held that the monopoly granted to authorized German legal professionals by a 1935 law could not be used to prevent a U.K. patent service company from handling maintenance and renewal of patents. The Court held that the U.K. company's right to perform services was improperly limited by the German law whose sweeping character violated the principle of proportionality. The judgment by implication would permit foreign patent attorneys to provide patent services in Germany on a regular basis.

\(^{129}\) This is the approach taken to distinguish establishment by LASOK, supra note 18, at 7. He cites as examples of establishment a British architect setting up practice in Paris and a British firm of solicitors opening an office in Brussels.
of Appeal in *Gullung*, which the Court of Justice declined to answer on the ground that Mr. Gullung lacked the "capacity" to satisfy French professional rules required for participation in a court proceeding. 130 The Commission hedged a bit on this issue, pointing out that Mr. Gullung's practice at his Mulhouse office was not conducted as a *Rechtsanwalt*, but rather as a *jurisconsulte*, or legal advisor. (Mr. Gullung's legal position undoubtedly would have been stronger had he tried to establish himself under his proper home title, *Rechtsanwalt*.) The Commission then appeared to say that Mr. Gullung could have acted "in the capacity of a provider of services" with the rights accorded by the Treaty and the 1977 directive 131 (perhaps with the idea that he could have acted in France as a *Rechtsanwalt* providing services from his office in Offenburg, Germany). Advocate General Darmon contended that to mix the rights relating to the provision of services with those of establishment represented "total confusion," 132 but his view is merely the logical consequence of his opinion that lawyers have no right of establishment except as members of the host state profession. 133

Article 6(2) of the CCBE draft directive on establishment would allow registered lawyers established in the host state under the home state title the power to participate in "legal proceedings" (i.e., civil and criminal litigation) in the manner permitted for lawyers performing "occasional services" under the terms of the 1977 directive, "in conjunction with" a qualified host state courtroom lawyer. 134 This represents a sound policy approach in the context of the draft directive's attempt to balance home and host state interests: it prevents established lawyers under the home state title from customarily or routinely engaging in litigation, while allowing them some participation in litigation on an "occasional" basis.

Apart from sound policy, there is good reason to argue that this is the correct legal interpretation of the interplay be-

131. *Id.* at 121.
132. *Id.* at 130, ¶ 30, [1988] 2 C.M.L.R. at 75.
133. See *supra* text accompanying note 95.
134. CCBE Draft Directive, *supra* note 117, art. 6(2).
tween Articles 52 and 59. It is probable that a host state can prevail in an argument that restriction of courtroom practice to qualified host state lawyers represents a “general good” interest that can limit the rights of foreign established lawyers.\textsuperscript{135} However, when foreign Community lawyers have the right to come into a host state occasionally to participate in litigation “in conjunction with” a qualified host state lawyer under the terms of the 1977 directive, it is difficult to believe that a host state has an objectively justified “general good” argument against similar occasional participation in litigation by an established Community lawyer under the home state title. After all, the established lawyer is certainly obliged to follow the host state professional rules in any such litigation, pursuant to article 4 of the directive.

This seems the appropriate way to apply the Treaty principle that the basic right of providing services is to be furthered, especially within the context of achieving an integrated internal market. If a foreign Community lawyer can claim greater rights under Article 59 than he or she can under Article 52, then it seems consonant with Treaty interpretation principles to cumulate the rights, rather than to treat Articles 52 and 59 as mutually exclusive.\textsuperscript{136} Advocate General Darmon’s view in \textit{Gullung} that simultaneous application of both Treaty articles would represent “confusion”\textsuperscript{137} holds water only if one agrees with him that a foreign Community lawyer, in order to be established, must first become a member of the host state profession qualified for courtroom practice, in which case, of course, it is superfluous to speak of rights to provide litigation services under Article 59.

Having thus concluded an appraisal of open issues with regard to the provision of legal services, we now turn to the topic of establishment.

\textsuperscript{135} See infra text accompanying notes 158-59.

\textsuperscript{136} See WYATT & DASHWOOD, supra note 16, at 199. The authors make a similar point in discussing possible gaps between the scope of Articles 52 and 59. They contend that one should “consider Articles 52 and 59 as a whole, and in the light of the object and purpose of the Treaty. . . . Articles 52 and 59 are intended to safeguard the rights of self-employed persons to pursue occupational activities throughout the Community regardless of the location of their place of business . . . .” Id.

B. Establishment Rights for Individual Lawyers

Although the Court of Justice case law from Reyners to Vlassopoulou has significantly facilitated the right of establishment for lawyers, it is the 1988 directive on recognition of higher-education diplomas that represents the most important Community law achievement to date.

The greatest impact of the 1988 Diploma Directive will be on law students and young lawyers. It is indisputable that recent years have marked a substantial increase in the mobility of young people within the Community. Greater opportunities for study in other countries, enhanced language capabilities, and social and marital ties with persons of other nationalities have all contributed to efforts by young people to reside and work in other states. Young lawyers are no exception. Moreover, young lawyers are often attracted to foreign commercial and financial centers as sites for attractive and potentially remunerative practice.

Large numbers of law students and young lawyers may be expected to make use of the directive’s new approach. Of course, much will depend on how rigorous or lenient a host state is in applying the exceptions to automatic recognition of higher education diplomas set out in article 4 of the directive. It may be expected, however, that the Commission will carefully monitor both the system established by Member States to apply article 4, as well as the functioning of the system in practice. The Court of Justice’s standards in Vlassopoulou may be expected to inspire the Commission to take action under EEC Treaty Article 169 against any state that raises too high a hurdle to foreign students or lawyers.

It appears that all, or virtually all, Member States will exercise their option under article 4 to use an aptitude test, rather than an adaptation period, to deal with applicants whose home state legal education and training differs significantly from that in the host state. This seems a desirable choice. By its nature, an aptitude test is more objective and tailored to cover the most critical differences in education between the host and other states. In contrast, the use of an adaptation period runs several risks: many otherwise highly skilled practicing attor-

138. See supra text accompanying notes 102-04.
139. See supra text accompanying note 111.
ney's are not talented in training young lawyers; any appraisal of the trainee's progress is apt to be much more subjective; and adaptation periods can become a form of economic exploitation of the young lawyer.

It is true that aptitude tests, particularly if they cover a substantial number of host state legal fields or if they are rigorously applied, may, in effect, require the applicant to undertake studies for several months or even a year in the host state. This is not necessarily unjustified, even if the directive's guiding principle is trust in the home state diploma for higher education. Legal education in the Community is highly diverse in character. It is reasonable for a host state to require an assurance that an applicant possess a basic knowledge of its legal system and the capacity to do legal research as practice needs may require. It is perhaps pertinent to note that the New York Court of Appeals changed its rules in 1990 to require all applicants for the bar examination to have successfully passed twenty-four credit hours of courses in a U.S. law school, as compared to its prior requirement that applicants with foreign law degrees only provide proof that their degree was recognized as sufficient for admission to a U.S. graduate law program.140

Moreover, there are an increasing number of Community law faculties that provide joint-degree programs, LL.M. studies, or other programs designed for foreign law students.141 The Community's Erasmus program for inter-university cooperation in teaching and research and for financial aid to students studying in other states is one of the noteworthy Community successes of recent years.142 Law students can take ad-

140. N.Y. Cr. App. R. pt. 520, ¶ 520.5(b). See Goebel, supra note 1, at 474-75, 517-18, for a description of the Court of Appeals rule prior to 1990 and the motive for the change to require 24 credit hours of study in an accredited law school.


142. The Erasmus program in the 1990-91 academic year furthered inter-univ-
vantage of Erasmus grants to study the basic features of other legal systems in law faculties in other states. Contributing to cross-border university education is the recent Council directive granting a right of residence for students, together with a right of non-discriminatory access to vocational and professional training. Also relevant is the inclusion of education as a formal area of Community activity for the first time in a new Treaty Article 126, to be added by the Treaty on European Union of February 7, 1992. Article 126 calls for increased mobility of teachers and students, cooperation between educational establishments, and enhanced language training, and may be expected to prompt further Community initiatives.

As valuable as the 1988 Diploma Directive is apt to become for recently graduated law students and young lawyers, it may not prove as useful to older lawyers. Experience shows that with increasing age and years of separation from an initial legal education, it becomes quite difficult to pass a formal examination of legal knowledge. Moreover, if a period of studies in the host state becomes pragmatically a necessity in order to pass the aptitude test, the older lawyer is more apt to have familial or other economic obligations that make it more difficult to cease or reduce remunerated practice during the period of studies.

Also important is the fact that many foreign lawyers, and especially foreign law firms, have no desire to become integrated in a host state bar. They usually have no interest in the host state courtroom or administrative practice which is often a monopoly of the host state legal profession. Instead, the...
eign lawyer or law firm customarily seeks to carry on international commercial practice (including, for example, finance, tax planning, corporate and securities law, franchising, licensing, distribution and commercial agency, joint ventures, competition law and general Community law). The foreign lawyer or law firm often believes that it is more appropriate to carry on such practice under the home state legal title, which informs clients properly and avoids confusion with host state lawyers.

There is therefore a definite need for Community legislation to supplement the 1988 Diploma Directive by recognizing a mode of establishment under the home state title. The CCBE's draft directive on establishment is the obvious candidate for the basis of such legislation.

At the outset of this Article, reference was made to the need for an integrated Community legal profession within the context of the integrated internal market. In the vitally important financial services industry, after long deliberation and analysis of policy, the Community has chosen to move to market integration through use of the "single license." Thus, pursuant to the Second Banking Directive, a bank may establish branches and operate throughout the Community on the basis of its home state license and under the prudential supervision of home state authorities.145

Why should legal services be treated in a different fashion from banking services? Is it because clients should be perceived as requiring greater consumer protection in the host state than are bank depositors or the users of financial services? That seems hardly plausible, especially in view of the fact that the large law firms that are most apt to provide cross-border services through branch offices typically have sophisticated commercial and financial clients who are quite capable of protecting their interests in dealing with their lawyers. Such sophisticated clients are precisely the type most apt to pursue ethics complaints or malpractice actions.

It is perhaps true that host states have an objectively justified "general good" concern in preventing established lawyers under the home state title from engaging in certain types of legal activities or counselling when the risk of error could create particular hardship for the client. A host state may reason-

ably consider that even sophisticated foreign lawyers could make disastrous mistakes in certain fields of practice where legal regimes differ radically and are apt to be highly technical. The CCBE draft directive responds to this host state concern by granting in article 6(1) the option to bar foreign lawyers established under the home state title from "the preparation of formal documents" in the administration of decedents' estates or in the transfer of title interests in real estate, as well as from general courtroom practice, subject to the right of occasional participation in litigation under the 1977 directive.\textsuperscript{146} The article 6(1) exceptions are narrowly tailored and would not appear to prevent lawyers established under the home state title from engaging in international trust and estate planning, especially when a client has assets in several countries, or in dealing with the investment, financing and tax planning involved in international real estate transactions, while leaving the actual estate administration or real property conveyances and title transfers to host state lawyers (who are often notaries).

Indeed, it might be that the CCBE draft should also include family law as an area that the host state could reserve to host state lawyers. Family law encompasses sensitive social issues, such as the validity of marriages, separations and divorces, marriage settlements and agreements, adoptions and custody. It is interesting to note that the New York Court of Appeals rules on legal consultants prohibit them from legal activities involving family law.\textsuperscript{147}

Do host states have a legitimate interest in insuring that all established Community lawyers follow their professional rules? This is a debatable premise (see Part VIII on applicable rules of conduct), but even if one accepts it, the CCBE draft directive takes the approach of requiring foreign lawyers established under their home state title to subject themselves to host state professional rules and disciplinary proceedings.\textsuperscript{148}

Undoubtedly, one of the unarticulated motives for trying to prevent foreign lawyers from establishment under the home state title is a fear of competition, especially from large foreign firms. Increased competition would certainly result in many

\textsuperscript{146} CCBE Draft Directive, \textit{supra} note 117.
\textsuperscript{147} N.Y. Ct. App. R. pt. 520.
\textsuperscript{148} CCBE Draft Directive, \textit{supra} note 117, arts. 8-10.
commercial centers if foreign firms had easy access to them, but in a free market competition is considered to be beneficial unless the competition is somehow unfairly conducted. The experience of the legal profession in many European commercial centers, notably Brussels, London, and Paris, would seem to demonstrate that the presence of large foreign firms has not stifled local competition, but rather stimulated the growth of large local firms capable not only of vigorous and competent competition on their own turf, but of branching out themselves to foreign centers.  

Sophisticated local firms have learned to compete by recruiting young lawyers educated and trained in foreign systems and international business transactions (often holding LL.M. degrees from leading U.S. or European law faculties), by merging to augment the scope of services, by adopting modern telecommunication and information facilities, and by developing cross-border associations or correspondent networks.

Accordingly, the CCBE draft directive on establishment merits serious examination. Indeed, even if the CCBE is unable to muster the necessary Member State delegation quasi-unanimity to approve the draft, there is no reason why the Commission should not act on its own initiative. After all, as suggested at the outset, greater market integration for the legal profession is a highly desirable factor in furthering the internal market goal. Commission resources are not unlimited, but they would be well spent on the endeavor to develop an appropriate draft for lawyers' establishment rights.

The final issue to be discussed in this section is whether foreign lawyers already enjoy a right of establishment under the home state title, even absent Community legislation.

The argument for the view that Community lawyers have a right to establish themselves in host states under their home state title, made formally by the United Kingdom in *Gullung*, is based on an expansive reading of Court of Justice judgments, notably *Reyners, Thieffry* and *Klopp*. It will be recalled that Professor Julian Lonbay suggested in his note on *Gullung* that the Court of Justice had implicitly approved such a right.

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149. The news articles in the *International Financial Law Review* on legal developments in such centers, supra notes 8-9 and 12, demonstrate the point.

when it stated that the issue of such practice under home state title was not before the Court. On the other hand, the strongest expression of the view that Community law does not permit a lawyer's establishment in other states under the home state title was made by Advocate General Darmon in Gulung.

The issue may well yet come to the Court of Justice, because the 1990 French legislation merging the avocat and conseil juridique professions includes an article that forbids the rendering of legal advice by unqualified persons. Several U.K. solicitor firms, practicing in Paris through branch offices for years, have never qualified as conseil juridique firms, and have relied on claimed rights of establishment under the home title. If the French authorities challenge the U.K. solicitor firms' continued practice of law in France, or if the firms raise the issue on their own initiative, presumably the issue will be referred to the Court of Justice.

The French position is weakened to some extent by Article 53, the "stand-still" article, which prohibits "any new restrictions on the right of establishment" after the EEC Treaty became effective in 1958. In as much as France had not granted a monopoly on legal activity to avocats before 1958, had not considered such a monopoly to be necessary to protect consumer or other interests from 1958 to 1990, and the French authorities had tolerated the establishment and active practice in France by Community lawyers under their home title for many years, whether France can now introduce a legal monopoly that cuts back on prior establishment rights is subject to seri-

151. See supra note 96.
155. It is possible, though unlikely, that the Commission itself could challenge the 1990 French law's barrier to foreign Community lawyers' establishment rights. The Commission is more apt to let the U.K. solicitor firms raise the issue, if they choose to do so. As of the end of 1991, it appears that all interested parties are waiting to see if the CCBE adopts its draft directive on establishment.
ous question under Article 53.  

Apart from that point, however, whether lawyers can claim a right of establishment under their home state title is by no means certain. It is true that Thieffry, Klopp, and Vlassopoulou hold that Member States, under Article 5 of the Treaty, have a duty not to frustrate an otherwise proper exercise of a right of establishment. It can be argued that a state has a duty, under Article 5, not to prevent Community lawyers from establishing themselves under their home state title unless the state can prove that this constitutes a serious risk to clients or the administration of justice.

On the other hand, the Court has consistently recognized a host state's power to limit establishment rights when the limit is objectively justified for the "general good." Moreover, the Court of Justice in Gullung stated that "in the absence of specific Community rules in the matter each Member State is, in principle, free to regulate the exercise of the legal profession in its territory." However, that quotation has to be seen in its context, which essentially limits it to courtroom practice. The Court also specifically stated that the issue as to whether Community lawyers could establish themselves under their home state title was not before it.

Perhaps the correct approach in resolving this issue would be for the Court to allow the foreign lawyer to practice only in certain fields under the home title, leaving the host state to forbid activities in certain other specified fields on the ground of objectively justified protection of a "general good" interest, which is essentially the approach taken by the CCBE draft directive. This would seem to abide by the principle of proportionality, which the Court has always said limits states when they create exceptions to the "four freedoms" of the Treaty.

156. France may argue that a non-discriminatory regulation does not violate Article 53, but it is unclear whether the case law justifies this view. See Lasok, supra note 18, at 27-28.


158. The principle of proportionality, derived originally from German administrative law, is one of the most fundamental features of Community law. The Court of Justice has used the principle to strike down excessive features of Community legislation. See, for example, S.A. Buitoni v. Fonds d'Orientation et de Régularisation des Marchés Agricoles, Case 122/78, [1979] E.C.R. 677, [1979] 2 C.M.L.R. 665. The Court has also used it to strike down excessive application of the protection of Mem-
The host state would have to justify the excepted fields of activity on the basis of the protection of clients (consumer protection) or the furtherance of the administration of justice, subject to the Court's review.\(^{159}\)

In any event, it would seem evident that a Community lawyer or law firm must be allowed to establish an office under the home state title in the host state to provide legal assistance and counsel on the home state domestic law, Community law, and international law. A host state would not seem to be able to claim that a "general good" interest exists to justify restricting advice on those subjects to host state lawyers.\(^{160}\)

The Court might also apply the "general good" principle to allow a host state to require that the established lawyer be subject to host state professional rules and disciplinary proceedings (which is again the approach of the CCBE draft). This might be seen as a necessary implication of the holding in *Gullung*. On the other hand, it could be argued that proportionality requires the narrowest exception to the establishment right, so that if the home state authorities energetically and effectively accept their responsibility to police the conduct of their legal professionals when practicing abroad, the home state rules and disciplinary proceedings can be relied upon to protect the host state's legitimate concern for protection of consumer interests and the administration of justice. If so,
there would be no objective need to subject the established Community foreign lawyer to the host state rules.

In conclusion, it is evident that there are thorny issues involved in deciding whether a lawyer should have a right of establishment in another state under the home title and home state supervision. Should the case come before the Court, it is to be hoped that it will seriously weigh the beneficial implications for the integration of the Community legal profession in allowing such practice, as a counter-weight to the undoubtedly eloquent host state arguments in favor of requiring foreign lawyers to join its legal profession in order to ensure respect for local professional rules.

C. Establishment Rights for Law Firms

The CCBE draft directive on establishment describes rights for law firms in article 11, Practice in Association. The term “association” is presumably intended to cover full partnerships as well as any looser contractual arrangement. Article 11 covers two basic rights: foreign lawyers may establish branches of a home state association in a host state, and foreign lawyers may enter into an association with host state lawyers in a host state. In both cases, limits are placed on the rights. For example, the foreign lawyers or association must be subject to the host state professional rules, and an association must supply host state authorities with pertinent information about the association.

The CCBE draft in this respect would represent a desirable step forward, because the rights of law firms to establish themselves in host states are not always clearly recognized at the present time. For the sake of convenience in further analysis, we will define a law firm as a partnership of lawyers, although recognizing that some legal systems (notably France, Greece, Portugal, and Spain) allow law firms to be established in a company form.

Article 52 of the Treaty states the right of “self-employed persons . . . to set up and manage undertakings, in particular companies or firms.” Moreover, Article 58 states that “companies or firms” are supposed to be “treated in the same way as natural persons” in terms of establishment rights. Article 58 defines “firms” as including those constituted under civil as
well as commercial law, so that professional partnerships formed under the civil law are clearly firms.

Certainly law firms are "firms" of "self-employed persons" in the sense of Article 52 and, as such, do enjoy rights of establishment. However, Article 52 stipulates that the establishment rights are subject to "the conditions laid down for its own nationals" by the host state.

There is no reason to doubt that a foreign law partnership should have the right to set up a branch in a host state, just as the Court of Justice held that an individual lawyer had that right in *Klopp.*\(^{161}\) Of course, if an individual foreign lawyer is properly subject to limitations on the exercise of the legal profession justified by the "general good" in host states, so too should be the foreign law firm. Thus, if ultimately it should be concluded that foreign lawyers may only practice in the host state as integrated members of a local bar, then a foreign law firm's resident partners, or at least some of them, would also have to be integrated members of the local bar. If, conversely, it is ultimately concluded (as contended in Part VII.B) that foreign lawyers do have a right of establishment under their home title, then a foreign law firm should likewise have the right to have its resident partners practice under their home title.

A foreign law firm's branch in the host state should have an accessory right to use the home state firm name. Although some states have professional rules requiring only, or preeminently, the use of the names of resident partners to identify the branch office (e.g., on firm letterhead, business cards, or office doors), it can be strongly contended that preventing the use of the home state firm name prevents clients (as consumers) from receiving information that they ought to obtain immediately, i.e., the branch office link to the home office. After all, a law firm name serves the same function as a trade name for a commercial enterprise: it conveys to clients a sense of the reputation or quality of the firm. Accordingly, a host state rule forbidding the use of the home state firm name should be considered to be disproportionate, not justified by the "general

\(^{161}\) The Court referred to the right of a branch office under Article 52 as being "applicable equally to the liberal professions." *Klopp,* [1984] E.C.R. at 2990, ¶ 19, [1985] 1 C.M.L.R. at 113-14. The Court did not limit its statement to individual lawyers. Moreover, Article 58 states that firms are to be treated in the same way as natural persons.
Article 11(5) of the CCBE draft directive on establishment permits the branch to use the home firm name, but adds that the host state may require in addition the identification of representative resident partners. This appears to be both a suitable policy solution and an arrangement which is in conformity with the Community law on establishment.

In addition to operating through branches, a Community law firm should be able to form joint ventures or looser associations with lawyers or law firms in a host state. Lawyers may make use of the European Economic Interest Grouping (EEIG), a sort of statutory joint venture authorized by a 1985 Council regulation, and indeed some law firms have formed EEIGs. But law firms are not obliged to form EEIGs in order to cooperate, and many prefer to use other contractual forms of relations among firms in different states for cross-border practice. If two or more law firms create a partnership or a joint venture office in a host state, as is increasingly common in Brussels, Frankfurt, London, and other centers, then the Community participants are creating either a joint branch office or a new firm, in either case justified under Article 52. If the joint venture or association is among two or more firms from different Community states, with no joint office or interchange of legal personnel (or interchange only for training purposes), then the applicable Article permitting this would seem to be 59, as each firm is only facilitating its cross-border practice through the cooperative relationship with the other firm or firms.

162. In GB-INNO-BM v. Confédération du Commerce Luxembourgeois, Case 362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801, the Court of Justice held that Luxembourg could not limit cross-border advertising by a Belgian supermarket chain on consumer protection grounds. The Court stressed that consumer protection could not justify a restriction on the amount of accurate information provided to the consumer. By analogy, a host state should not be able to limit the amount of information provided to law firm clients about the nature of a law firm and its affiliates.

163. Council Regulation No. 2137/85 of July 25, 1985 on the European Economic Interest Grouping (EEIG), O.J. L 199/1 (1985). EEIGs are intended to be a vehicle for cross-border cooperation between Community companies and firms in virtually any type of operation ancillary to the parties' principal activity. EEIGs are not limited to commercial enterprises and are being used by accounting and medical professionals, as well as by law firms. See Severine Israel, The EEIG—A Major Step Forward for Community Law, 9 COMPANY LAW. 14 (1988).

164. An EEIG created between Belgian, Dutch, and German law firms is described in Putting All Your EEIGs in One Basket, INT'L FIN. L. REV., June 1989, at 20.
In either case, Article 52 or 59 certainly would seem to prevent states from barring law firm joint venture or association relationships as such, leaving open the issue of the extent to which host states may place limits on them for the “general good.” The limits that host states may place upon practice by joint venture offices or associations formed by Community firms would appear to be essentially the same as those host state limits, discussed above, that are appropriate for branch offices of Community law firms. Accordingly, it would appear that a host state should not be able to prevent a local joint venture branch office, or a host state firm that is part of such a joint venture or association, from making reference to any association name, or the relation among the firms comprising the joint venture or association, on its firm stationery or business cards.

The next issue to consider is whether law firms from two states can either merge, or form a new partnership, and whether a foreign law firm can have host state lawyers as partners in its host state branch. In principle, the right to do this should flow from Article 52, but there is perhaps a stronger argument for host state limitations on the right.

It can certainly be contended, based on the host state’s duty under Article 5 to further rights of establishment, as articulated in Thieffry and Klopp, that a host state should not be able to totally forbid cross-border firm mergers or partnerships, or the association of host state lawyers in a foreign law partnership. Protection of “general good” interests may enable the host state to require the entity in question to register or provide pertinent information, to use a firm name that clearly identifies the entity, and to require that all host state lawyers and established foreign lawyers follow host state professional rules (where these are objectively justified). This is essentially the approach taken by the CCBE in article 11 of its draft directive on establishment. However, there appear to be no “general good” considerations that would require a host state lawyer who has become a partner in a foreign Community

165. Article 11(3) of the CCBE Draft Directive, supra note 117, creates an exception for the United Kingdom and Ireland as to U.K. and Irish barristers. By traditional rules of conduct, they are forbidden to be partners even with other barristers, although they may share expenses in chambers.
law firm to lose his or her status as a fully qualified member of the host state legal profession, or to limit his or her right to appear in host state court or administrative proceedings. Any limitation of this sort would appear disproportionate, because there is no basis for considering that the host state lawyer's partnership status would impair his or her independent fulfillment of host state professional rules.166

In conclusion, even though no Community legislation presently exists, it is submitted that law firms do have rights of establishment under Article 52 and that these rights may not be disproportionately limited by host states. Because the CCBE draft directive on establishment would appear to advance the recognition of establishment rights of law firms in a suitable manner, it is to be hoped that it will ultimately be endorsed by the CCBE and that it will incite the Commission to propose a directive inspired by its text.

D. Applicable Rules of Conduct167

No issue in cross-border practice of law is more intricate than that of the appropriate applicable rules of conduct.168 That is why the CCBE Code of Conduct should be applauded

166. Some Community states require courtroom lawyers to resign from the profession or cease to have the right to appear in litigation whenever they become employees of a commercial enterprise or anyone else who is not a courtroom lawyer. Assuming that such a rule is justified by the "general good," which is debatable, it presumably is premised on the idea that an employee lawyer has lost his or her independence. That premise does not apply to a host state lawyer who has become a partner in a foreign Community law firm.

167. For a review of national rules of professional conduct and ethics within the Community, see generally CCBE CROSS BORDER PRACTICE COMPENDIUM, supra note 1; Lagouette, supra note 1, at 123-67; Speeding, supra note 1, at 91-119.

168. The issue of applicable rules of conduct in interstate practice has become a serious one in the United States. Thirty-four states have adopted versions of the Model Rules of Professional Conduct, while sixteen have retained the earlier Model Code of Professional Responsibility, or mixed the Model Rules and the Model Code. See Model Rules on Professional Conduct (Discussion Draft 1983) [hereinafter Model Rules]; Model Code on Professional Responsibility (1980) [hereinafter Model Code]; ABA/BNA Lawyer's Manual on Professional Conduct (BNA) PO 1:3-4. An analysis of conflict rules is only beginning, and there is great uncertainty as to the proper approach. It is to be hoped that the American Law Institute's current draft Restatement of the Law Governing Lawyers will provide sorely-needed guidance. See ABA Committee on Counsel Responsibility, Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States, 45 Bus. Law. 1229 (1990); Stanley Kaplan, Professional Responsibility: Which State's Rules Apply?, Insights, Feb. 1988, at 17.
as a highly useful initiative. On the other hand, it must be recognized that, although the Code undoubtedly went as far in setting standards as its draftsmen were able to go, the Code still does not go far enough.

A major reason why the issue of applicable rules of conduct is so intricate is that too little expert analysis has been made of the core concepts and essential scope of specific professional rules of conduct and ethics in Community states. Some professional rules attempt to articulate ethical standards, others indicate a responsible mode of assisting courts and other instruments of justice, others attempt to assist courts and other instruments of justice, others attempt to protect client interests, still others relate to the organization of the profession and protection of its reputation, and, finally, some rules simply represent traditional modes of carrying out the professional activity. Moreover, in some states, national rules of professional conduct were developed many years ago and have not been seriously re-examined in light of modern practice. As a result, some national rules and practices may be out of date and might well be appropriately modified by

169. *E.g.*, rules on a lawyer's honesty, integrity, truthfulness, and avoidance of fraud.

170. *E.g.*, rules on adherence to court procedures, on demeanor in court, and on respect for judges.

171. *E.g.*, rules on competent and diligent representation of clients, on the avoidance of conflicts of interest, on protection of confidential client communications, on the segregation of, or other safeguards for client funds, and on professional malpractice insurance or guarantee funds.

172. *E.g.*, rules on membership in bar associations or councils and acceptance of their disciplinary proceedings, on professional courtesy between adversaries, on fee schedules and referral fees, and on the responsibility for training of young lawyers (in systems which require supervised practice training).

173. *E.g.*, rules on advertising, incompatibility of lawyer's status with other professional or commercial position (for example, a prohibition of a lawyer's service on a board of directors), or the former French *unicié* rule forbidding practice out of more than one office.

174. As noted above, the CCBE has working groups reviewing a number of areas where national rules may merit revision to bring them in line with modern practice views, for example, on advertising, protection of confidential communications, fees, and multi-disciplinary professional partnerships. It is to be hoped that these will result in recommendations to national lawyers' associations, or at least that the process of review will stimulate initiatives for revision in some states. It is quite evident that the U.S. legal profession benefitted greatly from the analytical review of rules which occurred in the process of the American Bar Association's adoption of the Model Rules in 1983, and is benefitting now from the careful examination of rules, case law, and ethics panel decisions as the American Law Institute works on the draft *Restatement of the Law Governing Lawyers*. 
more modern approaches. It is also possible that some national rules should be identified as appropriate to certain types of practice, but not others. Finally, some national rules, which may be perfectly proper for domestic legal practice, may not be objectively justified by the "general good" and accordingly should not represent limitations on cross-border legal practice.

Another complicating factor is the absence to date of careful analysis of choice of law principles as applied to this field. Such analysis is all the more necessary inasmuch as modern views on the appropriate manner to decide upon choice of law in substantive conflict of laws have evolved considerably in recent years.

Turning now to some comments on Community rules on applicable rules of conduct, we have already referred in Part VII.A to the unsatisfactory state of the choice of rule provisions in the 1977 directive on lawyers' freedom to provide services.

First, with regard to "legal proceedings" (criminal and civil litigation) and proceedings before public authorities, article 4(2) states that the service-providing foreign lawyer "shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations" in his home Member State. What does this mean? Although presumably the fundamental intent was to insure that the service-providing lawyer would comply with the host state rules on adherence to judicial or administrative procedures and on demeanor in court, article 4(2) goes beyond that to require adherence to all host state rules of professional conduct. Presumably, the phrase, "without prejudice" to home state "obligations," also was intended to suggest that the lawyer is usually considered to be bound by home rules no matter where he or she provides services.

175. Professor Julian Lonbay in his note on Vlassopoulou, supra note 107, at 516-17, commented on the protective effects of limiting certain types of practice to traditional classes of legal professionals and their rules in some Community states.
176. It may be that conflict of laws rules for substantive law are not appropriate for conflicts of professional rules and new approaches need to be found. See ABA Committee on Counsel Responsibility, supra note 168.
177. See supra text accompanying notes 123-24.
But suppose there is a conflict between home and host state rules. For example, may a foreign lawyer whose home rules permit contingent fees accept one for a civil litigation in a host state whose rules forbid such fees? In the alternative, may a foreign lawyer whose home rules forbid contingent fees accept one for a civil litigation in a host state whose rules allow such fees? Should the host state rules always prevail on the theory that the "without prejudice" wording of article 4(a) implicitly means that host state rules take priority in case of conflict? Or should the stricter rule, which in this case would be the rule against contingent fees, prevail? Note that Rule 3.3 of the Code of Conduct generally forbids contingent fees in cross-border practice, with limited exceptions, which suggests that the CCBE considered that the stricter rule should prevail in this case.

In contrast, Rule 3.4 of the Code provides that client fees in general should be regulated by home state rules. That would mean that a foreign lawyer whose home state rules do not fix a specific fee schedule would not have to follow the obligatory fee schedule of a host state in which services are being provided. While that seems sound policy, is Rule 3.4 consistent with a strict interpretation of article 4(1) of the 1977 directive?

An even more difficult issue would arise if there is a significant difference between home and host state rules as to the extent of the privilege for confidential client communications, or professional secrecy. May a foreign lawyer whose home rules strictly protect client confidences disclose some aspect of them in a court proceeding in a host state where the court has the power to require such disclosure? In the alternative, may a foreign lawyer refrain from disclosing a client's fraud on the court in a court proceeding in a host state where a lawyer has no right to breach the client's confidence in this regard, despite the fact that the home state rules require the lawyer to disclose such a fraud on the court? (This issue may also arise in the United States, as some states now require a lawyer to disclose a client's fraudulent conduct during litigation, while others forbid such disclosure.179)

179. See ABA Committee on Counsel Responsibility, supra note 168, at 1231, 1238-39 (discussing Maryland State Bar Committee on Ethics opinion allowing Mary-
Rule 2.3 on confidentiality of the CCBE Code of Conduct states the principle in a fairly absolute fashion ("A lawyer shall accordingly respect the confidentiality of all information given to him by his client"), but later Rule 4.4 forbids a lawyer from giving "false or misleading information to the court." Which rule should govern in trying to decide the question whether a lawyer must inform the court of a fraud on the court by the client? Moreover, does Rule 4.1, which requires a foreign lawyer to comply with a host state's court's rules of conduct, imply that the foreign lawyer may have to disclose client confidences if a host state court, consonant with its rules, should order the disclosure?

The proper resolution of these issues is by no means evident. What is clear is that article 4(1) of the 1977 directive does not give sufficient guidance. It may well be that article 4(1) ought to be amended to restrict the compulsory application of host state rules more precisely to the procedural rules of host state courts and tribunals and to direct obligations of the foreign lawyer to the judge or tribunal, while specifying that home state rules should otherwise be applicable. As for the CCBE Code of Conduct, though helpful, its rules still need to be supplemented by further analysis on conflict resolution. Assistance may be provided in this regard by the CCBE Working Groups studying some of these topics mentioned in Part VI.180

Even more troublesome is the ambiguity of the text in article 4(4) of the 1977 directive concerning services other than litigation, because standard corporate and commercial practice represents the vast bulk of cross-border legal services. Article 4(4) states that the foreign lawyer shall be subject to the home state rules "without prejudice to respect for the rules" of the host state, especially rules on incompatible business activities, professional secrecy, relations with other lawyers, conflicts of interest and publicity (advertising). However, the foreign lawyer's obligation to observe these host rules is limited to the extent that the rules are "objectively justified to ensure, in that

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180. See supra text accompanying note 114.
The fact that article 4(4) names certain types of host state rules as those particularly to be taken into consideration may mean that the draftsmen intended to have these host state rules prevail over home state rules in case of conflict. However, the "without prejudice" formula would normally seem to give priority to the home state rules. Moreover, even if one reads article 4(4) to give priority to the named types of host state rules, this is limited to those which are "objectively justified," which means that an analysis must be made of the relative importance of the host state rules.

In this context, the CCBE Code of Conduct is helpful because it tries to harmonize some concepts (e.g., Rule 2.3 on confidentiality, Rule 3.2 on conflicts of interest) and to supply choices of rules as to others (e.g., host state rules shall apply as to incompatible occupations, Rule 2.5, and as to advertising, Rule 2.6, while home state rules apply as to fees in general, Rule 3.4). Nonetheless, the possibility of conflicts continues to exist.

In particular, because states do vary in their concept of the nature and extent of the protection of confidential communications between lawyers and clients (common law states tend to see this as a client's privilege, while civil law states tend to view it as a lawyer's right, with significant differences in application arising from the different legal theories), and in their concept of what constitutes a conflict of interest and how it may be waived by clients, it would be helpful if experts on professional rules and ethics carefully tried to determine the proper key concepts to be applied universally, if any exist, and to resolve conflicts among different approaches. (Perhaps the CCBE Working Groups, referred to earlier, will help in this process.) Moreover, further reflection would be helpful on whether the types of host state rules that article 4(4) of the draft directive lists as perhaps prevailing over home state rules can properly

be considered to be objectively justified for the “general good,” notably restrictions on advertising or forms of fee arrangements, which may reflect traditional attitudes in some states but may no longer be so essential to society or the legal profession.182

Thus far we have concentrated on professional rules affecting cross-border services. Difficult issues also arise as to established lawyers. First, consider the case of a foreign lawyer who becomes a member of the host state bar. In that case, he or she is clearly bound by the professional rules of the host state. However, as the various national submissions made to the Court of Justice in Klopp indicate, such a lawyer also remains subject to the professional rules of the home state.183 What should happen in the case of conflict between home and host states, both purportedly binding?184

If the host state rules cover a subject not covered by home state rules or are stricter than the home state rules, the host state rules certainly should prevail. Accordingly, if the home state rules permit lawyers’ advertising or contingent fees, or are silent on the subject, while the host state rules forbid them, then the lawyer established in the host state must follow the host state rules.

Now suppose the home state rules are the stricter ones—for example, the home state forbids advertising, or contingent fees, or service as a member of a corporation’s board of directors, while the host state rules permit them or are silent on the subject. Should the foreign lawyer be bound by such rules while established in practice in the host state? Unless the home state authorities grant a waiver of the rule in question, the answer presumably is yes. This is because the host state in no way requires such conduct but only permits it, and because

182. A review on current state rules on lawyers’ advertising is contained in Albert Tanghe, Publish and Be Damned—Local Bar Publicity Restrictions, 1 LAW. IN EUR. 3 (1990). The trend in Europe seems to be toward a more permissive attitude toward advertising, notably in Belgium, the Netherlands, and the United Kingdom.

183. See supra text accompanying note 83. It is worth noting that Rule 8.5 of the Model Rules of Professional Conduct states that a lawyer is subject to the Model Rules and the home state disciplinary process even though engaged in practice elsewhere, and a comment suggests that conflicts of law rules should decide any conflict between home and host state rules.

184. For my earlier reflections on this subject, particularly as to conflicts when U.S. lawyers practice abroad, see Goebel, supra note 1, at 520-22.
the lawyer voluntarily has chosen to remain subject to home state rules by not resigning from the home state legal profession. However, it is possible that the home state authorities will choose not to impose a serious disciplinary sanction for the violation of home state rules if the violation occurs in the host state in such a case.\footnote{185} Another difficult question is what should happen when a lawyer's prospective relation with a new client would constitute a conflict of interest with an earlier client under home state rules, but not under those of the host state. Should it matter whether the lawyer served the earlier client in the home state or only began service of the earlier client in the host state? Arguably, in the latter case both the lawyer and the client expect their relations to be governed only by host state rules. That would not be the case where the earlier lawyer-client relationship began in the home state. Rule 3.2 of the CCBE Code of Conduct attempts to define a basic conflict of interest, but states still will have differing rules in their appraisal of the risk of conflict in practice, as well as with respect to the permissibility of waivers of conflict from clients.

Article 9 of the CCBE draft directive on establishment covers host state disciplinary proceedings of foreign lawyers who have become members of the host state legal profession. Article 9 allows the home state authorities to be represented in the host state proceeding, thus permitting comments on any issue of conflict between home and host state rules. The CCBE's Council for Advice and Arbitration, whose purpose is to assist in resolving conflicts of rules, may be able to help in such a proceeding. Moreover, article 9(6) specifies that the disciplinary panel should be capable of referring questions of Community law to the Court of Justice, which enables an authoritative resolution of difficult conflict issues.\footnote{186}

One must also consider the case of a lawyer or law firm established in a host state under the home state title. At present, such lawyers or firms consider themselves subject to home

\footnote{185. The Danish government made a comment along these lines in its response to the Court in Ordre des Avocats au Barreau de Paris v. Onno Klopp, Case 107/83, [1984] E.C.R. 2971, 2979-80, [1985] 1 C.M.L.R. 99, 104.}

\footnote{186. The Court of Justice has accepted that a bar council can be a tribunal with the right to refer questions under Article 177. In re Jean Razanatsimba, Case 65/77, [1977] E.C.R. 2229, [1978] 1 C.M.L.R. 246.}
state rules and discipline, except if they engage occasionally in host state litigation, in which case they would clearly be subject to host state rules pursuant to article 4(1) of the 1977 directive on legal services.

As discussed above, articles 8 and 10 of the CCBE draft directive on establishment would require such established lawyers to become subject to host state rules and disciplinary proceedings. This is presumably intended as an inducement to host states to allow foreign lawyers to establish themselves outside of the local legal profession.

The CCBE, however, does make two exceptions to the application of host state rules: first, the Code of Conduct is to prevail over host state rules if there is a conflict, and second, host state rules apply only to the extent that they are "objectively justified by the public interest" (Rule 8(2)). This is undoubtedly intended to represent a synthesis of the Court's views in Reyners, Thieffry, and Klopp.

It is conceivable that if the Court of Justice should have occasion to decide upon the status of foreign lawyers established under the home title in host states, in the absence of any Community legislation, the Court would extend the establishment right of Article 52 to such lawyers, but subject such established lawyers to host state rules, provided they are objectively justified. At some point in time, therefore, it may be necessary for the Court to determine whether compulsory fee schedules, restrictions on advertising or on contingent fees, or rules of professional incompatibility with service on corporate boards of directors, can be said to be objectively justified for the "general good" in modern legal practice. The answer is debatable. It is arguable that one or more of these rules, although traditional in many states, may not be sufficiently important to restrict lawyers' establishment rights, as in the case of France's rule obliging lawyers to maintain only one office, considered in Klopp.

187. It is also conceivable that, as discussed above in the text accompanying note 157, the Court will take the contrary view and conclude that foreign lawyers may only establish themselves in host states as members of the host state profession, unless Community legislation determines otherwise.

188. Restrictions on advertising appeal to many lawyers, who believe that advertising lowers the public image of lawyers. Nonetheless, such restrictions on advertising have nothing to do with ethical standards or the administration of justice. As for
Article 10 of the CCBE draft directive on establishment gives the host state authorities the power to conduct disciplinary proceedings against the established foreign lawyer practicing under the home state title, without prejudice to any disciplinary proceedings taken in the home state. Article 10 represents a compromise between host state and home state interests, because it provides for a joint disciplinary body, although weighted 3-2 in favor of the host state. Although article 10 thus requires that home state authorities be represented on the disciplinary panel, this may not go far enough, particularly in a case where the issue is one of compliance with a host state rule that is different in scope from, or even in conflict with, a home state rule. However, article 10 cross-references to article 9(6), so that the “mixed” panel should be able to refer difficult questions to the Court of Justice.

In conclusion, it is clear that there are difficult issues as to the applicable professional and ethical rules to be applied to foreign lawyers, either those providing services or those established and practicing in one form or another in a host state. The CCBE Code of Conduct is definitely quite valuable. Adoption of the CCBE draft directive on establishment as the basis for a Commission proposal for legislation would also be very helpful. Nevertheless, much serious thinking and careful analysis remains to be done in this area, because the unresolved issues are important and intricate.

 VIII. REFLECTIONS ON U.S.-E.C. CROSS-BORDER PRACTICE

Although the basic purpose of this Article is to review Community law on Community lawyers’ rights, it would be incomplete without a review of the status of U.S. lawyers and law firms in the European Community. This Part is divided into consumer interests, the more modern view is that advertising brings more information to the consumer and hence only unfair or misleading advertising should be prohibited. See GB-INNO-BM v. Confédération du Commerce Luxembourgeois, Case 362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801. As for restrictions on lawyers’ service in allegedly incompatible occupations, this again seems chiefly justified by a concern for the image of the profession. Any conflict of interest concern can be met by more limited restrictions, such as a prohibition of a lawyer’s representation of a corporate client on whose board he or she serves, or the representation of a party in litigation against a corporate entity on whose board the lawyer serves.
two sections: a review of Community law principles applicable to U.S. lawyers, and some reflections on how cross-border practice between the U.S. and the E.C. can be furthered.

A. The Status of U.S. Lawyers in Community Law

A basic principle of European Community law is that rights based on the Treaty are available only to Community nationals, while the nationals and enterprises of non-Community states derive particular rights within the Community only when Community legislation or agreements between the Community and third states specifically accord them. This principle also applies to rights to provide services under Article 59 and the right of establishment under Article 52.

189. Thus, in Elestina Esselina Christinor Morson and Sewradjie Jhanjan v. the Netherlands, Joined Cases 35 & 36/82, [1982] E.C.R. 3723, [1983] 2 C.M.L.R. 221, Surinamese nationals, parents of Dutch nationals, could not claim rights under Article 48 or Regulation No. 1612/68, J.O. L 257/2 (1968), O.J. Eng. Spec. Ed. 1968, II, at 475, as dependent family members of workers because their Dutch children were not migrant workers in another Community state and Regulation No. 1612/68 only grants rights to non-Community dependents of migrant workers. Morson is an example of the “internal affairs” doctrine, by which the internal law of a Community state alone is to be applied in cases where parties cannot demonstrate a jurisdictional basis to apply Community law. Accord Criminal Proceedings Against Guy Bekaert, Case 204/87, [1988] E.C.R. 2029, [1988] 2 C.M.L.R. 655, where the Court held that a French enterprise could not claim any protection based on Article 52 against French regulations governing retail trade.

Occasionally a Community international agreement has been construed to grant rights to foreign nationals. In Office National de l’Emploi v. Bahia Kziber, Case C-18/90, [1991] E.C.R. 199, a Moroccan national, residing in Belgium with her father, a retired migrant worker, was held to have a right to Belgian unemployment benefits on the basis of national treatment clause in the Community association agreement with Morocco. But see Meryem Demirel v. Stadt Schwäbisch Gmünd, Case 12/86, [1987] E.C.R. 3719, Common Mkt. Rep. (CCH) [1989] 1 CEC 3, which held that the language of the Community association agreement with Turkey was too vague and general to grant specific rights of free movement to Turkish workers. See also EMI Records Ltd. v. CBS UK Ltd., Case 51/75, [1976] E.C.R. 811, [1976] 2 C.M.L.R. 225, which held that a U.S. owner of the “Columbia” trademark could not market records under that mark in the United Kingdom, where a U.K. entity owned the same mark, in application of the Community law “common source” exception to protection of trademark rights, because that doctrine could not be relied upon by the owners of non-Community trademarks. The Court held that no protection for non-Community firms could be derived from a broad interpretation of Article 113 on the common commercial policy of the Community in its external trade. The Court reached the same conclusion in a narrow interpretation of the EC-EFTA agreement as to record imports into the United Kingdom under an infringing trademark from the then-EFTA state, Portugal, in Polydor Ltd. and RSO Records Ltd. v. Harlequin Record Shops Ltd. and Simon Records Ltd., Case 270/80, [1982] E.C.R. 329, [1982] 1 C.M.L.R. 677.
Thus, in *In re Jean Razanatsimba*, the Court held that the 1975 Lomé Convention between the Community and approximately sixty African, Caribbean, and Pacific island states did not enable a Madagascar national, who had obtained a French law degree and passed the French bar examination, to claim a right to be admitted to the French bar based on Article 52.190 This was despite the fact that the Lomé Convention's Article 62 guaranteed "non-discriminatory" treatment to Lomé state nationals. France was held to have the power to limit accession to the status of *avocat* to French and Community nationals. The implication of *Razanatsimba* is that a Community agreement with third states would have to grant in specific terms a right of establishment in the Community to foreign lawyers or other professionals.191

The Community legislation affecting lawyers based on Articles 52 and 59 grant no rights to non-Community nationals as such. As noted before, article 1 of the 1988 directive on the recognition of higher-education diplomas restricts its scope to nationals of Member States.192 However, the 1977 directive on lawyers' freedom to provide services grants rights on the basis of a person's status as a member of one of the listed Member State legal professions in article 1(2).193 Presumably, this would mean that a U.S. lawyer who has been able to attain the status of member of such a legal profession (for example, as a French or Belgian *avocat*, which is now possible under the rules in those states) would have the right to provide services under that title (but not as a member of a U.S. state bar) in other Community states.

Moreover, some persons who simultaneously have U.S. citizenship and citizenship in a Member State may be able to qualify as members of the legal profession in that Member State.190 Razanatsimba, [1977] E.C.R. 2971, [1985] 1 C.M.L.R. 99. It is possible that the specific holding of *Razanatsimba* as to the interpretation of the non-discrimination article of the Lomé Convention has been tacitly overruled by the Court's broader construction of a similar provision in the Community's association agreement with Morocco in *Küber*, [1991] E.C.R. 199.

191. As noted earlier, it appears that the 1992 European Economic Area agreement will grant partial rights of establishment and provision of services as between the Community and EFTA states, insofar as the 1977 and 1988 directives will have to be implemented by EFTA states. See supra text accompanying note 100.

192. See supra text accompanying notes 98-100.

193. See supra text accompanying notes 39-40.
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State. If so, and that profession is one listed in article 1(1) of the 1977 directive, they also could provide services under their Member State title in other Community states. Such dual nationals, however, cannot use the terms of the 1988 directive to obtain recognition of their U.S. law degrees in order to become a lawyer in a Member State, because the directive only covers diplomas provided by Member State institutions.194

A branch of a U.S. law firm in a Member State acquires rights only in that state. For Community law purposes, a branch is not a legal entity entitled to establishment or service-providing rights under Articles 52 and 59, but only an extension of the foreign head office.195 Accordingly, a U.S. firm with a branch in a Member State cannot use that branch to create sub-branches in other Member States. Fortunately for U.S. firms, many Member States have either traditionally taken a liberal attitude toward branch offices of reputable foreign law firms, or have recently modified their rules in that direction, so that a U.S. law firm’s inability to claim Community rights of establishment does not presently seem to pose a major hindrance to their practice in Europe.196

It is possible that as further steps are taken toward an integrated Community market in legal services, through further directives or Court of Justice case law, or both, the attitude of Member States and their bar associations will become progressively more liberal and less chauvinistic, so that U.S. law firms will have expanded opportunities to practice. If so, the ab-

194. A Council Recommendation of Dec. 21, 1988 concerning nationals of member states who hold a diploma conferred in a third state, O.J. L 19/24 (1989), supplements the 1988 directive with a non-binding recommendation that a Member State recognize a non-Community state’s diplomas in a manner analogous to Community diplomas. This may particularly prove helpful to U.S./Irish and U.S./English or Scottish dual nationals, because of the resemblances between common law legal education systems.

195. This has particularly been brought to the attention of U.S. firms through the provisions of the Second Banking Directive, supra note 62, O.J. L 386/1 (1989), which allows a Community subsidiary of a U.S. bank to derive rights to Community-wide banking, but leaves U.S. bank branches to qualify on a state-by-state basis if they can. See the 19th whereas clause of the Second Banking Directive.

196. Belgium, France, Italy, the Netherlands, and the United Kingdom have for years had a liberal policy toward U.S. law firms and the 1989 German legislation also allows U.S. firm branches on condition of reciprocity. There do not appear to be serious barriers to U.S. firm branches presently except in France (for firms that have “grandfather” status under the 1990 law) and Luxembourg. See the news articles cited supra in notes 8-10.
sence of direct Community rights will not prove very significant.

It is also worth noting that U.S. law firms may be able to make indirect use of Community law practice rights accorded to qualified Community lawyers who are associated with the U.S. firm. For example, if the Brussels bar permits some form of association between a U.S. firm and an avocat firm, the U.S. firm can enable their clients to obtain full use of the Community rights of the Belgian avocats. Moreover, if under the new U.K. rules for solicitors, a U.S. law firm and a U.K. solicitors' firm merge to create a new partnership in the United Kingdom,\textsuperscript{197} that partnership could exercise Community law rights to the extent described previously in Part VII.C.\textsuperscript{198} There may be other ingenious ways for U.S. firms to make indirect use of Community law practice rights, but it must be stressed that in no case does a U.S. lawyer established under his or her U.S. state title acquire rights of Community practice; it is only the U.S. firm that can provide its clients with services rendered by Community lawyers who are associated with the U.S. firm.

Finally, one should note a specific and quite irritating problem for U.S. lawyers specializing in Community competition law. In a famous 1982 judgment, \textit{AM & S Europe Ltd. v. Commission}, the Court of Justice recognized for the first time an attorney-client confidential communication privilege.\textsuperscript{199} This was a landmark in basic rights protection in the Community, because the Court reached its conclusion on the basis of the common legal traditions of the Member States even though neither the EEC Treaty nor any Community legislation recognized the privilege.

Unfortunately, in its judgment the Court limited the right to confidentiality of lawyer-client communications to those lawyers who figure on the list of recognized national legal pro-

\textsuperscript{197} See \textit{supra} text accompanying note 9.

\textsuperscript{198} See \textit{supra} text accompanying notes 163-66. If the London firm partnership is formed by merger into the U.S. firm, rather than by creating a new U.K. partnership, then it is technically only a branch of a U.S. law firm and has no direct Community rights.

essions in the 1977 directive on the freedom to provide legal services. This means that client communications with U.S. or other non-Community lawyers are not protected by the privilege, except in the relatively rare case of a U.S. lawyer who has managed to attain the status of a Member State lawyer on the list.

Thus far, the EEC Commission has never attempted to make use of a client communication with an outside U.S. counsel. Moreover, while Commission officials working in the Directorate General IV on competition policy are clearly disposed to grant informally such a privilege to U.S. lawyers, the Commission has not made a formal statement to this effect. A protest of this state of affairs by the American Bar Association in February 1984 has thus far not produced any result. The situation is all the more anomalous because case law in the U.S. does recognize the attorney-client confidential communication privilege when the communication is with a foreign lawyer. It is to be hoped that at some point the Commission will be able to declare formally that the privilege is recognized as to communications with U.S. lawyers, whether based in the U.S. or the Community, and/or that the Court of Justice will find occasion to extend the privilege to U.S. or other qualified non-Community lawyers whose professional rules are comparable to those of Community lawyers.

202. See Kreis, supra note 199, at 10-11, 18-20. In 1984, the Commission proposed to the Council of Ministers that negotiations be opened with the United States for treaty recognition of the attorney-client privilege on the basis of reciprocity. The Council has never acted on this request.
B. Furthering U.S.-E.C. Cross-Border Legal Practice

As indicated in section A, U.S. law firms are not encountering substantial difficulties in legal practice in most Community states through branches or through association or close correspondent arrangements with local firms. Correlatively, as indicated in Part I, ten U.S. states and the District of Columbia have created the status of legal consultant. There are over thirty Community law firms with branch offices in New York. Moreover, since U.S. citizenship is not a prerequisite for membership in a U.S. state bar since Griffith v. Connecticut, an increasing number of European law students are succeeding in passing the bar examination in New York and other states after studying at U.S. law schools, usually in an LL.M. program. Accordingly, in general the state of U.S.-E.C. cross-border practice is good. Nonetheless, some concerns do exist.

The ABA House of Delegates in August 1991 adopted several resolutions pursuant to a report of a special EC Task Force, acting for the section of International Law and Practice and the Business Law section. The ABA resolutions endorsed the Community efforts to create an integrated internal market, but added:

4. BE IT FURTHER RESOLVED, that measures adopted by the European Community relating to the integration of the legal profession should be designed so as to ensure the preservation of the integrity of the legal profession and the continued recognition of its distinctive characteristics and responsibilities.

5. BE IT FURTHER RESOLVED, that measures adopted by the European Community should not impose or permit restrictions upon the delivery of legal services by members of foreign legal professions that are not objectively required for the protection of the public.

The report cited the 1977 and 1988 directives, as well as the CCBE draft directive on establishment, and expressed concern that

[t]he position of some of the Member States coupled with

204. See supra note 2.
the lack of applicability of pertinent directives to third country lawyers provide the foundation for potentially discriminatory treatment of U.S. lawyers engaging in legal activities in Europe on behalf of their clients.\textsuperscript{207}

The Report concluded that

\[ \text{the fourth and fifth proposed resolutions accordingly urge the Community to eschew restrictions on the delivery of legal services by foreign legal professionals to the extent that these restrictions are not objectively required to protect the public.}\textsuperscript{208} \]

Although the concern of the ABA is undoubtedly genuine, it is not clear what should be done to alleviate the concern. As indicated in Part VIII.A, the Treaty grants rights of establishment and the provision of services to Community nationals, so that Community legislation intended to further the Treaty goals would, generally speaking, likewise be limited to Community nationals. Although the 1977 directive effectively grants rights to non-Community nationals who have acquired membership in the designated legal professions, that is an incidental effect of the law of those Member States that allow non-Community nationals to join their legal professions.

Presumably, the normal vehicle for assuring rights of establishment or the provision of services for U.S. lawyers in the Community would be a bilateral treaty between the U.S. and the Community that would grant such rights on the basis of reciprocity. This is quite unlikely, however, because it is difficult to conceive of the U.S. government and the Community institutions devoting so much time and attention to the concerns of one profession. A bilateral treaty covering all the principal professions would raise complex questions which would make it equally unlikely.

'A more suitable vehicle might be multilateral recognition of the principles of effective market access and national treatment with regard to the legal profession in the context of the GATT Uruguay Round negotiations. In fact, these negotiations do include trade in services. Although the principal focus has been on financial services, information services, and telecommunications, legal services is on the list of those for

\textsuperscript{207} ld. at 1197.
\textsuperscript{208} ld.
which liberalization is sought.\textsuperscript{209} Unfortunately, a U.S. initiative to treat legal services specifically has apparently not succeeded. Moreover, there are serious differences between the United States and the Community on the scope of liberalization to be achieved in the financial services sector (not to speak of the current impasse on agriculture), so that the fate of the Uruguay Round in general, and the nature of liberalization in trade in services in particular, is still in doubt.

Even if the ultimate GATT Uruguay Round trade in services text is stated more in the form of general principles of encouraging effective market access and national treatment, as opposed to specifically enforceable detailed rules, this will still be helpful. It may provide the basis for bilateral discussions between the United States and the Community to encourage a more liberal attitude in both.

In any event, as indicated above, U.S. law firms are encountering difficulties in only a few Community states at the present time. The 1989 German law has for the first time enabled U.S. law firms to open branch offices there and many are doing so.\textsuperscript{210} As the German law requires reciprocity in the United States, the German Ministry of Justice must at some point decide whether U.S. law firms from states that have not enacted legal consultant rules are entitled to open offices; if its decision is adverse, this might encourage more U.S. states to adopt such rules. In contrast, the 1990 French legislation, although according "grandfather" rights to the over thirty U.S. law firms that presently have offices, appears to prevent new U.S. firms from opening branches.\textsuperscript{211} The French Ministry of Justice is aware of U.S. law firms' concern about this, and a method of resolving the matter may yet be found.

Apart from rights of practice, there is also the very important issue of applicable rules of professional conduct. The Community at least has the assurance that under ABA Model


\textsuperscript{210} See supra note 10.

\textsuperscript{211} See supra note 11.
Rule of Professional Conduct ("Model Rules") 8.1, U.S. lawyers from states that have adopted the Model Rules are expressly bound by those rules even when established abroad, a principle which is presumably implicit in the older Model Code of Professional Responsibility ("Model Code").212 There need therefore be no concern that U.S. lawyers established in the Community under their home title would not be subject to any rules. Moreover, those U.S. lawyers who become lawyers in Community States, e.g., French or Belgian avocats, are obviously subject to the host state professional rules.

As the CCBE Code of Conduct is being seriously considered for adoption by European states outside the Community, the interesting question arises as to whether it could serve as the basis for a common understanding between the United States and the Community. This has definite appeal, in that it might reduce local opposition to the activities of foreign lawyers on both sides. Professor Geoffrey Hazard, one of the leading U.S. authorities on professional responsibility, remarked in a short comment on the Code of Conduct that "[m]any of its rules closely resemble those of the 1983 ABA Rules of Professional Conduct," which is an encouraging appraisal.213 On the other hand, he notes the presence of some significant differences, which are based in part on different traditions.

As John Toulmin has noted,214 the ABA and the CCBE have created ad hoc committees of experts to discuss the CCBE Code of Conduct approach and any significant differences with respect to U.S. rules. Thus far, their discussions have been private, with no published reports. Even if these experts are unable to recommend any form of adoption of the Code of Conduct to cover the cross-border practice of U.S. lawyers in the Community and vice-versa, it is to be hoped that they may issue a report that might incite further analysis of the differences in rules and how possible conflicts might be resolved.

214. Toulmin, supra note 46, at 676.
A careful reading of the CCBE Code of Conduct reveals immediately some striking differences with respect to the Model Rules and the Model Code. Perhaps most provocative is a point concerning the basic nature of professional rules. Rule 1.1 of the CCBE Code of Conduct lays equal stress on the lawyer's obligations to the client, the courts, the legal profession, and the general public, whereas the U.S. attitude, drawn from our common law tradition, gives, in Professor Hazard's words, "strong prominence" to a lawyer's obligations to the client.\textsuperscript{215} This difference may have an impact: Professor Hazard notes that CCBE Code Rule 4.4 forbids a lawyer to "give false or misleading information to the court," which goes further than Model Rule 3.3 which prohibits a lawyer from knowingly presenting false evidence.\textsuperscript{216} Because it is most unlikely that U.S. lawyers will appear before courts in the Community, this is probably an issue of only theoretical importance.

In contrast, of great practical importance is the fact that CCBE Code Rule 3.2 on conflicts of interest does not expressly permit client waivers of a conflict, which is not only permitted by Model Rule 1.8 and Model Code Disciplinary Rule 5-104(A), but is standard practice in the U.S. The ability to secure client waivers of conflicts is especially important in international practice, because a large branch office network creates a significantly higher risk of conflicts among clients.

Another obvious difference is that the CCBE Code of Conduct generally prohibits contingent fees in Rule 3.3, while Model Rule 1.5 expressly permits contingent fees, and they are implicitly permitted by Model Code Ethical Consideration 2-20. U.S. tort lawyers, who maintain that contingent fees are essential to enable poor clients to have any realistic opportunity to recover damages in tort, are sure to vigorously protest any attempt to prevent them from representing U.S. clients in some capacity on a contingent fee basis, when the clients have suffered a tort injury in a Community state.

Also, CCBE Code Rule 5.1 makes a lawyer responsible for payment of correspondent lawyer's fees, and Rule 5.6 forbids a lawyer from acting for a new client until the client has paid the fees of a prior lawyer in the same matter. U.S. lawyers are apt

\textsuperscript{215} Hazard, \textit{supra} note 213, at 14.
\textsuperscript{216} \textit{Id.}
to find both of these rules inappropriate as obligations, whatever they may think of them as aspirations.

Also troublesome are CCBE Code Rule 2.5 which forbids lawyers to have incompatible occupations (e.g., service on a corporate board of directors) in states where that is forbidden, and Rule 2.6 on personal publicity, which prohibits or restricts advertising or other publicity to the extent the host state prohibits or restricts it. Although U.S. lawyers may consider that both of these rules represent restrictions that do not accord with modern legal practice, they are not restrictions which are apt to seriously impede practice by U.S. lawyers in the Community.

Despite the above-mentioned differences (and others that may be perceived in careful comparative analysis), the Code of Conduct, with certain modifications to conform to binding U.S. rules, may still prove to be the basis of some statement on commonly-accepted professional responsibility standards between the ABA and CCBE. In any event, the process of comparative analysis can only be helpful.

**CONCLUSION**

This Article has attempted to achieve several goals. The most fundamental one was to present the Community law on a lawyer's right to practice in providing cross-border services under Article 59 and in a form of establishment protected by Article 59. In Parts II to V, the Article has accordingly concentrated on the Community legislation and Court of Justice case law which articulates the present scope of such rights. In presenting a comprehensive and analytical review, especially of recent developments, it is hoped that the Article will be informative.

Second, the Article in Part I has attempted to place the need for further action to expand Community lawyers' rights of practice in a broader context, namely, that of furthering the integration of the internal market. In that context, the Article has stressed in Part VII the need to recognize rights of law firms as well as those of individual lawyers. The Article has accordingly critically reviewed and generally endorsed the CCBE draft directive on establishment in Part VI. Finally, the Article has attempted to analyze the issue of the right of estab-
lishment under the home state title in a host state, and has urged that this right should be recognized in Part VII.B.

Third, the Article has tried to emphasize the need for careful analysis of applicable rules of professional conduct and ethics. In this context, in Part VI it has praised the helpful harmonization represented by the CCBE Code of Conduct, while urging in Part VIII a more intensive examination of the difficult issues that the 1977 directive on lawyers' services and the Code of Conduct have left unresolved.

Finally, the Article has attempted to review the status of U.S. lawyers within the Community legal regime and to emphasize the need to foster further U.S.-E.C. cross-border legal practice. Such cross-border practice benefits clients, facilitates U.S.-E.C. trade, and helps to bridge the cultural gap between diverse legal traditions. It is fitting to close with the hope that the present trend toward liberalization of cross-border legal practice will acquire increasing momentum with the passage of time.
APPENDIX

COUNCIL DIRECTIVE
of 22 March 1977

to facilitate the effective exercise by lawyers of freedom to provide services

(77/249/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 and 66 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament¹,

Having regard to the opinion of the Economic and Social Committee²,

Whereas, pursuant to the Treaty, any restriction on the provision of services which is based on nationality or on conditions of residence has been prohibited since the end of the transitional period;

Whereas this Directive deals only with measures to facilitate the effective pursuit of the activities of lawyers by way of provision of services; whereas more detailed measures will be necessary to facilitate the effective exercise of the right of establishment;

Whereas if lawyers are to exercise effectively the freedom to provide services host Member States must recognize as lawyers those persons practising the profession in the various Member States;

Whereas, since this Directive solely concerns provision of services and does not contain provisions on the mutual recognition of diplomas, a person to whom the Directive applies must adopt the professional title used in the Member State in which he is established, hereinafter referred to as 'the Member State from which he comes',

HAS ADOPTED THIS DIRECTIVE:

Article 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.

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

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<tr>
<th>Country</th>
<th>Designation</th>
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<tr>
<td>Belgium</td>
<td>Avocat—Advocaat</td>
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<tr>
<td>Denmark</td>
<td>Advokat</td>
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<tr>
<td>Germany</td>
<td>Rechtsanwalt</td>
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<tr>
<td>France</td>
<td>Avocat</td>
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<tr>
<td>Ireland</td>
<td>Barrister, Solicitor</td>
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<tr>
<td>Italy</td>
<td>Avvocato</td>
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<td>Luxembourg</td>
<td>Avocat-Avoué</td>
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<td>Netherlands</td>
<td>Advocaat</td>
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<tr>
<td>United Kingdom</td>
<td>Advocate, Barrister, Solicitor</td>
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Article 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 3

A person referred to in Article 1 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 practise or the court of law before which he is entitled to practise pursuant to the laws of that State.
Article 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.

2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

3. When these activities are pursued in the United Kingdom, 'rules of professional conduct of the host Member State' means the rules of professional conduct applicable to solicitors, where such activities are not reserved for barristers and advocates. Otherwise the rules of professional conduct applicable to the latter shall apply. However, barristers from Ireland shall always be subject to the rules of professional conduct applicable in the United Kingdom to barristers and advocates.

When these activities are pursued in Ireland 'rules of professional conduct of the host Member State' means, in so far as they govern the oral presentation of a case in court, the rules of conduct applicable to barristers. In all other cases the rules of professional conduct applicable to solicitors shall apply. However, barristers and advocates from the United Kingdom shall always be subject to the rules of professional conduct applicable in Ireland to barristers.

4. A lawyer pursuing activities other than those referred to in paragraph 1 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 ob-
served 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.

Article 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 applies:

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

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

Article 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 representation of that undertaking in legal proceedings in so far as lawyers established in that State are not permitted to pursue those activities.

Article 7

1. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

2. In the event of non-compliance with the obligations referred to in Article 4 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 the 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.
Article 8

1. 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.

2. 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.

Article 9

This Directive is addressed to the Member States.

Done at Brussels, 22 March 1977.

For the Council

The President

Judith HART