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Lawyer Ethics in the Twenty-first Century

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Lawyer Ethics in the Twenty-first Century: The Global Practice Reconciling Regulatory and Deontological Differences—The European Experience

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ABSTRACT

This Article surveys multijurisdictional legal practice in the European Community. It details some of the types of lawyers and law practices that can be found across Europe and describes the variety of activities in which these lawyers engage. The Article then examines the regulatory regime that controls the legal industry. Specifically, it considers Article 49, Article 43, Directive 89/48/EEC, and Directive 98/5/EC. The Article concludes with a discussion of how conflicts in the regulation of lawyers may be resolved.

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I. INTRODUCTION

This Article sets the scene regarding multijurisdictional practice in the European Community. It is important to have an idea of the wide variety of legal actors that participate in legal practice in

Europe. There are fifteen Member States in the European Union[1] and there are three countries[2] bound by the Single market rules through the European Economic Area Agreement (EEA).[3] As we will see, the question of "what is a lawyer" is far from academic in the European context. This Article evaluates the European rules that allow cross-border practice in Europe. Is there a single market for lawyers? European Community rules that liberate cross-border practices will be assessed. These rules, in themselves, provide some of the mechanisms put into place to try and reconcile regulatory and ethical differences that result from cross border activities by members of the European legal professions.

A fundamental dichotomy that European Community Law (EC law or Community law) has to confront is that the EC law demands free movement of services and free movement of persons, and yet, at the same time, the Member States retain regulatory control over their professions. This means that, in principle, any EU citizen[4] has a right to go and work or practice in another Member State. There is inevitably a clash of national regulatory rules as professional migrants leave their home State with the stamp of the rules and regulations that have conditioned their scope and type of practice there. Normally, on arrival in the host State, the local host State rules are applied to the professional migrant's practice, and often these rules are in conflict with the home State rules. Their very existence might be considered impermissible under host State rules, their mode of practice might be illegal, or the practice might be assigned to a different national profession. For example, in some Member States, multidisciplinary practice (MDP) is permitted, and in others it is prohibited. Thus a multi-practice law firm is likely to have difficulties practicing in a Member State that does not permit joint practice. This Article seeks to assess and evaluate what the European rules provide for in such situations.

The essential resolution of the dichotomy is that Member States retain their competence to regulate professionals in their territory, but the European Court of Justice (ECJ), requires that Member

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1. The fifteen Member States in the European Union are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. TREATY OF AMSTERDAM AMENDING THE TREATY ON THE EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM].

2. The three countries are Norway, Iceland, and Liechtenstein. Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1) 3.

3. *Id.*

4. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]. All nationals of the Member States of the European Union are now automatically also EU citizens. *Id.* art. 17.

States exercise this power in conformity with European rules.[5] The European legislature has enacted rules liberating professionals from national boundaries. In an age where borders between most EC nations[6] are no longer permitted, the very notion of national territory is under siege.[7] National regulation is informed by three sets of rules. The single market rules from the EC are known as the free movement of persons rules.[8] The anti-trust rules, known in Europe as competition law rules, also govern multipractice situations.[9] Finally, human rights law rules are relevant.[10]

II. TYPES OF LAWYERS

In Europe there is a tremendous variety of legal practitioners and each country has its own differing groups of legal practitioners.[11] This reflects the fact that all Member States have their own constitutions and that much law remains national in origin and scope. There are different legal orders and tremendous differences in the professions that deliver legal services. The differences start with access to the legal professions themselves. There are well over forty

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5. Case C–55/94, Reinhard Gebhard v. Consiglio dell' Ordine degli Avvocati e Procuratori di Milano 1995 E.C.R. I-4165; Julian Lonbay, *Case C-55/94 Reinhard Gebhard v. Consiglio dell' Ordine degli Avvocati e Procuratori di Milano, Judgment of 30 November 1995, 1995 ECR I-4165. Full Court*, 33 COMMON MKT. L. REV. 1073, 1082 (1996).

6. There are opt-outs from the full border free principle for the United Kingdom, Ireland, and Denmark. Julian Lonbay, *Free Movement of Persons*, 50 INT'L & COMP. L. Q. 168, 169 (2001).

7. EC TREATY, *supra* note 4, arts. 61-69 (outlining "policies related to free movement of persons"). Article 14 of the EC Treaty required a border free internal market. *Id.* art. 14. *But see* Case C-378/97 Florus Ariël Wijsenbeek, 1999 E.C.R. I-6207, I–6208 (holding that article 14 of the EC Treaty does not preclude a Member State from requiring a person to establish his nationality upon entering the territory of that Member State.)

8. EC TREATY, *supra* note 4, arts. 39-69.

9. *Id.* arts. 81-97. Some national regulations have been challenged based on competition rules. For example, those dealing with fee arrangements have been challenged. The European Court of Justice has said that various fee codes are anti-competitive behavior. Case C-130/99, Kingdom of Spain v. Comm'n of the European Communities, 2001 E.C.R. ___, *available at* http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en; Case C-221/99, Giuseppe Conte v. Stefania Rossi, 2001 E.C.R. ___, *available at* http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en.

10. TREATY ON EUROPEAN UNION, Nov. 10, 1997, art. 6, O.J. (C 340) 145, 153 (1997) [hereinafter EU TREATY]. The European Union was "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law . . ." and "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . ." *Id.*

11. *See generally* JULIAN LONBAY ET AL., TRAINING LAWYERS IN THE EUROPEAN COMMUNITY (1990) (describing the different qualifications and requirements for legal practitioners in the European Community).

professions, each having different training requirements.[12] In some countries one needs a law degree to become a lawyer; others lack this requirement.[13] A legal education itself can vary in length from three to six years.[14] In order to re-qualify to practice cross-border in Europe, it would take over seventy-five years just to complete the university stage of legal education. Professional experience is often a required component before one can join a legal profession, though it is not necessary in Spain where one does not need to have any professional experience before joining the profession of *abogado*.[15] There are professional exams that are mandatory in some countries and some are very difficult to pass. In other countries they do not exist at all. So there is a tremendous variety in training before one can become a lawyer.[16] But what is a lawyer?

The work of lawyers is carved up differently among various legal actors in each Member State. In the United Kingdom, for example, there is a split between solicitors and barristers.[17] Barristers undertake much of the court work and act as a reserve of specialization for solicitors. Solicitors do more transactional work.[18]

In other countries, pleading is reserved for particular groups. In Spain there are specialists, *procuradores*, who know how to sort out court papers and carry out all the service of documents as a separate profession.[19] Spain also has a labour law specialized profession, the *graduados sociales*.[20] A specialized "profession" for tax law advice

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12. *Id.*

13. In England and Wales a law degree is not necessary in order to qualify as a solicitor. The Solicitors Online Website, *at* http://www.solicitors-online.com.

14. *See generally* European Lawyers Information eXchange & Internet Resource ("ELIXIR"), http://elixir.bham.ac.uk (containing information on the training required to become a legal professional in each of the Member States of the European Union).

15. The Council of Europe Committee of Ministers has passed a resolution that begins to tackle the issue on minimum educational requirements. Council of Europe, Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer (adopted Oct. 25, 2000), *available at* http://cm.coe.int/ta/rec/2000/2000r21.htm. Both the FBE and CCBE have also elaborated Resolutions on minimum training standards. CCBE CODE OF CONDUCT, *available at* http://www.ccbe.org/documents/En/codeuk.pdf.

16. 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, 77 (Bruno de Witte & Caroline Forder eds., 1992).

17. Barristers are called "advocates" in Scotland. *Id.* at 93.

18. Solicitors in England and Wales can now qualify for rights of audience before the higher courts, so the distinction is less pressing. Julian Lonbay, *The Regulation of the Legal Practice in the UK and Beyond*, *in* UK LAW FOR THE MILLENNIUM 594-95 (John W. Bridge ed., 2d ed. 2000).

19. ELIXIR Website, http://elixir.bham.ac.uk/Country%20information/Spain/Lawyers/Procuradores_spain7.htm.

20. ELIXIR Website, http://elixir.bham.ac.uk/Country%20information/Spain/Lawyers/Graduado_Social_spain9.htm.

exists in the Netherlands, the *belastingadviseur*.[21] In many—mainly southern—continental European States, notaries carry out much of the legal work. All of these professionals have their own titles and their own monopolies in their own areas. National rules reinforce demarcations within one country and compartmentalize the market for that particular type of professional. These types of rules can be used to preserve exclusive areas of activity. They can also be pressed against foreign professionals to prevent their encroachment on the reserved turf. The different national rules of practice are reinforced by national laws and regulations and often include civil and criminal penalties.

III. TYPES OF PRACTICE

Just as the types of lawyers practicing in the EEA vary enormously from State to State, the way they practice is equally varied. Not only does the EC contain some of the biggest law firms in the world, but also large numbers of sole practitioners. The rules regulating legal practice are nationally-based and vary from country to country. The national ethical and deontological rules are reinforced by professional rules of conduct, but certain elements are common.[22] The independence of the lawyer and the promotion of the rule of law in justice are key elements for lawyers, and they are respected in all the Member States.[23]

In regards to the scope of practice, there is a wide range of reserved activities that vary in each of the Member States. Some countries have a very extensive list of monopolies for lawyers. This includes, for example, a monopoly on the giving of legal advice. In

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21. ELIXIR Website, http://elixir.bham.ac.uk/Country%20information/Netherlands/Netherlands_belastingaviseur_n7.htm.

22. The *CCBE Code of Conduct* was devised and adopted by the Council of the Bars and Law Societies of the European Union (CCBE).

> The CCBE liaises between the Bars and Law Societies from the Members States of the European Union and the European Economic Area. It represents all such Bars and Law Societies before the European Institutions, and through them some 500,000 European Lawyers.

CCBE Website, *What is the CCBE?*, http://www.ccbe.org/documents/Fr/LEAFLET2001%20A5.pdf.

23. Some professional rules have been, partially, judicially recognized at the EC level. *See, e.g.*, Case 155/79, AM & S Europe Ltd v. EC Comm'n, 1982 E.C.R. 1575, 1576 (recognizing lawyer-client privilege).

France, Luxembourg, and Germany, one must be a member of the relevant profession to give legal advice.[24]

Some countries have a slightly less monopolistic view of their profession, and mainly protect the lawyer with a few reserved areas of activity. This means, then, that anyone can give legal advice in the United Kingdom. The privilege of calling oneself a solicitor, a barrister, or an advocate, however, is reserved for members of those professions,[25] and that protection acts as a consumer guarantee. In England and Wales there are still some reserved areas for solicitors and barristers which relate to rights of audience before the higher court as well as probate and property transactions.[26]

The Scandinavian countries are even more liberal. There is little reserved to formally designated lawyers. They have their professional title protected, though anyone may do the same work without the title.[27] They rely on their organisation and good name. Thus, an *advocater* in Sweden, for example, may do anything as a legal practitioner within the confines of the local rules.[28] Other people who are not *advocater* may also do the same things without the restraint of professional rules.[29] The result has been that there are a number of *jurister*, people with law degrees not practicing under a professional title, who compete with formally recognized *advocater*.[30]

Lengthy lists of incompatible activities reinforce the preserves of various legal professionals. Some countries only require that members of the profession have good character, others explain more formally what that means.[31] Austria probably has the lengthiest list of incompatible activities.[32] In some Member States, such as Belgium, employment of lawyers is prohibited, as it is contrary to the dignity of the profession and their independence.[33]

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24. *See, e.g.*, ELIXIR Website, http://elixir.bham.ac.uk/Country%20information/France/Intro_france2.htm (stating that in France, "the *avocat* has a monopoly of giving legal advice . . . .").

25. Lonbay, *supra* note 18, at 595.

26. *Id.* at 595-99.

27. *See, e.g.*, ELIXIR Website, http://elixir.bham.ac.uk/Country/%20information/Denmark/Advocat%20dk3.htm (stating that "[w]ith narrow exceptions there is, in civil cases, no necessity for individuals to employ *advòkats* to plead the case in Court, as they have the right to plead the case themselves.").

28. THE SWEDISH BAR ASSOCIATION CODE OF CONDUCT (2001), *available at* http://www.advokatsamfundet.se/english/index_eng.htm.

29. Julian Lonbay & Linda Spedding, INTERNATIONAL PROFESSIONAL PRACTICE 30-3–30-6 (Harold Levinson U.S. ed., 1992); *see also* D.M. Donald-Little, CCBE: CROSS BORDER PRACTICE COMPENDIUM 7-8 (1991).

30. Simons Country Reports Website, *Sweden*, http://www.simons-law.com/e/lb_s_e.htm#3.

31. *See generally* DONALD-LITTLE, *supra* note 29.

32. *Id.*

33. Brussels Bar (French) Website, *La Competence et L'Ethique de L'Avocat*, http://www.barreaudebruxelles.be/j.htm#j21.

Partnership between lawyers is prohibited in some countries. In England and Wales, barristers are not allowed to be partners with anyone.[34] Other countries have size limits on partnerships.[35] England and Wales formerly had size limits on partnerships, but now in London one can find global law firms—Clifford Chance being the largest law firm in the world. Still other countries allow incorporation of legal practices, but significantly curtail the power to advertise. Some countries allow multidisciplinary practice (MDPs). This is quite common in some Member States between notaries and lawyers. In some German *Laender* partnership is permitted between accountants and lawyers. This has caused division in Europe, where the issue is currently the subject of litigation from the Netherlands before the European Court of Justice.[36]

Some of the common elements among the Member States merely serve to disguise their differences. A frequently used distinction is that of civil law versus common law legal systems. Yet even in civil law countries there are tremendous differences in the regulation of the practice of law. For example, in France, frequently changing national rules resulted in the disappearance of the *conseil juridiques*.[37] In England and Wales, the sudden emergence of solicitor-advocates now allows solicitors to appear in the higher courts. In Germany, lawyers can be both notaries and *Rechtsanwalte* (advocates) simultaneously. One can see a great variety of active professions working in legal practice in the European Union, each with their field of activity demarcated and regulated separately at the national level and, to greater or lesser extent, protected as a reserved area.

The Article will now look at what is the law on lawyers for these different types of lawyers. What can they do with all their different practice modes? How can they move cross-border?[38] Lawyers can

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34. *But see* Dir. Gen. of Fair Trading, Office of Fair Trading, Competition in Professions 14-15 (2000), *available at* http://www.oft.gov.uk/html/rsearch/reports/oft328.pdf (challenging the necessity of this rule in order to achieve stated objectives).

35. ELIXIR Website, *Abogados*, http://elixir.bham.ac.uk/country%20/information/spain/lawyers_frameset.htm (indicating a size limit on partnerships in Spain).

36. The Advocate General has given his opinion. The judgment of the ECJ is awaited. Case 309/99, Wouters v. Algemere Raad van de Nederlandse Orde van Advocaten, July 10, 2001, 2001 E.C.R. ____, *available at* http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en.

37. Richard L. Abel, Symposium, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 785-86 (describing the merger of *conseils juridiques* and *avocats* in France).

38. Roger Goebel, *The Liberalisation of Interstate Legal Practice in the EU: Lessons from the US?, in* SERVICES AND FREE MOVEMENT IN EU LAW (Andenas & Roth eds., 2001). *See generally* Hamish Adamson, FREE MOVEMENT OF LAWYERS (2d ed. 1998) (describing current forms of practice within the legal profession in the European

benefit from all the free movement rules the same way as everybody else.

IV. THE FREE MOVEMENT RULES

There are various modes of cross-border activities that need to be distinguished. The home State is the one where a lawyer is licensed and practicing. If a lawyer travels to provide consultation overseas, then, under Community law, he is deemed to be providing a service on a temporary basis.[39] Article 49 EC specifically permits a lawyer to provide cross-border services. The home State is the State where the lawyer is established and the host State is where the service is provided. The *Gebhard* case established that even when a lawyer provides a temporary service he or she is entitled to open a branch office.[40] In the single European market all professions, not just lawyers, have a completely new environment to work in with new opportunities to practice cross-border. The lawyer also has the option of establishing a permanent presence in another Member State. Traditionally, different rules have applied to services[41] and establishment[42] as a matter of EC law.

The host State is not entitled to apply the full rigor of its regulatory regimes to visiting professionals, as this would effectively nullify the right to provide cross-border services. One of the first rules to fall to Community law was the requirement of residence.[43] Many national laws in the European Union formerly required lawyers to live in the area where they practiced. This rule would stop any cross-border provision of legal services because if a *Rechtsanwalt* living in Düsseldorf wanted to go to Brussels to advise a client, the residence rule would effectively prohibit the trip.

Van Binsbergen resolved the issue.[44] The ECJ ruled that Article 49 had direct effect, meaning that Van Binsbergen could rely on it

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Community with particular reference to cross-border practice and relating to the relevant law and professional regulations).

39. Lonbay, *supra* note 5, at 1076.

40. *Gebhard*, 1995 E.C.R. at I-4172; Council Directive 77/249, art. 4, 1977 O.J. (L 78) ("A lawyer . . . shall observe the rules of professional conduct of the host Member States, without prejudice to his obligations in the Member State from which he comes.").

41. EC TREATY, *supra* note 4, arts. 49-55.

42. *Id.* arts. 43-48.

43. Case 33/74, van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299. *See also* Case 2/74, Jean Reyners v. Belgian State, 1974 E.C.R. 631 (Belgium, regarding the removal of nationality requirements, argued that lawyers were actually exercising official authority and therefore were exempt from establishment rules under EC TREATY art. 45. The Court rejected this argument).

44. *van Binsbergen*, 1974 E.C.R. at 1299.

before the national court without further EC implementation measures.[45] The Dutch rule itself was held to be non-discriminatory, but was still annulled, as such rules could only be applied if they were objectively justified by "the general good."[46] The only interest the Dutch could assert to require permanent establishment was one "objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics."[47]

On the facts of the case, the Dutch rules were not objectively justified.[48] The residence requirement could not pass muster, as it overly restricted cross-border practice.[49] The case was important because it recognized State interests—there was a justification for enforcing professional rules against migrants if they protected "the general good." The ECJ recognized that:

> [S]pecific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good — particular rules relating to organization, qualifications, professional ethics, supervision and liability — which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another member state.[50]

Moreover,

> [A] Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 [now 49] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.[51]

The reason Community law distinguishes between these two modes of provision in another country is that the application of the full panoply of local regulation would strangle cross-border service at birth. It could mean, in some cases, that a lawyer would have to join the local legal profession, a process that could take some seven to twelve years, before advising a local client. The lawyer could not just nip over on the plane to see the client, but would have to nip over on the plane, spend seven to twelve years getting qualified, and then see the client.

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45. *Id.* at 1304.
46. *Id.* at 1309.
47. *Id.* at 1310.
48. *Id.* at 1318.
49. *Id.*
50. *Id.* at 1309.
51. *Id.*

That would destroy any cross-border services. Therefore, as regards the provision of services, the full range of local professional rules is not permitted to be imposed on the person providing the service.[52] Where there are "indistinctly applicable"[53] national rules being imposed, they must be non-discriminatory and justified by general interests rather than economic arguments. Even if the national rules are applied equally to the incoming lawyer and the local lawyer, they could still have a discriminatory effect. This is not permitted unless the rules are fully justified and proportionate. Services, therefore, are treated differently from establishment.[54]

The case law allows Member States to maintain justifiable safeguards. The Lawyers' Services Directive, adopted in 1977, provides a definite right to provide services for lawyers and also introduced its own set of permitted safeguards and rules for the application of controls on lawyers providing cross-border services.[55] The Directive covers a limited range of lawyers defined in Articles 1 and 3. These lawyers, identified by origin,[56] are entitled to provide cross-border legal services. The activities covered by the Directive include giving legal advice to clients. The only fully reserved areas are certain property transactions and probate issues, which are reserved locally to particular groups of lawyers.[57] The other reserved area relates to representation in courts.[58] If a visiting lawyer wants to go to court and the host State reserves that activity to lawyers, the national rules can insist that court appearances are done in conjunction with a local lawyer. The ECJ has strictly applied this rule.[59] The host State can also prevent salaried lawyers from

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52. Council Directive 77/249, *supra* note 40, art. 4 (facilitating the effective exercise by lawyers of freedom to provide services).

53. An indistinctly applicable rule is a measure that seems neutral on its face and yet has an inhibiting effect on free movement to provide services in fact.

54. For a lawyer establishing permanently in another Member State it made more sense to apply the host State rules.

55. Council Directive 77/249, *supra* note 40, arts. 2-7.

56. This itself can be considered a "consumer" safeguard. *Id.* art. 3.

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

Id.

57. *Id.* art. 1(1). "Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land." *Id.*

58. *Id.* art. 5.

59. *See, e.g.*, Case C-294/89, Comm'n v. France, 1991 E.C.R. I-3591 (holding that France violated Council Directive 77/249); Case 427/85, Comm'n v. Germany, 1988 E.C.R 1123 (holding that Germany violated Council Directive 77/249); Julian Lonbay,

pursuing this activity if national salaried lawyers are prohibited from doing so.[60] This Directive, by giving lawyers the right to give advice, allows the lawyer to advise on any law, including host State law, without any prior assessment of competence by the host State. The rules of deontology in the European Code of Conduct[61] demand that lawyers should not give legal advice where they are incompetent to do so.[62] But which rules will apply?

Article 4 of the Directive provides a set of "conflicts" rules. For "activities relating to the representation of a client in legal proceedings or before public authorities" the host State rules will apply except for "any conditions requiring residence, or registration with a professional organization, in that State."[63] Double deontology, however, is imposed as the application of host State rules is "without prejudice to his obligations in the Member State from which he comes."[64] Article 4(4) covers all other activities of the lawyer. Lawyers must abide by their home State rules "without prejudice" to respecting rules that govern the host State lawyers, in particular:

> [T]hose concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the

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Cross-Frontier Provision of Services by Lawyers, 13 EUR. L. REV. 347-50 (1988) (commenting on *Comm'n v. Germany*).

60. Council Directive 77/249, *supra* note 40, art. 6. "Any Member State may exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings in so far as lawyers established in that State are not permitted to pursue those activities." *Id.* *See* Council Directive 98/5, *infra* note 83, art. 8. Under Council Directive 98/5 art. 8, a slightly stronger rule exists:

> Salaried practice
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> A lawyer registered in a host Member State under his home-country professional title may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the host Member State so permits for lawyers registered under the professional title used in that State.

Id.

61. *See supra* note 22 and accompanying text.

62. Case C–168/98, Comm'n v. Luxembourg, 2000 E.C.R. I-9131 § 42 (referring to the CCBE CODE OF CONDUCT, Article 3.1.3).

63. Council Directive 77/249, *supra* note 40, art. 4(1).

64. *Id.* art. 4(2). There are special rules for the United Kingdom and Ireland to take account of the existence of both barristers/advocates and solicitors in these jurisdictions. *Id.* art. 4(3).

> standing of the profession and respect for the rules concerning incompatibility.[65]

V. ESTABLISHMENT RIGHTS

As the European court of Justice stated in *Gebhard:*

> The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see, to this effect, Case 2/74 Reyners v. Belgium [1974] ECR 631, paragraph 21).[66]

In principle, professional practice is regulated locally and by Article 43 EC. In setting out establishment rights, paragraph 2 indicates that: "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."[67] This implies that lawyers must fulfill the conditions required of locals in order to practice law. Article 47 EC provides for the Council to "issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications . . . in order to make it easier for persons to take up and pursue activities as self-employed persons."[68] Again, this implies that re-qualification as a local lawyer might be required. There was a lot of pressure to allow what was called at the time *établissement sauvage* or establishment outside the confines of the host State regulatory rules under home State title. In other words, if a solicitor—say from England—goes to Rome, must he become an *avvocato*? Why can he not simply practice as a solicitor and bring his own regulatory environment with him, thereby letting himself be regulated by the home State rules?

There is precedent for the principle of home State regulation. In the banking sector, the European Community rules, to a large extent, allow banks to take their own environment with them.[69] In other words, if banks can do X, Y, and Z in London and they establish a branch in Paris, then they can do X, Y, and Z there, even if under

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65. *Id.* art. 4(4).
66. *Gebhard*, 1995 E.C.R. at I-4195.
67. EC TREATY, *supra* note 4, art. 43.
68. *Id.* art. 47.
69. Second Council Directive 89/646, 1989 O.J. (L 386) 1, art. 18.

Parisian rules banks cannot do X, Y, and Z.[70] This is often referred to as home State control, and it allows a single control point for access to the whole market. It does not resolve all the issues arising from conflicting rules, as is evident from the necessity of issuing a Communication attempting to clarify regulatory competence in the financial sphere.[71] The financial services Directives allow home State control as to certain key guarantees—such as capital adequacy requirements—that have been harmonized. In relation to the legal professions, there have been no harmonizing measures.

Moreover, some professions have different environments depending on where they practice. In England and Wales, for example, barristers have a rule that they are not allowed to be partners.[72] This is regarded as a protection of their independence.[73] The individual barristers, however, are allowed to form partnerships when they set up in Brussels.[74] Overseas practice rules allow such overseas partnerships. Sometimes Member State rule clashes disappear because, when the Member State is controlling extra-territorially, they have a different rule which may conform more to the local rule of the host State. This, of course, is not always true.

The *Gebhard* case was the culmination of the case law that led to the opening up of establishment rights for lawyers and other professionals.[75] Gebhard was a German lawyer practicing in Milan, Italy.[76] For many years he practiced there happily with a group of Italian lawyers. He then set up a *Studio Legale* (legal office), and described himself as an *avvocato*.[77] He was not an *avvocato*, but a *Rechtsanwalt* whose main role was to advise Germans coming to Italy about local law. He redirected their questions to local Italian lawyers.[78] He also acted as a bridge for German businesses coming to Italy and for ex-patriot Germans in Italy who needed assistance with

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70. The host State can exercise some regulatory control if it is for the general good. Comm'n Interpretive Communication 209/04, 1997 O.J. (C 209) 6. Comm'n Interpretive Communication 209/04 was "the product of discussions conducted by the Comm'n on the questions of the freedom to provide services and the interest of the general good . . . ." *Id.*

71. *See generally* E. Lomnicka, *The Home Country Control Principle in Financial Services Directives and the Case Law, in* SERVICES AND FREE MOVEMENT IN EU LAW (Andenas & Roth, eds., forthcoming Oct. 2001).

72. *Id.*

73. DIR. GEN. OF FAIR TRADING, COMPETITION IN PROFESSIONS §§ 284-86 (2000), *available at* http://www.oft.gov.uk/html/rsearch/reports/oft328.pdf (challenging the limitation on barristers and reviewing the argument for and against the establishment of MDPs).

74. *Id.*

75. *Gebhard*, 1996 E.C.R. at I-4165.

76. *Id.* at I-4189.

77. *Id.* at I-4189-90.

78. *Id.*

legal matters in Germany.[79] The Milan Bar acted against him for using the title *avvocato* and the subsequent litigation led to Luxembourg where the ECJ gave its ruling indicating that Italy could not impose the full range of regulations on a migrant lawyer.[80] If the migrant lawyer wanted to do what an *avvocato* does—advise on Italian law—he has to do what the *avvocati* do, namely, join to the local profession.[81] Community Law had already made this easier by the adoption of Directive 89/48/EEC.[82] If he wanted to stay a *Rechtsanwalt*, however, he was not necessarily doing what the Italian lawyer does, he was undertaking a different work.[83] Then the host State can impose its rules and regulations only if they are non-discriminatory and proportionate to the public interest protected by them. This opened the door to what had previously been called "wild establishment." Everybody had thought Article 43 allowed access under the same conditions as locals, but the *Gebhard* case allowed a wider access. One of the immediate results of this case was the adoption of the establishment Directive for lawyers,[84] which had been waiting in the wings for over twenty years.

VI. DIRECTIVE 89/48/EEC

The Community legislature, before it adopted the establishment Directive,[85] had already passed Directive 89/48/EEC. This Directive allowed for easier cross-border activities by individuals, in the sense that a migrant's diploma must be submitted for recognition to the competent authorities in other Member States.[86]

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79. *Id.*

80. *Id.* at I-4190, I-4196-99.

81. *Id.* at I-4196-99.

82. Council Directive 89/48, 1989 O.J. (L 19) 16 (providing a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration); Julian Lonbay, *The Mutual Recognition of Professional Qualifications in the EC*, *in* PROFESSIONAL LIABILITY AND INSURANCE 1-40 (Ray Hodgin ed., 1999).

83. *See generally*, Council Directive 98/5, 1998 O.J. (L 77) 36 (discussing professional titles and the role of lawyers in Member States).

84. Council Directive 98/5 facilitated practice of the profession of lawyers on a permanent basis in a Member State other than that in which the qualification was obtained. *Id.*

85. *Id.*

86. "Diploma" is widely defined under the Directive and includes not just the academic law degree but also the whole package of training that leads him/her to being qualified. Council Directive 89/48, *supra* note 82, art. 1(a). Article 1(a) of Directive 89/48 states:

> (a) diploma: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:

The process does not provide for automatic recognition. What essentially happens is that the knowledge and skills attested to by the diploma are matched against those required in the host State for professionals in the same field. Any "essential" missing parts can then be identified—the "substantial differences"—and the host State can require that the applicant complete an adaptation period or take an exam to show that the gaps have been filled. In the case of legal professions, the Member States—as opposed to the migrant—can insist on a test or adaptation period.[87] A recent amendment to the Directive insists that,

> [i]f the host Member State intends to require the applicant to complete an adaptation period or take an aptitude test, it must first examine whether the knowledge acquired by the applicant in the course of his

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which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions;

which shows that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications were received mainly in the Community, or the holder thereof has three years' professional experience certified by the Member State which recognized a third-country diploma, certificate or other evidence of formal qualifications.

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

Id.

87. *Id.* art. 4(1).

. . . By way of derogation from this principle, 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, the host Member State may stipulate either an adaptation period or an aptitude test.

Id.

> professional experience is such that it fully or partly covers the substantial difference referred to in the first subparagraph.[88]

This updates the Directive to take account of the *Vlassopoulou* jurisprudence.[89] The Directive puts a heavy burden on the regulators in each country to decide what the equivalences and equivalent professions are, while allowing for a great deal of flexibility. The result is an evaluation that, if passed, allows the migrant to integrate into the host State profession. The applicant would then be subject to all of the host State rules.

VII. DIRECTIVE 98/5/EC

Directive 98/5/EC[90] covers a limited range of lawyers[91] and gives them the right to practice under their home State professional title in another Member State.[92] This is essentially what *Gebhard* found to be possible. Once in another Member State, having registered,[93] they can undertake almost all activities other than those reserved by Article 5. Excluded areas can include property transfers, probate, and legal representation.[94] The migrant is subject to the host State deontological and other rules, but can practice immediately. All areas of legal advice, including advice on the host State law, are open. This is a major change for the legal professions, as there is no prior assessment of capacity to act as a local lawyer before the migrant can actually undertake such practice. As the ECJ stated in *Commission v. Luxembourg*:

> 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

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88. European Parliament and Council Directive 2001/19, 2001 O.J. (L 206) 1 (amending several Council Directives concerning general recognition of professional qualifications in several different professions).

89. Case C-340/89, Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg, 1991 E.C.R. I-2357; *See also* Julian Lonbay, *Picking Over the Bones: The Rights of Establishment Reviewed*, 16 EUR. L. REV. 507-20 (1991).

90. Julian Lonbay, *Lawyers Bounding Over Borders: The Draft Directive on Lawyer's Establishment*, 21 EUR. L. REV. 50 (1996); Julian Lonbay, Memorandum, *in* Fourteenth Report of the House of Lords, Session 1994-95: The Right of Establishment Lawyers: With Evidence, July 11, 1995, 66-68 (H.L. Paper 82, HMSO) (on file with author).

91. Council Directive 98/5, *supra* note 83, art. 1. Those not falling within the list must use the case law (*Gebhard*) right of establishment. *See generally* Lonbay *supra* note 82 (discussing the various professional qualification requirements for law practitioners in the EU).

92. Council Directive 98/5, *supra* note 83, art. 2.

93. *Id.* art. 3.

94. *Id.* art. 5.

> 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.[95]

The Directive allows migrants, after three years of practice in the host State, to automatically become a local professional with no testing.[96] The Directive defines host State law to include European Community law,[97] which could mean a migrant lawyer actually need not practice any national law to become a local lawyer.

The conflicts rules in Directive 98/5/EC are quite detailed. In fact, about half the Directive deals with which rules apply. Article 6 is the main rule and it clearly indicates that the host State rules apply.[98] So when the migrant lawyer registers, it is host State rules that apply, even if the migrant is not a host State lawyer. This would not have been the case in some Member States before this Directive was adopted. In England and Wales, for example, it is still not the case for non-European lawyers. U.S. lawyers can come and practice and establish in London or anywhere else, and they are not subject to English and Welsh professional rules at all. European lawyers, however, have to be registered—termed RELs for Registered European Lawyers—and are now subject to the local professional rules and regulations.[99]

Article 7 is interesting because it gives the first hint that Bars are going to have to cooperate in these matters. Where there are any disciplinary proceedings, the host State will discipline the lawyer in its territory, but it has to keep the home State Bar informed, exchange information with that Bar, and provide that Bar an opportunity to intervene by making submissions.[100] The same

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95. Case C-168/98, Grand Duchy of Luxembourg v. European Parliament and Council of the European Union, 2000 E.C.R. I-9131.

96. Council Directive 98/5, *supra* note 83, art. 10.

97. *Id.*

98. *Id.* art. 6.

99. *See* Julian Lonbay, *The Regulation of Legal Practice in the UK and Beyond*, *in* UK LAW FOR THE MILLENNIUM 594 (2000) (discussing a view of the UK's implementation of Council Directive 98/5).

100. Council Directive 98/5, *supra* note 83, art. 7.

obligation applies *mutatis mutandis* to the home State Bar that is undertaking disciplinary proceedings against one of its professionals who is also registered in another Member State.[101] Indeed, the home State status is vital as a source of the right to practice elsewhere in the Community. If a *Rechtsanwalt* registers in England and Wales and the *Rechtsanwaltskammer* strikes him off, the right to practice in the United Kingdom as a *Rechtsanwalt* disappears.[102] This disciplinary collaboration is likely to develop into something stronger eventually. It should help to prevent rogue lawyers from slipping through the regulatory net.[103] A similar rule is found in Directive 77/249/EEC with regard to salaried lawyers.[104]

The group practice rights rules in Article 11 are important rules about which law is going to apply to group practice—called joint practice in the Directive.[105] Basically, if joint practice is permitted in

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

102. *Id.* art. 7(5).

103. This is reinforced by the provisions of Article 13 that provides for close collaboration between regulatory bodies to prevent misuse of the Directive in order to circumvent national rules. *Id.* art. 13.

104. *See supra* note 60 and accompanying text.

105. Council Directive 98/5, *supra* note 83, art. 11.

Joint practice

Where joint practise is authorised in respect of lawyers carrying on their activities under the relevant professional title in the host Member State, the following provisions shall apply in respect of lawyers wishing to carry on activities under that title or registering with the competent authority:

(1) One or more lawyers who belong to the same grouping in their home Member State and who practise under their home-country professional title in a host Member State may pursue their professional activities in a branch or agency of their grouping in the host Member State. However, where the fundamental rules governing that grouping in the home Member State are incompatible with the fundamental rules laid down by law, regulation or administrative action in the host Member State, the latter rules shall prevail insofar as compliance therewith is justified by the public interest in protecting clients and third parties.

(2) Each Member State shall afford two or more lawyers from the same grouping or the same home Member State who practise in its territory under their home-country professional titles access to a form of joint practise. If the host Member State gives its lawyers a choice between several forms of joint practice, those same forms shall also be made available to the aforementioned lawyers. The manner in which such lawyers practise jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.

(3) The host Member State shall take the measures necessary to permit joint practice also between:

(a) several lawyers from different Member States practising under their home-country professional titles;

the host State then it must allow the migrant lawyer the right to set up a branch or agency.[106] Where fundamental rules governing the grouping in the home State are incompatible with those in the host State, however, the latter rules prevail if suitably justified.[107] The host State must allow joint practice between lawyers from the same or different Member States and give access to its modes of such practice—if they exist—to such lawyers practicing under their home State titles. Such practice is to be regulated under host State rules.[108]

The host State may prohibit certain types of joint practice between lawyers and non-lawyers and still enforce this prohibition against migrant lawyers practicing under home State title.[109] A

(b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.

The manner in which such lawyers practice jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.

(4) A lawyer who wishes to practise under his home-country professional title shall inform the competent authority in the host Member State of the fact that he is a member of a grouping in his home Member State and furnish any relevant information on that grouping.

(5) Notwithstanding points 1 to 4, a host Member State, insofar as it prohibits lawyers practising under its own relevant professional title from practising the profession of lawyer within a grouping in which some persons are not members of the profession, may refuse to allow a lawyer registered under his home-country professional title to practice in its territory in his capacity as a member of his grouping. The grouping is deemed to include persons who are not members of the profession if

- the capital of the grouping is held entirely or partly, or
- the name under which it practises is used, or
- the decision-making power in that grouping is exercised, *de facto* or *de jure*,

by persons who do not have the status of lawyer within the meaning of Article 1(2).

Where the fundamental rules governing a grouping of lawyers in the home Member State are incompatible with the rules in force in the host Member State or with the provisions of the first subparagraph, the host Member State may oppose the opening of a branch or agency within its territory without the restrictions laid down in point (1).

Id.

106. *Id.* art 11(1). The incoming lawyer has an obligation to declare that he is a member of a grouping in his home State. *Id.* art. 11(4).

107. *Id.* art. 11(1).

108. *Id.* art. 11(2).

109. *Id.* art. 11(5) (defining a grouping with non-lawyers for the purposes of the Directive).

lawyer belonging to such a grouping in his or her home State could only practice in the host State outwith his home State grouping.

VIII. RECONCILING CONFLICTS

One can see from this brief review that cross-border practice is permitted in the European Union and has been greatly facilitated by both the case law of the European Court of Justice and the secondary legislation flowing from the Treaty of Rome. Union citizens, qualified in a Member State as a lawyer, can practice their art where they wish within the European Union.[110] They can do this under home State title on a temporary basis or establish permanently. Moreover, they can cross qualify under both Directives 89/48/EEC and 98/5/EC and become host State lawyers. This means that lawyers can be dually qualified with relative ease. Given that lawyers can now practice in any national jurisdiction, which deontological and regulatory rules are going to apply?

In one sense, by allowing easier cross-qualification there is automatically a partial solution to the problem. A migrant lawyer who turns into a local lawyer is practicing as a home State lawyer, and, therefore, is subject to all the home State rules. Thus, in theory there will not be any conflicts if he or she is practicing as such. Now that access to the home state lawyer status has been simplified by Directives 98/5/EC and 89/48/EEC, such lawyers are likely to grow in number. It is only a partial solution, however, because such lawyers retain two professional allegiances. In which capacity was the lawyer acting when he or she allegedly breached a regulatory rule and which country's regulatory rule should apply?

There are several possible responses to regulatory and deontological clashes. First, there is the harmonization response. There could be Community rules that harmonize aspects of professional practice. This has happened, in some respects, with some of the medical and allied professions—nursing, doctors, and so on.[111] Harmonization of rules was impossible for lawyers because their rules are so different and their practice is so different and nationally defined. There is now[112] a common European Code of

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110. EC law allows a foreign client to travel to the State where a lawyer is licensed to practice for legal advice. In this situation there are normally no complex ethical or regulatory conflicts to deal with. The home State rules will apply. Joined Cases 286/82 and 26/83, Luisi and Carbone v. Ministero del Tesoro, 1984 E.C.R. 377.

111. Julian Lonbay, *The Free Movement of Health Care Professionals in the European Community*, *in* PHARMACEUTICAL MEDICINE, BIOTECHNOLOGY AND EUROPEAN LAW, 45-75 (Richard Goldberg & Julian Lonbay eds., 2000).

112. The IBA Code of Conduct dates from 1956 and has been amended a number of times.

Conduct[113] which has its limitations but is an initial attempt, constantly in revision,[114] to deal with regulatory and ethical issues arising from cross-border practice. CCBE is a pan-European Bars and Law Societies Association. The Code of Conduct is designed for cross-border activity. It is enforced not by any European body or centralized Bar, but by home State Bars. Membership of home State Bars is not always mandatory, so there are gaps in enforcement. Furthermore, the Code only deals with cross-border activities. Its rules are quite general.

Secondly, conflict rules can be placed in the provisions that allow for free movement of lawyers. This has happened in both Directives 77/249/EEC and 98/5/EC. Under Directive 77/249/EEC the migrant practicing in a host State must comply with host State regulations and professional conduct when representing a client in court or before a public authority.[115] This is without prejudice to observance of home State rules. Thus, a double deontology applies with primacy to the local rule. If just giving legal advice or undertaking other transactional activities, the visiting lawyer must observe the rules of the home State without prejudice to respecting rules in the host State. The precedence of the home and host State rules are reversed, depending on the activities. Some rules, however, are singled out as being particularly important—incompatible activities, professional secrecy, conflicts rules, and publicity.[116] In these areas, the migrant must comply with the host State rules:

> [O]nly if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.[117]

The logic of Directive 98/5/EC, which permits permanent establishment, requires that in most cases it is the host State rules that will prevail. There are also important provisions that allow joint

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113. For a detailed analysis of the CCBE CODE OF CONDUCT see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code*, 7 GEO. J. LEGAL ETHICS 1 (1993).

114. The CCBE CODE OF CONDUCT was last amended in 1998. CCBE Code of Conduct, *available at* http://www.ccbe.org/Documents/En/codeuk.pdf.

115. It expressly excludes the requirements of registration and residence. Council Directive 77/249, *supra* note 40, art. 4.

116. Within Europe there are significant differences in these areas. Different countries have different rules on secrecy, confidentiality, conflicts and publicity. Some ban almost all publicity while others are more liberal in their publicity restrictions. *See generally* DONALD-LITTLE, *supra* note 29.

117. Council Directive 77/249, *supra* note 40, art. 4.

practice,[118] and especially cooperation between Bars, particularly with reference to disciplinary proceedings.[119]

Thirdly, there is a case law approach where the ECJ has talked about abuse of rights. This is an unfortunate case law trend. If a Union citizen leaves France and learns to practice a profession in another Member State and then goes back to France, France could argue that this was an abuse of rights and that the migrant only traveled abroad to avoid French rules. That might be considered an abuse of rights and, therefore, France could stop the migrant from practicing his profession upon return.[120] This is rather mistaken case law because the whole point of the single market is to have competition between the regulatory regimes and types of practice. Clients should be able to choose an English, German, or French lawyer when in Athens. That is the whole point of the marketplace; there are different things to offer. This may now be more fully recognized by the ECJ.[121]

Finally, there is the jurisdictional question about who regulates what. Jurisdiction traditionally has been based on territory. The European Community is grappling with the fact that national territories are still going to be present, but the borders between the Member States are disappearing. In fact, they have largely already disappeared between most—*ex-Schengen*—Member States. In this circumstance, is territoriality still a sensible basis in single market regulation? Residence or territory as a basis for control would seem logical in the absence of centralized rules. There are, however, Community rules setting limits to Member State competence.[122] The single market rules set out basic limitations on what Member States can do. Basically, Member States now find that if they are going to impose regulatory rules, including ethical or deontological rules, they have to be non-discriminatory. Even if they are non-discriminatory, they may impose a heavier burden on the migrant. If they do and that hinders migration, even only notionally, then the rule is unlawful unless the State can actually justify it by some public, not economic, interest. The national rule also has to be proportionate to the aims it pursues. The single market regulatory regime includes the EC competition rules.[123] There is growing case law on their application to the professions.[124] So far this has not hit lawyers hard,

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118. *See supra* note 105 and accompanying text.

119. *See supra* notes 100-01 and accompanying text.

120. Case 61/89, Bouchoucha, 1990 E.C.R. I-3551.

121. Case 212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459; *Gebhard*, 1995 E.C.R. I-4165; Case 19/92, Dieter Kraus v. Land Baden-Württemberg, 1993 E.C.R. I-1663.

122. Case 168/98, Luxembourg v. Parliament, 2000 E.C.R. I-9131.

123. EC TREATY, *supra* note 4, 81-86.

124. Joined Cases 180 to 184/98, Pavlov v. Stichting Pensioenfonds Medische Specialisten, 2000 E.C.R. I-6451.

but they are about to be effected, in relation to MDPs,[125] and particularly those legal professions where they have tariff scales of fees.[126] The European Convention on Human Rights also provides a set of rules which potentially affect professional rights to practice. This Article has not discussed these rules but they are overarching human rights norms that bind in Community law and, thus, could affect legal practice rights.[127]

There is a great variety of legal professions in the European Union and a corresponding multitude of differing and contradictory regulations that govern them. This Article has shown that there are various mechanisms being put into place to try and resolve some of the conflicts that arise from liberalizing legal practice. The journey to resolving them has started, but is far from over.

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125. *Wouters*, 2001 E.C.R. at ____, *available at* http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en.

126. Case 35/99, Manuele Arduino (July 10, 2001), 2001 E.C.R. ____, *available at* http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en.

127. They may soon be further internalized by the alteration of the legal status of the Charter of Fundamental Right, adopted at the Nice Summit in December 2000. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 1-22.

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