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I. DOUBLE DEONTOLOGY

The regulation of the legal profession in Europe is within the competency of the Member States. So far there has been no harmonization by European Union ("EU") legislation. While very few Member States, with regards to regulation of the legal profession, have choice of law rules, no such conflict rules exist at EU level. This means as a consequence that whenever a lawyer works cross-border he is subject to his home country regulatory rules and to the host country regulatory rules at the same time—a phenomenon referred to in Europe as "double deontology." This double deontology is specifically recognized in the lawyer-specific directives of 1977 on temporary cross-border services and that of 1998 on cross-border establishment. The double deontology is also recognized in the Council of Bars and Law Societies of Europe's ("CCBE") Code of Conduct.

There are two kinds of double deontology which will be discussed in the following on the basis of a few examples.

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II. DIFFERING DEONTOLOGY

A. Conflict of Interest Prohibition

1. Definition

Germany has a narrow legal definition. A conflict of interest in which the lawyer is prohibited to act exists only if the two mandates involve, in whole or in part, the same legal matter.

France has basically the same narrow definition; however, a broader prohibition to act can follow from the rules on "délicatesse" in case there exists the risk that factual knowledge from one mandate can flow into another mandate in a different matter in the legal sense. In other words, secrecy aspects can impose additional prohibitions to act.

England and Wales have a prohibition to act whenever there is a conflict in the same or related legal matters.

An even broader definition is to be found in Austria where any commercial conflict triggers the prohibition to act, including conflicts from unrelated legal matters.

Let me give you an example. A German lawyer from Lindau, which is a city on the Lake of Constance, advises a German client who is a purchaser in a commercial sales transaction. He accompanies him to Bregenz, which is an Austrian city 10 kilometers away, also on the Lake of Constance, for negotiations with the Austrian seller. The seller is represented by an Austrian lawyer. The German lawyer representing the purchaser knows the seller rather well because he gives legal advice to the seller in a leasehold matter in Germany. The leasehold matter is a matter completely different from the commercial sales transaction. When the German lawyer enters the conference room, he is requested by the Austrian lawyer to resign from representing his German client, the purchaser, in the sales transaction because the interests of such client in that matter are opposed to the interests of his other client, the Austrian client, in the leasehold matter.

2. Client Waiver?

In France, Germany, and Austria the conflict of interest prohibition cannot be waived by the client.

Professional regulation in England and Wales does not permit a waiver either. However, professional regulation is, in factual life, superseded by civil law which knows countervailing duties of confidentiality and disclosure where a waiver is permissible. If the waiver is given by both parties, the lawyer does not violate his duties

under civil law, and the violation of professional regulation has no consequences because it is not brought to the attention of the competent professional bodies. This is different when the waiver is given by one party only. A lawyer acting on the basis of one waiver only runs the risk that the other client applies for an injunction under civil law and brings charges against him for violation of professional regulation.

3. Law Firm Dimension?

This is the question of whether the mandate of one lawyer creates a conflict of interest prohibition for the other lawyers in the firm. This is the case in France, Austria, and England and Wales. It is also the case in Germany; however, with the proviso that, in the law firm dimension of the prohibition, a waiver is possible under certain conditions. The clients after comprehensive written information can give their express waiver provided that the needs of the justice system, which requires that the lawyer represents the interests of the client in an independent, secrecy bound and integral manner, are not opposed to the waiver. In other words two conditions must be met, namely both clients must waive, and, there must not be opposing needs of the justice system.

The prevailing view in Germany is that needs of the justice system are not opposed if, in a bidding process, a law firm represents several bidders who have given their consent because the lawyers in question operate with Chinese walls. However, when a defeated bidder goes to court to challenge the victory of the successful bidder, the law firm cannot represent either client because the needs of the justice system are opposed to plaintiff and defendant being represented in court by the same law firm.

B. Secrecy/Confidentiality Obligation

1. What is a Secret?

Is a secret only what the client confides to the lawyer? Or is a secret everything that the lawyer learns in the mandate, including third party information? The answers in Europe differ from country to country.

2. Waiver?

In Germany and England and Wales, a waiver is possible with regard to information coming from the client, because the client is the master of the secret. France, Belgium, and Luxembourg do not accept a

waiver because in those countries the secrecy obligation follows from the professional status of the lawyer in the justice system.

3. Correspondence Between Lawyers

The aforesaid difference can become quite relevant in the case of correspondence between lawyers from different countries. A letter which is sent by a French lawyer to another lawyer with the specific mention "confidential" or "under privilege" must, under French rules, not be disclosed by the recipient lawyer to his client. Germany and other countries do not accept such secrecy vis-à-vis their own clients. In these countries, the client has a legal right to be fully informed by his lawyer, even as far as his correspondence with the other lawyer is concerned.

4. Law Firm Dimension

All countries in Europe recognize that the secrecy/confidentiality obligation applies not only to the acting lawyer but also to all other members of the firm.

C. Résumé

As regards conflicts of interest prohibition and secrecy/confidentiality obligation, which are both core values of the legal profession, the core is identical; the margins, however, differ from country to country. With specific regard to double deontology, there is only one practical consequence following therefrom: whichever regulation is stricter on any given aspect, such regulation applies.

III. CONFLICTING DEONTOLOGY

The typical situation is the clash between reporting/disclosure and secrecy/confidentiality obligations.

The best known examples of reporting obligations are in the areas of money laundering and the fight against terrorism. England and Wales and the Netherlands have very far-reaching reporting obligations that go well beyond the applicable EU Directives—these countries have "gold-plated" the EU legislation. Other countries such as Germany and France have limited their national laws to the minimum required under the Directives.

These differences in national implementation of EU legislation can have severe consequences as the following example shows. A German lawyer working in London, be it temporarily or in an office in London, is subject to English reporting obligations because he is working in England. At the same time, he remains subject to his German

secrecy/confidentiality obligations. This means that, looking at the difference in scope of English and German reporting obligations, such lawyer can be subject to English reporting obligations on the one hand and German secrecy/confidentiality obligations on the other hand. This is a true catch-22 situation, particularly when one considers that both the violation of the English reporting obligation and the violation of the German secrecy/confidentiality obligation are not only professional violations but also criminal offences.

These problems can also arise in the inverse situation, i.e. when an English lawyer is working in Europe. The English lawyer would be subject to English reporting obligations and to German or French secrecy/confidentiality obligations.

The issue of conflicting deontology can also become relevant whenever the competent authorities or bodies from England check whether English lawyers working in law firms in other European countries have properly complied with their English reporting obligations.

Another example of conflicting deontology can be found in child abduction cases. One German lawyer in London went to jail when, because of his German secrecy/confidentiality obligation, he refused to comply with the order of an English court to disclose certain information that the court held relevant in a child abduction case. Another German lawyer in a similar case escaped arrest in a London court room only because he produced a letter in which the German ambassador had invited him to a luncheon in honour of the president of the German Constitutional Court which was scheduled for right after the court hearing—the judge shied away from a diplomatic conflict. The judge immediately thereafter went on holiday. The lawyer in question was positively surprised when another judge stepped in and lifted the previous court order by which the lawyer had been put under disclosure obligation. Further, he was negatively surprised when other orders against him were lifted which had, in effect, mandated that his telephone lines be tapped and his mail courier scrutinized by the telephone and postal services.

It goes without saying that the aforesaid problems of conflicting deontology have law firm dimension.

IV. HOW TO SOLVE THE PROBLEM?

When I was Head of the German CCBE Delegation, I suggested that the CCBE should ask the EU Commission to introduce into the Lawyers' Directives of 1977 and 1998 clear rules on regulatory conflicts as far as work outside courts and authorities is concerned. Temporary cross-

border work should be subject to home country regulation only—i.e., it should be subject to the country of origin principle as it has long been recognized in the freedom of goods area. Work in a cross-border office should be subject to the host country regulation. This suggestion did not find the necessary majority in the CCBE. Some bars even denied the existence of a double deontology problem.

The country of origin principle is already to be found in connection with advertising in the E-Commerce Directive, which is also applicable to lawyers. It was included for temporary cross-border work in the 2004 draft of the 2006 Service Directive, which is a horizontal directive applicable to all service providers. It was taken out of the draft because it was rejected by a large majority of bars and law societies. They insisted that their national regulation should be applied to foreign lawyers working in their country and also to their own lawyers working in foreign countries—a clear example of national egoism. It would have been easy to say that there is enough equivalence in professional regulation from country to country in Europe to introduce clear choice of law provisions. In other areas, European politicians again and again have had the courage to use sufficient equivalence as basis for clear choice of law positions. Unfortunately, as regards regulation of the legal profession, politicians are inclined to follow the legal profession.

Consequently, the problem is ultimately in the hands of the European bar leaders who show less courage than national egoism.

The German Bar Association—the Deutscher Anwalt Verein—in 2006 suggested a so-called unilateral conflict rule to be included in the German Federal Lawyers Act, according to which all cross-border activity of a German lawyer should be subject only to the regulation of the country of destination (host country) provided that the rules of such country in such a case are applicable also to foreign lawyers. This unilateral conflict rule would be applicable to temporary and established cross-border activity. So far, this suggestion has not been taken up in public discussion.

Another way of eliminating the problems of double deontology would be to eliminate double deontology in the first place by harmonizing, through EU legislation, the regulation of the legal profession by the Member States as it applies to both domestic and cross-border activities of a lawyer. However, such an approach is even more ambitious than the conflict of laws approach, and it is in my mind completely unrealistic to expect such harmonization in the foreseeable future. Giving up national sovereignty over the entire regulation of the legal profession is even more difficult to accept than to make concessions, through conflict of law rules, with respect to cross-border activities only.

It would be unfair to put all the blame on the bars and law societies. Many parts of professional regulation are in the hands of the national governments. In particular, in the area of conflicting deontology, e. g. money laundering reporting versus professional secrecy/confidentiality, these governments are rather unlikely to take up suggestions from the bars and law societies to ease the problems of double deontology should such suggestions ever be made.

Does that mean that the situation is entirely hopeless? Not quite so. The International Bar Association and the CCBE have recently commenced active work in the double deontology area. Both of them are still in the beginning stages, namely the phase of fact finding through questionnaires. Let us hope that this work will go beyond this first phase and will result in concrete proposals, which will then be adopted by the respective decision-making bodies.