5-1-2004

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Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications

Wayne J. Carroll*

Abstract

This article begins with an analysis of the traditional path to the legal profession in European Union Member States. This section of the article includes a chart summarizing the requirements in each EU country regarding citizenship or age requirements, the duration of legal education, examination requirements, practical training requirements and other requirements. The next section of the article addresses the legislative milestones in the liberalization of legal practice requirements, including the 1977 Lawyers Services Directive, the 1989 Recognition of Diplomas Directive, and the 1998 Lawyers Establishment Directive. The article explains the political “smoothing techniques” used to facilitate liberalization by highlighting the compromises in the 1998 Directive that allowed its adoption. The article continues by noting the internal impact of, and challenges to, the European liberalization. This section includes charts that include a number of statistics about lawyer admission and migration in the EU, providing evidence of the impact of liberalization. The article then considers the consequences of liberalization on particular groups within the EU, including regulators (Admissions Boards, Bar Associations, Ministries of Justice), consumers of legal...
services, and law schools and other legal education service providers. This section of the article also explains the challenge to the 1998 Directive brought by Luxembourg, explaining the arguments raised and the European Court of Justice’s responses to these arguments. The article next analyzes the lessons and implications of European liberalization for those outside of Europe and concludes that the EU’s opening of alternative paths to admission has implications for the legal professions worldwide. The article discusses whether the refusal of some EU Member States to offer these alternative paths to admission to foreign lawyers might be a violation of treaty obligations, including bilateral treaties and multilateral treaties, such as the GATS. The article concludes that the regulatory framework, as currently applied, has the potential to provide a backdoor to admission for foreign lawyers. The final section of the article contrasts the various methods of admission that might be available to foreign lawyers in the U.S. and the European Union.

“You take the high road and I’ll take the low road, and I’ll get to [the court in] Scotland before ye,” (as long as they accord me national treatment or most-favored nation status).

Introduction

Until recently, most countries had a single, uniform set of requirements for admission to the respective legal profession. As contact between societies increased, countries developed rules for addressing cross-border legal practice. Such rules focused mainly on the practice of the lawyer’s home country law in the host country, or the temporary or “one-off” intrusions into the practice of host country law in connection with a particular legal proceeding or transaction. With the increasing frequency and magnitude of cross-border contact came the need to develop rules addressing full-fledged admission to the host country legal practice for lawyers trained and admitted in other jurisdictions. Economic and political integration, both at the regional and international level, brought additional pressure for the development of rules to address cross-border, and cross-system,¹ legal practice.

¹. The term “cross-border” legal practice is often used to describe the crossing of a geographic border by a legal adviser, or the legal advice. The distinction can have relevance in the trade law context. See, e.g., Prof. Laurel Terry, GATS: A Handbook for International Bar Association Members (May 2002) at 23-24 (analyzing the relevance of border-crossing in the GATS context) [hereinafter Terry, GATS Handbook]. In many instances cross-border advising does not entail the “intrusion” into a separate legal system, which the international practice described in this article is meant to address. See,
The European Union presents an interesting model for analyzing the admissions rules relevant to cross-system legal practice. Professional admissions requirements in the EU have undergone a series of liberalizations, both as a result of, and as a necessary underpinning for, further economic and political integration. This liberalization has occurred against the backdrop of widely varying legal regimes, different languages and cultures. In the course of this liberalization, the monopoly of the traditional approach to legal training and qualification has essentially been broken in order to legitimate and facilitate cross-system practice. This all happened with surprisingly little fanfare from the main participants in the legal qualification and regulation system, the law schools and faculties, qualified lawyers, and the regulators of the profession. Given the globalization of legal practice and developments under regional and international trade agreements, these developments have received increased attention, in particular from outside the European Union.

This Article aims to turn the spotlight on the recent developments in the legal admissions arena in the European Union and to highlight both the consequences and the lessons of the developments. Part I outlines the "traditional path" to the legal profession within the European Union, which also provided the backdrop for the liberalization which has followed. Part II traces the development of the liberalization, focusing in particular on the most recent and most revolutionary development in legal admissions requirements, the 1998 Lawyers Establishment Directive. Part III looks at some of the "smoothing techniques" used to bring about the political consensus necessary for the underlying liberalization. It also reviews a legal challenge to the Lawyers Establishment Directive, based upon the claim that it constitutes an impermissible ignoring or erosion of the traditional safeguards inherent in admissions requirements. Part IV looks at the internal impact that the liberalization has had in the EU. Finally, Part V looks at the implications that the European admissions liberalization might have outside the EU, especially in light of the application of the General Agreement on Trade in Services (GATS) to legal services worldwide. This Part considers whether some EU Member States and some U.S. states may be in violation of their obligations under bilateral treaties, and the impact these bilateral treaties might have on obligations under the GATS.

e.g., Prof. Ronald Brand, Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational and Foreign Law, 34 VAND. J. TRANSN’L L. 1135 (Oct. 2001) [hereinafter Brand, Uni-State Lawyers and Multinational Practice]. The term "cross-system" is used herein to refer to the traversing of national legal systems in the context of legal advising, in particular the seeking of full-fledged admission to the legal profession in another country.
I. The Traditional Path to the Legal Profession in the European Union

The path to admission to the legal profession in a Member State in the European Union generally involves up to three components, an educational component, an examination component, and in most Member States a practical training component. This path to the "original" or "first" qualification as a legal professional is referred to in this article as the "traditional" path and describes the steps required, and taken, by the overwhelming majority of the legal professionals admitted in a given Member State. Part II of this Article describes how additional "paths" to admission have been opened in all of the EU Member States. For the aspiring European lawyer, the gaining of one initial qualification to admission is a prerequisite to these alternative paths being relevant.

Law is taught at the university level within Europe, which means the entering students are usually 18 or 19 years old. The first year curriculum generally consists of introductory subjects such as philosophy and legal history, the civil and criminal code. As in the U.S., classes in more specific areas of substantive law are often not taken until after the first year. The duration of the educational component varies within the EU, with four years being common (Spain, England), but lasting up to five years in some Member States (Germany, the Netherlands). The following Table outlines the preliminary requirements facing aspiring lawyers in EU Member States.

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2. It is estimated that at least 99.4% of the lawyers in a given EU Member State qualify in this manner, with the exception of Belgium, where the figure is estimated to be 97.5%. See infra Part IV. A.

3. The term "European lawyer" can be misleading. For the purposes of this article the term is meant to describe a person admitted to the legal profession in a Member State of the EU, normally, but not necessarily, a citizen of an EU Member State. This distinction has particular relevance to the discussion in Parts IV and V.

4. As is later described in Part II, this does not necessarily entail an initial legal qualification in an EU Member State. This fact has particular relevance for Part V.

5. In this respect the United States represents an anomaly in the world by virtue of its treatment of law as a graduate school level subject, leading to the degree of Juris Doctor, a requirement for sitting for a state bar exam. In the 19th century, the rules regarding admission to the profession were rather liberal, not requiring a specific educational background. They later evolved to a regime that did require university level study, but again without a specific content requirement. The idea was that such study would provide the philosophical and theoretical underpinnings for the subsequent study of law. Prof. Dr. Kirk Junker, "Introduction to Common Law Concepts and Processes," papers from lecture series at the University of Cologne, winter semester 2003-04. In this respect, the U.S. system has parallels to the European system, with the splitting of legal education in the U.S. representing an historical accident of sorts.


7. CCBE Preliminary summary of requirements for admission to the legal
<table>
<thead>
<tr>
<th>Member State</th>
<th>Citizen or Age Limit</th>
<th>Duration of Legal Education</th>
<th>Examination Requirements</th>
<th>Practicable Training Requirement</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>EU</td>
<td>4 (magister) to 5 (doctor) years</td>
<td>Bar exam in two parts, 18 months apart</td>
<td>5 years</td>
<td>Considered trustworthy</td>
</tr>
<tr>
<td>Belgium</td>
<td></td>
<td>5 at university or 3 as trainee</td>
<td>Examination at end of education</td>
<td>1 year practical training course</td>
<td>Good character; no record of criminal/financial problems</td>
</tr>
<tr>
<td>Denmark</td>
<td>EU and domicile in FI, MIN 25 years old</td>
<td>5 year degree program from 1 of 2 universities</td>
<td>Professional law exam</td>
<td>3 years practical training</td>
<td>No record of criminal or financial problems</td>
</tr>
<tr>
<td>Finland</td>
<td>EU and Greek origin, MAX 35 years old</td>
<td>5-6 year degree program from 1 of 3 universities</td>
<td>Bar exam toward end of training period</td>
<td>4 years practical training</td>
<td>Good character and no record of criminal or financial problems</td>
</tr>
<tr>
<td>France</td>
<td></td>
<td>4 year degree</td>
<td>One year state course and exam to become avocat stagiaire</td>
<td>2 year traineeship</td>
<td>Good character and no record of criminal or financial problems</td>
</tr>
<tr>
<td>Germany</td>
<td></td>
<td>4 year degree</td>
<td>Bar exam in two parts over two years</td>
<td>2 years</td>
<td>No record of criminal or financial problems</td>
</tr>
<tr>
<td>Greece</td>
<td></td>
<td>4 year degree program from 1 of 3 universities</td>
<td>Professional law exam</td>
<td>18 months practical training</td>
<td>No record of criminal or financial problems</td>
</tr>
<tr>
<td>Ireland</td>
<td></td>
<td>Solicitor vs. Barrister distinction, university or practical experience</td>
<td>Written and oral exam for all, including Irish language testing</td>
<td>Solicitors: 12 month training after 6 month course Barristers: 1 year</td>
<td></td>
</tr>
</tbody>
</table>


8. The number of legal educational institutions is included because it provides some insight into the uniformity of the traditional path within a Member State and perhaps an indication of how tight-knit the legal community may be. For example, in Europe it is common to associate specific fields of national law with renowned jurists and law professors. This is something that can serve as a bond between generations of lawyers within a Member State. Given the introduction of alternative paths to admission, the question is raised whether this bond may be missing between lawyers who qualify in other ways.

9. In the U.S., the maintenance of a minimum (Finland) or maximum (see Greece) age in order to study law would likely be unconstitutional. The existence of such restrictions in the EU may be a reflection of the state's hand in university education. The Commission has successfully pressured Member States to remove such barriers, including Finland's age and residency requirements, even with respect to non-EU citizens. See European Commission to Welcome non-EU Practitioners, available at http://www.internationallawoffice.com/detailnews.cfm?News__Ref=832 (last visited April 2nd, 2004).

10. The Irish language requirement for lawyers has historical roots. According to the Irish Law Society, the language test only applies to Irish citizens. Takers of alternative paths to admission would presumably avoid this requirement.
11. This was presumably a reflection of Luxembourg’s history of being part of different countries (modern day France, Belgium, and Germany). The University of Luxembourg now has a faculty of law. See http://www.cu.lu/def/etudesDEF.html#droit (last visited April 2\textsuperscript{nd}, 2004).

12. Aspiring Spanish lawyers take a series of exams at university as a prerequisite to registration with the bar association, but there is not at present an additional state-sponsored bar examination.

13. In some Member States, positive verification of adequate financial means is required to reduce the risk that financial problems might affect lawyers’ practice.
In some EU countries, there were traditionally few restrictions on the duration of the study period, but in an era of increasing fiscal constraints, most countries have imposed time limits for the completion of university studies. Additional pressure to reduce study periods in some Member States has come from the efforts to harmonize European legal education. This has led to a convergence of the duration of legal education and even the proposed introduction of a bar examination in Spain.

Unlike in the U.S. and with very few exceptions, European universities (and thus the educational component to legal qualification) are state-run institutions, which do not charge tuition. As in the U.S., following completion of legal studies at university, aspiring EU lawyers generally must take a state-administered examination before being allowed to engage in the practice of law. In a few Member States, this exam-taking component is broken down into two stages or exams. The successful completion of the first examination is often a prerequisite for the mandatory practical training period. It also allows the individual to engage in some professional activities, but does not provide the right to

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15. Spain is apparently the only EU Member State that does not have a state examination requirement for admission to the practice of law. Instead, law students are expected to pass certain university exams as a prerequisite to applying for admission to a local bar association. A bill entitled the Access to Practice as a Lawyer or Court Agent Act was brought before the Spanish Parliament in 2003. It proposed the introduction of an examination requirement before aspiring lawyers could enroll with the local bar association and begin the practice of law. Id. at 31. According to the Ilustre Colegio de Abogados de Madrid (Madrid Bar Association), at present the proposal is still only a bill. (Author’s informal telephone inquiry of the Madrid Bar Association on March 17th, 2004).

16. In recent years private schools have been accorded full recognition by the educational ministries in EU countries and have set up shop in an attempt to provide a better educational experience than the state universities, which often suffer from insufficient funds and outdated infrastructures. Examples of private institutions of higher education in Germany are the Bucerius Law School in Hamburg for law (www.law-school.de, last visited February 2nd, 2004) and the WHU School of Management (www.whu.edu, last visited February 2nd, 2004), which offers a U.S.-style MBA program. The MBA curriculum and degree are relatively new in Europe, as business administration is generally a university level subject.

17. Many European universities charge a nominal registration fee each semester, but the education is otherwise free. The traditional full state financial support for universities has been increasingly questioned as unrealistic in light of fiscal restraints and a growing need for substantial investment in infrastructure. Thus it is likely that in the near future many European universities will charge tuition beyond the normal application fee. See e.g. Pay or Decay, THE ECONOMIST, Jan 24, 2004 at pp.11, 23-26.

18. For example, in countries with a training component, passing the first state exam is generally a prerequisite to the taking up of the various clerkship rotations, completion of which permits the aspiring lawyer to apply for admission to the second state exam.
give legal advice.

Interestingly, completion of an LL.M. program abroad often counts towards fulfilling local educational or practical training requirements. For persons from the European continent, the United Kingdom and the United States are popular destinations for such LL.M. programs. The two main reasons are the opportunity for the individuals to improve their English language skills and to gain greater exposure to the common law system. Also important, completion of an LL.M. program may even count towards qualifying the university graduate to sit for the local bar examination. Thus, for some aspiring EU lawyers, it may be possible, and even recommendable, to become fully-qualified in a foreign jurisdiction before they become fully-qualified in their home jurisdiction. Ironcally, the alternative paths created specifically for foreign lawyers may provide some students with a shortcut to admission in their own country.

Finally, most of the EU Member States have a third component of practical training before full admission to the local profession is possible. In England, for example, solicitors would traditionally have to complete their so-called “Articles” training before becoming full-fledged lawyers. This basically entailed working with a practicing solicitor for a period and learning the ropes of the profession. In recent years, this


20. Both of these skills are becoming increasingly important in the job search of newly admitted lawyers, in particular those wishing to work in private commercial practice or as a lawyer in an international company.

21. For example, some U.S. states permit applicants who have completed an LL.M. program to sit for the state bar examination. This includes some of the main commercial states such as New York, which are favorites of foreign lawyers on account of the number of legal relationships made subject to the respective state law. EU citizens with an LL.M. may even qualify to sit for the bar examination in their own or another EU Member State.

22. Some of the practical reasons for this include the generally greater flexibility enjoyed by the future lawyers before completion of their studies at home or the taking up of a full-time job. An additional qualification also can improve job prospects given the increasing internationalization of legal practice and the growing number of newly qualified lawyers entering the local legal job market.

23. See Peter Haver’s update on administrative court proceeding “Admission of American Lawyers to the Practice of Law” [hereinafter “Haver 2003 Update”], dated March 31, 2003 (on file with author) (noting that the majority of applicant’s for Germany’s aptitude test are German law students who have obtained a qualification abroad).

requirement has morphed into a general practical training requirement, but without the more formal structure that the "Articles" entailed.25

In Germany, a mandatory training period of two years between the two state examinations requires the aspiring lawyer to complete various rotations, including one with a court, one with a government agency, and one with a law firm or private practitioner.26 During this training period the individuals usually have the status of civil servants.27 There are also particular training obligations which the "hosts" must meet to ensure proper training. The status as "trainee" also permits the aspiring lawyer to undertake certain preparatory legal work. There are some parallels between the work of a trainee in the EU and that of a U.S. "law clerk" as that term might be understood with the respective hosts (court, public agency, law firm). The traditional recognition of the value of practical training in lawyer admissions regimes presumably influenced the liberalization efforts within the EU.

II. Legislative Milestones in the Liberalization of Legal Practice Requirements

A. The 1977 Lawyers Services Directive

The 1977 Lawyers Services Directive28 was the first major legislative step in loosening the restrictions on the provision of legal services across borders in the European Union. The Directive permits lawyers to cross borders to provide temporary services in another Member State. It also reserves some activities to local professionals and

25. Id.
26. The German educational system has a long tradition of combining theoretical study with practical training. This applies both to technical trades as well as the liberal professions. The practical training period for lawyers is called the Referendariat, and the individuals completing them carry the title of Referendar (male) or Referendarin (female).
27. This default rule had to be modified, partly on account of the more recent requirement to accept non-German citizens of other EU Member States as Referendare. Since the civil servant status is generally reserved by law to German citizens, an exception had to be made to accommodate non-German applicants. An additional factor in this trend to not accord civil servant status on all Referendare is the current fiscal situation, as the Referendare traditionally enjoy certain pension and health insurance benefits.
28. Directive 77/249/EEC, COUNCIL DIRECTIVE of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC), O.J. L. 78/17 (1977) [hereafter Lawyers Services Directive]. Article 1 states that the Directive applies to "the activities of lawyers pursued by way of provision of services," a broad description which arguably includes all forms of legal advising and representation.
requires foreign lawyers to use their home country professional title.\(^{29}\) Remarkably, the Directive permits advocacy in the local courts or agencies, overlooking for the instant case or proceeding the fact that the foreign lawyer is not admitted locally.\(^{30}\) This overlooking of the general admissions requirement could be seen as the first step in the erosion of Member State supremacy in matters of legal admissions and practice. The express reference to the end of the transition period for any restrictions on the provision of services based on nationality or residence is particularly noteworthy in comparing the EU liberalization efforts with the U.S. and in analyzing the GATS application to legal services.\(^{31}\)

**B. 1989 Recognition of Diplomas Directive\(^ {32}\)**

The next major legislative step in the liberalization of the European legal profession was in the context of a general effort to facilitate the free movement of persons within the EU. The thrust of the 1989 Diplomas Directive was to facilitate cross-border trade in services in the EU by accepting, in part or in full, the educational qualifications of service providers from other EU Member States. Given the nuances of legal education and qualification in the EU, a special rule was included to cover applications for recognition of legal qualifications in a host Member State. Recognizing the inherent differences in the national legal systems within the EU, the Directive left to the individual Member States the decision whether or not to require applicants to sit for an aptitude test.

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\(^{29}\) Article 1(1) and 3, respectively. Some of the restrictions in the Lawyer Services Directive were later incorporated into the 1998 Lawyers Establishment Directive, a measure whose imminence was mentioned in whereas clause 3: “more detailed measures will be needed to facilitate the effective exercise of the right of establishment.”

\(^{30}\) Article 5 does require the lawyer to be introduced to the judge in a given matter and to “affiliate” with a local lawyer for purposes of the instant proceeding. It does not, however, provide any guidance on the extent of the affiliation requirement. This issue was fleshed out in a series of ECJ decisions which moved increasingly away from a mandatory affiliation requirement in all cases to a model where the lead lawyer has to decide based upon his or her own professional competence and the needs of the client. (See discussion infra Part V. A.).

\(^{31}\) Lawyers Services Directive, whereas clause 1. The reference is to Articles 57 and 66 of the Treaty Establishing the European Community, commonly known as the Treaty of Rome. As is discussed later in this Article, residency requirements had a slow death in the U.S. setting, and in-state office requirements continue to be part of the regulatory landscape. Nationality requirements are a controversial topic in multilateral liberalization efforts.

to verify their competence in local law. The alternative, apparently favored by the Commission, was to require an adaptation period during which an applicant for admission would gain familiarity with local law through practical experience. In the end, all Member States except Denmark chose to require applicants to pass an aptitude test before they could obtain the local legal professional qualification.

The aptitude test requirement raised some interesting issues both within the EU and outside it. First of all, the scope of the test was the subject of debate, with Member States often pushing for no limits on the subject matter covered. In this respect, the Member States were merely requiring a similar level of knowledge of local law as they require for takers of the traditional path. Applicants and foreign bar associations sometimes argued that the scope of such tests should be narrower than the traditional state exams, since most foreign applicants would only be giving advice on a particular area of local law in line with their specialized practice. Some even believed that the applicant should have some influence in defining the scope of his or her individual test.

Some Member States do allow some flexibility in the coverage of the various legal areas in their test. Germany, for example, allows applicants to select specific legal areas on which to be tested, in addition to a mandatory common exam given to all. The Law Society of


34. The language in the preamble hints at this preference: "whereas, in principle, the choice between the adaptation period and the aptitude test should be made by the migrant, . . . however, the nature of certain professions is such that Member States must be allowed to prescribe, under certain conditions, either the adaptation period or the test."

35. Proposed Professional Recognition Directive: CCBE Comments, supra note 33. This evidenced reluctance on the part of the Member States to rely on the vagaries of an individual "adaptation period" and as such an implicit judgment that an adaptation measure was insufficient to guarantee an applicant's acquisition of the necessary skills and knowledge. For an overview of the specific requirements of individual Member States, see Prof. Julian Longbay's website at http://elixir.bham.ac.uk/menu/country/default.htm.


37. Id. See also Donald H. Rivkin, Transnational Legal Practice, 34 INT'L LAW 825, 826 (Fall 1999) (reporting on ABA's request for limitation to subject matter "reasonably related to the applicant's intended practice.") For a discussion of U.S. lawyers' ethical obligations when dealing with foreign law questions, see Mary C. Daly, Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners, The Professional Lawyer, at p.123. Daly argues that U.S. lawyers confronted with foreign legal issues must understand "the basic concepts of foreign legal systems" including domestic relations and estate law, federal immigration, and the fundamental principles of trade law. Id.

38. Rivkin, supra note 36.

England and Wales takes a different approach, waiving sections of their aptitude test for lawyers deemed to have sufficient training in the respective areas, primarily for lawyers with a common law background. The globalization of services, in particular as a result of the GATS, has raised the question of the accessibility of these tests to lawyers from treaty countries, something discussed in further detail in Part V.

A second interesting aspect of the aptitude test is the language in which it is given. Except for Belgium and Luxembourgh, most of the current EU Member States have one official language, and that is the sole language for the examination(s) for takers of the traditional path. In relation to the aptitude test, however, some have argued that given the foreign background and expected future language of advising of successful foreign applicants, the aptitude test should also be given in other languages. Such arguments have not swayed most local regulators and admissions authorities, so that at least for the time being, there is an inherent language requirement for applicants seeking admission in most Member States via an aptitude test. In summary, the Diplomas Directive introduced an alternative path to admission to the local profession to complement the permitted offering of cross-border legal services on a temporary basis under the Lawyers Services Directive. The chipping away at the monopoly of the traditional path continued a decade later with the passage of the Lawyers Establishment Directive.


The boldest step in the liberalization of legal admissions in the EU was undoubtedly the passage of Directive 98/5/EC, the Lawyers Establishment Directive. This Directive provided an alternative to

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40. For all lawyers with a common law background, the Law Society waives the "Principles of Common Law" portion of the exam. Lawyers from Australia, New Zealand and Scotland only need to pass the Professional Conduct and Accounts head. See http://www.lawsoc.org.uk (click through from "qualifying as a solicitor" to "QLTT") (last visited Feb. 20, 2004).  
41. Rivkin, supra note 37, at 825-26. This also raises questions as to the validity and accuracy of legal advice given in a foreign language. Many legal concepts are deeply rooted in a given language and do not lend themselves easily to translation.  
42. This may be changing. For example, the Czech Republic, which became a Member State of the EU on May 1, 2004, offers an aptitude test in French, English and German in addition to Czech. (letter from Czech Bar Association to author dated February 6th, 2004, on file with author).  
43. The full name of the legislation is Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification
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becoming admitted in a host EU Member State without having to pass an aptitude test. The formal acceptance of another alternative path to admission in the Lawyers Establishment Directive is found in the introduction in Article 10 Section 1, which reads as follows:

A lawyer practising under his home-country professional title who has effectively and regularly pursued for a period of at least three years an activity in the host Member State in the law of that State, including Community law shall, with a view to gaining admission to the profession of lawyer in the host Member State, be exempted from the conditions set out in Article 4(1)(b) of Directive 89/48/EEC . . . [to complete an adaptation period not exceeding three years or take an aptitude test].

The practical effect of the above exemption is that EU lawyers can now acquire the same status as their locally-trained and traditionally-qualified colleagues by being "sufficiently exposed" to local law for a period of at least three years. In other words, an EU lawyer can sidestep the traditional path as well as the aptitude test in any given EU Member State, yet obtain the same professional title and all the rights that go with it, often in a shorter time compared to the colleagues who have followed the traditional path. Upon closer inspection, the truly revolutionary nature of this new path becomes even clearer.

First, there are no set guidelines as to how this "exposure" must be gained. This raises some interesting questions. For example, in cross-border cases, does merely working with a colleague from the EU host state in a particular matter count toward this three-year period? Must there be a substantive exchange between the two about local law? To what extent must an applicant be active in the research, analysis and communication of the legal conclusions in a matter? If passive exposure is acceptable, to what extent can attendance at lectures and seminars bring the applicant closer to meeting the three-year requirement?

was obtained, O.J. L 77/36 (14.3.98). The short name given to the Directive is the Lawyers Establishment Directive, which is the term used throughout this article. For a summary of the path to adoption of this Directive, see Prof. Laurel Terry's article on the ABA-Brussels Bar negotiations at http://www.personal.psu.edu/faculty/l/s/lst3/ABA-Brussels%20Bar%article,%20part%20201.pdf.

44. Lawyers Establishment Directive, Art. 10 sec. 1. For the sake of clarity, the italicized text was lifted from the Diplomas Directive.

45. The extent to which this alternative path is shorter depends upon the particular Member State and how strictly the authorities view the 3-year requirement being met (e.g. the mere elapsing of time as opposed to a thorough scrutinizing of an applicant's "activity").

46. The text seems to clearly require the physical presence of the lawyer in the other Member State. This may raise issues for lawyers in border areas in particular.

47. See discussion infra Part IV B on the topic of accumulation of knowledge relevant to qualification by means of study.
about self-study? Is physical presence in the Member State really required for all phases of these "activities?" The language of the Directive as implemented in the Member States leaves these questions unanswered.

Second, since the local law of any Member State also includes Community law, it is conceivable that the exposure of the foreign lawyer could consist mostly, or even entirely, of Community law. This raises tricky questions about the exact delineation of Community and Member State law. Binding EU law consists of regulations, which are directly applicable without modification, and directives, which set out overall EU policy in an area, but leave it to the Member States to implement the provisions into national law. So does giving advice on an EU Regulation (e.g. the Merger Control Regulation) constitute practicing EU law, local Member State law, or both? If an EU Directive is implemented essentially verbatim in the Member State law, which law is a lawyer practicing if he or she gives advice on the underlying legal provisions? Do such distinctions even matter in relation to the applicant's documenting their three-year practice requirement?

Third, there is no express requirement that the foreign lawyer gain this exposure in the, or a, native language of the Member State. This is perhaps a reflection of the fact that increasingly, advice on local law is sought in a foreign tongue. But this raises similar questions as in the first point. Must the applicant be actively involved in the creation of the advice, e.g., by collaborating in the framing of the relevant questions, the

48. See also the discussion in footnote 63, infra. To avoid confusion on this issue, it must be pointed out that through the years of harmonization of European national law, a large portion of the more recent national law of each EU Member State has its origins in legislation from Brussels. Each Member State entered the EU with an existing legal framework, which since its membership has been modified and amended in the process of convergence of individual Member State law. The very idea that the traditional fundamental underpinnings of a Member State's legal system could conceivably be ignored, even if unintentionally, by someone aspiring to the local legal profession is a huge leap from where all the Member States were in their admissions requirements prior to implementation of the Directive. This represents a true sacrifice of authority over licensing, an area traditionally resistant to liberalization or deference to centralized European authority. Though not an exact comparison, it would be as if states in the U.S. would accord a path to full admission to lawyers from other states and only require sufficient background in federal law, with little or no knowledge of state law.


50. The Europeans have a historical deeper experience with cross-language communication compared to the U.S., such that there is generally less instinctive reluctance or concern on this point. Given the increasing frequency with which legal advice is given in a language other than the "native language" of a national legal system, this is an important point. Essentially it entails recognition of what already exists in practice, the development of different segments of the "market" for advice on local law, depending on the background of the client. See, e.g., Carroll, Innocents Abroad, supra note 6, at 1100-1104.
research to answer these, and the forming of the final opinion? What if the bulk of an applicant's practice consists of communicating host state legal advice to clients in his or her home state in their own tongue, with the initial input provided solely, or mainly, by a locally-admitted colleague? Would it suffice if a lawyer primarily worked doing legal translation in a law firm or company in the host state? Are such activities sufficient for qualifying under the Lawyers Establishment Directive?

The above questions should not imply that there is no control over the qualification standards for lawyers from EU Member States seeking admission through this path. The text of Section 1 of Article 10 of the Lawyers Establishment Directive provides the following guidance as to what constitutes the "effective and regular pursuit" of an activity in the law of the host Member State: "Effective and regular pursuit" means actual exercise of the activity without any interruption other than that resulting from the events of everyday life.

Article 1 goes on to outline the affirmative verification obligations of the applicants with respect to the "sufficient exposure" requirement. The competent authority of the host Member State may review whether the information submitted on the nature of the exposure suffices to qualify the applicant for admission to the local legal profession. In undertaking such a review, the competent authority may ask the applicant for additional information or clarification of the experience gained. If an application is rejected, this decision must be supported by reasons, and the decision itself is subject to appeal under domestic law.

Beyond the above procedural guidance, most of the substantive issues will have to be worked out in the ensuing years as more and more EU lawyers take advantage of the alternatives under the Directive.

51. Legal translation is a classic "activity" of foreign lawyers working in another Member State. The knowledge of both the law and the language of both the "source" and "recipient" countries are essential to the successful practice of this activity. But does it constitute legal advice? Under most countries' intellectual property laws, translations are deemed copyrightable works of the translator. Thus the end product, or advice, given in such situations is arguably that of the communicator. This would appear to strengthen the argument that this activity should count towards the 3-year requirement. On the other hand, a lawyer-client relationship does not generally arise between a legal translator and a client.


53. Section 1 of Article 10 of the Lawyers Establishment Directive reads, in relevant part, as follows: "It shall be for the lawyer concerned to furnish the competent authority in the host Member State with proof of such effective regular pursuit for a period of at least three years of an activity in the law of the host Member State."

54. Id. at Article 10 section 1(b).

55. Id.

56. Id.
III. Political “Smoothing Techniques” Used to Facilitate Liberalization

The radical breakthrough made by the Lawyers Establishment Directive would not have been possible without some political compromises along the way. The background to many of these compromises is hidden in some of the “whereas” clauses which proceed the substantive provisions of the Directive. The compromises generally consist of the creation of exemptions that preserve the regulatory status quo in a given country, or provisions meant to allay fears of the loss of quality or competence of legal advisers as a result of liberalization. Examples of both types are highlighted below.

A. Limitations on Full Liberalization

The final version of the Lawyers Establishment Directive contained limitations either because of political sensitivities, or because the resulting changes necessary for implementation were not feasible (e.g. requiring a constitutional change). For example, whereas clause 11 permits Member States to “reserve access to their highest courts to specialist lawyers, without hindering the integration of Member State lawyers fulfilling the necessary requirements.”57 An example of such reserved access is Germany, where only a few dozen lawyers are admitted to the Federal Supreme Court, the Bundesgerichtshof.58 This limitation has been the subject of debate within Germany, and has also been the subject of review by the European Commission, which is responsible for antitrust matters having a “Community dimension.” Whatever results from those discussions, such exemptions were preserved in the final version of the Directive. They were even later referred to as examples of the limitations of the Directive’s reach in the face of a challenge before the European Court of Justice.59

Another example is whereas clause 10, which reads, in part: “this Directive in no way affects the provisions under which, in every Member State, certain activities are reserved for professions other than the legal profession. . . .”60 This handles the situations where certain activities are not deemed to be legal services in the host Member State, even though they might be in the home Member State.61 Moreover, whereas clause

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58. http://www.brak.de/seiten/pdf/Statistiken/Mgklein04.pdf. This contrasts with the situation in the U.S., where every admitted lawyer may become admitted to practice before the U.S. Supreme Court.
61. Institutional differences are not easily undone with the stroke of a pen. Thus some clear differences in approach, such as regarding licensure requirements for
10 expressly references an earlier exclusion exercised by the UK and Ireland in relation to "the preparation of certain documents in the conveyancing and probate spheres."\(^{62}\) Such an express exclusion was presumably not needed in the civil-law based EU Member States given that such activities are already reserved by law to a subgroup of legally-trained professionals, the notaries.\(^{63}\)

B. Safeguards for Consumers of Legal Services

In addition to the above "market access" type compromises, a number of safeguards had to be included in the Directive to gain approval of enough Member States. These mainly deal with traditional regulatory and discipline requirements. For example, if disciplinary proceedings are to be initiated against a lawyer from another Member State, there is an affirmative obligation for the competent authority to notify and provide information to its counterpart in the lawyer's home state.\(^{65}\) To the extent possible, the prosecuting authority is to coordinate such proceedings with that counterpart.\(^{66}\) Additionally, a lawyer suspended temporarily or permanently in a host Member State will automatically be subject to an equivalent sanction in his or her home Member State.\(^{67}\) Though this will most likely only be utilized in extreme cases, it is quite remarkable in the level of cooperation that it requires conveyancing, are directly addressed in the EU legal framework. But there are surely other differences. Some Member States define by statute which professional activities constitute legal services and thus require the service provider to be admitted to the local profession. For example, in Germany the *Rechtsberatungsgesetz* sets out in detail the types of activities that necessitate legal qualification. In the U.S. this issue is addressed at the state level through the Unauthorized Practice of Law (UPL) rules.


63. The term *notary* in relation to the EU is misleading in the U.S. context in that the underlying European profession bears marginal resemblance to the U.S. concept of notary. In civil law-based EU countries, the notary is a public official with full legal training, often with a given jurisdiction reserved exclusively to him or her (though several notaries may serve the same larger metropolitan areas). Within that jurisdiction, all transfers of real estate or shares of private limited companies, and most probate matters are only legally valid if performed through a notary with the requisite authority. *See also* Goebel, Roger J., *Liberalization of Interstate Legal Practice in the EU: Lessons for the U.S.?,* 34 *INT'L. LAWYER* 308, 312 (noting the special role of notaries in the EU) [hereinafter Goebel, *Liberalization in the EU*].

64. "Market access" is a trade law term referring to the rules and situations affecting the ability of a goods or service provider to compete in a given market. Since licensing regimes can lead to de facto bars to market access, they often need special scrutiny in relation to their compliance with trade law obligations.


66. *Id.* at section 4.

67. *Id.* at section 5.
between the Member State regulators, who historically have operated with complete autonomy with respect to legal professionals in their jurisdiction.

The cooperation and deference required amongst Member State regulators should not come at the expense of the consumers of legal services. Though certain recognition obligations are introduced with the Lawyers Establishment Directive, such as the obligation to take into account the professional practice insurance that a Community lawyer has in his or her home jurisdiction, this recognition should not lead to a reduction in the protection required for host country activities. Thus, Article 6, while accepting that some "credit" may be given for home country insurance in applying host country rules, ensures that the level of coverage should not fall below that generally required for all practitioners.68

In practice, lawyers often end up taking out separate individual policies in each Member State where they offer legal services, since most professional liability insurance carriers still follow a coverage regime based solely upon the legal professional that followed the "traditional path" to admission. The newness of the Directive, the relatively minor level of penetration by EU lawyers into other Member States, and the inertia of insurance contracts in general, means that few insurers make special arrangements to accommodate the nuances of cross-system practitioners.69 The CCBE has called upon the bodies responsible for professional indemnification insurance to liaise with their counterparts in other Member States to ensure proper recognition of existing insurance coverage and to avoid double premiums and coverage to the extent possible.70

68. Article 6 of the Lawyers Establishment Directive contains an exemption from local insurance requirements if the applicant can show that the home country coverage is "equivalent in terms of the conditions and extent of cover." "Where the equivalence is only partial" the host Member State authority can require the individual to "top-up" their insurance to make up for any deficit. Id.

69. This statement is based upon the author's own experience in working as a common law lawyer for German law firms as well as conversations with dozens of cross-system legal practitioners within the EU.

70. CCBE Guidelines for Implementation of the Establishment Directive, http://www.ccbe.org/doc/En/guid_en.pdf. The added administrative costs of verifying a foreign lawyer's insured status has been an issue of contention, such that the CCBE has proposed that the bars be permitted to pass along these costs to the lawyer applicants. The CCBE has also been working to get more uniform coverage throughout the EU. For more information on these efforts, see http://www.ccbe.org/en/comites/assurance_en.htm and http://www.ccbe.org/doc/ Archives/pr_0304_en.pdf. In addition to its addressing of the insurance issue, the CCBE's Guidelines are particularly interesting in their confirming that Community law experience counts for Lawyers Establishment Directive purposes (Point 8, which reads the phrase "including Community law" into Articles 10.1 and 10.3 of the Directive). The CCBE also confirmed that experience gained prior to the
IV. Internal Impact of and Challenges to the European Liberalization

The actual "fallout" from the Lawyer Establishment Directive is only now becoming clear. All of the Member States have implemented the Directive.71 But it is the application of the respective regulations by the competent authorities that defines the exact level of change or intrusion into the traditional admissions regime that each Member State permits.

A. Evidence of the Impact of Liberalization

Column 2 in the following table provides an overview of the number of locally-admitted legal professionals who originally qualified in another Member State. The 2002 statistics do not reveal whether the individuals qualified through the traditional path, by means of examination under the Diplomas Directive, or by taking advantage of the liberalized path provided by the Lawyers Establishment Directive.72 Column 3 provides an estimate of the overall number of lawyers admitted in each Member State. Column 4 gives an idea of the level of penetration of each Member State by "Community" lawyers by estimating the percentage of foreign-qualified colleagues.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Reported Number of &quot;Community&quot; Lawyers 2002</th>
<th>Overall Number of Lawyers Admitted (2002)</th>
<th>Estimated Level of Penetration of Member State by Foreign-Trained Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>24</td>
<td>4,151</td>
<td>0.58%</td>
</tr>
<tr>
<td>Belgium</td>
<td>378</td>
<td>15,432</td>
<td>2.45%</td>
</tr>
<tr>
<td>Denmark</td>
<td>10</td>
<td>4,319</td>
<td>0.23%</td>
</tr>
<tr>
<td>Finland</td>
<td>4</td>
<td>1,588</td>
<td>0.25%</td>
</tr>
<tr>
<td>France</td>
<td>33</td>
<td>40,775</td>
<td>0.08%</td>
</tr>
<tr>
<td>Germany</td>
<td>156</td>
<td>116,305</td>
<td>0.13%</td>
</tr>
</tbody>
</table>

implementation of the Directive counted, and introduced an advisory service to ensure uniform implementation. Despite these efforts, EU Member States still differ on a very crucial aspect of the Directive, namely its accessibility to non-EU citizens. See infra Part V.

71. For an overview of the date of adoption, date of implementation, and relevant legislation in the current EU Member States as well as several accession countries, see http://www.ccbe.org/doc/En/tableau_transposition_en.html (last visited Feb. 20th, 2004).
72. The CCBE statistics were provided by the respective national delegations.
73. It is unclear whether these numbers reflect only EU citizens or anyone admitted to the local legal profession via an alternative path. As discussed in Part V, some Member States restrict access to such paths to EU citizens, while others do not. The numbers for the UK, for example, do not appear to include non-EU citizens as "Community lawyers," see infra note 81.
There are two reasons to believe that most of the persons behind the numbers in Column 2 above qualified either via the traditional path or, more likely, by means of a qualification examination introduced by the Diplomas Directive. First, the above figures date from 2002 (i.e., relate to prior years) and thus cover a very short period during which rights under the Lawyers Establishment Directive could even be exercised. Second, though the Lawyers Establishment Directive was formally implemented in 2000, “full implementation” in the sense of the creation of specific rules and a system for handling applications at the local level took longer. Statistics over a longer period would reveal more information of the impact of the individual liberalization milestones in each Member State.

Still, the above figures provide some information about the level of cross-system legal qualification, and perhaps cross-system legal practice, in the respective Member States. Luxembourg has the highest percentage of foreign-trained lawyers, probably due to its legal education

<table>
<thead>
<tr>
<th>Country</th>
<th>Number</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>53</td>
<td>31,300</td>
<td>0.17%</td>
</tr>
<tr>
<td>Ireland</td>
<td>13°</td>
<td>8,000</td>
<td>0.16%</td>
</tr>
<tr>
<td>Italy</td>
<td>47</td>
<td>140,000</td>
<td>0.03%</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>42</td>
<td>850</td>
<td>4.94%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>28</td>
<td>12,200</td>
<td>0.23%</td>
</tr>
<tr>
<td>Portugal</td>
<td>4</td>
<td>33,339</td>
<td>0.01%</td>
</tr>
<tr>
<td>Spain</td>
<td>4</td>
<td>138,367</td>
<td>0.00%</td>
</tr>
<tr>
<td>Sweden</td>
<td>2</td>
<td>3,821</td>
<td>0.05%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>157</td>
<td>156,493</td>
<td>0.10%</td>
</tr>
</tbody>
</table>

75. For example, the author applied in 2000 in Germany, and received a request to wait out implementing legislation, since it the implementing procedures had not yet been approved (communication from Prüfungsamt Nordrhein-Westfalen, on file with author). In Ireland, Section 20 of the Solicitors (Amendment) Act 2002 was enacted on April 13th, 2002 to implement the Lawyers Establishment Directive. The actual regulations required by sub-section 2 of that Act in accordance with section 3 of the European Communities Act 1972 are “currently being drafted by the State.” Law Society of Ireland Law Directory 2004 at page 557. For this reason, the other European lawyers registered with the Law Society are described as “provisionally registered.” See supra note 74.
76. The mere existence of legislation at the Member State level does not always mean that an applicant has an immediate and defined path to exercise rights under the Directive. In many cases, questions of responsibility (which organization has authority to handle actual applications) and logistics (how are applications to be evaluated) needed to be flushed out.
77. A survey of EU Member States along these lines was conducted by the author in late 2003/early 2004. The results shall be published in a later article.
system and its role as a major financial center in Europe. As described in Part I, until recently Luxembourg did not have its own law school, such that Luxembourg lawyers traditionally trained elsewhere. Luxembourg's tax regime and sophisticated financial services sector has produced a net influx of lawyers to the country. The level of foreign lawyer penetration and concerns about a continuing influx may have motivated Luxembourg's challenge to the Lawyers Establishment Directive described in Part C.

As to the accuracy of the above numbers in specific EU Member States, a few remarks are warranted. Given its comparatively longer experience in dealing with foreign lawyers, Belgium provides a good starting point. Belgium has a disproportionately high number of foreign-qualified lawyers compared to its population and the size of its economy, probably on account of its unique position as the seat of most of the EU political institutions. In reality, however, the real number of foreign-trained but locally-admitted lawyers shown in Column 2 is likely to be significantly higher, given the heavy presence of foreign law firms in Brussels engaged in the provision of advice on EU law. There are two possible explanations for this disparity. The murky classification of EU law by some as part of public international law and a period of perceived laissez-faire of the Brussels bars is believed to have contributed to a large number of unregistered foreign lawyers. Whatever one's views on those developments, the experience of Belgium may provide valuable lessons for liberalization efforts in other countries.

The United Kingdom has the second highest reported number of Community lawyers, most likely due to London's position as a major financial and business center as well as the Law Society's longstanding liberal approach to the admission of foreign lawyers. The actual number of Community lawyers practicing in the UK is also likely to be

78. This classification is not universally accepted in the EU and most Member States require a European legal qualification before permitting a lawyer to give advice on EU law. For an excellent discussion on these developments, see Prof. Laurel S. Terry, A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement between the American Bar Association and the Brussels Bars, 21 FORDHAM INT'L. LAW J. 1382, 1428-1436 (April 1998) (discussing the historical treatment of foreign lawyers in Brussels and the debate over EU law classification) [hereinafter Terry, Cross-Border Legal Practice].

79. Id. at 1475-1482 (comparing various models and approaches to legal practice liberalization efforts).

80. Given the UK's historical ties, the Law Society of England and Wales has considerable experience dealing with cross-system practitioners. Within the UK there is a decentralized regulatory structure reflecting the political makeup of the country, with the Law Society of England and Wales covering those jurisdictions, the Law Society of Scotland with its own rules, similar but different, and the Law Society of Northern Ireland responsible for regulation in the 6 northern counties in Ireland.
higher than the figure shown in Column 2. Possible explanations for this could be that many Community lawyers are only registered in their home States, with fewer colleagues practicing exclusively in England. As is the case with Brussels, many law firms maintain an "outpost" in major commercial cities but do not fully staff them in the early stages.

EU Member States, which maintain stricter admissions regimes, also provide useful information on the impact of the liberalization efforts. Germany, for example, has a high number of reported Community lawyers, likely due to its role as the "economic motor" of the EU and its geographic location at the center of Europe. The level of penetration is small, however, when one considers the size of the population and economy of the country. The EU Member States with smaller populations, like Sweden and Finland, though not economically insignificant, have a noticeably low number of Community lawyers reported. This is probably due to a combination of a comparatively conservative approach to lawyer admissions (Finland) or geographic and linguistic "remoteness" compared to other EU Member States (Sweden). All in all, however, the comparison of the number of foreign qualified lawyers with the overall number of lawyers in a given Member State provides a clearer picture of the extent of the "intrusion" of the takers of an alternative path to admission. As is evident from Column 4 in the above table, even in countries with a nominally high number of foreign-trained but locally-qualified lawyers, the level of penetration is extremely small. Emotionally, there may be a stronger reaction to the competency concerns that such individuals may engender compared to


82. See Carroll, Innocents Abroad, supra note 6, at 112-114 (comparing legal admissions regimes in various EU Member States).

83. Given the sensitivity attached to nationality and language, this is not to imply a qualitative judgment to any of the languages used in the EU. Under EU rules, legislation is generally equally valid and must be produced in all official languages. But the size of the respective language groups worldwide results in a sort of weighting of the usefulness of a language, with English and French having become the primary languages within the EU. For example, within European universities, legal education is increasingly being offered in languages other than that of the respective country. See infra Part B.3 describing developments in European legal education. Some EU countries even offer their admissions examinations in foreign languages, see supra note 42.

84. Although the numbers of foreign lawyers seeking full-fledged admission are small, there is perhaps an instinctive reaction to the threat posed by "outsiders." The true competitive threat more likely comes from the newly-qualified lawyers who seek their place in the local marketplace for legal advice. Though not yet approaching the situation in the U.S., several EU countries are experiencing historically high ratios of lawyers per capita, and the numbers are expected to increase.
newly-qualified local lawyers.\textsuperscript{85}

The February 2004 CCBE statistics show the increasing numbers of foreign lawyers registering in other Member States. For some Member States they also provide a breakdown of lawyers qualifying for full admission to the local legal profession by exercising their rights under the Establishment Directive.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Reported Number of &quot;Community&quot; Lawyers\textsuperscript{86} (2004)</th>
<th>Overall Number of Lawyers Admitted (2004)</th>
<th>Estimated Level of Overall Penetration</th>
<th>Community Lawyers Qualifying under LED</th>
<th>Level of Penetration by LED Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>47</td>
<td>4,494</td>
<td>1.05%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Belgium</td>
<td>378</td>
<td>12,672</td>
<td>2.98%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Denmark</td>
<td>13</td>
<td>4,490</td>
<td>0.29%</td>
<td>3</td>
<td>0.07%</td>
</tr>
<tr>
<td>Finland</td>
<td>5</td>
<td>1,662</td>
<td>0.30%</td>
<td>3</td>
<td>0.18%</td>
</tr>
<tr>
<td>France</td>
<td>493</td>
<td>40,847</td>
<td>1.21%</td>
<td>?</td>
<td>?</td>
</tr>
<tr>
<td>Germany</td>
<td>196</td>
<td>121,420</td>
<td>0.16%</td>
<td>93</td>
<td>0.08%</td>
</tr>
<tr>
<td>Greece</td>
<td>97</td>
<td>33,727</td>
<td>0.29%</td>
<td>10</td>
<td>0.03%</td>
</tr>
<tr>
<td>Ireland</td>
<td>31</td>
<td>1,479</td>
<td>2.10%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Italy</td>
<td>47</td>
<td>129,071</td>
<td>0.04%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>42</td>
<td>941</td>
<td>4.46%</td>
<td>22</td>
<td>2.34%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>39</td>
<td>12,743</td>
<td>0.31%</td>
<td>6</td>
<td>0.05%</td>
</tr>
<tr>
<td>Portugal</td>
<td>25</td>
<td>21,726</td>
<td>0.12%</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Spain</td>
<td>37</td>
<td>146,214</td>
<td>0.03%</td>
<td>?</td>
<td>?</td>
</tr>
<tr>
<td>Sweden</td>
<td>2</td>
<td>4,129</td>
<td>0.05%</td>
<td>?</td>
<td>?</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>244</td>
<td>118,869</td>
<td>0.21%</td>
<td>94</td>
<td>0.08%</td>
</tr>
</tbody>
</table>

Though it is still relatively early, the above table provides some interesting statistics on the early impact of the Lawyers Establishment Directive. Luxembourg has already experienced a significant number of

\textsuperscript{85} Unfortunately, there are few statistics available on the breakdown of professional malpractice claims or complaints (i.e. foreign lawyer, newly-qualified local lawyer, experienced local lawyer). The limited information available does not reveal a higher malpractice risk associated with such foreign-qualified lawyers. See infra note 101. In addition, the reaction to the competitive threat which such lawyers might pose may not be completely rational, given the comparative annual numbers of newly qualified lawyers and the presumption that most foreign-trained lawyers are catering to a different segment of the market for local legal advice.

\textsuperscript{86} It is unclear whether these numbers reflect only EU citizens or anyone admitted to the local legal profession via an alternative path. As discussed in Part V, some Member States restrict access to such paths to EU citizens, while others do not. The numbers for the UK, for example, do not appear to include non-EU citizens as "Community lawyers," see supra note 73.
applicants for admission on this basis. The UK has the largest number, presumably lawyers who had already been practicing in the dominant London legal market. Germany experienced the second largest number of applicants, ironically including a large number of its own citizens.

B. Consequences of Liberalization on Particular Groups Within the Individual EU Member States

1. Regulators (Admissions Boards, Bar Associations, Ministries of Justice) as Gatekeepers

The intrusion into the traditional sphere of national lawyer admissions regulation that the European liberalization, and particularly the Lawyers Establishment Directive, constitutes may hold some valuable lessons for other jurisdictions experiencing similar integration and liberalization pressures. In the EU model, the admissions regulators may be put in an awkward position as enforcers of admissions requirements for takers of the traditional path, and quasi-diplomats in the handling of applications from other Community lawyers. On the one hand they are obligated to ensure that every applicant before them has verified competence to practice, including in matters of local law. On the other hand, there may exist some political pressure to perhaps be less stringent than they otherwise might be with a “home-grown” applicant for admission.

For example, they may more easily accept a foreign colleague on the idea that they represent a separate market segment serving a specific (foreign) client base. Or there may be a perceived pressure not to disappoint the other Member State, especially given that the counterpart authority will be making similar decisions based on our lawyers applying for admission over there. Though no statistics are available on the acceptance rates of Community lawyers compared to takers of the traditional path, anecdotal evidence indicates that the odds may be in the favor of the Community lawyer applicants.

In some respects, the above discussion ties into the points in section 2 below regarding the gradual market segmentation in the provision of services affecting local Member State law. It raises the question of

87. The statistics on passage rates for takers of the traditional path in the EU average 60-75%, while the initial numbers on the takers of an aptitude test are higher. Additionally, given the absence of a test for EU lawyers exercising rights under the Lawyers Establishment Directive and given the rather open-ended criteria for measuring the sufficiency of an applicant’s professional activities, it is likely that the level of rejection of applicants is rather low. This theory is supported by field research conducted by the author that shall be the subject of a subsequent article.
whether a split set of unwritten "rules" might develop in handling applicants who have taken different paths to the aspired legal profession. If so, there is *de facto* disparate treatment, presumably to the detriment of the takers of the traditional path.\(^8\) Ironically, the Lawyers Establishment Directive may even be used by nationals of a Member State as a shortcut to admission in their own Member State.\(^9\)

It is a given that the Lawyers Establishment Directive can provide a shorter path to full admission compared to the average duration of the educational and examination components of a respective Member State's traditional path.\(^9\) An applicant must be able to verify some professional activity of at least three years duration. But even the three-year "minimum" local practice requirement seems to be rather flexible. Article 10 section 3 reads:

"A lawyer practising under his home-country professional title who has effectively and regularly pursued a professional activity in the host Member State for a period of at least three years *but for a lesser period in the law of the Member State* may obtain from the competent authority of that State admission to the profession of lawyer in the host Member State without having to meet the conditions referred to in Article 4(1)(b) of Directive 89/48/EEC.\(^9\) under the conditions and in accordance with the procedures set out below:

(a) The competent authority of the host Member State shall take into account the effective and regular professional activity pursued . . . and any knowledge and professional experience of the law of the host Member State, and any attendance at lectures or seminars in the law of the host Member State, including the rules regulating professional practice and conduct.

(b) The lawyer shall provide the competent authority of the host Member State with any relevant information and

\(^{88}\) This argument was raised in the attempt by Luxembourg to have the Directive annulled. See Part IV B. *infra*.


\(^{90}\) The Lawyers Establishment Directive permits admission to the local legal profession within a period as short as three years, compared to a period of four to six or seven years for takers of the traditional path in some Member States. (See infra Part I). Naturally, in order to take advantage of the alternative path provided by the Directive, the applicant should already have a traditional path in their home state behind them. At the extremes, a lawyer from a Member State with a short educational component could obtain the license to practice in two Member States in the same time it takes a local lawyer in a Member State with a longer educational and training component to complete the traditional path.

\(^{91}\) In other words, without having to pass an aptitude test or complete an adaptation period.
Assessment of the lawyer's effective and regular activity... and capacity to continue the activity he has pursued [in the host State] shall be carried out by means of an interview with the competent authority... to verify the regular and effective nature of the activity pursued."

This section appears to grant the applicants broad leeway in accumulating the necessary exposure to local law. As evident from the above citation, that exposure may consist of a combination of actual experience and/or learning, either through traditional providers of legal education (e.g. classes at a local university) or presumably through commercial providers as well (seminars and lectures). The reference to the learning method (study or attendance at lectures) is interesting in that it recognizes the value of legal education, yet seems to permit forms which generally do not require any examination. Any verification of knowledge or competence gained by the individual would only occur in the course of the application procedure, such as by means of the interview foreseen in Article 10 section 3(b). The reference to professional “experience” is even more interesting in that the basis for the underlying legality of the “experience” is unclear. May the lawyer “dabble” in areas of local law in which he or she feels confident without the requisite license? Must an already-admitted local lawyer supervise and/or be involved in each aspect of the matter? If not, what level of supervision is required? What are the consequences if the resulting service is faulty?

92. Lawyers Establishment Directive, Article 10 section 3 (emphasis added).
93. For a discussion of the same issue in the U.S. context, see Daly, Practicing Across Borders, supra note 37, at 126 (highlighting the relevance of globalization to small firm and solo practitioners). Daly quotes Degen v. Steinbrink, 202 App.Div. 477, 195 N.Y.S. 810 (1st Dep’t 1922), aff’d 236 N.Y. 669, 142 N.E. 328 (1923) for the court-endorsed proposition that a lawyer preparing papers for filing outside his place of practice has a duty “like any artisan... to inform himself... if he has not knowledge of the [applicable] statutes...." This article also highlights the obligation of a lawyer to seek the assistance of, or refer a matter to, a specialist in certain circumstances, in keeping with the general duty of competence. Id at 124-28. A general duty of competence is a mainstay of the ethical rules in all EU Member States as well as all U.S. states. Article 3.1.3 of the CCBE Code of Conduct requires EU lawyers not to “handle matters which he knows or ought to know he is not competent to handle.” The CCBE Code of Conduct has been adopted by each of the EU Member State legal regulatory bodies. For a thorough discussion of the Code, see Prof. Laurel Terry, An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct, 7 GEORGETOWN J. LEGAL ETHICS No. 1 (Summer 1993).
94. Within the private practice context, this also raises issues of professional liability insurance. In law firms, such issues are often addressed by requiring active supervision by a locally-admitted lawyer. In addition, the foreign lawyer is often not permitted to sign any communications containing legal advice, or may only sign together with a locally-admitted colleague.
The existence of alternative paths to the same professional qualification automatically raises questions as to whether this leads to differences in the quality of the service. Still, one must be very careful in insinuating that any particular path available to aspiring lawyers in a Member State produces a better-qualified lawyer than the other. More likely, arguments can be made both ways. For example, takers of the traditional path may claim that their Community lawyer colleagues lack the depth of understanding of local law that only completion of the full domestic educational program, or even growing up or living in the jurisdiction, can provide. Alternatively, Community lawyers admitted through the Lawyers Establishment Directive could claim that given the overly academic approach to legal education in many EU Member States, their three years of practical exposure, combined with their existing legal education and qualification, actually better prepares them for the local legal profession. This ties into the next topic, the level of quality, perceived or real, of the underlying legal services.

2. Consumers of Legal Services

The fact that there are now different paths to admission to the practice of law in the EU Member States raises issues for the general public as well. Does the level of quality differ for professionals who have taken different paths? What role does initial and continuing legal education play in guaranteeing at least a minimum level and “currentness” of legal knowledge in practitioners? What about lawyers who practice cross-border, cross-system, and/or cross-language? Do they represent a growing group of specialists drawing on a number of skill sets which are not gained through traditional legal education (i.e. dependent more on background and experience than on training)? Or do such hybrid lawyers lack the depth of knowledge and experience of their colleagues who have remained focused on one particular legal system and language of communication? Most likely, in the words of lawyers

95. In several civil law-based EU Member States, the main objective of the legal education program is to train law students to become judges, i.e., to apply statutory law, leaving gaps for those pursuing other legal careers to fill in. This approach has been criticized, even domestically, on the grounds that such training mainly serves the rather small percentage of lawyers who become judges upon completion of their legal education. This issue may come as a surprise to American readers used to a different path to judgeship, generally much later in a lawyer’s career, as opposed to straight out of law school, which is rather common in the EU.

96. The CCBE recommends the mutual recognition of legal training so that “migrant lawyers” (e.g. cross-system practitioners) would not be subject to double continuing education requirements. See CCBE Recommendations on Continuing Training at http://www.ccbe.org/doc/En/ccbe_recommendation_continuous_training_281103_en.pdf.
everywhere, "it depends."

The market for legal services may provide an indication of the answer to the above questions. In general, client choice is a combination of a search for specific legal expertise, an existing preferred adviser (e.g. one a person or company has traditionally used), and awareness of alternatives, i.e. the existence of services offered by other qualified professionals.\(^7\) Evidence seems to suggest an increasing specialization in legal practice, including the rise of cross-system specialists. This trend can be seen both in the approach of domestic legal professionals to attract foreign clients,\(^8\) as well as the spread of law firms and lawyers into other jurisdictions to offer services on the doorstep of potential or existing clients.\(^9\) There does not, however, seem to be a concurrent dramatic rise in cross-border or cross-system legal malpractice.\(^10\)

3. Law Schools and other Legal Education Service Providers

Legal educators in the EU, primarily the state-run universities, have

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97. See Goebel, supra note 63, Liberalization in the EU 34 INT'L. LAWYER No. 1, 308, at 328 (Spring 2000) (noting that clients are the best judges of a lawyer's competence).

98. See Daly, Practicing Across Borders, supra note 37, at 124-28 (noting the increasing collaboration between U.S. lawyers and foreign lawyers and legal assistants and attendant liability risks).

99. See Silver, Lawyers on Foreign Ground, supra note 81 (tracing the recent spread of U.S. law firms to foreign jurisdictions).

100. See, e.g., Goebel, Liberalization in the EU, supra note 63, at 341 (noting that U.S. case law doesn't show more "ethical lapses" or "false representations" by out-of-state lawyers). One could even suppose that lawyers treading into new jurisdictions or areas of practice are extra careful, given the higher risk and perhaps added attention presumably given to such matters. One could draw an analogy between such legal practice and driving, as statistics tend to show that the majority of auto accidents occur within a close proximity of the driver's home (i.e. there tends to be a lapse in concentration as the driver acts routinely). Though empirical evidence is lacking, the author's conversations with bar disciplinary officials from England, Australia, Germany and some U.S. states confirmed that there did not seem to be a noticeable higher incidence of disciplinary problems with locally admitted lawyers who originally qualified outside those jurisdictions. See also N.H. vs. Piper, 470 U.S. 274 (1985) (holding unconstitutional New Hampshire's residency requirement challenged by a Vermont lawyer seeking admission to the New Hampshire bar). In Piper, Justice Powell expressly rejected the presumption that a nonresident would be less familiar with the local rules and procedures and more apt to behave unethically: "There is no evidence to support appellant's claim that nonresidents might be less likely to keep abreast of local rules and procedures. Nor may we assume that a nonresident lawyer—any more than a resident—would disserve his clients by failing to familiarize himself with the rules. . . . [T]here is no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner. The nonresident lawyer's professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers. A lawyer will be concerned with his reputation in any community where he practices, regardless of where he may live."
already adjusted to the increasing European component/role of national law. Several universities offer additional programs specializing in European Union law. Increasingly, special programs educating students as to the legal systems in other Member States are being offered, including programs in the respective native language of that country. For example, at the Law Faculty of the University of Münster in Germany, there is a foreign law program which runs parallel to the normal (German) legal education curriculum. Participants in the program choose a concentration in either common law, and learn in English, or French law, taught in French. These programs generally run four semesters (i.e., two full years) and are taught by members of the respective legal professions. The main idea behind such programs is to better prepare the students for interaction with colleagues trained in other legal systems. For some, it may be a first step in seeking full-fledged admission to the legal profession in another Member State. But the main impact of the liberalization on legal educators in the Member States may be that future members of the local legal profession may gain that status without any contact with those "keepers of the traditional path," the university law faculties, the training supervisors, and the state exam administrators. This was one of the reasons why the most recent step in European liberalization has not gone without challenge.

C. The Luxembourg Challenge

Not everyone was happy with the extent of the liberalization of the legal admissions requirements and the departure from the traditional path that it permits. The Lawyers Establishment Directive was not passed unanimously, and in 2000 was challenged by Luxembourg before the European Court of Justice. In its challenge, Luxembourg sought to

101. For example, the University of Frankfurt in Germany offers in LL.M. program in EU law.
102. See http://uni-muenster.de/Jura/Welcome-d.html (follow the descriptions under “FFA,” the German abbreviation for the combined language and foreign law study programs, last visited Feb. 5, 2004).
103. Id.
104. Id. For a full description of the content and nature of the program see “Merkblatt zum Studiengang.”
105. Such programs have spread considerably over the past few years, as have study abroad programs through which European law students spend a semester or longer at the law faculty in another EU Member State.
106. Luxembourg v. European Parliament and Council of the European Union, Case C-168/98 dated 7 November 2000 [hereinafter Luxembourg vs. EU]. One of the arguments raised by Luxembourg was that the nature of the subject matter of the Directive required unanimous approval by the Member States, as opposed to the qualified majority that it received. The defense of the challenge was supported by some of the main Member State proponents of the Directive, the UK, Netherlands, and Spain, as well
have the Directive annulled as going beyond the powers of the respondent institutions under EU law. The case is fascinating in its addressing of some of the practical impact of implementation of the Directive in each Member State. The source of the challenge, the Grand Duchy of Luxembourg, was also interesting given that until very recently, Luxembourg had no law schools of its own.\footnote{When seeking annulment of the Directive, Luxembourg alleged infringement of Articles 52, 57(2) and 190 of the EC Treaty.\footnote{These Articles were subsequently renumbered in connection with the passage of the Treaty of Amsterdam and are now numbered Articles 43, 57(2) and 253, respectively.} The alleged Article 52 infringement is most relevant to the discussion in this Article and consisted of two main arguments: first that the Directive represented an impermissible discrimination against nationals in favor of "migrant" lawyers, and second, the failure of the Directive to safeguard the interests of consumers of legal services and the general public in the proper administration of justice.\footnote{See Luxembourg vs. EU, supra note 106, at para. 14 -17 and para. 30.} Both arguments, and the Court’s responses thereto, are addressed individually below.

1. Inherent Discriminatory Treatment by Creation of Alternative Paths to Admission

In its challenge, Luxembourg recognized the general right of establishment in keeping with EU jurisprudence as the basis of the Directive, but argued that it “may not be granted in breach of overriding principles governing the self-employed professions, common to the laws of the various Member States.”\footnote{Id. at para. 17.} While it recognized the importance of harmonization of EU laws, it argued that even harmonization has its limits.\footnote{Id.} In relation to the competence of legal professionals, Luxembourg argued that “while harmonization may justify dispensing with any assessment of knowledge of international law, Community law and the law of the Member State of origin, no such dispensation can be contemplated as regards the law of the host Member State.”\footnote{Id. at para. 17.} It is difficult to argue that the allowance of different paths to the same legal qualification is not inherently discriminatory, unless those paths are

\footnote{Id. This ties into the discussion of the potential lack of knowledge of host Member State law, discussed in further detail in Part B of this section.}
substantively equivalent in their guaranteeing of the professional competence of the applicant. When one compares the duration, and in particular the focus on national law, of the traditional path compared to the alternative paths introduced by the EU Directives, it is easier to see the logic in the Luxembourg argument.

The argument regarding discriminatory treatment is less strong, though certainly still relevant, when a Member State insists upon passage of an aptitude test before an applicant gains admission to the local legal profession, as was introduced by the Diplomas Directive. But even then, only a closer comparison of the content and complexity of the two tests can yield a true picture as to whether takers of the traditional path have a harder road before them. The argument may be stronger when one compares the traditional path with the possibility opened up by the 1998 Lawyers Establishment Directive, with its liberal “sufficient exposure” approach and apparent downplaying of the requirement for knowledge of local law.

Despite the logic of Luxembourg's arguments, the ECJ had little difficulty in refuting them in ruling that the Parliament and Council had not gone too far in their liberalization efforts. The court focused on the general principle of equality laid down in Article 52 and applied it to the facts at hand as requiring “that comparable situations should not be treated differently unless such difference in treatment is objectively justified.”

The Court viewed the situations of the “migrant” lawyer and the “lawyer practising under the professional title of the host Member State” as “not comparable.”

The Court seemed to sidestep the point that the migrant lawyer could obtain that same title in the host Member State by following an alternative (and by implication easier) path, and thereafter could provide services on the same footing as his local colleague. In its arguments, the Court focused on the various “smoothing techniques” addressed in Part III above, referring to the restrictions on certain advocacy work, legal documentation work, and the possibility of Member States to require the foreign colleague to work in conjunction with local colleagues “in certain circumstances.”

With these comments, the Court minimizes the true extent of the

114. Id. at para. 24. This supports the theory raised in this and other articles that such lawyers primarily cater to different segments of the market for local law advice.
115. Id. at para. 25.
116. Id. at para. 26.
117. Id. at para. 27. As discussed in Part II, the collaboration requirement has evolved from a mandatory one to one that applies when it appears sensible under the circumstances.
liberalization. The references to excluded practice areas raise a false impression that these two restricted areas represent a large part of legal services affected by the Directive. In reality, much of legal services consist of the provision of advice on applicable law, which advice often precedes and/or accompanies both advocacy and legal documentation work. In other words, the Court seems to pay short shrift to the fact that a major area of legal services, the provision of advice, is essentially unrestricted for professionals having obtained the requisite qualification, whichever path to admission they took.

The reference to the collaboration requirement is similarly exaggerated in two regards. First, the permissible scope of a collaboration requirement has been extremely whittled down by the ECJ itself.\(^{118}\) Second, the reference to certain courts being “off limits” and requiring local specialists ignores the fact that the overwhelming majority of litigation in each Member State occurs at levels below such specialist courts, where the restrictions on legal service providers admitted through an alternative path do not apply. Finally, throughout its response, the Court seems to miss the thrust of the Luxembourg challenge, which is not that there is discrimination post-admission to the profession in favor of takers of an alternative path, but rather that the very fact that an alternative (and by insinuation easier) path is available to foreign\(^{119}\) colleagues in itself constitutes discriminatory treatment in violation of EU law. This sidestepping can be seen by the Court’s references to the foreign colleague “practising under his home professional title.”\(^{120}\) This misses the point that such colleagues can, as a result of liberalization, practice under the title of the host state professional title.

2. Disregard of Consumer and General Public Interests

The second thrust of the Luxembourg challenge was the “abolishing of all requirement of training in the law of the host Member State.”\(^{121}\) Though it is conceivable that an applicant may obtain admission to the local profession without much, or any, knowledge of local law, the only true way to test this hypothesis would be to review the actual processing of applications under the Directive by the respective competent

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118. The areas of legal services that have been reserved exclusively to local lawyers, \(i.e.\) takers of the traditional path, have been substantially reduced through the case law of the ECJ. See \(e.g.\) Goebel, *Liberalization in the EU*, supra note 63, at 310-317 (analyzing ECJ jurisprudence in this area).

119. Interestingly, in some Member States this path is available and frequently utilized by local citizens as well.

120. See, \(e.g.\), paragraph 28.

As mentioned in Part IV.A.1, the competent authorities are permitted to assess both the utility of the applicant's exposure to local law as well as the perceived capacity of the applicant to provide competent advice in the future. In any event, the argument did not carry much weight with the Court, which repeated the comments of the Parliament and the UK intervener that "under the rules of professional conduct, lawyers are in any event obliged not to handle cases which they know or ought to know that those cases fall outside their competence...."

The reasoning of the Court in response to the admissions regime challenge is fascinating in that it evidences a shift away from the very underpinnings of traditional legal admissions requirements, namely the a priori jumping through specific and uniform hoops by aspirants to the local legal profession. In the Court's own words:

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 being made easier by experience of other laws gained in the home Member State.

The Court described the approach that the Directive entails as a "plan of action," which combines consumer information (e.g. rules regarding how a lawyer may "hold himself out" to the public, requiring references to titles held and competent authorities to which the individual is subject), restrictions on activities, compulsory insurance, and a coordinated system of discipline by the competent authorities. This approach was upheld as at least equivalent to a system requiring a priori testing. In other words, the Court sanctioned the disparate treatment of applications for admission, provided that such treatment was essentially equivalent and did not sacrifice the traditional objectives of professional services licensing, ensuring the quality of both the services and of the administration of justice.
V. Lessons and Implications of the European Liberalization Outside the EU

A. Model for Liberalization of Admissions Policies?

In the United States legal education has been harmonized to a large extent. But there are still considerable restrictions on the abilities of lawyers admitted in one U.S. state to practice law in another state. In relation to advocacy, most states do permit temporary practice in the local jurisdiction, including appearance before local courts, through the *pro hac vice* mechanism. Admission "pro hac" is analogous to some of the temporary practice the EU sanctioned in the 1977 Legal Services Directive. It is more restrictive than the EU rules, however, in that a) a formal application and a fee is required before admission may be granted, and b) most states require the out-of-state lawyer to work with a local lawyer, who must sign all pleadings as "attorney of record" and share joint responsibility for the matter.

Mandatory collaboration requirements for lawyers are just the sort that the European Court of Justice (ECJ) struck down in *Commission v. Germany* as incompatible with EU law on account of their being overly restrictive. The ECJ held that foreign and local lawyers should judge their own competence in a given matter and decide on their respective roles in a "form of cooperation appropriate to their client's instructions." The ECJ rejected Germany’s argument that the foreign lawyer might have insufficient knowledge of local laws and procedure and noted that it was the responsibility of the lawyer to obtain such knowledge directly or seek outside assistance. Similar arguments in defending a residency requirement for admission to the local bar have

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129. This fee ranges from $0 to $250 per case per year. Id.

130. Id. The requirement for the active participation and supervision by a local lawyer was maintained in the modification to Model Rule 5.5 proposed by the ABA Multijurisdictional Practice Commission. See ABA Center for Professional Responsibility, Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions, available at ABA http://www.abanet.org/cpr/jclr/ prohac_admin_comp.doc (last visited Nov. 8, 2004)

131. Commission v. Germany, 1988 E.C.R. 1123. In that case, the ECJ ruled that Germany’s legislation implementing the Lawyers Services Directive was excessive in calling for a local lawyer to assume the primary role of the representation and to be present at all times during any proceedings.

132. Id. at 1161.

133. Id. See also Daly, *Practicing Across Borders*, supra note 37, at 124-128 (discussing U.S. lawyers’ obligations and the malpractice risk associated with collaborating with foreign lawyers).
been struck down by the U.S. Supreme Court as unconstitutional.\textsuperscript{134} Such an approach by implication addresses the issue of duplicative legal fees by rejecting a mandatory consultation rule for all matters.\textsuperscript{135}

In relation to the provision of legal advice, the U.S. states are presently more restrictive than the EU Member States.\textsuperscript{136} Also, as evidenced in the Birbrower decision, some states vigorously enforce their unauthorized practice of law statutes against out-of-state lawyers.\textsuperscript{137} In Birbrower, even though the client was aware of and sought the advice of an out-of-state law firm, the court found the firm in violation of the California UPL statute.\textsuperscript{138}

Though regulators are required to enforce statutes as they are on the books, one might question whether the strict UPL enforcement approach is in keeping with developments on the national and international level.\textsuperscript{139} On the national level, there is an increasing trend toward a

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\textsuperscript{134} See N.H. vs. Piper, 470 U.S. 274 (1985) (rejecting presumption of greater likelihood of unethical behavior of out of state lawyers).

\textsuperscript{135} A lawyer handling a matter with a foreign law dimension has a number of options. If that foreign dimension is relatively small and the lawyer in question feels competent in that area, he or she may decide to handle the entire matter on his or her own. If the foreign law dimension of a matter is more significant, a lawyer may draft an opinion and seek confirmation or correction by a local colleague, or delegate parts of an overall legal matter to local counsel. See e.g. Daly, Practicing Across Borders, supra note 36, at 127 (discussing the obligation to refer or decline representation as well as the risk of liability associated with lawyer referrals). An interesting question is whether liberalization leads to an increased willingness by lawyers to take on the foreign law dimension of the matters they are handling. This could alter the practice both within large law firms and between cooperating law firms and lawyers. Depending on the number and level of practice of cross-system lawyers, this could lead to a relative reduction in the number of referrals made to foreign colleagues.

\textsuperscript{136} If a lawyer wishes to practice in another state, there is a procedure in most states to become fully admitted by motion based upon the number of years the applicant has been practicing.

\textsuperscript{137} See Birbrower, Montalbano, Condon & Frank P.C. vs. Superior Court, 949 P.2d 1 (applying the California UPL statute to deny fee recovery to New York law firm hired for arbitration services by client in California). For a discussion of the Birbrower case, see Brand, Uni-State Lawyers and Multinational Practice, supra note 1, at 1148-1151. The Birbrower case caused such a reaction that the California Supreme Court adopted Rule 983.4, Out-of-State Attorney Arbitration Counsel, essentially approving the active involvement by non-local lawyers in local arbitration proceedings. It is unclear whether the rule will be extended beyond the envisaged sunset date of January 1, 2006.

\textsuperscript{138} Id. But there are some situations that allow states some wiggle room in relation to the ancillary practice of local law in connection with a home state matter. For a case focusing on the location of the client as crucial to the UPL analysis, see Estate of Condon, 65 Cal. App. 4\textsuperscript{th} 1138, 1140 (Cal. Ct. App. 1998) (permitting the practice and application of California law for the settlor, not licensed in California, of a Colorado estate as an ancillary aspect of the overall legal advice).

\textsuperscript{139} For an interesting discussion of the difficulties in practice of applying UPL statutes to given advice scenarios, see Brand, supra note 1, Uni-State Lawyers and Multinational Practice, 34 VAND. J. TRANSNAT'L. L. 1135 (Oct. 2001).
federalization of the bar.\textsuperscript{140} And on the international level, regional and international trade agreements bring with them liberalization mandates for all countries acceding to them.\textsuperscript{141} The extent to which these agreements apply to legal services is subject to debate as well as further institutional initiatives.

The European experiment in liberalization of admissions requirements has already gone further in comparison to the existing regime of interstate admissions in the U.S. This is particularly remarkable in light of the fact that:

- a) the U.S. is a single country subject to a federal constitution applicable to all states\textsuperscript{142}

- b) the substantive law in most states is for the most part either identical (e.g. on account of federal law supremacy)\textsuperscript{143} or extremely similar (due to the historical adoption of the same rules to given areas or the adoption of harmonized jurisprudence such as the

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\item \textsuperscript{140} Certain areas of federal law, such as patent, trademark, and securities, have always had a strong federal regulation component, with special sets of rules overlaying the state ethical rules in matters affecting those areas of federal law. Some such rules have been given increased legislative and enforcement attention, such as the tightening of federal securities practice rules which resulted from the Sarbanes Oxley Act (SOX). Several of the practice rules in SOX, such as the lawyer’s duty to "report up" (the chain of command in the case of a company client) and "report out" (to the SEC or other government agency) were controversial and the subject of debate amongst various legal organizations, including the ABA.

\item \textsuperscript{141} For the U.S., at the regional level the North American Free Trade Agreement brought with it liberalization imperatives for NAFTA members vis-à-vis service providers from other NAFTA member states. Legal services, however, do not yet seem to have been affected much. See e.g. Donald H. Rivkin, \textit{International Legal Developments in Review: 1997 Foreign Law}, 32 Int’l. Law 423, 424 (noting the U.S. abstention from the NAFTA draft legal services annex for fear it represented a "worsening of the current status"). At the international level, the inclusion of legal services within the GATS framework brings with it interesting questions of possible violation of the GATS by both U.S. states and EU Member States (see infra Part V. section 2).

\item \textsuperscript{142} The EU has made attempts at introducing a Constitution applicable to all Member States. The last two attempts in Dec. 2003 and June 2004 failed, with disagreement over proposed changes in voting rules seen as the chief cause of the failure. The draft Constitution, which was produced by a special Commission headed by former French president Gerard D’Estaing, foresaw a shift in voting more in line with a country’s population. Compared with the existing voting rules, this would have benefited some countries (Germany) but entailed a loss of votes for others (Spain, Poland as country which acceded in May 2004). Resolution in the very near future is unlikely, as several Member States' constitutions require a referendum for such a step.

\item \textsuperscript{143} Federal law preempts state law in several areas, including antitrust, bankruptcy, maritime and intellectual property. In many other areas, a body of federal law exists parallel to the respective state law.
Restatements or model laws such as those created by NCCUSL \textsuperscript{144} c) with the exception of Louisiana, all of the U.S. states share a common law heritage\textsuperscript{145}

d) at least half of the examination\textsuperscript{146} required for the initial admission in a U.S. state is the same regardless of where an applicant seeks his or her first legal qualification, and the other half is often quite similar in approach \textsuperscript{147}

e) the language of creation of U.S. federal and state law is uniform,\textsuperscript{148} though the language of communication of advice may differ depending on the client.

Even given all of the above points, the EU has managed a greater level of liberalization of legal services when compared to the United States. This has happened despite the presence of language differences, deep differences in the systemic approach to law (2 common law jurisdictions and 23 primarily civil-law based jurisdictions), and legal culture and tradition. Early indications are that there has been more of a trickle than a flood of foreign lawyers entering other EU Member States. And though it is still relatively early, the influx does not seem to have produced considerable problems for clients or the local legal profession.

Given the more coherent historical, linguistic and cultural

\textsuperscript{144} Even in areas left to individual state law (torts, contracts, criminal law), there has been a wide degree of convergence, as evidenced by collective legal frameworks such as the Restatements and the Model Laws produced by NCUSL, the National Commission on Uniform State Law. The best known of these is probably the Uniform Commercial Code (UCC) (see http://www.ncusl.org for more information on the areas of harmonization covered by Model Laws).

\textsuperscript{145} This contrasts with the situation in the EU, where there are two common law Member States and the rest predominantly follow the civil law model. The common legal heritage in the U.S. is relevant to some of the states admissions on waiver policies.

\textsuperscript{146} This refers to the multiple-choice Multistate Bar Examination (MBE), which comprises a large part of each state's bar examination. According to bar exam lore in many states, a good performance on the MBE goes a long way in guaranteeing passage of the overall exam, with the MBE score possibly influencing the graders of the essay portion of the bar exam, which focuses more on state law nuances. It is unclear whether this myth has any basis in reality, \textit{i.e.} whether graders of the essay portion are even aware of the applicant's score on the MBE.

\textsuperscript{147} Most U.S. state bar examinations have an essay portion focusing more on local law. This portion is generally weighted at 50\% of the overall score.

\textsuperscript{148} This contrasts with the situation of EU law and individual EU Member State law. Though there have been calls for the inclusion of other languages in the process of U.S. legislation, English has maintained its historical predominance. On account of the growing number of U.S. citizens for whom English is not their mother tongue, many government agencies at the federal, state and local level provide significant amounts of information, sometimes bordering on legal advice, in other languages, especially Spanish.
background between citizens of the U.S. states, one would have expected easier cross-system admissions rules there. This raises the question of whether there has been a lack of comparable political pressure to ease restrictions in the U.S., e.g. in the course of continued political and economic integration, or perhaps a political resistance to the forces of liberalization. According to some commentators, the Birbrower decision caused the U.S. legal profession to focus on these issues.

The American Bar Association created the Multijurisdictional Practice (MJP) Commission to review rules regarding interstate practice in the U.S.. The results of the Commission’s efforts appear represent a workable compromise reflecting policies that support further liberalization, as well as those which do not. The Commission has proposed a revised Model Rule 5.5, which would introduce specific exceptions to traditional restriction on the practice of law by out-of-state lawyers. These cover legal services that are:

- undertaken with locally admitted counsel who is actively involved in the matter
- “reasonably related” to a pending or potential proceeding in or outside the state
- “reasonably related” to a pending or potential ADR proceeding in or outside the state
- “reasonably related” to a lawyer’s practice in a state where the lawyer is admitted

All of the above carve-outs are only permitted on a temporary basis and where there is no “unreasonable risk to the interests of their clients, the public or the courts.” The Commission recognized the challenges in determining when services are only offered on a “temporary” basis. The Commission’s recommendations must go through the normal

149. See Protect the Clients, Not the Lawyers (Altman Weil client notice, on file with author).
150. The Reports of the MJP Commission are available under http://www.abanet.org/cpr/mjp-home.html (last visited April 12th, 2004).
152. See Report 201B, MJP Commission Recommendation on proposed amendments to ABA Model Rule 5.5 § (c)(1).
153. Id. § (c)(2).
154. Id. § (c)(3).
155. Id. § (c)(4). This is a catch-all rule for activities that do not fall under § (c)(2) or (c)(3).
156. See MJP Commission Recommendation on proposed amendments to ABA Model Rule 5.5 at Comment 5.
157. Id. at Comment 6.
legislative and administrative approvals process before any liberalization is given effect.\footnote{158} The Commission also proposed a Model Rule on Pro Hac Vice Admission, which would harmonize the eligibility requirements and application procedures for pro hac admission.\footnote{159} The Model PHV Rule Recommendation emphasizes the affirmative duty of the in-state lawyer’s (i.e. attorney of record) obligation to advise the out-of-state lawyer by exercising independent judgment.\footnote{160} The courts and agencies are expected to ordinarily grant the applications, unless they believe that would be detrimental to the administration of justice, the parties’ legitimate interests, or the adequate representation of one or more client.\footnote{161} And as with the Model Rule 5.5 Recommendation, the Commission noted the restriction of this option to a frequency that would not constitute regular practice in the state.\footnote{162} As the states contemplate the adoption of the Commission’s recommendations, a review of the impact of similar liberalization initiatives in the EU may assist in addressing concerns, in particular those regarding consumer protection and the impact on the local profession.

B. Violation of Treaty Obligations by Refusing Alternative Paths to Admission to Foreign Lawyers?

Regulated services, including those offered by the liberal professions,\footnote{163} pose special problems in relation to the application of treaty rights. This is because the analysis of customary trade law concepts such as most-favored-nation (MFN) and national treatment (NT) must be superimposed on underlying national licensing regimes. If a licensing regime is applied too rigidly such that foreign service

\footnote{158} According to a chart available on the webpage of the ABA Joint Committee on Lawyer Regulation, which is responsible for implementing the MJP Commission Report, as of September 15, 2004, 1 state (Delaware) had implemented the liberalized Model Rule 5.5 identically, 10 had adopted similar rules, 13 had identical or similar rules pending in the relevant court, 5 had committees which recommended an identical or similar rule to the highest court, while 21 states still had the proposed rule under review. The Connecticut bar rejected recommending adoption of the proposed rule by its highest court. See \url{http://www.abanet.org/cpr/jclr/jclr_home.html} (last visited Nov. 8, 2005).

\footnote{159} Report 201 F, ABA MJP Commission Recommendation on a Model Rule on Pro Hac Vice Admission (Aug. 2004) [hereinafter “Model PHV Rule Recommendation”].

\footnote{160} \textit{Id.} Part I, subpart C.

\footnote{161} \textit{Id.} Part I, subpart D. Nr. 3 (a)-(c).

\footnote{162} \textit{Id.} Part I, subpart D. Nr. 3 (d).

\footnote{163} This includes lawyers, doctors, architects, accountants and other service providers. The term frequently used in the EU to describe these is “the liberal professions.” One factor traditionally distinguishing the liberal professions from other services is the independent nature (i.e. the requirement to act in the best interests of clients and not at the direction of others) and ethical obligations of the professionals.
providers are kept out or placed at a considerable disadvantage vis-à-vis local service providers, then MFN and market access commitments may become meaningless. On the other hand, the licensing regimes must be respected in order to preserve the underlying public policy goals of quality and consumer protection. Foreign lawyer licensing regimes (e.g. registration as a foreign legal consultant) typically only deal with the practice of home, international and third country law. But what about host country law? While MFN and NT obligations do not obviate licensing requirements regarding local law, they do raise issues as to whether countries must make available all, or even any, avenues of domestic licensure to foreign service providers.

1. Bilateral Treaty Obligations

In analyzing the global liberalization of legal services, one source of prohibition against discrimination is often overlooked, namely bilateral treaties. Bilateral treaties are important because they may on their own give rise to rights for lawyers, or alternatively may influence the interpretation of rights arising under multilateral treaties such as the GATS. The most common examples are bilateral treaties of Friendship, Commerce and Navigation (FCN treaties). The United States has FCN treaties with many countries. FCN treaties generally require nondiscriminatory treatment of nationals of the treaty partner country. This obligation not to discriminate is generally couched in most-favored nation and national treatment obligations.¹⁶⁴

A central question in applying treaty rights to professional services is whether MFN and NT obligations require countries to apply their professional licensing regimes to foreigners as they do to their own citizens. Absent some precedent or agreement regarding the application of MFN and NT to legal services, an analysis of standard FCN provisions may be helpful. Since Germany belongs in the camp of countries that do not presently open alternative paths to admission to non-EU citizens, the U.S.-Germany bilateral FCN¹⁶⁵ provides a good

¹⁶⁴. Most FCN's refer to a general obligation not to discriminate against the nationals of the treaty party country. Most favored nation and national treatment principles are two of the underlying basic requirements of global trade liberalization and are also anchored in the agreements which comprise the WTO legal framework, including the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). The former require the treaty partner to afford any benefits granted to parties of third countries on an equal basis to parties from the treaty partner country. The latter oblige countries to treat nationals from treaty partner countries equally as the respective domestic providers of goods and services.

¹⁶⁵. The full name of the treaty is the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, signed Oct. 29, 1954 and entered into force July 14, 1956. The texts of this and other
example.

Article III of the U.S.-Germany FCN contains NT and MFN obligations as follows:

Nationals of either party . . . shall be accorded, in like circumstances, treatment no less favorable than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favorable than that accorded nationals of any third country or that required by international law.\textsuperscript{166}

Article XIV repeats the MFN and NT obligations "with respect to all matters relating to importation and exportation."\textsuperscript{167} Under a reasonable application of MFN and NT obligations to legal services, it would appear that U.S. lawyers should be able to provide U.S. legal services in or into Germany, while German lawyers should at least be able to provide German legal services in or into the U.S. But what about becoming licensed to the local legal profession? Article VI may shed some light: "Nationals and companies of either Party shall be accorded national treatment with respect to the courts of justice and to administrative tribunals and agencies within their territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights."

Since courts and agencies in both the U.S. and Germany are responsible for overseeing lawyer admissions, does this Article require them to open alternative paths to admission to lawyers from the other country? Or was the Article only intended to address general access to courts and agencies for purposes of litigation? A narrow interpretation of the phrase "in like circumstances" and "in like situations" could lead to the conclusion that the different educational and training backgrounds of U.S. and German lawyers justify the failure to open the alternative paths. And yet, such differences did not prevent Germany from

\textsuperscript{166} Id. The first sentence refers to the NT obligation, while the second encompasses the MFN obligation. Both are further defined in Article XXV as follows: "The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." MFN is defined as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." \textit{Id.}

\textsuperscript{167} Id. The full text of the Article reads: "Nationals and companies of either Party shall be accorded national treatment and most-favored nation treatment by the other Party with respect to all matters relating to importation and exportation." \textit{Id.} In the GATS framework this is broken down into four "modes of supply," with importation termed as "consumption abroad," exportation as "cross-border supply." \textit{See supra} Part 2.
providing access to aptitude tests and qualification by exposure to UK and Irish solicitors, who also have a common law background and train in English. Nor do they appear to prevent U.S. states with liberal admissions regimes from allowing German lawyers to qualify as local lawyers without having to follow the traditional path.

Recent examples of the protection of FCN rights enjoyed by other regulated service providers from treaty countries may aid the analysis. In 1993, for example, Germany relied upon the FCN in refusing to implement provisions of an EU Directive which would have resulted in discriminatory treatment of U.S. telecom service providers. And just last year, the German Supreme Court held that Germany’s MFN and NT obligations under the FCN mandate recognition of the status of a U.S. corporation with respect to its capacity to contract and right to sue and be sued in German courts. In other words, the underlying corporate status of the U.S. judicial person had to be accepted with respect to its activities in Germany, even though the company was established under U.S. law.

Could a U.S. lawyer by analogy argue that his or her status as a lawyer should be recognized with respect to the availability of alternative paths to admission to the legal profession in Germany? If a German citizen could become qualified as a lawyer outside Germany and use that status to become a German lawyer under the Diplomas or Lawyers Establishment Directive, doesn’t Germany’s NT obligation require it to treat U.S. lawyers equally (i.e. permit access)? As outlined below, some of the German Supreme Court’s reasoning in the Company Recognition Case seem to hint at an answer in the affirmative.

168. See Julie M. Grimes, Conflicts between EC Law and International Treaty Obligations: A Case Study of the German Telecommunications Dispute, 35 HARVARD INT’L. L. J. 535 (1994) (analyzing occasional conflict between EC law and prior bilateral treaty obligations of EU Member States) [hereinafter Grimes, EC Law and International Treaty Obligations]. This case is referred to as the German Telecoms Dispute and is further analyzed in Part V.3 of this article.

169. Id.

170. German Supreme Court Docket No. VIII ZR 155/02 [hereinafter referred to as the “Company Recognition Case”]. For a discussion of this case and a link to the website of the German Supreme Court, see http://www.amrecht.com/corporatewagner82003.shtml. The background of the dispute was the failure of a German company and buyer of a shareholding in a German limited liability company to pay the purchase price for the shareholding to the seller, a U.S. company established in Florida and having its administrative center in Germany. The defendant and buyer argued that because the seller (a U.S. company) was not established under German law despite having its administrative center in Germany, then it had no standing to sue in the German courts. This argument gets into nuances of German corporate law, which follows the so-called “seat theory” of incorporation in contrast to many common law jurisdictions, which permit different theories of “corporate seat,” e.g. the “nucleus theory,” where the main decision-making is concentrated as contrasted with the “muscle theory,” which looks to where the company has its main operations and does the most business.
After addressing the differences regarding the law of incorporation in the U.S. and Germany, the court in the Company Recognition Case held that in accordance with German private international law, even fundamental principles of German international corporate law can be deviated from by means of a treaty. The court focused on Article XXV para. 5 sent. in concluding that as long as a U.S. company is properly incorporated under the relevant applicable laws in the U.S., it must be recognized in Germany. It continued: "Article XXV... means... that for a company which is set up in the territory of one treaty partner, the rules of the legal system of that treaty partner determine the requirements under which this company may act as a legal subject in the territory of the other treaty partner." Interestingly, the Court also highlighted Article VII as securing a right of establishment for companies from one treaty partner in the territory of the other treaty partner. It rounded off its analysis of the FCN by holding:

If national treatment, most favored nation and establishment rights are agreed [in a treaty] and a company may accordingly conduct business in another country, then the legal personage which it has according to the law of the country in which it was established may not be undermined. The right of establishment in particular has at its core the full recognition of its legal and litigant status.

But is a professional licensing regime to be handled the same way as a company-licensing regime? National rules regarding incorporation or establishment usually provide a few alternatives for foreigners interested in engaging in any legal commercial activity. Companies choose a particular form based upon a combination of operational, tax,

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171. Company Recognition Case, Part II, section. 2 (referring to Art. 3, para. 2 sentence 1 of the Introductory Act to the German Civil Code, or the Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB), which contains the statutory provisions of German private international law.

172. This part of Article XXV reads as follows: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."

173. Company Recognition Case, Part II, section. 2 (author's translation). The court pointed to the Preamble, Articles V section 5 (confirming NT and MFN to property and other rights), Article VI section 1 (confirming NT with respect to access to courts, agencies and other tribunals), Article VII section 1 (confirming NT with respect to "engaging in all types of commercial, industrial, financial and other activity for gain, whether in a dependent or independent capacity, and whether directly or by agent or through the medium of any form of lawful juridical entity."), as well as Article IX section 4 (confirming MFN and NT with respect to property rights) in support of its interpretation.

174. Id.

175. Id. (author's translation).
liability risk tolerance and other reasons. Professional licensing regimes, on the other hand, provide a predefined range of options to becoming licensed to practice a particular profession. A reasonable application of the NT obligation to lawyer licensing would suggest that whatever alternative paths to becoming admitted to the legal profession in one country should be available to citizens from the other treaty partner. Thus if Germany permitted German citizens who had qualified e.g. as solicitors in England or avocat in France, to either sit for their own aptitude test or become admitted based upon three years of local legal experience, presumably the same avenues should be available to U.S. citizens. But an automatic recognition of a U.S. citizen admitted as a lawyer in the U.S. for the purposes of access to the alternative paths would certainly go too far.

Definitive answers generally must await definitive cases. Obviously, for countries that follow a liberal approach to the treatment of foreign lawyers (e.g. by making available the alternative paths discussed herein), no test cases arise. And, in countries that follow restrictive admissions regimes in relation to foreign lawyers, until a lawyer actually attempts to rely upon such treaty rights, abstract MFN and NT obligations remain just that. Some test cases in such countries have recently been making their way through the courts. After eight years of litigation, the Haver case looks like it may be moving toward a final resolution permitting the lawyer applicant to sit for the German aptitude test. But if the outcomes of such test cases produce conflicting results

176. This appears to be the practice in Germany, with one source noting that the majority of applicants for the German aptitude test (Eignungsprüfung) are German nationals.

177. A recent case decided by the German Supreme Court supports this conclusion. A German citizen had completed part of the German legal educational requirements including passing the first state exam. Afterwards, he completed an LL.M. program in the U.S. and became admitted as an attorney-at-law in New York. Later, he worked for a few years in England and had established himself there as a foreign legal adviser. On that basis he became admitted to one of the bar associations in Germany. His application for admission to the German aptitude test was rejected, however, because he had failed to obtain a full legal qualification in an EU Member State. The same barrier prevented him from succeeding with an application under the Lawyers Establishment Directive based upon his years of “activity” of legal practice in England. Additionally, the court mentioned as relevant the fact that the applicant had not completed his legal education predominantly in the EU, despite his having completed the German university education component and the first state exam. See Case AnwZ (B) 74/02 decided Sept. 19, 2003 (see the Supreme Court’s website at http://www.bundesgerichtshof.de ).

178. See supra section 3 describing practical application of treaty rights to lawyer applicants for admission. See also, Carroll, Innocents Abroad, supra note 6, at 1120-1125 (discussing bottom-up challenges to lawyer admissions regulations in the EU and the U.S.).

179. Discussions between the author and Peter Haver in May 2004. The resolution is likely to take the form of a settlement, under which Haver would be granted permission
in or between Member States, final resolution may necessitate action by the government of a treaty partner.  

Finally, a word about the broader relevance of the bilateral treaty analysis must be mentioned. Though the FCN option may seem to have been made outdated by the adoption of the General Agreement on Trade in Services (GATS) in 1994, two factors hint at the likely continued relevance of FCN treaties in this context. First, there may be bilateral treaties between nations, one or both of which are not members of the WTO. Second and more importantly, some of the FCN treaties were concluded prior to the adoption of the Treaty of Rome and/or the GATS. As discussed in further detail in section 3 below, this could mean that parties from FCN treaty countries would benefit from the national and regional liberalization that has occurred since the conclusion of the respective FCN treaty.

2. Multilateral Treaty Obligations: GATS and Legal Services

The GATS was concluded as part of the legal framework underpinning the creation of the World Trade Organization (WTO) in 1994. The establishment of the WTO was significant in a number of respects, among them the formal extension of free trade principles to sit the aptitude test. But the settlement would not constitute a ruling on the underlying legal issues. Moreover, it would not be directly applicable to other lawyers facing similar situations. Nonetheless, it would likely have some precedential value for such applications. To the extent it actually does represent a ruling on the application of MFN and NT obligations to national lawyer licensing regimes, it may even have precedential value to the ongoing efforts under the GATS.

180. This is because of the provisions regarding interpretation disputes under the FCNs. In the U.S.-German FCN, for example, Article XXVII requires that “Any dispute between the Parties as to the interpretation of application of the present Treaty which the Parties do not satisfactorily adjust by diplomacy or some other agreed means shall be submitted to arbitration or, upon agreement of the Parties, to the International Court of Justice.” Similarly, with respect to “business practices which restrain competition,” Article XVIII requires the treaty Partners to “consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effects.”

181. The U.S. has FCN’s with 14 of the pre-May 2004 expansion 15 EU Member States. Seven of these FCN’s (with the UK, Spain, Italy, Ireland, Greece, Denmark, Germany) came into force prior to the effectiveness of the Treaty of Rome. The remaining FCN’s came into force well before the creation of the WTO and introduction of the obligations under the GATS. See Grimes, EC Law and International Treaty Obligations, supra note 150, at Parts IV-V (analyzing dates of effectiveness of FCN’s between the U.S. and individual EU Member States).

182. The GATS is an annex and integral part of the Agreement Creating the World Trade Organization.

183. One of the major advances of the WTO was the creation of the Dispute Resolution Boards (DSBs), which were authorized to make binding decisions on disputes brought before them. The decision to make DSB rulings binding on the Member States
services in addition to goods. Legal services have also been brought within the ambit of the GATS, though questions remain about exactly what that means. In its initial offer on legal services within the GATS framework, the U.S. commented that “the basic problem stems from the national character of each country’s legal system” and called for licensing rules which focus on the “need to demonstrate knowledge and competence in the law of that jurisdiction.” In other words, the GATS analysis is complicated by the same problem as the bilateral treaty analysis, namely the overlap between trade law obligations and national licensing regimes.

So what do we know thus far about the application of GATS to legal services? First, most favored nation treatment appears to be due from the overwhelming majority of countries, including the U.S. and all EU Member States. Second, market access and national treatment are owed if and subject to any conditions upon which a country included legal services in its Schedule of Specific Commitments. And third, WTO members may not introduce additional restrictions on legal services offered by other members beyond those in effect when the member became subject to the GATS.

Since the creation of the WTO there have been additional liberalization efforts made by WTO bodies directly addressing issues that could affect legal services. The GATS itself contained “built-in”

involved was controversial, with many countries preferring to maintain the existing GATT structure of nonbinding rulings carrying only moral and political weight. For an excellent discussion of the background of the DSB system, see International Lawyer article.

184. The General Agreement on Tariffs and Trade (GATT) 1994 was essentially a continuation of the GATT 1948 Agreement, which applied free trade principles to the international trading in goods. The logic and framework of the GATT 1948 provided the basis for the other WTO agreements, including the GATS, the TRIPS (Trade Related Aspects of Intellectual Property), the TRIMS (Trade Related Investment Measures) and other ancillary agreements.

185. See USTR Proposal on Legal Services in the “Purpose” section. This document expressly recognized that some EU Member States continue to maintain limitations based upon citizenship. Id.

186. Countries had an opportunity to make a reservation to the obligation to provide MFN treatment, but only eight countries actually did so: Brunei Darussalam, Bulgaria, the Dominican Republic, Singapore, Costa Rica, Honduras, Panama and Turkey (the last four made reservations to professional services altogether, not just legal services). See, e.g., Terry, GATS Handbook, supra note 1, at 14-15

187. Id. See also Laurel S. Terry, Latest Developments Regarding the GATS and Legal Services, THE BAR EXAMINER, 27-30 (August 2003) (discussing efforts to harmonize Foreign Legal Consultant (FLC) rules in the U.S. and their potential inclusion in ongoing liberalization negotiations), and Laurel S. Terry, Current Developments Regarding the GATS and Legal Services: The Cancun Ministerial GATS Negotiations, THE BAR EXAMINER, 38-39 (February 2004). Terry outlines the two main tracks of legal services liberalization at the international level, the Doha Round negotiations of specific
negotiations on further liberalization of services, which have already produced proposals from some Member States. In addition, the Working Party on Professional Services created a set of rules addressing domestic regulation of the accounting professions. In the view of most commentators, these are still works-in-process and not yet binding on WTO Member States. This fact, combined with the general structure of the GATS, seems to support an interim conclusion: as applied to professional services, there is a schism of obligations depending upon whether one is dealing with home (and perhaps third) country law (presuming the individual is qualified to practice this) or the respective host country law (presuming the individual is not qualified to practice this). These are discussed individually below.

a. Doing what a lawyer is already licensed to do, but elsewhere

An individual qualified to practice the law of a given country (most often the individual's home country) should be permitted to do so in relation to other WTO member states to the extent that that nationals or third country lawyers may, unless restricted. The 15 members of the European Community when the GATS entered into effect did not list any limitations on market access or national treatment for Modes 1 (cross-border supply), 2 (consumption abroad) and 3 (commercial presence) in relation to "legal advice on home country law and public international law." In relation to Mode 4 (presence of natural persons), Germany

commitments, and the WTO Working Party on Domestic Regulation.

189. Id.
190. The Working Party's main task is to investigate the possibility of applying the Disciplines for Domestic Regulation in the Accountancy Sector, S/L/64, to legal services. The application of the Accountancy Disciplines could have a tremendous impact on legal admissions policies. Restrictions presently found in several WTO Member States, in particular citizenship and residency requirements, would likely be incompatible with the Disciplines. For an excellent outline of the development and application of the Accountancy Disciplines, see Bernard Ascher, Trade Disciplines for Regulation: Lessons from the Accountancy Sector (paper presented at the Conference on (R)Evolution of Quality and Competency Assurance in the Global Market Place, Santa Fe, New Mexico, June 2-4, 1999.

191. See WTO Services Database Output, Schedule of Specific Commitments of the EC 15-NP, under "L.A. Business Services—Professional Services," available at www.wto.org. This picture is complicated by the entry covering the EC-12 (Austria, Sweden and Finland having joined on January 1, 1995, the first effective date of the GATS), which contains limitations on Mode 1 by France and Portugal in relation to drafting legal documents, procedural requirements for Mode 3 by Germany and Denmark, and again a general exception to Mode 4 with a few specific exceptions. See WTO Services Database Output, Schedule of Specific Commitments of the European Community 12, under "L.A. Business Services—Professional Services." In any event, the commitments appear to entail rather broad freedom to provide home country legal services within most of the EU, which is generally that which interests most legal service providers.
and the UK listed specific market access limitations, while the remaining Member States made no commitments (i.e. are "unbound").\textsuperscript{192} The United States' Schedule contained no limitations on Modes 1 and 2 for "consultancy on the law of [the] jurisdiction where [the] service supplier is qualified as a lawyer," but 35 states made no commitments in relation to Modes 3 and 4.\textsuperscript{193} Since the overwhelming majority of cross-border legal services are dependent upon the level of commitments under Mode 1 and 2, the current situation in the EU and the U.S. reflect rather liberalized markets for the respective legal services.\textsuperscript{194}

The mechanism generally used by countries in according foreign lawyers access for these legal services is registration as a "foreign legal consultant (FLC)" with the respective bar authority. In return for permission to practice, lawyers usually must subject themselves to the local ethical rules, which generally prohibit the practice of local law without the active assistance of a locally admitted professional. In some jurisdictions, the lack of harmonization and confusion regarding the term "foreign legal consultant" has led to sort of a gray area of international legal practice.\textsuperscript{195} Organizations such as the International Bar Association are trying to bring about more clarity and uniformity in this area.

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} WTO Services Database Output, Schedule of Specific Commitments of the United States of America, under "1. A. Business Services—Professional Services, a) 2)."

\textsuperscript{194} See \textit{e.g.} WTO Secretariat, Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services (Kluwer 2001) at footnote 11 on page 405 (citing 1995 OECD study that only a few thousand lawyers move abroad permanently while over 300,000 travel abroad occasionally). The former are impacted by Modes 3 and 4, while the latter depend upon the commitments made under Modes 1 and 2.

\textsuperscript{195} Statistics presented by Prof. Carole Silver at the Spring Meeting of the ABA Section of International Law and Practice (April 2004) (on file with author). Prof. Silver's research indicated wide variances between the number of self-identified legal consultants and those actually licensed with the respective state bar authority. The research even revealed the existence of FLC's in states that have yet to pass any FLC regulations.
b. Becoming licensed or obtaining temporary permission to do what lawyers do elsewhere

But what about the ability of foreign lawyers to provide services which deal with local law? Is there any room for tolerance of the ancillary practice of host country law, as we have seen at the regional and national level in the EU and the U.S.? In the cross-border context, many practice areas automatically trigger the need for cross-system advice.\(^\ast\)\(^{196}\) Thus even a lawyer licensed to provide services regarding the law chosen to apply to an underlying legal relationship often needs to address host country law issues. Obviously, MFN and NT do not provide a free pass to admission to the local legal profession, even if mandatory local law issues impact other legal services commitments (i.e. with respect to home, third country, or international law). Do MFN or NT obligations mean that a Member State must make available all, or even any, of the paths to local admission to foreign lawyers from WTO Member States? The fact that the Working Party is still working on the issue indicates that from a GATS perspective, the extension of alternative paths to admission is not axiomatic.

The prevailing view of commentators is that any existing GATS obligations only apply to services for which an individual is already authorized.\(^{197}\) Many domestic regulations are not subject to scheduling and fall under Article VI:4 of the GATS. This Article requires that for those services listed on a country’s Schedule of Specific Commitments, the qualification and licensing rules should not themselves constitute a restriction on the supply of the service nor constitute unnecessary barriers to trade in such services.\(^{198}\) The WTO bodies are charged to work out the details regarding obtaining authorization (e.g. a license) to provide any further services. The only indication regarding the application of the GATS to domestic regulation is in relation to accountancy services. There, the Disciplines call for the respective qualification examination to “be open for all eligible applicants, including foreign and foreign-qualified applicants.”\(^{199}\) The idea behind

\(^{196}\) Many legal systems have areas where local law is mandatory. For example, most countries follow the principle of *lex loci sitae* with respect to real property. Similar rules apply to shareholdings in corporate entities. Thus, in relation to legal relationships where these types of property are involved, national law will be triggered regardless of any choice of law made in the underlying contract.

\(^{197}\) See e.g. WTO Secretariat, Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services (Kluwer 2001) at page 418 (noting that host, home, and third country law qualification requirements are domestic regulations not subject to scheduling under Articles XVI and XVII).

\(^{198}\) GATS Article VI:4.

\(^{199}\) Disciplines on Domestic Regulation in the Accountancy Sector, at Nr. 23.
the WTO Track 2 negotiations is to use the Accountancy Disciplines as a
guideline in looking at other service sectors.

The above analysis highlights the inherent difficulty that legal
services pose for the WTO. Most professions believe they are unique
and hence require an individual, sectoral agreement under the GATS.
With respect to law, the argument appears relatively strong. For
example, though national regimes for licensing a doctor may differ, the
underlying reference point is determined by something that is essentially
uniform across the globe, namely the workings of the human body.
Where professional services are based upon an artificially-created regime
(such as a legal system or accounting regime), however, the one-to-one
transferability of the knowledge and skills of a trained individual is not
as simple. An objective benchmark for measuring competence, which
should be the guiding factor in nondiscriminatory evaluation and
licensing of professionals, is directly tied to specifics of a particular
national system. Only by emphasizing the commonalities of professional
training and experience over systemic differences, as the EU has
managed to do in its liberalization efforts, can one move toward a system
of mutual recognition or opening of alternative paths to admission.

3. Practical Issues in the Application of MFN and National
Treatment Principles to Lawyer Applicants for Admission

a. The impact of bilateral treaties and the timing dimension to
treaty rights

The interpretation of MFN and NT obligations under bilateral
treaties as applied to legal services could influence both of the
liberalization tracks currently being negotiated at the WTO. As
mentioned above, some, if not all, of the FCN treaties in place predate
the adoption of the GATS Agreement. More importantly in the U.S.-EU
context, many of the FCN treaties between the U.S. and most of the
present Member States of the EU predate the Treaty of Rome. This

200. For a thoughtful discussion of the issues here, see Laurel S. Terry, But What
Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National
Treatment, and Article VI:4 Measures When Applying the GATS to Legal Services. In
the paper, Terry considers whether common qualification and licensing measures might
be subject to Article VI:4. As a general principle, one would expect that measures related
to competence of the service (educational, testing, and training requirements) would
easily survive scrutiny, while other, arbitrary requirements (citizenship or residency)
might not.

201. Id. The Treaty of Rome, which established the European Communities was
adopted in 1957 and has served as the backbone of the EU legal framework since.
Dozens of additional treaties and accords have been concluded in the course of the
LIBERALIZATION OF NATIONAL LEGAL ADMISSIONS raises the question whether lawyers from FCN treaty countries enjoy liberalized admissions policies introduced after the entry into force of the respective treaty. In one test case presently working its way through the German courts, the initial response was not positive. Some government bodies, including the U.S. State Department, have come out differently on the analysis.

Under principles of public international law, and in accordance with the Vienna Convention on the Law of Treaties (to which the individual EU Member States are parties), a subsequent treaty may not take away any rights of a prior treaty without the consent of that treaty partner. Thus an EU Member State which has an earlier bilateral treaty with a non-EU country would seem to be unable to derogate from those earlier obligations. There even seem to be examples of state practice supporting this obligation, including in countries that maintain restrictive legal admissions regimes. In the German Telecoms Dispute, for example, Germany relied on its obligations under the earlier German-U.S. FCN as justifying its failure to implement the EU Utilities Directive in a way that would discriminate against U.S. telecom companies. The EU Utilities

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expansion of the EC as well as in the course of political and economic integration. One of the objectives of the EU Constitution project was to bring together in one document the major EU rules and principles.

202. That case is Haver v. Prüfungsamt der Länder Hessen, Nordrheinwestfalen, Rheinland-Pfalz, Saarland und Thüringen zur Abnahme der Eignungsprüfung der Zulassung zur Rechtsanwaltschaft, VGH Düsseldorf, 15 Kammer[K] 6961/96 [hereinafter "the Haver case"]. For a discussion of this case as well as the author's own attempts to gain admission to alternative paths within Germany, see Carroll, Innocents Abroad, supra note 6, at 1121-1125.

203. Id. In the Haver case, the U.S. State Department filed a Note [hereinafter "State Department Note"] in support of Haver's application to sit the German aptitude test based upon his status as a French avocat. The State Department disagreed with the lower court's reasoning that the United States had implicitly waived any FCN treaty rights in this area by failing to invoke them over the years. More likely, any failure to invoke could be attributed to the novelty of both the alternative paths and cross-border and cross-system legal practice.


205. Vienna Convention on the Law of Treaties, Article 30. The United States is not a party to this Convention, but the U.S. State Department has recognized it as reflective of principles of customary international law. Thus it would seem that EU lawyers—through their national governments—could rely upon this principle against the United States, and vice versa. This Article was also referenced in the State Department Note in the Haver case, supra notes 181-182, as follows: "Paragraph 4 [of the Vienna Convention on the Law of Treaties] provides that, when the parties to the later treaty do not include all the parties to the earlier one, as between a party to both treaties and a party to only one of the treaties, 'the treaty to which both States are parties governs their mutual rights and obligations.' State Department Note page 3 para. 3.

Directive contained provisions indirectly allowing EU Member States to reject certain tenders of non-EU companies.\(^{207}\) In this sense, it was a positive discrimination in *taking a way* a right under a prior existing treaty (e.g. to participate in tenders on an equal basis). Germany saw this as inconsistent with its obligations to accord nondiscriminatory treatment to U.S. persons under the FCN treaty.

In relation to accessibility to alternative paths to legal admission, the issue seems to be whether the obligation to provide nondiscriminatory treatment also means that later-introduced changes in licensing regimes must be extended to FCN treaty partners. In contrast to the situation with the Utilities Directive, this would not entail a prohibition against taking away an existing right, but rather the obligation to grant an additional, newer right (e.g. access to alternative paths to admission) based upon an MFN obligation. The distinction may be a fine (and one could argue an irrelevant) one with respect to a country's obligation to afford nondiscriminatory treatment to nationals of a treaty party country. The differing interpretations to date hint at the complexity of and confusion surrounding the issue.

b. Regional preferences and nondiscriminatory treatment obligations

One of the arguments frequently raised by some EU countries that the alternative paths within the EU have no application to non-EU countries, is that they represent further liberalization within a regional trading bloc, something permitted under the WTO legal framework.\(^{208}\) The origins of this argument lie in an exception under trade law for customs unions. Yet some commentators question whether the customs union exception, which historically applied primarily to the levying of tariffs (i.e. to goods), is equally applicable to market access and licensing regimes.\(^{209}\) They also query whether the extent of the integration within the European Union since its founding brings it beyond the narrow scope of the customs union exception in the GATT and GATS to the requirement of nondiscriminatory treatment.\(^{210}\) Moreover, the extension

\(^{207}\) In particular, Article 29 of the Utilities Directive permitted such rejection where the proportion of non-EU products constituting the tender exceeded 50%. *Id.*

\(^{208}\) GATT Article XXIV(5a), GATS Article V. permitting an exception to MFN treatment for Free Trade Areas and Customs Unions. *See also* Grimes, *EC Law and International Treaty Obligations*, *supra* note 168, parts IV-VI. Grimes remarks that "granting MFN status to third countries would undermine the purpose of the EC.... It could defeat the purpose of the EU if, as a result of having MFN status with one of the Member States, third party nations could opt into all of the benefits but not be subject to the sacrifices of membership." *Id.*

\(^{209}\) *See e.g.* Grimes, *supra* note 168, *EC Law and International Treaty Obligations.*

\(^{210}\) *Id.* This argument may gain strength depending upon the outcome of the
of Directive rights to Swiss nationals, *inter alia*, has called into question the strength of the customs union defense.\textsuperscript{211}

In the *Haver* case, the U.S. State Department was not convinced of the customs union exception argument.\textsuperscript{212} It noted the court’s correct reference to the MFN treatment obligation in Article VII “with respect to engaging in all types of commercial, industrial, financial or other activity for gain.”\textsuperscript{213} It also agreed with the court’s reference to the MFN exception in para. 6 of that Article for “advantages accorded by either party by virtue of a customs union or free trade area.”\textsuperscript{214} But, in its view, that exception pertains only to the treatment of products, whereas Haver’s case involves trade in services.\textsuperscript{215} The same argument was raised to rebut the court’s presumption of an express MFN exception in Article XXIV for “special advantages accorded by the GATT.”\textsuperscript{216}

As mentioned above, some Member States have implemented the Directives without discriminating against certain non-EU persons, while others have not. Even if one accepts the “customs union defense” as justifying the failure to accord MFN treatment to non-EU foreign lawyers, what about the NT obligation? Some Member States that do not grant access to the alternative paths to admission to non-EU citizens do so for their own citizens (e.g. by taking and passing an aptitude test).\textsuperscript{217} This discriminatory treatment of foreign lawyers vis-à-vis such States’ ongoing efforts at introducing an EU Constitution. The closer the EU approaches a federation of states, the weaker seems to be customs union defence.

\textsuperscript{211} While it is true that Switzerland, along with Norway, Lichtenstein, and Iceland, are part of the European Free Trade Association (EFTA) and thus enjoy preferential treatment in many areas, this does not extend as far as the “Four Freedoms” (movement, capital, workers and right of establishment). Moreover, the respective legal professional designations in those countries are not part of the EU legislation discussed herein. Thus extending the rights under the EU Directives to some non-EU citizens but not others undermines the justification of those EU Member States with restrictive admissions regimes that non-EU citizens enjoy no rights under EU Directives. This very inconsistency was deemed relevant by the German court in the *Haver* case, supra notes 181 and 182.

\textsuperscript{212} The State Department concluded that “the Government of the United States is aware of no exception under the FCN that would apply in this instance, notwithstanding the obligations of the Federal Republic of Germany with respect to other EU members under applicable EU treaties ... [such that] Mr. Haver is, pursuant to rights under the FCN, entitled to treatment no less favorable than that accorded nationals of other EU member states with respect to eligibility to sit for the examination.” State Department Note, page 4 para. 1.

\textsuperscript{213} State Department Note, page 2 para. 2.

\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} “To the extent that this provision would be interpreted to apply to GATT (1994) [GATT (1947) being no longer in force], Article XXIV thereof permits certain preferential arrangements between participants in customs unions or free trade areas. However, the GATT pertains only to trade in products, not services.” Id. at para. 3.

\textsuperscript{217} See supra notes 6 and 23.
own citizens would appear to violate their NT obligation, as it is difficult to argue that there is a customs union defense to the obligation for national treatment.

The CCBE recognized the existence of continued barriers which may not be GATS (and by analogy FCN) compliant, and highlighted the attraction, and drawbacks, of concluding Mutual Recognition Agreements (MRAs) with other WTO Member States. The CCBE papers do not address the question of whether FCNs are relevant in relation to admissions policies. As mentioned above, some rather authoritative sources such as the U.S. State Department believe that FCNs are relevant. Most FCN’s contain a termination provision, such that the FCN issue could become moot if a treaty partner were to exercise its termination right. But given the general applicability of FCN’s across the entire spectrum of trade in goods and services, termination is not very practical.

c. Backdoors to admission?

Citizenship requirements have always been particularly odious to trade liberalization efforts. The EU has outright banned restrictions based upon nationality or residence for EU citizens. In the transatlantic context, the EU has highlighted some restrictions on access to U.S. legal practice, such as the citizenship requirement of the U.S. Patent and Trademark Office, as violative of the GATS. But in relation to general practice, the U.S. States do not have any citizenship restrictions, including with respect to their pro hac vice or admission by motion rules. Thus there may be a “backdoor” available to non-U.S. lawyers. Presumably, foreign lawyers who manage to become admitted in a U.S. state or the District of Columbia can then use that status to become admitted in other U.S. states. Though such avenues may be

218. Position of the CCBE in Relation to GATS 2000 (May 31, 2000). http://www.ccbe.org/doc/En/lamy_310500_en.pdf. The CCBE position hints that clarity can only be achieved through the ongoing efforts of the GATS 2000 liberalization and subsequent efforts at the WTO. In relation to Foreign Legal Practitioners, the CCBE has published a position paper setting out a framework for acceptance of FLP’s, but expressly limiting them to providing advice on their home country law. Inbound Position of the CCBE vis-à-vis Requests for Liberalization from Third Countries (March 1, 2001). http://www.ccbe.org/doc/En/lamy_010301_en.pdf.

219. More likely, the potential application of FCN treaty rights was not considered at all.

220. See e.g. EU Request to the United States regarding change of state admission to practice rules (The Law Society of England and Wales Gazette, on file with author).

221. See In Re Griffiths, 413 U.S. 717 (1973) (holding that Connecticut’s citizenship requirement violated the Equal Protection Clause of the U.S. Constitution).
cumbersome, they may provide an opportunity for professionals to obtain unrestricted market access on an equal footing as their local colleagues.

Within the EU, the maintenance of citizenship requirements by some Member States would seem to eliminate any such backdoor possibilities. For example, even a U.S. lawyer who managed to be admitted in a Member State which did not maintain a citizenship requirement (e.g. by passing an aptitude test or gaining sufficient experience), would not be able to use that new status in a Member State which does have a citizenship restriction.

C. Report Card of European Union and United States

It seems to be beyond dispute that at least as a result of WTO membership, if not on account of an earlier bilateral treaty, the U.S. and the EU owe at least nondiscriminatory treatment to each others' lawyers. An obligation to provide MFN treatment may flow from a country's membership in the WTO and the listing of legal services as subject to the GATS. Only eight countries, not including the U.S. or any of the EU Member States, declared an MFN reservation to the application of GATS to legal services in their country. The WTO followed a “list it or lose it” approach in the Schedule of Specific Commitments in relation to market access and national treatment commitments. The Schedule thus represents the initial commitments, with the Track 1 and 2 efforts intended to fill in the details and ideally extend the liberalization to other parts of the legal services spectrum. As outlined above, the admissions policies of some EU Member States and U.S. states reflect inconsistent interpretations of MFN obligations, presuming they even reflect them at all.

Many jurisdictions permit lawyers to register as Foreign Legal Consultants (FLCs) in another country, thereby permitting them to give advice on the law of the jurisdiction(s) where they are already admitted, as well as international law. There are separate rules governing the ability of lawyers to act as FLCs, but this is beyond the scope of this

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222. Many states maintain in-state office requirements. The U.S. Supreme Court has also ruled residency requirements to be unconstitutional, see N.H. vs. Piper, supra note 100. That case dealt with a U.S. lawyer residing in Vermont and wishing to practice in neighboring New Hampshire. Several states maintain residency requirements in their foreign legal consultant rules.

223. See supra note 186. Moreover, any MFN restrictions are supposed to expire 10 years after the inception of the GATS, i.e. on January 1, 2005.

224. Id. at 32-50. Countries had the option to list limitations on the four Modes of delivery, or outright exclude any commitment by scheduling a given service as “unbound.”
Generally, FLC rules merely facilitate the practice of home country law in a host country. Though they may provide an initial step in becoming fully-admitted in a host state, they do not represent the "encroachment on the turf" of the local lawyers which alternative paths to full admission entails. The following outlines the current situation facing U.S. and EU lawyers seeking full admission to the legal profession in each other's jurisdictions.

1. Admission Via the Traditional Path

a. European Union

Generally speaking, there do not seem to be any legal hurdles to lawyers from either U.S. states or EU Member States to obtaining admission to the local legal profession across the Atlantic by taking the traditional path (e.g. educational qualification, standard examination, and if applicable, a practical training period). Even seemingly insurmountable hurdles have been dealt with to guarantee that the traditional path remains open to all. For example, in some EU Member States the practical training period afforded the lawyer aspirants the status of civil servant, something generally reserved exclusively to citizens. Even this rule has been relaxed, such that even non-citizens are able to meet the practical training requirement, with its inherent placement within state courts and government agencies.

b. United States

In the U.S. the situation is the same. The obstacles facing a European applying to a U.S. law school are practical rather than regulatory. These include being admitted to a study program, obtaining a visa to study, or financing the study. But provided they meet the requirements for law school admission and complete the educational and testing steps to admission in a state, EU lawyers may be admitted to


226. Though some EU Member States list nationality requirements (see supra Part I), it is unclear whether in practice a non-EU citizen who had completed all the requisite steps would be prevented from becoming admitted to the local profession. This hypothesis is supported by some of the responses of law societies from EU countries following restrictive admissions policies vis-à-vis non-EU citizens.

227. This last factor should not be underestimated. Private legal education in the U.S. is extremely expensive, whereas almost all legal education in the EU is free or subject to comparatively low fees. Such systemic obstacles, however, would not appear to have any GATS relevance.
practice on the same terms as a U.S. citizen. Thus, in summary, with respect to the traditional path to admissions, the EU Member States and the individual U.S. states do not appear to discriminate based upon nationality.

2. Admission Via an Alternative Path Requiring an Aptitude Test

a. European Union

Regarding a "low road," or shortened path to admissions for lawyers from other countries, the treatment of the individual EU Member States and U.S. states is inconsistent. In the EU, Belgium, France, Ireland, the UK do permit foreign lawyers, including U.S. lawyers, to sit for the aptitude test introduced as a result of the implementation of the EU Diplomas Directive. The inclusion of Belgium and France in this group indicates that even in a civil law country, equal treatment is given to exam candidates coming from a common law background. Other EU Member States, such as Germany, Austria and Finland refuse access to the aptitude test to non-EU citizens. This runs counter to the EU principle of consistent implementation of EU Directives.

b. United States

Looking across the pond to the U.S., the situation facing European lawyers seeking an alternative path to admission is also mixed. Some jurisdictions, including New York, permit lawyers to sit for the state bar exam after a one-year program of U.S. legal education, e.g. by completing an LL.M. program. But many states do not offer this alternative. Some allow foreign graduates to sit for the local bar exam

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228. The term chosen is intentionally provocative to reflect the often-heated debates surrounding admissions requirements for cross-border and cross-system practice.

229. Some jurisdictions, such as France and England already had aptitude test procedures in place given their history of accepting lawyers from foreign countries into the local legal profession.

230. This contrasts with those U.S. states that only accord preferential treatment to lawyers with common law backgrounds.

231. See e.g. Clark, Global Law Schools, supra note 19, at 267 (noting that between 1988 and 1998 over 3700 foreign lawyers have passed the New York bar exam). Other states permitting foreign lawyers who have completed an LL.M. program at an ABA-accredited law school include Arizona, Connecticut, Michigan, Montana, North Carolina, South Carolina, Tennessee, and Texas. See ABA/NCBE Comprehensive Guide to Bar Admissions Requirements (2000).

232. It is not always clear if the absence of an express rule on this issue means that such applicants cannot take advantage of alternative paths to admission, e.g. on admission on motion. Id.
based upon their admission to practice elsewhere.233 Others do so only after the determination of the educational sufficiency of an applicant.234 Finally, some states only extend liberalized admissions procedures to lawyers from common law backgrounds.235 These continuing barriers in the U.S. have stymied efforts of the American Bar Association to open up more restrictive EU Member State admissions regimes.236 If one accepts the interpretation of the FCN obligations outlined above, some EU Member States and U.S. states may be in violation of their treaty obligations as a result of such disparate treatment. This may come as a surprise to those Member State and U.S. state bar officials.

3. Admission Via an Alternative Path Based Upon Experience and Exposure

a. European Union

As outlined above, the EU Lawyers Establishment Directive opened an alternative path to admission based upon the gaining of sufficient exposure to law, including an unspecified level of exposure to local law. Initial evidence indicates that some EU Member States only permit this alternative to citizens from other EU Member States.237 In fact, the Lawyers Establishment Directive itself is an expressly discriminatory, by

235. Alaska, Colorado, Connecticut, Hawaii, Oregon, Texas, Utah, Washington, Virginia. The recognition of lawyers from common law backgrounds is likely a throwback to the 18th and 19th centuries, when the American and English legal professions were much closer. Such a restriction is certainly defendable on objective grounds, yet for political reasons was not maintained in the EU liberalization efforts.
236. See Rivkin, Transnational Practice, supra note 37, at 829 (noting that the failure of several states to adopt Foreign Legal Consultant rules in particular created “a weapon in the hands of overseas bars to resist efforts to liberalize their systems for the admission and licensing of foreign lawyers.”). See also Testimony of Daniel McGraw to the ABA Multijurisdictional Practice Commission, available at http://www.abanet.org/cpr/mjp-comm_sip2.html (last visited Sept. 27th, 2004). As Chair of the ABA Section of International Law and Practice, McGraw commented: “Time and time again we are confronted with the contention that we advocate freedom of access for American lawyers abroad that is far more comprehensive than that accorded foreign lawyers in the United States.” He warned that U.S. GATS negotiators could expect similar resistance in the GATS built-in negotiations and urged improvement at the state level.
237. For example, in Germany the author’s application based upon his admission as a solicitor in England and Ireland (gained by taking the aptitude test introduced under the Diplomas Directive) for admission to either the aptitude test, or in the alternative for admission to the local legal profession based upon more than three years’ activity in local law was denied based solely upon the author’s U.S. citizenship (letter from Rechtsanwaltskammer Frankfurt dated May 12th, 2003, on file with author).
defining a lawyer as a person holding a specified legal qualification and being a citizen of an EU Member State.\textsuperscript{238} Such treatment may be permissible if deemed to be further integration within a regional trade bloc.\textsuperscript{239} It may not, however, be permissible in those Member States where a bilateral treaty required MFN or national treatment to foreign lawyers.\textsuperscript{240} For example, under this interpretation, U.S. lawyers holding one of the professional qualifications listed in Article 1 section 2. of the Lawyers Establishment Directive might be able to gain admission in the bilateral treaty country based upon verification of "sufficient exposure" just as their European counterparts currently can.

b. United States

Similar to the path opened by the Lawyers Establishment Directive, 30 U.S. states permit admission by motion based upon an applicant's experience gained through a given number of years in practice. The duration of the experience requirement is generally longer than the 3-year period of the EU Lawyers Establishment Directive, with verifiable practice during at least 5 of the past 7 years a common benchmark.\textsuperscript{241} Though these rules do not have a direct citizenship requirement, many do have reciprocity requirements, which would naturally impact the potential availability of these paths to non-U.S. lawyers.\textsuperscript{242} And since

\textsuperscript{238} Article 1 section 2 defines "lawyer" as "any person who is a national of a Member State and who is authorised to pursue professional activities under one of the following professional titles: Belgium (Advocat/Advocaat/Rechtsanwalt), Denmark (Advokat), Germany (Rechtsanwalt), Greece (dirigoros), Spain (Abogado/Advocat/Avogado/Abokatu), France (Avocat), Ireland (Barrister/Solicitor), Italy (Avvocato), Luxembourg (Avocat), Netherlands (Advocaat), Austria (Rechtsanwalt), Portugal (Advogado), Finland (Asianajaja/Advokat), Sweden (Advokat), UK (Advocate/Barrister/Solicitor).

\textsuperscript{239} See discussion in Part V. 3.

\textsuperscript{240} See discussion supra Part V.B.1. See also, Admission by Motion Rules, ABA Center for Professional Responsibility Joint Committee on Lawyer Regulation (August 20\textsuperscript{th}, 2004), available at http://www.abanet.org/cpr/jclr/admission_motion_rules.pdf (last visited Sept. 27th, 2004).

\textsuperscript{241} Although the period is longer, what counts as "legal practice" in the U.S. may be broader than in some EU Member States, e.g., law teaching, in-house counsel, government lawyer. In the EU, there are many more categories of legal professional. See e.g., Mary Daly, Practicing Across Borders, supra note 36, (noting there are about 34 different legal professions in the EU at present). It is unclear whether all of those EU lawyers will be able to take advantage of the Lawyers Establishment Directive, for example, since this is tied to the holding of a particular title. Whether such distinctions matter for a European lawyer seeking admission in the U.S. is unclear. In any event, the requirement by some states that an applicant have graduated from an ABA-accredited law school represents an intrinsic barrier to most European lawyers, since there are no ABA-accredited law schools in the EU.

\textsuperscript{242} Of the 32 states that have admissions on motion rules, 20 of them have a reciprocity requirement.
these rules were generally drawn up with U.S. lawyers in mind, it could be that in practice they are only available to lawyers admitted in a U.S. jurisdiction.243

Conclusion

The liberalized legal admissions policies in the European Union present an interesting model for the United States. The truly revolutionary aspect of the liberalization in the EU has been the shift away from a system of *a priori* verification of knowledge, as represented by the traditional path to admission, to one that relies more on the lawyer's own actions in acquiring the necessary skills. These actions are supplemented by the lawyer's own judgment in only providing services where he or she believes to have the requisite competence. Applied to the cross-system practitioner, this appears to entail an increased weighting of fundamental lawyering skills, such as legal research, analysis and communication, as opposed to the verification of knowledge of specific substantive laws. This shift in thinking will surely have a marked impact on legal educators, practitioners, and regulators in the years to come.

The U.S. has some mechanisms (pro hac vice, admission by motion) in this direction, but lacks a comprehensive and uniform approach to the issue. The efforts of the ABA Multijurisdictional Practice Commission have led to some liberalization of services between the U.S. states, but to date only 10 or 11 states have implemented the Commission's recommendations regarding temporary practice.

The opening of alternative paths to admission has implications for the legal professions worldwide. The verse at the beginning of this Article could continue, with the takers of different paths to the same destination meeting up and comparing notes. Takers of the high road could make themselves out to be superior to those who had taken "shortcuts." Those unable to take a certain path could bemoan the injustice of the rules prohibiting access of the lower roads to them. In the WTO context, such bemoaning could eventually lead to a request that the competent authority in a WTO Member State initiate a dispute in accordance with the Dispute Settlement Board (DSB) system against a perceived violator.

The accessibility of alternative paths to admission to the local legal profession is arguably a matter for the GATS and/or applicable bilateral treaties. Though the observance of bilateral and multilateral treaty obligations in an individual case depends upon the specifics of the

243. One possible exception to this could be lawyers with a common law background and qualification, since several states grant preferential treatment to such lawyers.
lawyer applicant and the host country where admission is sought, some basic conclusions seem inevitable. These include the requirement for WTO Member States to grant nondiscriminatory treatment to lawyer applicants from other WTO Member States. In practice, several EU countries and U.S. states do not grant such treatment consistently. Reasons given for not according this treatment include those to which trade agreements like the GATS are most hostile, such as citizenship or local presence requirements. This inconsistency needs to be dealt with, either at the multilateral (such as through the WTO) or bilateral level (e.g. through Mutual Recognition Agreements).

Two factors hint that this may take a bit longer to happen than has been the case with other service sectors. First, the WTO framework does not provide a private cause of action for affected individuals. Thus a significant political critical mass would have to be reached to persuade a WTO Member State trade official to act. Second and perhaps more important, since many countries themselves may be in violation of their bilateral or multilateral treaty obligations in this area, they may be reluctant to press the rights of their own lawyer citizens at the risk of being seen as “the pot calling the kettle black.”

A continuing obstacle to resolution of the liberalization debate lies in the nature of law and legal admissions. The closer a foreign legal system and the respective regulations on admission to practice law are to a country’s own system, the easier it is for regulators to devise mutual recognition or adaptation schemes. Unfortunately, this does not square neatly with the political realities of regional and multilateral trade blocs, nor with the trade law liberalization framework. But as the EU experience has shown, this need not mean that such efforts are impossible. The WTO and the national regulators will have their hands full in ironing out the details. The results will determine just how much globalization has affected legal services, and whether lawyers will be able to maintain their arguments for special treatment under international trade agreements.