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Abstract

This Article focuses on recent developments in European multi-jurisdictional practice rights that have major implications for the control of entry to the legal professions and some of the related deontological rules that govern access to professional legal life across the European Union (”EU”) and the European Economic Area (”EEA”). Additionally, it looks at their impact on rules regulating the competence of lawyers and admission to the legal professions, primarily in Europe, but with some reference to the position in the United States as well.

ASSESSING THE EUROPEAN MARKET FOR LEGAL SERVICES: DEVELOPMENTS IN THE FREE MOVEMENT OF LAWYERS IN THE EUROPEAN UNION

Julian Lonbay[*]

INTRODUCTION

Lord Slynn played an instrumental role in developing the case law of the Court of Justice of the European Union ("Court") on the free movement of lawyers, most notably in the *Vlassopoulou* case,[1] among others. The growth of international legal practice has been widely recognized,[2] as have the related ethical dilemmas thrown up by such trans-border practice.[3] There is no need for lawyers within the European Economic Area ("EEA")[4] to "sneak

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1. Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg, Case C-340/89, [1991] E.C.R. I-2357.

2. *See generally* YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMICS AND THE CONTEST TO TRANSFORM LATIN STATES (2002); Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994); John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT'L J. LEGAL PROF. 169 (1996); Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789 (2003); Laurel S. Terry et al., *Transnational Legal Practice* 42 INT'L LAW. 833 (2008); David M. Trubek et al., *Global Restructuring and the Law; Studies of Internationalization of Legal Fields and the Creation of Transnational Arenas*, 22 CASE W. RES. L. REV. 407 (1994).

3. *See* Bernard L. Greer, Jr., *Professional Regulation and Globalization: Towards a Better Balance*, *in* GLOBAL LAW IN PRACTICE 169, 169–84 (1997). *See generally* LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW (Edwin Godfrey ed., 1995); Owen Bonheimer & Paul Supple, *Unauthorized Practice of Law by U.S. Lawyers in U.S.-Mexico Practice*, 15 GEO. J. LEGAL ETHICS 697 (2002); Julian Lonbay, *Lawyer Ethics in the Twenty-First Century: The Global Practice Reconciling Regulatory and Deontological Differences—The European Experience*, 34 VAND. J. TRANSNAT'L L. 907 (2001); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677 (2000); Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931 (2001).

4. The European Economic Area ("EEA") consists of all the Member States of the European Union ("EU"), together with Iceland, Leichtenstein, and Norway which have

around" in order to practice in multiple jurisdictions, as U.S. lawyers must do for the most part.[5] Entry controls to the various bars in the United States were mostly established after the First World War with little regard for the impact that they would have on multi-jurisdictional U.S. practice or the multi-national authorized legal practice rules.[6] This issue is currently under review by the American Bar Association ("ABA") and U.S. state bar associations.[7]

In the EEA, as in the United States, the trend towards larger law firms is evident, particularly in Germany, the Netherlands, and the United Kingdom.[8] The resulting increase in lawyer

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accepted essentially all of the EU legislation and rules governing transnational legal practice.

5. Consider, for comparison, the relatively low level of permissible multijurisdictional practice in the United States, which many observers regret. *See* Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1975); Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135 (2001); Peter S. Margulies, *Protecting the Public Without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law*, 7 ROGER WILLIAMS U. L. REV. 285 (2002); John F. Sutton, Jr., *Unauthorized Practice of Law by Lawyers: A Post Seminar Reflection on "Ethics and the Multijurisdictional Practice of Law,"* 36 S. TEX. L. REV. 1027 (1995); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code*, 7 GEO. J. OF LEGAL ETHICS 1 (1993); Vagts, *supra* note 3; Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995); AMER. BAR ASSOC. [ABA], REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (2002), *available at* http://www.abanet.org/cpr/mjp/final_mjp_rpt_5-17.pdf.

6. Gerard J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251, 251, 254 (2002).

7. *See* ABA, CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.abanet.org/cpr/rule-adoption.html (last visited Oct. 1, 2010). U.S. states are increasingly adopting more liberal rules. *See* John Haltaway, ABA, *Multijurisdictional Practice*, http://www.abanet.org/barserv/issuesupdate/mjp.html (last visited Oct. 1, 2010).

8. *See, e.g.*, Trubek et al., *supra* note 2, at 435–36. In fact, the EU legislation and policies discussed in this Article apply not only to all twenty-nine Member States, but also to Iceland, Leichtenstein, and Norway, by virtue of their membership in the EEA, closely linked to the EU by the EEA Treaty. *See* Agreement on the European Economic Area, 1994 O.J. L 1/3. In addition, Switzerland has a number of specific bilateral arrangements with the EU. *See e.g.*, Cooperation Agreement to Combat Fraud and Any Other Illegal Activity to the Detriment of Their Financial Interests, EC-Switz., Oct. 26, 2004, 2009 O.J. L 46/8; Agreement on the Swiss Confederation's Association with Implementation, Application and Development of the Schengen Acquis, EC-Switz., Oct. 26, 2004, 2008 O.J. L 53/52; Agreement Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland, EC-Switz., Oct. 26, 2004, 2008 O.J. L 53/5; Agreement Concerning the Participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network, EC-Switz., Oct. 26,

specialization[9] has increased the stratification of the legal professions, and is leading commentators to consider that "elite" lawyers may not identify so readily with the general legal profession, as much as with other specialists and perhaps other professions, too.[10] In England and Wales, the educational effects of this tendency are becoming apparent in the bespoke legal practice courses run for the benefit of larger law firms. This tendency is likely to become more pronounced as the barriers to increased inter-disciplinary practice decrease at the national level. The Clementi-based reform in England and Wales[11] and the Legal Services Act of 2007,[12] currently being implemented by the new Legal Services Board, will allow multi-disciplinary practice in England and Wales in the form of alternate business structures. This is primarily advanced by the view that the "marketplace" wants to receive legal advice as part of a general business package.[13] As the monopoly rights of legal professions

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2004, 2006 O.J. L 90/37; Agreement in the Audiovisual Field, Establishing the Terms and Conditions for the Participation of the Swiss Confederation in the Community Programmes MEDIA Plus and MEDIA Training, EC-Switz., Oct. 26, 2004, 2006 O.J. L 90/23; Agreement on Cooperation in the Field of Statistics, EC-Switz., Oct. 26, 2004, 2006 O.J. L 90/2; Agreement Amending the Agreement Between the European Economic Community and the Swiss Confederation of 22 July 1972 as Regards the Provisions Applicable to Processed Agricultural Products, EC-Switz., Oct. 26, 2004, 2005 O.J. L 23/19; Agreement Providing for Measures Equivalent to Those Laid Down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, EC-Switz., Oct. 26, 2004, 2004 O.J. L 385/30; Council & Commission Decision as Regards the Agreement on Scientific and Technological Cooperation, on the Conclusion of Seven Agreements with the Swiss Confederation, No. 2002/309, 2002 O.J. L 114/1 (attaching seven bilateral agreements concluded with Switzerland in 1999 commonly referred to as the "bilateral I" package); Agreement Between the European Economic Community and the Swiss Confederation, July 22, 1972, 1972 O.J. L 300/189 (establishing a free trade agreement). *See generally* MARIUS VAHL & NINA GROLIMUND, INTEGRATION WITHOUT MEMBERSHIP: SWITZERLAND'S BILATERAL AGREEMENTS WITH THE EU (2006).

9. *See* David Sugarman & Avrom Sherr, *Globalisation and Legal Education*, 8 INT'L J. LEGAL PROF. 5 (2001).

10. *See* Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multi-Disciplinary Practice, Competition, and Globalization*, 52. J. LEGAL EDUC. 480, 482 (2002) (commenting on the position in the Unites States).

11. *See* SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL PAPER (Dec. 2004), *available at* http://www.legal-services-review.org.uk/content/report/report-chap.pdf.

12. Legal Services Act, 2007, c. 29 (U.K.).

13. *See* CLEMENTI, *supra* note 11, at 5–6; Daly, *supra* note 10, at 485–86.

diminish with national regulatory reform,[14] pushed a little by the impulsion of EU law, the increasing de facto specialization of parts of the legal professions will increase pressure on entry regimes to permit ultra-specialized and experienced practitioners access to the growing market for such services. Such access to a host state market might be allowed without the full local regulatory requirement of broad-based knowledge of the host state's law. EU law has permitted temporary practice under a lawyer's home state title since the 1970s[15] and the more recent Establishment Directive[16] allows those with relatively minimal knowledge of local rules to gain access to the host state legal market and the host state legal profession, even with little pre-controlled assessment of their local legal knowledge.

This Article focuses on recent developments in European multi-jurisdictional practice rights that have major implications for the control of entry to the legal professions and some of the related deontological rules that govern access to professional legal life across the EU and the EEA. Additionally, it looks at their impact on rules regulating the competence of lawyers and admission to the legal professions, primarily in Europe, but with some reference to the position in the United States as well.

I. INTERFACE OF ENTRY CONTROLS AND UNION LAW

A. *Competence of Lawyers and Entry Controls*

The question of competence to enter the legal profession is fundamentally an ethical issue.[17] Lawyers should be competent,[18]

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14. *See* LA COMMISSION PRESIDEE PAR JEAN-MICHEL DARROIS, RAPPORT SUR LES PROFESSIONS DU DROIT [REPORT ON THE LEGAL PROFESSION] (2009) (Fr.), *available at* http://www.justice.gouv.fr/art_pix/rap_com_darrois_20090408.pdf.

15. *See* Council Directive No. 77/249/EEC to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. L 78/17 [hereinafter Lawyers' Services Directive].

16. *See* Parliament & Council Directive No. 98/5 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than that in which the Qualification Was Obtained, 1998 O.J. L 77/36 [hereinafter Establishment Directive].

17. *See generally* RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE (Mary C. Daly & Roger J. Goebel eds., 2d ed. 1994).

18. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) ("A lawyer shall provide competent representation to a client."); Council of Bars & Law Societies of Europe [CCBE], CODE OF CONDUCT FOR EUROPEAN LAWYERS § 3.1.3 (2008) [hereinafter CCBE

especially in societies where they have reserved rights and privileges.[19] Competence is considered a core attribute or value of lawyers.[20] The Council of Europe's Recommendation on the Freedom of Exercise of the Profession of Lawyers, adopted in 2000, strongly supports the independence of lawyers as necessary in a free society that upholds the rule of law.[21] Principle 1 emphasizes that access to the profession should be controlled by independent authorities.[22] Under principle 3, lawyers also have a duty to act "diligently."[23]

Entry controls essentially govern the initial competence of lawyers.[24] Such entry regulations can be considered "necessary for the proper practice of the legal profession."[25] The regulatory

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CODE OF CONDUCT] (mandating that all lawyers "shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it" and "shall not accept instructions unless he or she can discharge those instructions promptly having regard to the pressure of other work"); INT'L BAR ASSOC. [IBA], DRAFT CODE OF PROFESSIONAL CONDUCT FOR COUNSEL BEFORE THE INTERNATIONAL CRIMINAL COURT art. 5(1)(a) (2003), *available at* http://www.ibanet.org/document/default.aspx?documentuid=6f13da33-4c27-47d0-9cba-ad1e3a7dc324 (declaring that counsel is obligated to "act with competence").

19. These are usually expressed as a monopoly on providing legal advice, often including special rights of audience in courts and special privileges in relation to communications with clients.

20. *See* ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (2000), *available at* http://www.abanet.org/cpr/mdp/mdpfinalrep2000.html ("It is undeniable that competence is a core value of the legal profession."); CCBE, *Charter of Core Principles of the European Legal Profession*, princ. (g) (Nov. 25, 2006), *available at* http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1249308118.pdf (listing "professional competence" as a "core principal"); IBA SECTION ON BUSINESS LAW, TASK FORCE ON INTERNATIONAL COMMERCIAL PRACTICE, RECOMMENDATIONS FOR TEMPORARY CROSS-BORDER COMMERCIAL PRACTICE 16 n.18 (2004).

21. Council of Europe Recommendation of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer, No. R(2000)21 (Oct. 25 2000).

22. *Id.* at 3.

23. *Id.* at 4.

24. Entry controls are one of the signs of a self-regulating profession, "professional knowledge" being "the key" to market control and self-regulation. ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 42 (1st ed. 1999). Somewhat in contrast, Dezalay considers knowledge as part of the battleground between lawyers and other market suppliers. Yver Dezaley, *Turf Battles and Tribal Disputes*, 54 MOD. L. REV. 792 (1991).

25. *See* Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, Case C-309/99, [2002] E.C.R. I-1577, ¶ 110. *But see* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 812 (1992).

authority for solicitors in England and Wales is considering whether competence should not be checked more directly after admission as well.[26] Other arguments for entry control include the promotion of more efficient court and dispute resolution processes.[27] In the U.S. context, Barton argues that "rising entry standards have multiple benefits to lawyers," but with little evidence that the resulting increased costs for consumers are justified.[28]

B. *Entry Controls and Competition Law*

From a competition law point of view, the asymmetry of information between lawyers and average consumers of legal services (the average consumer is not in a position to judge the competence of lawyers) can be used to justify professional entry controls as a restraint on trade, allowing for the protection of the ill-informed consumer.[29] The European Commission issued a White Paper on Competition and Professional Services, and published an independent Austrian study on legal services, which was critical of many European bars.[30] Particularly in view of the

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26. Neil Rose, *Lawyers Face Prospect of Competence Checks*, LAW SOC'Y GAZETTE, July 27, 2006, at 1.

27. *See* Luxembourg v. European Parliament, Case C-168/98 [2000] E.C.R. I-9131, ¶ 30 ("According to the case-law of the Court, the application of professional rules to lawyers, in particular those relating to organisation, qualifications, professional ethics, supervision and liability, provides ultimate consumers of legal services and the sound administration of justice with the necessary guarantees of integrity and experience." (citing Reisebüro Broede v. Sandker, Case C-3/95 [1996], E.C.R. 6511, ¶ 38)).

28. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Regulation—Courts, the Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1190, (2003); *see also* Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Exam and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191 (1995).

29. RICHARD ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE 96–120, (2003); Benjamin H. Barton, *Why Do We Regulate Lawyers? An Economic Analysis of Justifications for Entry and Conduct Regulations*, 83 ARIZ. ST. L. J. 429, 437 (2001). Barton finds the consumer protection argument to be unpersuasive in the United States, but notes the context of the advice and representation monopoly that exists there for lawyers. *Id.* at 437.

30. Commission of the European Communities, Report on Competition in Professional Services, COM (2004) 83 Final (Feb. 2004) [hereinafter White Paper on Competition & Professional Services]; IAIN PATERSON ET AL., INSTITUT FÜR HÖHERE STUDIEN [INSTITUTE FOR ADVANCED STUDIES], ECONOMIC IMPACT OF REGULATION IN THE FIELD OF LIBERAL PROFESSIONS IN DIFFERENT MEMBER STATES: REGULATION OF PROFESSIONAL SERVICES 43–50 (2003), *available at* http://www.ihs.ac.at/publications/lib/eb1-i.pdf (research study performed for the Directorate General for Competition of

EU's competition rules, the Commission's White Paper describes entry requirements for lawyers as possibly being overly restrictive and unnecessary.[31] The Commission report and Austrian study, which the Commission funded, indicated that many of the monopolies that lawyers have, which vary in different European states, are excessive and unnecessary. Many of those services could be done better and more cheaply by other people, and the examples tended to come from the more liberal states where monopolies are being diminished or disbanded.[32] The European Commission is essentially arguing that if this reform can be achieved in certain Member States, such as England or Sweden, then it should likewise be possible in other Member States, such as France or Germany, or even a state with a high level of restraint, such as Greece. Given the modern, decentralized nature of EU competition law enforcement, the Commission has encouraged national competition authorities to investigate and follow the path the Commission set up and implement competition law at the national level with respect to legal services.[33] Such inquiries were instigated in Denmark,[34] Ireland,[35]

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the European Commission); *see also* CCBE, RECOMMENDATION ON TRAINING OUTCOMES FOR EUROPEAN LAWYERS (2007), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf. The Organisation for Economic Co-operation and Development ("OCED") also published a report on competitive restrictions in the legal profession. Organisation for Economic Co-operation and Development [OECD], *Competitive Restrictions in Legal Professions*, OECD Doc. DAF/COMP(2007)39 (Apr. 27, 2009), *available at* http://oecd.org/dataoecd/12/38/40080343.pdf.

31. White Paper on Competition & Professional Services, *supra* note 30, COM (2004) 33 Final, at 9–10.

32. *See id.*

33. *See id.* at 22–23. A follow-up report was issued by the Commission in the following year. *See* Commission of the European Communities, Professional Services—Scope for More Reform: Follow-up to the Report on Competition in Professional Services, COM (2004) 83, of 9 Febuary 2004, COM (2005) 405 Final (Aug. 2005).

34. *See* Konkurrence- og Forbrugerstyrelsen, Rapport fra arbejdsgruppen vedrørende juridisk rådgivning mv. [Report of the Working Group on Legal Advice, etc.] (June 2004) (Den.), *available at* http://www.konkurrencestyrelsen.dk/en/service-menu/publications/publication-file/publikationer-2004/konkurrencepolitisk-strategi/rapport-fra-arbejdsgruppen-vedr-juridisk-raadgivning-mv-pdf-format.

35. *See* THE COMPETITION AUTHORITY, COMPETITION IN PROFESSIONAL SERVICES: SOLICITORS & BARRISTERS (2006) (Ir.), *available at* http://www.tca.ie/images/uploaded/documents/solicitors%20and%20barristers%20full%20report.pdf.

and the United Kingdom.[36] In England and Wales this has, in part, lead to the Clementi review, a subsequent White Paper, and the current implementation of the Legal Services Act of 2007, the last of which includes the possibility of multi-disciplinary practice in alternative business structures, scheduled to start in October 2011.[37]

In much of Northern Europe, particularly in Scandinavian states, there is little or no protection of legal monopolies, leading to legal services often being supplied not by the formal legal profession, but rather by unregulated or semi-regulated legal advice providers, such as the *jurist* or *Rettshjelper*.[38] There are also, across Europe, many legal education providers that are "unrecognized" by professional legal bodies and whose graduates are not easily able,[39] or are even unable,[40] to join the national legal professions under the traditional entry routes, but who are nevertheless able to supply legal services in other Member States with more liberal regulatory rules—and who subsequently may be able to take advantage of some of the new entry routes provided by EU internal market rules set out below.

The providers of legal services are varied. Sophisticated purchasers of legal services provided by mega-sized firms (not all of which are necessarily members of self-regulating legal professions) can be contrasted with the small, solo legal practitioners and their largely un-knowledgeable clients (who therefore need a higher level of protection). The legal professions still seek a common high standard of competence at entry and highly value their unity and professional ethics.

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36. *See* OFFICE OF FAIR TRADING, CONSULTATION ON THE FUTURE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES (2004) (U.K.), *available at* http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft722.pdf.

37. *See* LEGAL SERVS. BOARD, WIDER ACCESS, BETTER VALUE, STRONG PROTECTION: DISCUSSION PAPER ON DEVELOPING A REGULATORY REGIME FOR ALTERNATIVE BUSINESS STRUCTURES (2009), *available at* http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/140509.pdf.

38. *See, e.g.*, Webjuristene, Rettshjelper til halv advokatpris, http://www.webjuristene.no (last visited May 10, 2010) (Nor.).

39. For example, those in England and Wales graduating with non-qualifying law degrees offered by some higher education institutions.

40. For example, the *Hochschule* graduates in Germany, or those with business law degrees from Denmark or the Netherlands.

II. *ENTRY CONTROLS, NATIONAL STANDARDS, AND EUROPEAN LAW*

The power of regulating entry by standard setting is exercised in a different manner by all the official legal professions in the EU and the EEA.[41] Many factors influence how entry conditions are regulated in different Member States. This Article does not propose to investigate them all; instead, this Article will investigate the inroads made at the European level to these autonomous professional and governmental powers and will reflect on reactions thereto.

National entry rules are under sustained pressure from various European developments. The entry barriers and rigorously regulated access to the legal profession in each state have, to a considerable extent, been trumped by European free access rules. Would-be lawyers no longer have to follow the prescribed national routes into the host state professions. It is not only the Union's free movement rules that are knocking down the doors. As noted above, the Member States' respective competition authorities are also asking for justifications of access-restricting rules (and a lot more besides).[42] Now, several EU mandated access points to EEA legal professions have been created.

Citizens of EU and EEA Member States who are qualified lawyers have, in principle, a right to migrate. EU law traditionally asks if migrants are nationals (or spouses or dependant members of the family) of a Member State, and whether they are either employed (as workers), or are seeking to provide services or establish themselves in the host state. Different provisions of the Treaty Establishing the European Community ("EC Treaty") (now the Treaty on the Functioning of the European Union ("TFEU")) apply in each case[43] and all assume that the migrant is in the labor market or is economically active.[44]

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41. *See* European Lawyers' Information Exchange & Internet Resource [ELIXIR], http://elixir.bham.ac.uk//index.htm (last visited Oct. 1, 2010) (showing many of the entry regimes to European legal professions). *See generally* JULIAN LONBAY, TRAINING LAWYERS IN THE EUROPEAN COMMUNITY (1990).

42. *See supra* notes 29–37 and accompanying text.

43. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 45, 49–50, 2010 O.J. C 83/47, at 65–68 [hereinafter TFEU] (establishing the free movement of workers, right of establishment, and free movement of services, respectively). Prior to the enactment of the Treaty of Lisbon, similar provisions were

The rise in use of EU citizenship (often called European citizenship),[45] which is also recognized in legislation[46] and the case law of the Court,[47] has decreased the need for EU migrants to be economically active. The focus is more on the status of citizenship in the Union and migrants' "lawful" presence as residents in the host state.[48] Lawful residence for a sufficient duration[49] will give rise not only to access to various elements of social welfare and job access benefits,[50] but also, less controversially,[51] to the host state professions and now their

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contained in the Treaty Establishing the European Community ("EC Treaty"). Consolidated Version of the Treaty Establishing the European Community arts. 39, 43, 49, 2006 O.J. C 321 E/37, at 57, 59, 62 [hereinafter EC Treaty] (establishing the free movement of workers, right of establishment, and free movement of services, respectively).

44. *See, e.g.*, Kempf v. Staatssecretaris van Justitie, Case 139/85, [1986] E.C.R. 1741, ¶ 16; Levin v. Staatssecretaris van Justitie, Case 53/81, [1982] E.C.R. 1035, ¶¶ 21–22.

45. *See* TFEU, *supra* note 43, arts. 20–25, 2010 O.J. C 83, at 56–58. Prior to the enactment of the Treaty of Lisbon, similar provisions were contained in the EC Treaty. *See* EC Treaty, *supra* note 43, arts. 17–22, 2006 O.J. C 321 E, at 49–51. Citizenship of the Union was introduced by the Treaty of Maastricht. Treaty on European Union art. G(C), July 29, 1992, 1992 O.J. C 191/1, at 7; *see also* Consolidated Version of the Treaty Establishing the European Community arts. 8–8c, 1992 O.J. C 224/1, at 11.

46. Council Directive No. 2004/38 on the Rights of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, 2004 O.J. L 158/77, corrected version in 2004 O.J. L 229/35, corrected by 2005 O.J. L 197/34, corrected by 2007 O.J. L 204/28 [hereinafter Citizenship Directive] (subsequent citations will be to the full-text English version at 2004 O.J. L 229/35, unless otherwise noted).

47. *See, e.g.*, Bidar v. London Borough of Ealing, Case C-209/03, [2005] E.C.R. I-2119, ¶ 31; Zhu and Chen v. Sec'y of State for the Home Dept., Case C-200/02, [2004] E.C.R. I-9925, ¶ 47; Baumbast v. Sec'y of State for the Home Dep't, Case C-413/99, [2002] E.C.R. I-7091, ¶ 94; Martínez Sala v. Bayern, Case C-85/96, [1998] E.C.R. I-2691, ¶ 65.

48. *See* Martínez Sala v. Bayern, Case C-85/96, [1998] E.C.R. 2691, ¶ 63.

49. As yet, this is indeterminate and largely depends on the circumstances. *See generally* Robin C.A. White, *Citizenship of the Union, Governance, and Equality*, 29 FORDHAM INT'L L.J. 790 (2006); Robin C.A. White, *Conflicting Competences: Free Movement Rules and Immigration Laws*, 29 EUR. L. REV. 385 (2004).

50. *See* Catherine Barnard, *EU Citizenship and Principle of Solidarity*, *in* SOCIAL WELFARE AND EU LAW: ESSAYS IN EUROPEAN LAW 157 (Michael Dougan & Elanore Spaventa eds., 2005); Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 EUR. L. REV. 613 (2006); Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, 45 COMMON MKT. L. REV. 13 (2008); Alina Tryfonidou, *In Search of the Aim of the EC Free Movement Provisions: Has the Court of Justice Missed the Point?*, 46 COMMON MKT. L. REV. 1591 (2009).

51. *Cf.* Kay Hailbronner, *Union Citizenship and Access to Social Benefits*, 42 COMMON MKT. L. REV. 1245 (2005) (arguing that only after extensive negotiations were "non-economically active Union citizens" covered by article 12 EC (now article 18 TFEU)).

training regimes. Subsequent access to professions is considerably facilitated by use of the directives on mutual recognition of qualifications, recently revised and consolidated,[52] coupled with an extensive interpretation of their provisions and the underlying treaty provisions by the Court of Justice of the European Union.

The deregulatory effects of the Court's case law has not, in the main, been supplemented by "positive" harmonization in this field as each Member State jealously guards its sovereignty in the field of education[53] and the transmission of national values or ethos.[54] EU rules have not replaced or abandoned national laws that were seen as restrictive, even though they can only be replaced at the national level by rules that comply with EU law. Member States have placed some aspects of their educational policies into the sphere of the EU-wide Lisbon process,[55] and yet more is to be found within the wider Sorbonne-Bologna process.[56] However, Member States permit very little to be dealt with by the traditional Union method of decision-making, the main exceptions being the adoption of educational funding programs[57] and the mutual recognition of national professional

52. The latest comprehensive version is Parliament & Council Directive No. 2005/36 on the Recognition of Professional Qualifications, 2005 O.J. L 255/22 [hereinafter Professional Qualifications Recognition Directive].

53. Article 166(4) TFEU (formerly article 49(4) EC) specifically forbids harmonization of education laws across Member States while permitting incentive measures. TFEU, *supra* note 43, arts. 166(4), 2010 O.J. C 83, at 121.

54. *See* Groener v. Minister for Education, Case C-379/87, [1989] E.C.R. I-3967, ¶¶ 21, 24 (recognizing that Ireland can require vocational school teachers to be capable of speaking the national language).

55. *See* Julian Lonbay, *Reflections on Education and Culture in EC Law*, *in* CULTURE AND EUROPEAN UNION LAW (Rachel Craufurd Smith ed., 2004).

56. *See* Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More Than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107 (2008). The Sorbonne-Bologna Process, named after the two prominent European universities that launched the idea, is an initiative to achieve common educational policies across universities in different states with the goal of facilitating common approaches to access to higher education. *See* Joint Declaration of the European Ministers of Education ("Bologna Declaration"), June 19, 1999, *reprinted in* THE HERITAGE OF EUROPEAN UNIVERSITIES 189 (Nuria Sanz & Sjur Bergan eds., 2d ed. 2006); Joint Declaration on Harminisation of the Architecture of the European Higher Education System ("Sorbonne Declaration"), May 25, 1998, *reprinted in* THE HERITAGE OF EUROPEAN UNIVERSITIES, *supra*, at 185. Copies of the Bologna Declaration and the Sorbonne Declaration are electronically available at http://www.bologna-berlin2003.de/en/main_documents/index.htm.

57. *See, e.g.*, Parliament & Council Decision No. 1720/2006/EC on Establishing an Action Programme in the Field of Lifelong Learning, 2006 O.J. L 327/45.

qualifications, as mandated by single market concerns. The result is a patchwork of incoherent rules and principles that has forced non-state actors, partially within the Sorbonne-Bologna process and partially outside it but within the sphere of the internal market regime, to try and cope with the resulting deregulatory pressure. This Article will focus on the internal market aspects.

The multitude of legal professions across the European Union has varying structures,[58] customs, cultures, and legal traditions.[59] The variation among entry requirements reflects this colorful diversity.[60] Yet, despite these relatively deep differences in entry requirements, the EU has created some of the "particularly remarkable"[61] and most dramatic rules for allowing free movement of lawyers and cross-jurisdictional practice rights in the world.[62] These generous rules reflect the, perhaps surprising amount of mutual trust that bars and law societies in the EU and EEA must have in each other.[63] While education and the regulation of legal professions in each Member State are classically considered as matters falling within the exclusive

58. *See* Shigeru Kobori, *Discussion Paper Presented by the Japan Federation of Bar Associations*, 18 DICK. J. INT'L L. 109, 122 (1999) (discussing ownership structures).

59. *See generally* FREE MOVEMENT OF LAWYERS (Hamish Adamson ed., 2d ed. 1998); LAW WITHOUT FRONTIERS, *supra* note 3; LAWYERS IN SOCIETY (Richard L. Abel & Philip S. C. Lewis eds., 1988); LONBAY, *supra* note 41.

60. *See* Julian Lonbay, *Differences in the Legal Education in the Member States of the European Community*, *in* THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION 75–94 (Bruno de Witte & Caroline Forder eds., 1992). *See generally* TOWARDS A EUROPEAN IUS COMMUNE IN LEGAL EDUCATION AND RESEARCH (Michael Faure et al. eds., 2001).

61. Wayne J. Carroll, *Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications*, 22 PENN ST. INT'L L. REV. 563, 598 (2004); *see also* Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT'L L.J. 1239 (1998).

62. *See* Roger J. Goebel, *Professional Qualification and Educational Requirements for Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989); Lonbay, *supra* note 3*; see also* IBA, *supra* note 20, recommendation 3 (proposing a set of relatively cautious and timid recommendations allowing for temporary cross-border practice).

63. Apparently this is not found in the state jurisdictions of the United States. *See* Donald H. Rivkin, *Translational Legal Practice*, 33 INT'L L. 825, 828–29 (1998); *cf.* Birbrower, Montalbano, Condon & Frank P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998) (ruling that New York lawyers breached the relevant California statute on the unlicensed practice of law). For further reading, see Ronald A. Brand, *Uni-State Lawyers and Multinational Practice*, 14 VAND. J. TRANSNAT'L L. 1135, 1139 (2001), and Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States*, 34 INT'L LAW. 307, 308 (2000).

jurisdiction of that Member State,[64] the EU's internal market rules are having a major impact in this most national of spheres. These rules are briefly sketched out below.[65]

There are three key European legislative provisions. The first relevant Directive is the Lawyers' Services Directive 77/249/EC.[66] This Directive allows lawyers to carry out cross-border legal services and lists the types of lawyers to which it is applicable.[67] However, the list is rather limited and does not include all of the types of lawyers or legal service providers that in fact exist. Nonetheless, the Directive does authorize temporary multi-jurisdictional practice for these listed types of lawyers.[68]

The second legislative instrument, Directive 98/5 ("Establishment Directive"), allows for the establishment of European Union nationals who are members of an EU legal profession in another Member State.[69] There are two modes of establishment for lawyers under this Directive. One is establishment as a home state lawyer.[70] For example, a French *avocat* can relocate to England while retaining his or her status as an *avocat* and, as such, he or she can practice French law, English law, and European law without limit. It is important to recognize that, pursuant to the directive, a migrant lawyer can simply

64. *See* Mauri v. Ministero della Giustizia, Case C-250/03, [2005] E.C.R. I-1267, ¶¶ 41–45; Council of Europe, *Recommendation to Member States on the Freedom of Exercise of the Profession of Lawyers*, 727th meeting of Ministers' Deputies, Doc. No. R(2000)21 (Oct. 25, 2000); Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990,, *Basic Principles on the Role of Lawyers*, ¶¶ 9–11, U.N. Doc. A/Conf. 144/28/Rev. 1 (1990).

65. *See generally* FREE MOVEMENT OF LAWYERS, *supra* note 59; SERGE-PIERRE LAGUETTE, LAWYERS IN THE EUROPEAN COMMUNITY (1987); LONBAY, *supra* note 41; CCBE CROSS-BORDER PRACTICE COMPENDIUM (Donald Little ed., 1991); THE LEGAL PROFESSIONS IN THE NEW EUROPE: A Handbook for Practioners (Alan Tyrrell & Zahd Yaqub eds., 2d ed. 1996); Roger J. Goebel, *Lawyers in the European Community's Progress Towards Community Rights of Practice*, 15 FORDHAM INT'L L.J. 556 (1991).

66. Lawyers' Services Directive, *supra* note 15, 1977 O.J. L 78/17.

67. *Id.* art. 2, at 17.

68. The directive lists a few derogations from otherwise free practice rights. *See* SJOERD CLAESSENS, FREE MOVEMENT OF LAWYERS IN THE EUROPEAN UNION 77–280 (Wolf Legal Publishers, 2008); Julian Lonbay, *The Regulation of Legal Practice in the United Kingdom and Beyond*, *in* UK LAW FOR THE MILLENNIUM 594, 594–633 (2d ed. 2000).

69. Establishment Directive, *supra* note 16, 1998 O.J. L 77; *see also* CLAESSENS, *supra* note 68, at 140–48; Julian Lonbay, *Lawyers Bounding Over the Borders: The Draft Directive on Lawyers' Establishment* (1996) 21 EUR. L. REV. 50–58; House of Lords Session 1994-1995 14th Report of the Select Committee on the European Communities *The Right of Establishment for Lawyers* (July 11, 1995) (House of Lords Paper 82).

70. Establishment Directive, *supra* note 16, art. 2, 1998 O.J. L 77, at 38.

establish under his or her home state title, and practice host state law without joining the host state legal profession. Currently, there are over 250 Registered European Lawyers with the Law Society of England and Wales. Overall, it is estimated that just under 4,000 EEA lawyers are registered outside their own jurisdiction.[71]

The other mode opened by Directive 98/5 is to transform oneself into a host state lawyer,[72] a new entry route to membership of bars and law societies. Fully qualified lawyers from other EEA Member States can practice and join a host state bar or law society with no prior examination of their competence.[73] They can become local lawyers after three years of relevant legal practice in the host state, with no formal examination to complete.[74] Bars and law societies rely on the integrity of their members as lawyers to limit their practice to areas in which they are competent, as mandated by the duty set out in article 3.1.3 of the Council of Bars and Law Societies of Europe ("CCBE") Code of Conduct, which states:

> A lawyer shall not handle a matter which he knows or ought to know he is not competent to handle, without co-operating with a lawyer who is competent to handle it. A lawyer shall not accept instructions unless he can discharge those instructions promptly having regard to the pressure of other work.[75]

The new stream of host-state lawyers[76] do not normally have the broad range of knowledge of host-state law that the national regime typically requires of those who enter through their normal admission processes.

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71. CCBE, TABLE OF LAWYERS (2008), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Table_of_Lawyers_in_1_1264506152.pdf.

72. Establishment Directive, *supra* note 16, art. 10, 1998 O.J. L 77, at 40–41. This is most easily done through use of article 10 of Directive 98/5, but can also be achieved through the mutual recognition route described above. *See supra* note 52 and accompanying text.

73. Establishment Directive, *supra* note 16, art. 10, 1998 O.J. L 77, at 40–41.

74. Advocate General Colomber, in a "brilliant piece of legal analysis" considered that the right to establish could be based on article 43 EC alone. Pedro Cabral, Comment, 39 COMMON MKT L. REV. 129, 136 (2002).

75. CCBE CODE OF CONDUCT, *supra* note 18, § 3.1.3.

76. In England and Wales, over 160 former Registered European Lawyers are now English and Welsh solicitors.

Luxembourg challenged the legality of Directive 98/5 after it was adopted, claiming that it was discriminatory in that migrant lawyers under the Directive have an easier entry route than nationals.[77] Luxembourg argued that article 43 EC (now article 49 TFEU) requires equal treatment[78] and not an easier route into the profession of *avocat*.[79]

The European Court of Justice acknowledged that the migrant lawyer could have relatively little knowledge of local law but stressed that, as lawyers, they would know that they may not undertake legal work in which they were not competent.[80] In effect, relevant knowledge is acknowledged to be essential, but the migrant lawyer will have to exercise self-restraint and not practice in areas where he or she is not competent. The Court indicated that this professional knowledge simply did not need to be proved in advance.[81] Thus, there exists a new route to join the legal profession of another Member State. The principle of equal treatment is not breached because the migrant lawyer is not in a similar situation to a host state trainee, subject to the national route. As Directive 98/5 did not alter the routes of national educational and training, there was no need to fall back on article 47(2) EC[82] as a legal basis. As the Court of Justice indicated:

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77. Luxembourg v. European Parliament, Case C-168/98, [2000] E.C.R. I-9131.

78. EC Treaty, *supra* note 43, art. 43, 2006 O.J. C 321E, at 59. Article 43 (now article 49 TFEU) reads in full:

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons* and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, *under the conditions laid down for its own nationals by the law of the country where such establishment is effected*, subject to the provisions of the chapter relating to capital.

Id. (emphasis added).

79. Opinion of Advocate General Colomer, *Luxembourg*, [2000] E.C.R. I-9131, ¶¶ 16–18 (summarizing the equal treatment argument of the government of Luxembourg).

80. *Luxembourg*, [2000] E.C.R. I-9131, ¶ 31. For comparison, see the standards of competence promulgated by other bar associations *supra* note 18.

81. *See Luxembourg*, [2000] E.C.R. I-9131, ¶¶ 42–43; *see also* Opinion of Advocate General Colomer, *Luxembourg*, [2000] E.C.R. I-9131, ¶¶ 66–72.

82. EC Treaty, *supra* note 43, art. 47(2), 2006 O.J. C 321 E, at 61.

> It would therefore seem that the Community legislature, with a view to making it easier for a particular class of migrant lawyers to exercise the fundamental freedom of establishment, has chosen, in preference to a system of a priori testing of qualification in the national law of the host Member State, a plan of action combining consumer information, restrictions on the extent to which or the detailed rules under which certain activities of the profession may be practised, a number of applicable rules of professional conduct, compulsory insurance, as well as a system of discipline involving both the competent authorities of the home Member State and the host State. The legislature has not abolished the requirement that the lawyer concerned should know the national law applicable in the cases he handles, but has simply released him from the obligation to prove that knowledge in advance. It has thus allowed, in some circumstances, gradual assimilation of knowledge through practice, that assimilation being made easier by experience of other laws gained in the home Member State. It was also able to take account of the dissuasive effect of the system of discipline and the rules of professional liability.[83]

Thus, article 10 of the Establishment Directive creates a special mode of establishment that gives EEA lawyers access to the host state legal profession.[84] In short, they can convert and become local lawyers after three years of relevant legal practice in the host State, without a formal examination.[85] Article 10 of the Establishment Directive allows lawyers to cross-qualify very easily. This may seem odd, because what an English solicitor does in initial training is completely different in many respects from what a German *Rechtsanwalt* must do. Yet, after three years of practice in another EU or EEA Member State, the migrant lawyer can join the bar or law society of the host state.[86]

The third legislative measure is Directive 89/48 ("Diploma Directive"),[87] which preceded the Establishment Directive, but is

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83. *Luxembourg*, [2000] E.C.R. I-9131, ¶ 43.

84. Establishment Directive, *supra* note 16, art. 10, 1998 O.J. L 77, at 40–41.

85. *See supra* note 74 and accompanying text.

86. *Id.*

87. Council Directive No. 89/48 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years Duration, 1989 O.J. L 19/16, amended by Directive 2001/19, 2001 O.J. L 206/1 [hereinafter Diploma Directive].

considered to be less important for lawyers now because of the ease of quasi-automatic recognition under the Establishment Directive. Directive 89/48, now replaced by a more comprehensive Directive 2005/36 ("Professional Qualifications"),[88] allowed members of regulated professions, including lawyers, to have their qualifications recognized in another Member State in order to enable cross-border practice.[89] Recognition is not automatic, however, and competence may be tested or entry subjected to an "adaptation period," in certain circumstances. Under this Directive, the "competent authority" of the host state has a duty to assess migrants and note what specific elements of qualification are missing.[90] If some element is missing, the professional concerned must pass an "aptitude test" or undergo a period of "adaptation," collectively referred to in the relevant legislation as a "compensation mechanism," in order to join the host state's equivalent profession.[91] In the case of lawyers, there is an exception that allows the host state to insist on an aptitude test.[92] As a result, all European bars, except Denmark's *Advokatsamfundet*, employ an aptitude test to allow transmigration of colleagues from other EU and EEA countries. The Directive supports the growth of mutual confidence between the competent authorities of Member States, and the diplomas are recognized as they "give the right to take up a regulated profession" in the host state.[93] The mutual recognition of qualifications regimes,[94] with the exception of medically-related

88. Professional Qualifications Recognition Directive, *supra* note 52, 2005 O.J. L 255.

89. Diploma Directive, *supra* note 87, art. 3, 1989 O.J. L 19, at 19.

90. *Id.* art. 8(2), at 20.

91. *Id.* art. 4(1)(b), at 19. This so-called "compensation mechanism" is also found in article 14 of the Professional Qualifications Directive, *supra* note 52, 2005 O.J. L 255, at 13.

92. Diploma Directive, *supra* note 87, art. 4(1)(b), 1989 O.J. L 19, at 19 (carving out this exception for "professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity"). This same principle is also found in article 14(3) of the Professional Qualifications Recognition Directive, *supra* note 52, 2005 O.J. L 255, at 33.

93. Beuttenmüller v. Land Baden-Württemberg, Case C-102/02, [2004] E.C.R. I-5405, ¶ 52.

94. *See generally* HILDEGARD SCHNEIDER, DIE ANERKENNUNG VON DIPLOMEN IN DER EUROPÄISCHEN GEMEINSCHAFT [THE RECOGNITION OF DIPLOMAS IN THE EUROPEAN COMMUNITY] (1995); J. Pertek, *Free Movement of Professionals and Recognition of Higher-Education Diplomas*, 12 Y.B. EUR. L. 293 (1992); Hildegard Schneider, *The Free Movement*

professions where common minimum levels of training were specifically established,[95] deliberately left the issue of competence and regulation of qualification regimes within the national orbit.[96] National jurisdiction exercised in this field still has to respect the principles of EU law,[97] and the Court fairly early on required procedural safeguards for EU citizens utilizing these new rights.[98] This access route remains important.[99] Whether the Diploma Directive or Professional Qualifications Recognition Directive can act as a shortcut to enable nationals to avoid lengthy or difficult national training requirements is being tested again in the *Koller* case.[100] While Directive 98/5 applies only to certain named and narrowly specified legal professions, the Professional Qualifications Recognition Directive allows for

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of Lawyers in Europe and Its Consequences for the Legal Profession and the Legal Education in the Member States, *in* TOWARDS A EUROPEAN IUS COMMUNE IN LEGAL EDUCATION AND RESEARCH, *supra* note 60, at 15.

95. *See* Julian Lonbay, *The Free Movement of Health Care Professionals in the European Community*, *in* PHARMACEUTICAL MEDICINE, BIOTECHNOLOGY AND EUROPEAN LAW 45 (Richard Goldberg & Julian Lonbay eds., 2001).

96. The second paragraph of article 49 TFEU (formerly article 43 EC) on the right of establishment gives access to self-employment:

> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

TFEU, *supra* note 43, art. 49, 2010 O.J. C 83, at 67.

97. *See* Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, [1995] E.C.R. I-4165.

98. *See* Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football v. Heylens, Case 222/86, [1987] E.C.R. 4097.

99. *See* Ebert v. Budapesti Ügyvédi Kamara, Case C-359/09 (pending case).

100. Koller v. Rechtsanwaltsprufungskomimission beim Oberlanders- gericht Graz, Case C-118/09 (pending case); *see also* Consiglio Nazionale degli Ingegneri v. Ministero della Giustizia, Case C-311/06 [2009] E.C.R. I-415 (ruling that the host Member State competent authority can seek to maintain nationally set professional competence standards). In *Koller*, Robert Koller, the holder of a law degree from the University of Vienna (*Magister der Rechtswissenschaften*), went to Spain, where, after passing several additional law courses at the University of Madrid, his Viennese degree was homologated as equivalent to the Spanish law degree (*Licenciado en Derecho*) thus enabling him to register in Madrid as a Spanish lawyer. He then returned to Austria and requested access to the profession of lawyer (*Rechtsanwalt*) relying upon the provisions of the Austrian implementation of Directive 89/48. He sought an exemption from the required aptitude test on the basis of his Austrian law degree thus potentially evading the Austrian five year practice requirement. His request was refused and the matter is currently up for decision before the Court, following the preliminary ruling procedure. *Koller*, Case C-118-09 (pending case).

transmutation from professions not listed in Directive 98/5 or from professional activities not regulated in the home state.[101]

These, then, are the legislative routes that the EU has opened up to allow for cross-qualification and cross-border practice of law. Europe has a regime that allows lawyers to follow their clients to different states and advise them there. Once qualified, lawyers can more or less freely practice in any EU or EEA state; in the name of the creation of a single market the EU mandates that businesses should be able to find a suitable mix of legal services. However, the EU influence has now spread beyond this realm to national rules that regulate pre-qualification education and training.

The Professional Qualifications Recognition Directive 2005/36 must also be interpreted in accordance with the Court's judgment in *Vlassopoulou*.[102] The judgment effectively mandates that the entry doors must be open to EU and EEA legal professionals, because the competent authority of the host state must assess migrant lawyers to examine the extent of any missing attribute in their lawyering or other necessary professional skills and knowledge and permit the applicant migrant to make up the deficiency.[103] By the very terms of the only exception carved out in the Recognition Directive (as well as its Diploma Directive precursor), the host state can insist on an aptitude test for "professions whose practice requires precise knowledge of national law and in respect of which the provision of advice or assistance concerning national law is an essential and constant aspect of the professional activity."[104] The Professional Qualifications Recognition Directive provides that professional rules of conduct, or codes of deontology, can be tested as part of the aptitude test.[105] The EU thus explicitly recognizes the importance of ethical codes in the definition of an aptitude test.

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101. Establishment Directive, *supra* note 16, 1998 O.J. L 77; *cf.* Professional Qualifications Recognition Directive, *supra* note 52, 2005 O.J. L 255.

102. Vlassopoulou v. Ministerium für Justiz, Case 340/89, [1991] E.C.R. I-2357.

103. *Id.* ¶¶ 19–22.

104. *See* discussion *supra* note 92. The new consolidated Directive was initially going to be rather radical. The option to insist on an aptitude test was slated to disappear in an earlier draft. *See* Proposed Parliament and Council Directive on the Recognition of Professional Qualifications, COM(2003) 119.

105. Professional Qualifications Recognition Directive, *supra* note 52, art. 3(1)(h), 2005 O.J. L 255, at 28 (defining the content of "aptitude test").

It is clear from *Hocsman*[106] that article 49 TFEU (previously article 43 EC) can still apply even though there are applicable Directives[107] in the field.[108] This article requires that migrants be treated equally when subjected to any relevant national laws.[109] As the Court held in *Gebhard*: "the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability."[110]

So, even though professional activities undertaken in the Member States can be regulated,

> national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[111]

While requiring a "national" law degree, the Court held in *Gebhard*:

> [I]n applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State. Consequently, they must take account of the equivalence of diplomas and if necessary proceed to a comparison of

106. Hocsman v. Ministre de l'Emploi et de la Solidarité, Case C-238/98, [2000] E.C.R. I-6623. The Court made it clear in this case that the principle of assessment of migrants was "inherent in the fundamental freedoms" protected by the EC Treaty. *Id.* ¶ 24.

107. *See* discussion *supra* notes 69–101.

108. *Hocsman*, [2000] E.C.R. I-6623, ¶¶ 31–34; *see* Morgenbesser v. Consiglio dell'Ordine degli Avvocati di Genova, Case C-313/01, [2003] E.C.R. I-13,467, ¶ 58 (confirming the holding in *Hocsman*, [2000] E.C.R. I-6623); Sam McCauley Chemists (Blackpool) Ltd. v. Pharm. Soc'y of Ir., Case C-221/05 [2006] E.C.R. I-6869, ¶ 24.

109. *See supra* note 78 and accompanying text.

110. Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, [1995] E.C.R. I-4165, ¶ 35 (citing Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris, Case C-71/76, [1977] E.C.R. 765, ¶ 12).

111. *Id.* ¶ 37 (citing Kraus v. Land Baden-Württemberg, Case C-19/92, [1993] E.C.R. I-1663, ¶ 32).

> knowledge and qualifications required by their national rules and those of the person concerned.[112]

In *Vlassopoulou*, it had already been made clear that the indistinctly applicable requirement of a national qualification would hinder the exercise of the right of establishment.[113]

III. *RECENT DEVELOPMENTS*

A. *Partial Practice Rights*

Two recent developments take the trend of recognition of non-national training and practice one step further. One of the most radical proposals, the partial practice provision, was rejected during the negotiation of the new Recognition Directive 2005/36.[114] The Commission's initial draft of this directive would have provided that an incoming migrant who is not sufficiently qualified to go through with an adaptation period or aptitude test would nevertheless be allowed to practice that element of a profession at which he or she is skilled.[115] For instance, a lawyer from an EU or EEA Member State who specializes in competition law could, on the basis of this provision, gain admission to practice only competition law in the host state.[116] Such "lawyers" would not be members of the host state legal profession after "admission" to the legal market, but they would have a license to practice competition law there.

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112. *Id.* ¶ 38 (citing Vlassopoulou v. Ministerium für Justiz, Case 340/89, [1991] E.C.R. I-2357, ¶¶ 15–16; Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris, Case C-71/76, [1977] E.C.R. 765, ¶¶ 19, 27).

113. *Vlassopoulou*, [1991] E.C.R. I-2357, ¶ 15.

114. *See* Council of the European Union, Common Position Adopted by the Council on 21 December 2004 with a View to the Adoption of a Directive of the European Parliament and of the Council on the Recognition of Professional Qualifications, Doc. 13781/2/04/Rev.2/Add.1, at 5, ¶ 15 (Dec. 2004) (expressing the Council's decision to delete the draft provision concerning partial access to the host State's profession). The bars successfully joined forces with other professional organizations to persuade the government to delete this particular provision.

115. *See* Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the Recognition of Professional Qualifications, COM (2002) 199 Final, art. 4(3), at 16 (Mar. 2002), *reprinted in* 2002 O.J. C 181 E/183.

116. *See, e.g.*, Rivkin, *supra* note 63, at 826 (proposing that a host country test only "subject matter reasonably related to the applicants' intended fields of practice in the host country").

The increasing specialization of the legal professions, particularly in the very large commercial law firms of England,[117] is becoming seen as a fragmentation of the profession that calls into question the ability of the profession to be regulated by a single ethical code.[118] This trend emphasizes the potential difficulties of professional deregulation on a grand scale, which we might be witnessing within the EU and EEA.

Although this "partial practice" provision was dropped from the final text of the Professional Qualifications Recognition Directive, the issue reemerged in the *Colegio de Ingenieros* case.[119] The question at stake was whether there should be a "restricted recognition" of a migrant's qualifications under the Diploma Directive 89/48, or, alternatively, under article 39 EC (now article 45 TFEU) or article 43 EC (now article 49 TFEU).[120] In that case, a hydraulic engineer from Italy was missing several core elements of the relevant qualifications for the Spanish engineering profession.[121] This case had the potential to have very significant results for lawyers, raising the specter of specialized practice certificates or licenses, which, as noted above, encourages the fragmentation of professions. In the Opinion of the Advocate General, a limited practice right could be granted if the migrant consents, thus avoiding the necessity for further aptitude tests or adaptation periods by the migrant.[122]

The Court decided that partial recognition of qualifications is not precluded by the Diploma Directive and, even more, might be required by article 39 EC (now article 45 TFEU) and article 43 EC (now article 49 TFEU) in some circumstances.[123] The Court indicated that a refusal to allow partial recognition, in appropriate cases, could be considered a hindrance to free movement of persons and therefore contravene article 39 EC

117. *See* Andrew M. Francis, *Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism*, 12 INT'L J. LEGAL PROF. 173, 177 (2005) (indicating that the smallest of the top twenty law firms in England has over 1,000 fee-earners).

118. *Id.* at 185–89 (arguing that the professional associations are no longer in a position to regulate the profession with the growth of large law firms).

119. Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado, Case C-330/03, [2006] E.C.R. I-801.

120. *Id.* ¶ 15.

121. *Id.* ¶¶ 10–12.

122. Opinion of Advocate General Léger, *Colegio de Ingenieros*, [2006] E.C.R. I-801, ¶ 44.

123. *Colegio de Ingenieros*, [2006] E.C.R. I-801, ¶¶ 26, 39.

(now article 45 TFEU) and article 43 EC (now article 49 TFEU).[124] Such a hindrance might be justified under the rationale of *Gebhard*.[125] The Court noted, however, that the risk of misleading recipients or consumers of services could be overcome by appropriate use of titles and languages.[126]

If the migrant's profession is broadly the same as the host state profession under the Professional Qualifications Recognition Directive, and the differences in competences can be resolved by use of the compensation measures found in article 14, which allows full access to the host state profession, then this route must be used;[127] the migrant cannot evade the compensation measures. However, if the professions, or the training and education for the professions, do not sufficiently overlap, then the Directive would not apply, and the competent authority of the host state must assess whether the professional activity of the migrant can be objectively separated out from the other tasks that the profession in question typically undertakes in the host state.[128] In this respect, the host state authority can look to the practice in the home state for partial guidance. If the activity can be objectively separated out, and if there are substantial differences that would effectively mean a complete retraining in order to join the host state profession and the migrant requests partial recognition, then the host state cannot prohibit partial practice. However, the host state authority can establish some justified safeguards if it can prove that there is an overriding reason in the general interest which demands the safeguards, and that they are suitable for securing this objective, and that the safeguards are absolutely necessary.

It seems that although the legal professions contained in the list from the Lawyers' Services Directive[129] would undoubtedly be members of the "profession in question," the substantial differences in knowledge from one state to another would nevertheless often require as much retraining as for the

124. *Id.* ¶ 31.

125. Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, [1995] E.C.R. I-4165, ¶ 32.

126. *Colegio de Ingenieros*, [2006] E.C.R. I-801, ¶ 38.

127. *See* Professional Qualifications Recognition Directive, *supra* note 52, art. 14, 2005 O.J. L 255, at 33.

128. *Colegio de Ingenieros*, [2006] E.C.R. I-801, ¶ 38.

129. *See* Lawyers' Services Directive, *supra* note 15 1977 O.J. L 78.

engineers in *Colegio de Ingenieros*, which means that an applicant to a national bar might be tempted to request partial practice rights pursuant to that judgment. It would, of course, be open to them to rely directly upon the Establishment Directive (if they were members of one of the legal professions listed therein), which would allow them all the rights they need in order to practice under home or eventually host state professional title, thus specializing as they please. In this way, the Establishment Directive might be used as a relief valve for members of the legal professions recognized within this instrument.

An interesting question arises, however, when one considers how the rule would be applied to those already practicing in a specialized area of law, but outside of the legal professions mentioned in Directive 98/5. For example, a Finnish jurist experienced in mergers and acquisitions work or, perhaps more likely, a *belastingadviseur* or *fiscalisten*[130] from the Netherlands experienced in tax law, might seek to practice that specialty in a host state that maintained rules prohibiting unlicensed legal practice, such as Greece or Germany.[131] It appears from *Colegio de Ingenieros* that such a practitioner may be entitled to partial practice rights in the host state if this professional activity could be objectively separated out from the other activities pursued by German *Rechtsanwaelte*. One criterion for determining whether the activity in question can be "objectively separated" is whether it can be pursued autonomously or independently in the home state.[132] If the activity can be practiced autonomously in the home state, then the migrant should be allowed partial practice rights. Clearly, in the states with a relatively deregulated provision of legal services and those with a high level of specialization, where lawyers de facto specialize and in some cases have a recognized regime of specialization qualifications, the logic should be that the migrant specialist should be permitted to practice, though precluded from joining the profession in question.

A difficult issue arising from the effects of such regulatory fragmentation is the threat to the "unity" of the legal professions.

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130. *See* Lonbay, *supra* note 41, at 89.

131. *See* Rechtsberatungsgesetz [RberG] [Legal Counseling Act], Dec. 13, 1935 RGBl. I at 1478, § 1 (F.R.G.); Bundesrechtsanwaltsordnung [BRAO] [Federal Lawyers Code], Aug. 1, 1959 BGBl. I at 565, § 3.

132. *See Colegio de Ingenieros*, [2006] E.C.R. I-801, ¶ 37.

If migrants can pick off elements of professional activity under the emerging EU citizenship rights, why should the host state nationals not also benefit? Individuals wishing to practice in a particular narrow area of law might wish, for example, to avoid learning about criminal law, family law, or other areas of law altogether and may not wish to join the profession, but instead prefer to practice in their chosen area of specialization.[133] To some extent, one can distinguish the two situations. The specialist migrant may have been subject to home state rules and regulations. In some cases, however, there may have been no such rules in place. EU law certainly did not intend to provide a carte blanche for migrants to evade host state regulations.[134]

Although national admission rules have been challenged by the new EU admission routes, the EU cannot simply demolish Member State entry regimes for professionals. Member States can preclude partial practice if the migrant's shortcomings can effectively be made up through the use of the compensation mechanisms of article 14 of the Professional Qualifications Recognition Directive.[135] Because Directive 89/48 was in use for about fifteen years until being recently replaced and members of the legal professions mentioned in Directives 77/249 and 98/5 have since used its provisions, one could argue initially that the compensatory burden is not apparently too great. It could, also be argued, however, that there would have been a much larger migration of lawyers in the absence of the relatively heavy burden imposed on migrants, at least in movement between national jurisdictions, which have the greatest differences in entry requirements. An aptitude test could certainly be used to deter potential migrants.[136] The host state can justify the refusal of

133. Some professions, such as nursing, allow specialization without prior generalization. *See* EUROPEAN COMMISSION, INTERNAL MARKET DIRECTORATE GENERAL, STUDY OF SPECIALIST NURSES IN EUROPE 9 (2000), *available at* http://ec.europa.eu/internal_market/qualifications/nurses/nurses-study-2000_en.htm.

134. *See* Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 LEGAL ISSUES OF ECON. INTEGRATION 43 (2008).

135. *See* Professional Qualifications Recognition Directive, *supra* note 52, art. 14 2005 O.J. L 255, at 33.

136. *See* Opinion of Advocate General Léger, Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado, [2006] E.C.R. I-801, ¶¶ 76–77 (indicating that the adaptation period and aptitude test found in article 4 of the Diploma Directive (now article 14 of the Professional Qualifications Recognition Directive) could "seriously discourage" or "strongly dissuade" a potential migrant).

partial practice rights on the basis of "overriding reasons based on the general interest" that are proportional.[137] The question has yet to be definitively resolved, but it should be noted here that some EU jurisdictions currently require a relatively low level of local legal knowledge. This is notably the case in Cyprus and Luxembourg, where the bars, in the absence of local universities with law faculties, have traditionally accepted overseas legal education and training with some additional training in the local law.[138]

B. *The Partially-Trained Lawyer*

In 2003, another significant development was presented by the *Morgenbesser* case, causing even bigger ripples.[139] In *Morgenbesser*, a law student obtained a law degree in France, then went to Italy and requested access to the professional practice regime for *avvocati* (Italian lawyers).[140] The Italian bar decided that the law student either needed an Italian law degree or should get an Italian university to recognize her French law degree as equivalent to an Italian *laurea in giurisprudenza* (law degree) before entering the Italian legal training regime.[141] Various questions were referred to the Court, which came out with several key rulings. First, the bar itself must decide on whether an applicant satisfies the necessary qualifications; it cannot rely on or require a university or a Ministry of Education or anybody else to check academic equivalence.[142] This ruling seems to override its earlier ruling in *Thieffry* where the Paris bar had to accept the University of Paris's acceptance of a Belgian law degree for admission to the French bar's legal training CAPA

137. *See supra* note 111.

138. *See infra* notes 163–164 and accompanying text.

139. *See generally* Morgenbesser v. Consiglio dell'Ordine degli Avvocati di Genova, Case C-313/01, [2003] E.C.R. I-13,467; *see also* CCBE, CHRONOLOGY (I), ANALYSIS (II) AND GUIDANCE (III) TO BARS AND LAW SOCIETIES REGARDING CASE C-313/01 CHRISTINE MORGENBESSER V CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI GENOVA 5TH CHAMBER (2003) [hereinafter Morgenbesser Report] *available at* http://www.ccbe.org/fileadmin/user_upload/NTCdocument/morgenbesser_guidanc1_1183976940.pdf.

140. *See* Morgenbesser Report, *supra* note 139, at 2.

141. *Id.*

142. Assessment of academic equivalence was in any case illegitimate in this context. *Id.* at 4.

admission examination.[143] The Paris bar could not justify such a refusal by proving a "general good."[144]

Second, the Court extended the case law to allow partially trained potential lawyers to travel and have access to legal training in a host state.[145] This has a highly deregulatory effect on accredited access routes to the professions because a migrant can come in with a foreign diploma, which is not recognized in the host state, and insist on being assessed for the purpose of joining a professional training regime. The host state's competent authority must assess the applicant's qualifications.[146] It cannot say to that person, "Go and get an English law degree; go and do the English legal practice course; go and pass all the usual exams and then come back." The host state competent authority must assess an applicant's credentials and determine what they lack.[147] If there is nothing missing, it must let them onto the practice course or training regime. If elements are still missing, then it is up to the person seeking entry to fill in the remaining gaps.

Until the *Peśla* case, it was uncertain whether a host state could require assessment of such an applicant by requiring the applicant to sit for an examination.[148] It was clear that a competent authority could make this an option for the migrant, but it was not at all clear that the state could oblige the migrant do it. After *Peśla*, it seems that after an initial assessment the host Member State competent authority can thereafter, by examination, assess whether gaps identified in the initial assessment have been closed.[149] Such an exam system must be

143. Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris, Case C-71/76, [1977] E.C.R. 765.

144. *Id.* ¶ 12 (ruling that freedom of establishment, reconciled with the application of national professional rules, is "justified by the general good").

145. *See* Morgenbesser Report, *supra* note 139, at 4.

146. *See id.* at 5.

147. *See id.* (discussing the duties of the competent authority); *see also* Julian Lonbay, *Legal Ethics and Professional Responsibility in a Global Context*, 4 WASH. U. GLOB. STUD. L. REV. 609, 615 (2005).

148. Peśla v. Justizministerium Mecklenburg-Vorpommern, Case C-345/08, (ECJ Dec. 10, 2009) (not yet reported).

149. Mr. Peśla had mixed German-Polish law degrees awarded by the Universities of Poznán and Frankfurt-an der-Oder. The Ministry of Justice of the Land of Mecklenburg-Vorpommern considered that his resulting knowledge of German law was not equivalent to that of those who had passed the German First State exam. *Id.* ¶ 12.

flexible so as to avoid re-examination of topics that the applicant may have already covered in sufficient depth.[150]

This new Court ruling places a major assessment burden on the host state's bar, law society, or other relevant competent authority. In Italy, for example, the regional bars are not accustomed to assessing foreign law degrees. In Germany and other Member States where the state or the courts actually admit applicants to the Bar, there are real problems in determining who should make these assessments and upon whom the burden should fall.[151] This is a new and highly deregulated route to joining a legal profession, and the likely result could be an increase in the number of bar or law society "final" exams imposed on all entrants because examinations can be considered a neutral means of assessing a person's ability.

The *Morgenbesser* case[152] has thus broken the traditional mold even though, on its face, it appears to be simply an extension of the *Vlassopoulou* principle.[153] One reason it is unique is that the *Morgenbesser* applicants are not "finished products" in the traditional sense.[154] They are, by definition, still in the training process. The current EU Directive on the mutual recognition of professional qualifications is based on the notion of the recognition of the final product of education and training that gives professionals access to the relevant profession or

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150. *Id.* ¶¶ 59–60 (discussing the required nature and depth of the legal examinations).

151. Germany amended the *Deutsches Richtergesetz* with paragraph 112a following the Morgenbesser case. *See* Peśla, Case C-345/08, ¶ 10 (ECJ Dec. 10, 2009) (not yet reported).

152. Morgenbesser v. Consiglio dell'Ordine degli Avvocati di Genova, Case C-313/01, [2003] E.C.R. I-13,467, ¶ 72 (holding that Community law precludes a Member State from refusing to allow the holder of a legal diploma obtained in another Member State to seek admission to the bar solely because the refusing Member State does not recognize that legal diploma as an equivalent to one obtained within that Member State).

153. Vlassopoulou v. Ministerium für Justiz, Case C-340/89, [1991] E.C.R. I-2357 ¶ 19 (holding that a Member State must review qualifications of foreign-certified applicants to practice law when law diploma requirements of the two states correspond only partially).

154. *See Morgenbesser*, [2003] E.C.R. 13,467. The leading cases of the free movement of lawyers all deal with individuals who were already fully qualified lawyers. *See, e.g.*, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, [1995] E.C.R. I-4165 (German lawyer in Italy); *Vlassopoulou*, [1991] E.C.R. 2537 (Greek lawyer in Germany); Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris, Case C-71/76, [1977] E.C.R. 765 (Belgian lawyer in France).

trade.[155] In other words, it assumes that the migrant wishes to become a professional in, and of, the host state, thus causing no disruption to the host regime's regulation of those professions, other than by the addition of largely foreign-trained participants to the local market. However, *Morgenbesser* breaks with this regime by granting migrants, who have not completed their training, a right to be assessed by the competent authority to discover whether they can join the host state's training regime.[156] There are several further complications caused by this ruling.

The competent authority will vary according to the national or sub-national regimes that are applicable. In the United Kingdom, for example, the professional bodies (law societies and bars) initially grant access to the professions,[157] then, in the post-academic stage of training, the professional schools regulate their own intake. In England and Wales, an applicant to the professional schools must first be registered with the Law Society as a student member and get confirmation that the academic stage has been completed.[158] Thus, in England and Wales, the Law Society will receive solicitors' Morgenbesser applications. Though applicants to the Legal Practice Course ("LPC") or Bar Vocational Course ("BVC") may not have the status of self-employed persons or workers, but rather will be considered as students, their rights of access to cross border training are now also fully recognized in EU law.[159]

In Germany, after the first state examination (given to students who have first completed university studies) candidates seek to fulfill the *Referendarzeit* (traineeship stage) and must apply to the *Lander* judicial administration for placements.[160] The trainees at this stage

155. Professional Qualifications Recognition Directive, *supra* note 52, 2005 O.J. L 255.

156. *See Morgenbesser*, [2003] E.C.R. 13,467.

157. Solicitors Regulation Authority, Information for Students and Trainees, http://sra.org.uk/students/students.page (last visited Oct. 1, 2010).

158. *Id.*

159. *See* Commission v. Austria, C-147/03, [2005] E.C.R. I-5969; Raulin v. Minister van Onderwijs en Wetenschappen, Case C-357/89, [1992] E.C.R. I-1027; Gravier v. City of Liège, Case 293/83, [1985] E.C.R. 593; *see also* Julian Lonbay, *The European Higher Education Area: Two Steps Closer*, 2 EUR. J. LEGAL EDUC. 75, 75 (2005).

160. *See* ISTITUTO DI RICERA SUI SISTEMI GIUDIZIARI CONSIGLIO NAZIONALE DELLE RICERCHE, RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND

> are employed by the State (the judicial administration) as or similar to civil servants in training and are paid a small monthly allowance while in preparatory service. They have to spend a few months each in a court for civil law suits, in a criminal court or a prosecutor's office, in a local or government administration, with a practising lawyer (barrister/solicitor) and at other places of their choice.[161]

Morgenbesser candidates would, then apply in Germany, to the state authorities, as in the *Peśla* case. In the Netherlands, the district courts admit would-be lawyers to the bar,[162] as long as the Council of Supervision (of the Bar) has not opposed the application[163] of the candidate within six weeks of receiving a copy of the application; candidates here apply to a court.

In each of these cases the body dealing with the application often has no guidance from national law on how to deal with the application,[164] as the relevant provisions are determined by the pre-existing national routes that grant access to the profession. However, by virtue of the *Morgenbesser* case, they must not only consider the new applicants (about whom national law might be silent) and make an assessment of their readiness to participate in the traineeship stage, but they must also assess all their qualifications and professional experience without resorting to academic homologation of their law or other professional

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PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS AND SPAIN 74 (2005).

161. *Id.*

162. *See* Wet van 23 juni 1952 (Stb. 365), met betrekking tot de oprichting van de Orde van Advocaten Nederland met inbegrip van regels met betrekking tot de bestelling en disciplinaire maatregelen van toepassing zijn op advocaten (Wet op de advocaten), met de laatste wijzigingen dateren 13 juli 2002 (Stb. 440), inwerkingtreding op 4 september 2002 [Dutch Act on Advocates], art. 2, Staatsblad [Official Reporter] 440 (2002) ("Anyone who has earned a post-graduate law degree or has the right to carry the title of *meester* from a university or the Open University to which the Higher Education and Research Act applies, provided that this degree or this right was conferred on him after passing passed the exam in private law, including civil procedural law, criminal law including criminal procedural law, and one of the following three subjects: constitutional law, administrative law including administrative procedure, or tax law, may apply in writing to the president of the district court to be admitted to the Bar.").

163. *See id.* art. 4.

164. *See* discussion *supra* note 151. However, it must be noted that Germany's Law on Judges, which governs these matters, has been amended and does provide guidance. *See* Peśla v. Justizministerium Mecklenburg-Vorpommern, Case C-345/08, (ECJ Dec. 10, 2009) (not yet reported).

degree.[165] It is clear from Court rulings that prior academic equivalence of qualifications cannot be demanded.[166] As the *Morgenbesser* case confirmed,[167] what is to be assessed are the candidate's "professional" qualities compared to what is required to join the local legal profession.[168] The competent authority can take into account the requirements of the local profession.[169] Thus courts, bars, law societies, and judicial administrations across Europe are thrown a task for which many are ill-equipped and ill-prepared. A new access route has been forced through the carefully crafted national training regimes, which typically provided set routes for access to the legal profession.[170] The host state competent authority, however, can seek to maintain the nationally required standard of entry to their professions.[171]

This new European alternative route is likely to have a destabilizing and fragmenting effect on existing national training regimes.[172] It also reinforces the search for discovery of the common elements in legal education and training across Europe, primarily through developments that have occurred totally outside the ordinary EU method of decision-making, though the latest consolidating Directive, Directive 2005/36/EC on mutual recognition of professional qualifications, allows for specific developments in this regard by allowing for the creation of "common platforms."[173] The result of this "negative" integration

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165. The *Morgenbesser* principle could apply to mixed law degrees, such as Denmark's Law and Business degree.

166. *See, e.g.*, Fernández de Bobadilla v. Museo Nacional del Prado, Case C-234/97, [1999] E.C.R. I-4773.

167. Morgenbesser v. Consiglio dell'Ordine degli Avvocati di Genova, Case C-313/01, [2003] E.C.R. I-13,467, ¶¶ 57–58, 63–66.

168. *Peśla*, Case C-345/08, ¶ 44 (ECJ Dec. 10, 2009) (not yet reported).

169. *See* Colegio Oficial de Agentes de la Propriedad Inmobiliaria v. Aguirre Borrell, Case C-104/91, [1992] E.C.R. 3003.

170. *See generally,* ELIXIR, *supra* note 41 (providing links to training programs of fifteen countries).

171. Consiglio Nazionale degli Ingegneri v. Ministero della Giustizia, Case C-311/06, [2009] E.C.R. 415.

172. The Law Society Training Framework Review in England and Wales, for example, has in part been propelled by the *Morgenbesser* case. *See generally* Andrew Boon et al., *Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession*, 22 J.L. & SOC'Y 473 (2005).

173. Professional Qualifications Recognition Directive, *supra* note 52, 2005 O.J. L 255. The directive allows professions at the European level to create "a common platform." In the case of lawyers, professions at the European level are represented by the CCBE, which could define the attributes that lawyers should have. If the CCBE

is to promote the role of sub-state actors. Unlike the field of free movement of goods, where the possibility of harmonization of national rules is provided for expressly in the Treaty in order to reduce justifiable national barriers to free movement[174] in relation to the free movement of persons, article 47 EC (article 53 TFEU) poses a serious procedural barrier because unanimity in the Council is required when any harmonized rules would affect state regulations. Moreover, harmonization of the content of education and training itself is explicitly ruled out by the TFEU.[175]

The *Morgenbesser* case is groundbreaking in other respects too. Article 39 EC (now article 45 TFEU), and article 43 EC (now article 49 TFEU) are applied as the prime legal basis for the decision. While article 45 TFEU (previously article 39 EC) has been used to benefit those not actually formally in work (at least under national law),[176] article 49 TFEU (previously article 43 EC) has not been applied in respect of trainees before. This is less dramatic now that EU citizens can claim rights on article 21 TFEU (previously article 18 EC), discussed below.[177] Article 45 TFEU is only applicable if the person provides "economic activity," and trainees do not always satisfy this criterion (e.g., when following practical training courses such as the Legal Practice course in England and Wales). However, in *Lawrie-Blum*[178] trainees were paid, and in *Morgenbesser* the Court pointed

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reached agreement on a common platform, it could serve as a passport to practice law in other EU States, for those attaining it, if the European Commission adopts the common platform. There would then be no aptitude testing or adaptation periods. *See id.*

174. Harmonization is also encouraged in some aspects through case law. *See* Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein (*Cassis de Dijon*), Case C-120/78, [1979] E.C.R. 649; *see also* Commission Communication, 1980 O.J. C 256 (concerning the consequences of the judgment given by the Court of Justice on February 20, 1979 in Case 120/78 (*Cassis de Dijon*)).

175. EC Treaty, *supra* note 43, arts. 149, 150, 2006 O.J. C 321 E, at 61; TFEU, *supra* note 43, arts. 165–66, 2008 O.J. C 155, at 69; s*ee* Lonbay, *supra* note 55, at 243.

176. *See* Raulin v. Minister van Onderwijs en Wetenschappen, Case C-357/89, [1992] E.C.R. I-1027; The Queen v. Immigration Appeal Tribunal, *ex parte* Gustaff Desiderius Antonissen, Case C-292/89 [1991] E.C.R. I-745; Lawrie-Blum v. Land Baden-Württemberg, Case 66/85 [1986] E.C.R. 2121.

177. Added by the Treaty of Maastricht in 1993, EC Treaty article 18 provides for the free movement and residence rights of all citizens, not just workers, who derive these rights from article 39. EC Treaty, *supra* note 43, art. 18, 2006 O.J. C 321 E, at 17; TFEU, *supra* note 43, art. 21, 2010 O.J. C 83, at 57.

178. *Lawrie-Blum*, [1986] E.C.R. 2121, ¶¶ 19–21; *see also* Bernini v. Minister van Onderwijs en Wetenschappen, Case 3/90 [1992] E.C.R. I-1071, ¶¶ 14–17.

out that *praticanti* (Italian trainee lawyers) in Italy can have clients of their own. As long as "real and effective" work is carried out, article 49 TFEU applies.

Admission as a trainee lawyer will, in some jurisdictions, enable partial practice rights.[179] Thus migrants who might have little or even no formal training in host state law would be permitted to practice (though subject to the general rule of not practicing what they are not competent to do). It is submitted that in these cases the regulatory authorities might, if necessary, avail themselves of the "general interest" concerns to protect consumers and the fair administration of justice in order to ensure that migrant trainees practice only in matters where they are competent.

Most states have centralized or partially centralized the processing of applications under Directive 98/5/EC and Directive 2005/36/EC. However the Court in *Morgenbesser* assigned the admissions role to the bar or the competent authority that leads students to the relevant course or training that, if successfully completed, gives the trainee lawyer status; it is quite possible that at this lower level of competence, there could be conflicting decisions by local competent authorities. This again has the effect of increasing the demand for centralized guidance.[180] Article 53 TFEU (previously article 47 EC) deals with access to the profession (not training for the profession), and the Court in *Morgenbesser* established that traineeship as such is not a profession for the purposes of Directive 89/48/EEC.[181] Article 5 of Directive 89/48/EEC specifically avoided imposing the obligation on host state competent authorities having to accept migrants who had not completed their traineeships. Thus the Court has clearly, of its own initiative, moved the agenda forward.

IV. MORGENBESSER *ACCESS FOR HOST STATE NATIONALS*

It is clear from general EU law that EU citizens have rights of mobility that allows them access to host state territories for the

179. For example in Belgium, Italy, and the Netherlands.

180. The CCBE in fact gave such guidance in 2004. *See* Morgenbesser Report, *supra* note 139, at III B.

181. Morgenbesser v. Consiglio dell'Ordine degli Avvocati di Genova, Case C-313/01, [2003] E.C.R. I-13,467, ¶¶ 54–55.

purposes of further study or training.[182] If the bars and law societies of the EU Member States must admit migrant trainees on the basis of article 45 TFEU (previously article 39 EC) or article 49 TFEU (previously article 43 EC) then those receiving training are entitled to the equal treatment rule in article 18 TFEU (previously article 12 EC).[183] However, the rule requires like treatment for equivalent (not identical) situations. As bars and law societies normally require specified national degrees before access to such training, their obligation seems to be limited to an assessment of equivalence. Those with missing elements must fill any lacunae discovered However, the host state must, if it requires an aptitude test after such an assessment, set a flexible examination.[184]

Another issue raised by the *Morgenbesser* case is whether or not the new *Morgenbesser* route should be open to nationals of a host Member State. It is clear from *Morgenbesser* that non-nationals who are EU citizens migrating from another Member State can claim *Morgenbesser* rights to be considered for access to a profession's training regime.

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182. *See* Raulin v. Minister van Onderwijs en Wetenschappen, Case C-357/89, [1992] E.C.R. I-1027, ¶ 40; *see also* Council Directive No. 93/96/EC, 1993 O.J. L 317/59, *repealed and replaced by* Council and Parliament Directive No. 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 O.J. L 229/35, art. 7. The Court in the past has considered that migrants not in "genuine or effective" activity were outside the scope of the notion of a worker. *See, e.g.*, Bettray v. Staatsecretaris van Justitie, Case 344/87, [1989] E.C.R. 1621, ¶ 20 (a drug addict in a rehabilitation program); Brown v. Sec'y of State of Scotland, Case 197/86, [1988] E.C.R. 3205, ¶¶ 12–13 (a university student in a sandwich course); *Lawrie-Blum*, [1986] E.C.R. 2121, ¶ 29 (a teacher in training was considered a worker). The receiving of education, which was not considered a "service" in *Belgium v. Humbel*, would allow residence rights, but not access to general welfare benefits. Case 263/86, [1988] E.C.R. 5365, ¶ 20. The situation is now not so clear cut. *See* Bidar v. London Borough of Ealing, Case C-209/03, [2005] E.C.R. I-2119, ¶¶ 48, 56–58; Morgan v. Köln, Joined Cases C-11 & C-12/06, [2007] E.C.R. 9161, at 51; Förster v. Hoofddirectie van de Informatie Beheer Groep, Case C-158/07, [2008] E.C.R. I-8507, ¶ 60; Opinion of Avocate General Sharpston, Bressol v. Gouvernement de la Communauté Française, Case C-73/08, ¶¶ 91–92 (ECJ June 25, 2009) (not yet reported).

183. TFEU, *supra* note 43, art. 18, 2010 O.J. C 83, at 26; EC Treaty, *supra* note 43, art. 12, 2006 O.J. C 321 E, at 48.

184. *See* Peśla v. Justizministerium Mecklenburg-Vorpommern, Case C-345/08, ¶ 59 (ECJ Dec. 10, 2009) (not yet reported).

Equally it seems that nationals of a Member State who have studied[185] or gained relevant experience abroad could return to their own Member States to seek entry to the profession using the *Morgenbesser* route to request assessment. This follows from the Court's case law, which requires a link to EU law, traditionally shown by cross-border economic activity. As the Court indicated in *Broekmeulen v. Huisarts Registratie Commissie*:

> Those freedoms [free movement of persons, the right of establishment, and the freedom to provide services], which are fundamental to the system set up by the Community, would not be fully realized if Member States were able to deny the benefit of provisions of Community law *to those of their nationals* who have availed themselves of the freedom of movement and the right of establishment and who have attained, by those means, the professional qualifications mentioned in the directive in a Member State other than the State whose nationality they hold.[186]

In *Knoors v. Staatssecretaris van Economische Zaken*, the Court indicated:

> Although it is true that the provisions of the treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in article 52 [now Article 43] to "nationals of a Member State" who wish to establish themselves "in the territory of another Member State" cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, *owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of Community law*, are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the treaty.[187]

185. *See* Kraus v. Land Baden-Württemberg, Case C-19/92, [1993] E.C.R. I-1663, ¶¶ 18–23, 32.

186. Broekmeulen v. Huisarts Registratie Commissie, Case 246/80, [1981] E.C.R. 2311, ¶ 20 (emphasis added).

187. Knoors v. Staatssecretaris van Economische Zaken, Case 115/78, [1979] E.C.R. 399, ¶ 24 (emphasis added).

Traditionally, in EU law, individuals in situations that are "wholly internal" to a single Member State (i.e., involving no cross-border element) cannot invoke EU law.[188] The potential "reverse discrimination" (i.e., allowing non-mobile home state nationals to be treated less favorably than non-national EU citizens or home state nationals who have exercised their right to free movement) was accepted and justified on the theory that EU law should not interfere with purely national matters.[189] It was up to Member States to correct such imbalances should they choose to do so.[190] In *Nordrhein-Westfalen v. Uecker*, the Court considered that the fact that a claimant of rights had EU citizenship would not as such affect the scope of the treaty, thus leaving internal situations to be dealt with by national law.[191] However, this rule permitting reverse discrimination is in the process of being reduced in extent by the advancement of various rights now accruing to European citizens since that concept was introduced in the Treaty on European Union (Maastricht Treaty). In *D'Hoop v. Office national de l'emploi,* the Court ruled that EU law precluded a Member State from refusing to grant the tide-over allowance (a financial subsidy intended to cover living expenses) to one of its nationals, a student seeking her first employment, on the sole ground that that student had completed her secondary education in another Member State.[192] The Court wrote:

> In that a citizen of the Union must be granted in *all Member States* the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable

188. *See generally* Steen v. Deutsche Bundespost, C-332/90, [1992] E.C.R. I-341; Stephen Kon, *Aspects of Reverse Discrimination in Community Law*, 6 EUR. L. REV. 75 (1981); David Pickup, *Reverse Discrimination and Freedom of Movement for Workers*, 23 COMMON MKT. L. REV. 135 (1986).

189. *See generally* Niam Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, 39 COMMON MKT. L. REV. 731 (2002); Tryfonidou, *supra* note 134.

190. *See* Shuibhne, *supra* note 189, at 732.

191. Nordrhein-Westfalen v. Uecker, Joined Cases C-64–65/96, E.C.R. [1997] I-3171.

192. D'Hoop v. Office national de l'emploi, Case 224/98, [2002] E.C.R. I-6191, ¶ 34.

> than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.[193]

The case involved a form of cross-border movement (a Belgian national's receipt of secondary education in France), but the phrase "in all Member States" in the paragraph above indicated the line of thinking of these cases.[194] It is still currently linked to free movement: "Such inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law *in the exercise of the citizen's freedom to move*."[195]

Some authors consider that the reverse discrimination rule is dead.[196] However, there are as yet no definitive cases. European bars and law societies should consider preparing for the situation whereby their own nationals, with no European studies or experience, seek access to the *Morgenbesser* route as European citizens seeking equal treatment as such. Currently, in my view, nationals who have relevant studies or experience in another Member State could already have a legitimate claim to use the *Morgenbesser* route. The only state defense against such use is the doctrine of abuse of rights, but this has been whittled down.[197]

CONCLUSION

This Article has outlined a series of events and legal developments opening access to the legal professions in Europe and raising ethical questions about regulatory control over the competence of members of the legal professions.[198] One result

193. *Id.* ¶ 30 (emphasis added).

194. *Id.*

195. *Id.* ¶ 35 (emphasis added).

196. *E.g.*, Vassilis Hatzopoulos, *A (More) Social Europe: A Political Crossroad or a Legal One-Way? Dialogues between Luxembourg and Lisbon*, 42 COMMON MKT. L. REV. 1599, 1607 (2005) (arguing that it stems from case law that, at least as far as "personal freedoms" (i.e., free movement of persons and services) are concerned, European citizenship now prohibits reverse discrimination).

197. *See* Zhu and Chen v. Sec'y of State for the Home Dept., Case C-200/02, [2004] E.C.R. I-9925, ¶ 36. Generally, the motive for the person's movement is irrelevant. *See, e.g.*, Ninni-Orasche v. Bundesminister für Wissenschaft, Case C-413/01, [2003] E.C.R. I-13,187.

198. Parliament and Council Directive 2006/123/EC now basically mandates home state control of cross-border services with many provisos and exceptions. *See* Council

has been increased pressure within the CCBE to develop and recognize commonalities in legal training across Europe. The European Law Faculty Association ("ELFA") has also sought to find commonality in legal education.[199] There is great pressure for professions and their regulators to try to find commonality in terms of training requirements. In discussions on this topic they used to say, for example, "We had to do so many hours training in this and that in order to become a lawyer, therefore we could not possibly accept somebody who has done less training on these topics." The application of *Morgenbesser* indicates that there has to be a lot more transparency about access to a bar or law society. The move to measuring training in terms of outcomes has helped to secure a certain level of agreement. The CCBE has started that work by producing a training document, the Recommendation on Training Outcomes for European Lawyers, which strongly emphasizes the ethical component of legal training.[200] That the CCBE could actually agree on training outcomes at the European level, even though in a non-binding instrument, is a considerable achievement. A parallel ELFA process sought to determine a common set of outcomes of law degrees at the university level.[201] All these developments have significant implications for lawyers and how their competence to practice in EU Member States is assessed and controlled.

One should also look at the experience of some of the smaller jurisdictions when working on commonalties in legal education. Luxembourg had no law school of its own until very recently. It happily accepted graduates in law from Germany, France, and Belgium, who then had to supplement their studies with some courses on Luxembourg law before entering the professional stage of training. Similarly, Cyprus still accepts law degrees from many European states as an acceptable basis for entering its largely common law practice, as it had no native law

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Directive 2006/123/EC on services in the internal market, 2006 O.J. L 376/36. More detailed treatment of this directive is outside the scope of this Article.

199. *See, e.g.*, Richard Parnham, *Searching for a True European Lawyer*, 27 EUR. LAW. 31 (2003); *see also* JULIAN LONBAY ET AL., EUROPEAN LAW FACULTY ASS'N TUNING LEGAL STUDIES IN EUROPE: INITIAL FINDINGS (2008), *available at* http://ssrn.com/abstract=1677820.

200. CCBE, *supra* note 30.

201. *See* LONBAY, *supra* note 199.

school training provider.[202] This experience suggests that precise knowledge of a very wide range of national law before entry is not necessary, depending on what area one intends to practice. This suggests that the large national legal educational regimes are not, strictly speaking, necessary for the effective practice of law. What is needed is the ability to find, understand, and apply the law relevant in a particular case.[203] This would indeed mean learning the key concepts applicable in a given legal system. The implication here is that some core competencies could indeed be learned and then applied to particular aspects of law in particular cases. The European Lawyers' Establishment Directive came to a similar conclusion some time ago, though of course it only provides practice rights to lawyers already fully trained in the law of another jurisdiction.

Many consider that the legal professions, as such, are not entitled to the large monopolies of legal practice that they currently enjoy in many states in Europe. This consideration is behind the EU competition law campaign[204] to promote the de-monopolization of many legal services. The professions tend to emphasize their role in protecting citizens' rights and the rule of law in the face of such "threats." The legal professions can justifiably point to the essential public service role that they perform in the protection of democracy, the promotion of the rule of law, and the sound administration of justice.

As has been shown, national entry routes that set out and enforce precisely defined national legal knowledge and skills are undermined by the developing internal market law of the EU. Given the fragmentation and divergent nature of the profession in some countries and the already flexible nature of legal services provision in others, the effects of the intervention of EU internal market rules, combined with application of EU competition law, are likely to exaggerate the existing tendency toward divergence,

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202. *See generally* Kaniye Ebeku & Sofia Michaelidou-Mateou, *Developing Legal Education in Europe: The Experience of the Republic of Cyprus*, 4 EUR. J. LEGAL EDUC. 19 (2007).

203. *See* LONBAY, *supra* note 199, at 13–15.

204. *See* OECD, COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS (2007), *available at* http://www.oecd.org/dataoecd/12/38/40080343.pdf. Many also feel that in the United States, the legal advice monopoly is an unnecessary burden on the economy and that non-lawyers could happily supply specialist advice in particular sectors with little or no reduction in the quality of service to clients.

fragmentation, and competition, all leveled by general consumer protection rules.

If there is to be an increasingly atomistic delivery of legal services in Europe, what effects will there be on training requirements? The issue of guaranteeing the competence of the individual lawyer in the future could, in part, be satisfied by accredited specialist groupings, protected titles, or even through a series of common Europe-wide platforms now permitted by the new mutual recognition of qualifications Directive 2005/36, as well as by initial training. The issue of specialist delivery of legal services by those who are not members of the legal profession will have to be faced, whether they are somehow accredited or not. The strategy of the "traditional" legal professions faced with this situation, if they wish to survive as such, is to be flexible in their entry routes and requirements and to develop or encourage the recognition of accredited (or not) specialist legal practice. They should, where possible, develop flexible assessment mechanisms to cope with entry at different stages of development, knowledge, and skills. Ideally they should move beyond establishing a set of common training outcomes and work on "common platforms" for some types of legal practice. Continuing legal training[205] would become a more normal pattern and could be used to promote high standards and to help ensure competence, particularly in fields of legal practice where specialization exists or is developing.

The issues confronting the European legal professions and legal service providers outlined above indicate that change is on the way and must be handled with care. More work is necessary to define the core elements and legal skills and knowledge that are necessary for successful practice of law; the development of more understanding of how to successfully assess the preparedness for legal practice of candidates; the probable acceptance of an increasingly specialized legal services work force; and related sets of specialist titles that themselves may permit limited specialist practice rights across borders. The evolving European legal market will itself need servicing, and the development of effective modes of continuing professional training, easily achieved and recognized across borders, should

205. *See* CCBE, *supra* note 30.

help in enabling cross-border practice and delivery of legal services.