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Obstacles to the Implementation of the Treaty of Rome Provisions for Transnational Legal Practice

Gerald L. Greengard*

One of the avowed goals of the European Community (EC)¹ is “the abolition, as between Member States, of obstacles to freedom of movement of persons, service, and capital.”² The European Community applies this policy goal to professionals in Treaty of Rome articles 52–66.³ Nearly a decade ago, commen-

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1. This note uses the term European Community in accordance with the resolution of the European Parliament, Resolution on a single designation for the Community, 21 O.J. EUR. COMM. (No. C 63) (1978). The six original Member States of the European Community are Belgium, the Federal Republic of Germany, Luxembourg, France, Italy, and the Netherlands. Denmark, the Irish Republic, and the United Kingdom joined the Community on January 1, 1973. Greece became the tenth Member State on January 1, 1981. Spain and Portugal will join the Community on January 1, 1986.

2. Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, art. 3(c), 298 U.N.T.S. 11 (1958) [hereinafter cited as Treaty of Rome].

3. Articles 52–58 set forth the right of establishment and describe the circumstances under which it can be exercised. The right of establishment is the right to settle in an EC Member Country and to pursue economic activities there. The right connotes permanent integration into the host country's economy. The right includes taking up and pursuing an occupation in a self-employed capacity, and in some circumstances, setting up and managing a business. Treaty of Rome, *supra* note 2, at arts. 52–58.

Articles 59–66 of the Treaty set forth the principle of the freedom to provide services and describe the circumstances under which this freedom can be exercised. Services are defined in article 60. The services must be provided within the community for remuneration. The provider of services must reside in one EC nation, and the recipient in another EC nation. *Id.* at arts. 59–66. *See generally* Levasseur, *Establishment and Services in the EEC Twenty Years Later*, 5 S.U.L. REV. 61, 79–80 (1978).

The distinction between the right of establishment and the freedom to provide services is not always clear. The provision of services may involve temporary residence in the host state. According to article 60, paragraph 3, as long as residence is temporary, the activities in question will fall within the Treaty provisions on freedom to provide services rather than those on establishment. *See* Treaty of Rome, *supra* note 2, at art. 60, para. 3. If residence is of a more permanent character, the activities will be regulated by the provisions governing the right of establishment. Thus, “provision of services from one State to another on a regular basis, accompanied by temporary residence in the host State may shade imperceptibly into establishment.” D. WYATT & A. DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 182 (1980).

tators were optimistic about the effect these Treaty articles would have on the ability of European lawyers to practice in EC countries other than their own.⁴ One writer stated:

[W]e can expect that a lawyer admitted to practice in any European Community country will be able to establish himself in any other State in the EEC without having to obtain national certification. . . . [T]he sovereign nations of Europe . . . are rapidly progressing toward a much more open system of transjurisdictional legal practice than exists between the states of the United States.⁵

This note, to the contrary, argues that the Treaty of Rome has had, and will continue to have, little impact on legal practitioners within the European Community.

Part I examines Community barriers to transnational legal practice among the EC nations. It looks first at the history and shortcomings of the 1977 Directive on Freedom of Lawyers to Provide Services. It then describes the effect of the failure of the Council of the European Community to enact a directive mandating mutual recognition of legal degrees. It concludes that neither the Council nor the European Court of Justice is likely to eliminate existing Community-wide barriers to practice.

Part II analyzes national barriers to the transnational practice of law within the EC. It argues that differences in the law, the function of legal practitioners, and the official languages of the Member States, make it unlikely that lawyers within the EC will ever enjoy the right of establishment and the freedom to provide services envisioned in the Treaty of Rome.

I. COMMUNITY OBSTACLES TO THE ESTABLISHMENT AND PROVISION OF SERVICES BY LAWYERS

The Treaty of Rome requires the abolition of all restrictions on the freedom to provide services and the right of establishment within the EC.⁶ The Treaty mandates that the Council of the EC shall, "acting unanimously on a proposal from the Commission [of the European Communities] and after consulting the Economic and Social Committee and the Assembly, draw up a general programme for the abolition of existing restrictions" and issue directives implementing the general program.⁷ Implementation is to be facilitated by secondary legislation

4. See, e.g., Lévassieur, *supra* note 3, at 106; Wagenbaur, *The Mutual Recognition of Qualifications in the EEC*, in *EUROPEAN LAW AND THE INDIVIDUAL* 109-10 (F. Jacobs ed. 1976).

5. Recent Developments, 7 GA. J. INT'L & COMP. L. 723, 732-33 (1977).

6. Lévassieur, *supra* note 3, at 65-66.

7. Treaty of Rome, *supra* note 2, at arts. 54, 63. The Treaty of Rome provides in article 4(1) that the tasks entrusted to the European Community shall be carried out by an Assembly, a Council of Ministers, a Commission, and a Court of Justice, each acting within the limits of the powers conferred upon it by the Treaty. For a discussion of the composition and functions of these Community organs and their relationships to each other, see T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (1981); P. MATHIJSSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW* (3d ed. 1980).

insuring the mutual recognition of “diplomas, certificates and other evidence of formal qualifications,”⁸ and coordinating national requirements governing self-employed persons.⁹ Despite the Treaty’s mandate, implementation has been slow and controversial with respect to the provision of legal services.

A. History of the Development of the Council Directive for the Provision of Legal Services

The Treaty articles regarding establishment and services were to be fully implemented by 1969—twelve years after the establishment of the European Community. Yet twenty-two years elapsed between the signing of the Treaty and the enactment of any measures to implement these rights for lawyers. The Commission of the European Communities only forwarded a proposal for a directive regarding provision of legal services to the Council of the EC in 1969.¹⁰ It took almost a year for the Economic and Social Committee to approve the proposal,¹¹ and nearly seven more years passed before the Council issued its directive.¹²

The main obstacle to the passage of a directive for legal services was a dispute over the proper interpretation of article 55 of the Treaty. Article 55 excludes from the scope of the freedom to provide services and the right of establishment, activities that involve the exercise of “official authority.”¹³ The question of whether lawyers exercise “official authority” and therefore fall within this ex-

A directive is one of five types of actions which the Council of Ministers is authorized to take under the Treaty of Rome. Treaty of Rome, *supra* note 2, at art. 189. Once a directive is adopted, the national authorities of each Member State are required to enact their own laws or regulations giving effect to the directive. This procedure allows Member States to implement directives in a manner that takes into account their own national institutions and political processes.

If a Member State does not take appropriate measures to comply with a directive, the Commission may deliver an opinion on the matter. If this does not resolve the issue, the Commission may bring the matter before the European Court of Justice. *Id.* at art. 169. If the Court of Justice finds for the Commission, it will require the Member State to take the measures necessary to comply with the directive. *Id.* at art. 171.

Directives are sometimes ineffective as tools for harmonization. Laws involving widely differing procedures may be used to implement the provisions of a directive. As a result, the laws of the Member States may remain quite different following the implementation of a directive.

8. Treaty of Rome, *supra* note 2, at art. 57(1).

9. *Id.* at art. 57(2)

10. 12 J.O. COMM. EUR. (No. C 78) 1 (1969).

11. See Kramer, *The Liberal Professions in the EEC*, 122 NEW L.J. 648, 649 (1972).

12. Council Directive 77/249/EEC, 20 O.J. EUR. COMM. (No. L 78) 17 (1977) [hereinafter cited as Directive]. Member States were to enact appropriate national legislation within two years of the passage of the directive. *Id.* at art. 8(1).

13. Article 55 provides that the provisions of Treaty chapter 2 shall not apply “so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.” Treaty of Rome, *supra* note 2, at art. 55.

ception incited substantial debate among the Council representatives of the Member States.¹⁴

The debate was not resolved until 1974 when the European Court of Justice decided *Reyners v. Belgian State*.¹⁵ Reyners, a Dutch national possessing a Belgian law degree, had satisfied all of the conditions for admission to the Brussels Bar, but was refused membership because he was not a Belgian national. Reyners brought an action before the Belgian Counsel of State, which stayed its proceedings to request a preliminary ruling from the European Court of Justice interpreting article 55 and its applicability to legal practitioners.¹⁶ The Court

14. J.P. DE CRAYENCOUR, *THE PROFESSIONS IN THE EUROPEAN COMMUNITY* 96–97 (1981). The governments of Luxembourg and the Federal Republic of Germany maintained that the legal profession is “intimately involved” in the exercise of official authority. They argued that even though some of the activities of the legal profession are not directly connected with the exercise of official authority, the profession’s activities should be treated as an indivisible whole and that all lawyers should be excluded from the Treaty articles mandating freedom of establishment and provision of services. *See id.* The governments of other EC countries took a different view. They asserted that most of the legal profession’s activities were not directly connected with the exercise of official authority, and that those that were could be separated from those that were not. *See id.* at 97.

15. *Reyners v. Belgium*, 1974 E. Comm. Ct. J. Rep. 631 (Preliminary Ruling), 14 Common Mkt. L.R. 305.

16. The Counsel of State requested a definition of the article 55 exclusion of “activities which in that State are connected, even occasionally, with the exercise of official authority.” Specifically, it asked:

whether, within a profession such as that of *avocat*, only those activities inherent in this profession which are connected with the exercise of official authority are excepted from the application of the Chapter on the right of establishment, or whether the whole of this profession is excepted by reason of the fact that it comprises activities connected with the exercise of this authority.

Reyners, 1974 E. Comm. Ct. J. Rep. at 652, 14 Common Mkt. L.R. at 327.

This was not the only issue addressed by the *Reyners* court. The Belgian Counsel of State also inquired “whether Article 52 of the EEC Treaty is, since the end of the transitional period, a ‘directly applicable provision’ despite the absence of directives as prescribed by Articles 54(2) and 57(1) of the Treaty.” *Reyners*, 1974 E. Comm. Ct. J. Rep. at 648, 14 Common Mkt. L.R. at 324. The first paragraph of article 52 states that restrictions on the freedom of establishment are to be abolished by progressive stages within a transitional period. It was uncertain in 1974 whether article 52 conferred rights on individuals directly or only when it was implemented by directives issued under articles 54 and 57. No such directives applicable to the legal profession had been issued.

The court ruled that article 52 was directly applicable despite the absence of implementing directives. The Court stated:

The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community.

As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being invoked by nationals of all the other Member States.

In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to attain a precise result, the fulfillment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.

held that the article 55 exception applied only to activities directly connected with the exercise of official authority. The Court further ruled that the functions of a Belgian *avocat*, which include counseling and representation in court,¹⁷ did not involve an exercise of official authority, and therefore, could not be denied to non-nationals under Treaty article 55.¹⁸

B. Shortcomings of the 1977 Directive

In 1977, following the resolution of the "official authority" issue, the Council enacted a directive to facilitate the exchange of legal services throughout the EC.¹⁹ The directive, however, falls short of the Treaty's mandate. The first limitation of the directive is its inapplicability to certain legal practitioners.²⁰ It does not, for instance, apply to notaries, who, in most EC countries, perform impor-

. . . It is right, therefore to reply to the question raised that, since the end of the transitional period, Article 52 of the Treaty is a directly applicable provision despite the absence in a particular sphere, of the directives prescribed by Articles 54(2) and 57(1) of the Treaty.

Reyners, 1974 E. Comm. Ct. J. Rep. at 651–52, 14 Common Mkt. L.R. at 326–27.

This ruling prohibits the use of nationality to bar people from carrying on their trade or profession. PARRY & HARDY, *EEC LAW* 263–64 (A. Parry & J. Dinnage 2d ed. 1981). Expanding on *Reyners*, the Court in two later cases held that article 52 cannot be sidestepped by the imposition of artificial and therefore discriminatory professional requirements. See *Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris*, 1977 E. Comm. Ct. J. Rep. 765 (Preliminary Ruling), 20 Common Mkt. L.R. 373 (1977); *Patrick v. Ministre des Affaires Culturelles*, 1977 E. Comm. Ct. J. Rep. 1199 (Preliminary Ruling), 20 Common Mkt. L.R. 523 (1977).

17. There is one type of legal practitioner in Belgium, the *avocat* or *advokaat*. The only function reserved to *advokaatan* is pleading before the courts. De Kesel, *Kingdom of Belgium*, in *LAW AND JUDICIAL SYSTEMS OF NATIONS* (C. Rhyne ed. 1978).

18. Specifically, the court stated:

[T]he exception to freedom of establishment provided for by the first paragraph of Article 55 must be restricted to those of the activities referred to in Article 52 which in themselves involve a direct and specific connection with the exercise of official authority.

. . . It is not possible to give this description, in the context of a profession such as that of *avocat*, to activities such as consultation and legal assistance or the representation and defense of parties in court, even if the performance of these activities is compulsory or there is a legal monopoly in respect of it.

Reyners, 1974 E. Comm. Ct. J. Rep. at 655–56, 14 Common Mkt. L.R. at 329–30.

19. Directive, *supra* note 12. The directive is only concerned with the short-term visits of EC lawyers to other countries, and the temporary provision of legal services. *Id.* at preamble.

20. The directive covers the Belgian *avocat* or *advokaat*, the Danish *advokat*, the German *Rechtsanwalt*, the French *avocat*, the Irish barrister and solicitor, the Italian *avvocato*, the *avocat-avoué* of Luxembourg, the Dutch *advocaat*, the barrister and solicitor of the United Kingdom, and the Greek *dichegoros*.

Directive, *supra* note 12, art 1(2). The Act of Accession of the Hellenic Republic, Annex I (III)(g) added the Greek *dichegoros* to the directive's coverage.

For descriptions of the legal professions mentioned in this note, see *Appendix 3: Glossary of Terms Defining the Function of Legal Professionals in Various Countries*—eds.

tant legal functions.²¹ Nor does it apply to French *conseils juridiques*, who draft legal documents and give legal advice,²² or *avoués*, who have a monopoly over practice before French courts of appeal, including the *Conseil d'Etat* and the *Cour de Cassation*.²³

The directive also permits EC countries to prohibit foreign lawyers from providing legal services related to the administration of estates and the transfer of property.²⁴ Thus, for example, the Federal Republic of Germany may require an Irish solicitor to use the services of a German notary in a transfer of German land even though the Irish solicitor can undertake transfers of land in the Republic of Ireland.²⁵ There are several explanations for this deficiency. Hans Smit and Peter Herzog suggest that it was an intentional omission designed to protect the monopoly civil law notaries have over activities related to the administration of estates and the transfer of property.²⁶ Another commentator argues that this provision was the result of political pressure by English solicitors who feared losing the monopoly they have over such services in the United Kingdom.²⁷ One analysis synthesizes the two explanations:

The exception allowed for formal documents for obtaining probate etc. is to cover the fact that these activities are exercised in the United Kingdom and Ireland by solicitors, which [sic] are covered by the Directive, but in most other Member States by notaries, who cannot take the benefit of the Directive. Thus the basic "home" market of the notary must be protected to preserve their position from the United Kingdom [sic] and Irish solicitors who would have nothing to surrender in return.²⁸

Additionally, under article 6 of the directive, governments of EC countries may prohibit foreign lawyers who are salaried employees of corporations or other businesses from representing their employers. This provision exists because in-house attorneys are not members of the legal profession in Belgium, France, Italy, and Luxembourg. These countries do not permit lawyers to be employed, even by other lawyers, because employment is regarded as incompatible with

21. For a discussion of these functions, see *infra* text accompanying note 72.

22. G. GLOS, *COMPARATIVE LAW* 181 (1979). For further discussion of *conseils juridiques*, see *infra* text accompanying note 65.

23. Important functions are performed before these courts. The *Conseil d'Etat*, the highest administrative court, may act as an advisory body on legislative matters. Taylor, *France*, in *LAW AND JUDICIAL SYSTEMS OF NATIONS* 241-42 (C. Rhyne 3d ed. 1978). The *Cour de Cassation*, the highest French judicial court, is composed of one criminal and five civil chambers, all sitting in Paris. *Id.* at 242.

24. Directive, *supra* note 12, at art. 1(1).

25. See Recent Developments, *supra* note 5, at 732.

26. H. SMIT & P. HERZOG, *The Law of the European Economic Community* 2-69 (Supp. 1984).

27. Wallace, *Lawyers' Services Within the Common Market*, 121 *SOLIC. J.* 843 (1973).

28. 4 *THE ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW: COMMUNITY SECONDARY LEGISLATION* C12-534/2 (K. Simmonds ed.).

independent judgment.²⁹ In Italy, for example, lawyers may receive yearly retainer fees and may be given office space within the facilities of corporations they represent, but they cannot be employees of corporations.³⁰

Finally, the directive imposes requirements on foreign lawyers that are not imposed on domestic lawyers. Under article 3 of the directive, foreign lawyers must use the professional title under which they practice in their home country, expressed in the language of that country.³¹ Foreign lawyers must also "indicate" the professional organization which authorizes their practice, or the court before which they are entitled to practice.³²

Article 5 of the directive imposes an even greater potential burden on foreign lawyers who wish to represent clients in court. Under this article, host countries may require that foreign lawyers who wish to practice before a court be "introduced" to that court or to the president of the bar whose members practice before that court.³³ A Member State may also require that foreign lawyers work in conjunction with local lawyers who practice before that court.³⁴

Although the impact of these requirements is unclear,³⁵ they undoubtedly impose considerable costs on foreign lawyers. Foreign lawyers probably cannot resort to a court hearing as quickly and inexpensively as domestic practitioners and the requisite introduction may be difficult to obtain. Before bringing a case, a foreign lawyer must determine the appropriate person to make the introduction and convince that person to introduce him. Furthermore, the foreign lawyer forced to obtain the assistance of a domestic lawyer may be forced to relinquish control over a significant portion of his or her case.

29. See Crossick, *The C.C.B.E.: An E.E.C. Bar Association?*, 67 A.B.A. J. 170, 171 (1981).

30. See M. Cappelletti, J. Merryman & J. Perillo, *The Italian Legal System* 93 (1967).

31. Directive, *supra* note 12, at art. 3. Thus, solicitors from the United Kingdom working in the Federal Republic of Germany would refer to themselves as "solicitors" and not as "*Rechtsanwälte*."

32. *Id.* The directive fails to specify when or to whom the lawyer should "indicate" this information.

33. *Id.* at art. 5. The directive does not specify how such an "introduction" is to take place.

34. *Id.*

35. The exact meaning and scope of these requirements is unclear largely because of the differing rationales for the requirements. It has been argued that these requirements are necessary to ensure competence among foreign lawyers in light of the variation in legal and procedural rules among EC countries. See Opinion of the Economic and Social Committee, 19 O.J. EUR. COMM. (No. C 50) 17 (1976). According to this view, the involvement of a domestic lawyer ensures the competence of the foreign lawyer. See Wallace, *supra* note 27, at 844. Others suggest, however, that the requirements are a political phenomenon. According to this view, the chance of adoption of the directive without the article 5 restrictions was poor because without the restrictions, the directive might have allowed the foreign lawyer a less restricted practice than that allowed nationals. For example, in the Federal Republic of Germany, *Rechtsanwälte* who wish to try a case in a district other than the one in which they are admitted must do their pleading through *Rechtsanwälte* who are admitted in that district. If foreign lawyers were not required to obtain assistance from *Rechtsanwälte* admitted in the district of the trial, they would have a considerable advantage over their German counterparts. See *Proposal for Freedom to Provide Services by Lawyers is Redrafted*, [1973-1975 New Developments] COMMON MKT. REP. (CCH) ¶ 9782.

C. *The Right of Establishment: A Problem of Degree Recognition*

Treaty article 57(1) mandates that the Council of the European Community "issue directives for mutual recognition of diplomas, certificates and other evidence of formal qualification."³⁶ Although the Council has issued directives requiring mutual recognition of other professional degrees,³⁷ it has not yet issued such a directive for law degrees. The membership of the Council believes that it is more important that lawyers have qualifications analogous to domestic lawyers when they are permanently establishing themselves in another country than when they are temporarily providing services. Thus, while they are willing to effectuate freedom to provide services without issuing a directive pertaining to mutual recognition of legal degrees, they are not similarly willing to ensure the right of establishment.³⁸

The Council is unlikely to issue a directive for the mutual recognition of legal degrees any time in the near future. The Council's struggle with the question of whether lawyers exercise official authority suggests that it has a difficult time resolving issues involving the provision of legal services, and the mutual recognition of degrees is arguably one of the more problematic aspects of transnational legal practice. It is difficult to equate a law degree issued in one EC country with law degrees issued in all other EC countries because legal education differs substantially between common law and civil law countries. For example, English and Irish law schools place greater emphasis on legal history than continental law schools.³⁹ Furthermore, English and Irish law schools do not offer training in economics or finance, although such courses are available in all Continental law schools.⁴⁰ Academic schedules also differ among the law schools of the European Community. Law courses in Continental schools generally take eight to ten semesters—four to five years. Examinations are generally taken only after all courses are completed. It usually requires a full year after completion of courses to take all of the examinations necessary for matriculation.⁴¹ In contrast, legal

36. Treaty of Rome, *supra* note 2, at art. 57(1).

37. The Council has issued directives for the mutual recognition of other professional degrees, including medical diplomas, Council Directive 75/362, 18 O.J. EUR. COMM. (No. L 167) 1 (1975); dental diplomas, 21 O.J. EUR. COMM. (No. L 233) 1 (1978); veterinarian diplomas, 21 O.J. EUR. COMM. (No. L 362) 1 (1978); and nursing degrees, 20 O.J. EUR. COMM. (No. L 176) 1 (1977). The directive addressing medical degrees requires that Member States recognize evidence of qualification, such as medical certificates or university degrees, issued in other Member States, provided the training in the other Member State corresponds to certain minimum standards set down in an accompanying directive. Additional provisions attempt to facilitate the effective exercise of the right to provide services or to effectuate establishment. The directives mandating the recognition of dental, veterinarian, and nursing degrees are modeled on the directive concerning medical degrees.

38. See H. SMIT & P. HERZOG, *supra* note 26, at 68.

39. See G. Glos, *supra* note 22, at 760.

40. See *id.*

41. *Id.* at 762.

education in the United Kingdom takes three to four years. Each course is fully completed during the academic year, and examinations are held at the end of each course.⁴²

The Council is not the only Community body with the authority to require mutual degree recognition. The European Court of Justice also has this authority, and on two occasions it has mandated degree recognition. However, the narrow range of circumstances addressed in these two cases limits their usefulness for EC lawyers seeking to establish a practice in countries other than their own.

The first case, *Thieffry v. Paris Bar Council*,⁴³ involved a Belgian citizen who held a Belgian law degree recognized by the University of Paris as equivalent to a French law degree. Although Thieffry had acquired the qualifying certificate for the profession of *avocat*,⁴⁴ the governing board of the Paris bar refused to allow him to undergo the practical legal training necessary for licensing on the ground that he did not possess a French law degree.⁴⁵ The Court held that the Paris Bar Council's refusal to admit Thieffry was incompatible with the freedom of establishment guaranteed in Treaty article 52. The Court stated that when academic authorities of a country recognize a foreign degree as equivalent to domestic degrees for the purpose of permitting certain studies, the civil authorities of that country must recognize the equivalency of the degree if the "diploma recognized for university purposes is supplemented by a professional qualifying certificate obtained according to the legislation of the country of establishment."⁴⁶

42. *Id.* at 763-64.

43. 1977 E. Comm. Ct. J. Rep. 765, 20 Common Mkt. L.R. at 373.

44. For a discussion of the functions of a French *avocat*, see text accompanying note 64, *infra*.

45. Jean Thieffry was an experienced lawyer who had obtained the diploma of *Doctor en Droit* from the University of Louvain, Belgium. In addition to practicing in Belgium, he had practiced in Paris as an associate of a French *avocat*. In 1974, the University of Paris I recognized his Belgian law degree as equivalent to the French *license en droit*, thereby qualifying Thieffry to sit for the French bar examination. Thieffry passed the bar examination and requested to be sworn in. His request was denied by the *Conseil de l'Ordre* on the ground that he did not hold a French law degree as required by the legislative act of December 1971 reorganizing the French legal profession. Thieffry brought an action before the French courts. The Court of Appeals of Paris referred his case to the European Court of Justice. *Thieffry*, 1977 E. Comm. Ct. J. Rep. at 767-68, 20 Common Mkt. L.R. at 374-75.

46. See *Thieffry*, 1977 E. Comm. Ct. J. Rep. at 779, 20 Common Mkt. L.R. at 404. The Court's summary of its ruling is as follows:

[W]hen a national of one Member State desirous of exercising a professional activity such as the profession of advocate in another Member State has obtained a diploma in his country of origin which has been recognized as an equivalent qualification by the competent authority under the legislation of the country of establishment and which has thus enabled him to sit and pass the special qualifying examination for the profession in question, the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes, even in the absence of the directives provided for in Article 57, a restriction incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty.

Id.

The *Thieffry* decision was followed by *Patrick v. Minister of Cultural Affairs*⁴⁷ which, while not about lawyers, is nevertheless relevant to the issue of intercommunity recognition of professional degrees. *Patrick* involved a British architect's request to practice his profession in France. Richard Patrick possessed a British certificate which, in 1964, had been recognized by the French Ministry of Cultural Affairs as equivalent to a French architectural degree. Nevertheless, the French Minister for Cultural Affairs denied Patrick's request because Patrick was a British national. The Minister justified his decision on the grounds that there was no agreement between France and the United Kingdom for the reciprocal recognition of qualifications governing the practice of architects. The Minister also argued that he did not have to admit Patrick to practice because the European Council had not yet issued a directive for mutual recognition of architectural degrees.⁴⁸

The Court held that the rule of equal treatment of nationals and non-nationals contained in Treaty article 52 could not be weakened by the absence of Council directives on mutual degree recognition.⁴⁹ The Court stated:

[A] national of a . . . Member State who holds a qualification recognized by the competent authorities of the Member State of establishment as equivalent to the certificate issued and required in that State enjoys the right to be admitted to the profession of architect and to practice it under the same conditions as nationals of the Member State of establishment without being required to satisfy any additional conditions.⁵⁰

Thieffry and *Patrick* establish that a professional who is a national of an EC country has the right to practice in another EC country under the same conditions as that other country's nationals when "competent authorities" have explicitly recognized that his or her degree is equivalent to a domestic degree. Competence, according to the facts of these cases, is defined by knowledge of the subject matter in question. Therefore, when the equivalence of a non-national's qualifications are recognized by educational authorities or government officials possessing substantive knowledge of the area at issue, the non-national should not have to meet any further requirements.⁵¹ Yet the number of foreign lawyers

47. 1977 E. Comm. Ct. J. Rep. 1199, 20 Common Mkt. L.R. at 523.

48. *Patrick*, 1977 E. Comm. Ct. J. Rep. at 1201, 20 Common Mkt. L.R. at 524.

49. *Patrick*, 1977 E. Comm. Ct. J. Rep. at 1204-05, 20 Common Mkt. L.R. at 529-30.

50. *Patrick*, 1977 E. Comm. Ct. J. Rep. at 1206-07, 20 Common Mkt. L.R. at 530-31.

51. The converse of this rule—that civil authorities regulating a profession may require a domestic degree of non-national professionals when there is neither an applicable Council directive nor explicit recognition by competent authorities of the equivalence of the foreign degree—was articulated in *Ministere Public v. Auer*, 1979 E. Comm. Ct. J. Rep. 437 (Preliminary Ruling), [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8544. *Auer* involved a veterinarian with an Italian degree who wanted to establish himself in France. Since at that time there were no Community measures regarding veterinarian degrees, and competent French authorities had not recognized Auer's degree, the Court ruled that French regulatory authorities did not have to recognize the equivalence of the Italian diploma and admit the plaintiff to practice. *Id.* at 451-52.

who are likely to obtain such recognition and thus ensure their right of establishment under this line of cases, is small.⁵² Until the Council forwards a directive for the mutual recognition of legal degrees, most European lawyers will continue to be barred from establishing practices in EC countries other than their own.

II. NATIONAL OBSTACLES TO ESTABLISHMENT AND THE PROVISION OF SERVICES

The Commission of the European Community and the European Court of Justice have failed to eliminate important Community barriers to transnational legal practice within the EC. Treaty articles 59–66, on the freedom to provide services, and Treaty articles 52–57, on the right of establishment, have not been fully implemented, and it is not likely that they will be in the near future.⁵³ Even if these articles are fully implemented, however, national obstacles to the transnational practice of law will continue to frustrate transnational practice within the Community.

Law is not like medicine or engineering. Bodies of knowledge in the latter fields are often quantifiable, objectively verifiable, and based on physical principles which do not vary from country to country. Law, in contrast, is intimately associated with a particular nation's history, political ideals, economic structure, and culture. Law and legal practice vary tremendously from country to country, and differences in the legal systems, the legal professions, and the official languages of EC countries complicate transnational practice.

A. Differences in the Legal Systems of EC Countries

Differences in the legal systems of EC countries, including variations in the role of judicial precedent and legal procedure, as well as differing substantive concepts, present a formidable obstacle to the establishment of a transnational legal practice. The role of judicial precedent differs considerably among EC countries. In Continental civil law countries, legislative or regulatory texts emanating from the legislatures and administrative authorities are the primary source of legal rules and dispute resolution. The doctrine of *stare decisis* is not formally recognized, and judicial pronouncements are not binding on the same or coordinate courts. Such pronouncements may be rejected or modified at any time upon

52. This is indicated by the fact that *Thieffry* and *Patrick* appear to be the only cases presented to the European Court of Justice in which "competent" authorities had recognized that a non-national's qualifications were equivalent to domestic qualifications, while regulatory officials had denied the non-national the right to practice.

53. The Dutch government supports this view. It formally "is of the opinion that this right of establishment will take a long time to implement within the European Communities because of the enormous differences between the legal systems of the Member States. . . ." Kellerman & Winter, *Current Survey: Netherlands*, 6 EUR. L.R. 408, 409 (1981).

the examination of a new case.⁵⁴ By contrast, in common law Ireland and the United Kingdom, prior judicial decisions are authoritative. The doctrine of *stare decisis* is firmly established, and judicial decisions are an important source of new law.⁵⁵

The role of procedure also differs between civil law and common law EC countries. Continental jurists, traditionally academics, concentrate on the substantive rules of law and frequently neglect matters of procedure, evidence, and the enforcement of judicial decisions.⁵⁶ Procedure is more significant in the United Kingdom and Ireland, where practitioners shape the law.⁵⁷

These differences in the role of judicial precedent and procedure result in fundamental differences in the practice of law. In addition to learning another country's substantive legal rules, lawyers from civil law countries wishing to practice in common law countries, and lawyers from common law countries wishing to practice in civil law countries, must alter their basic assumptions about how legal problems are analyzed and argued. The methods of legal research and the structure of legal arguments will also differ depending on whether the primary source of law is legislation or precedent and whether procedure is a significant factor in judicial decision making.

Common law and civil law EC countries have developed differences in legal concepts which may also present obstacles to transnational practitioners. An English lawyer, for example, may have difficulty with French law because there is no English distinction comparable to the French distinction between "public" and "private" law.⁵⁸ Similarly, a French lawyer may have problems with English distinctions between common law and equity or between real and personal property because there are no comparable distinctions in the French legal system.⁵⁹ Furthermore, the terms of one legal system frequently cannot be successfully translated into terms appropriate for another system. When translations are made, the meaning is often completely distorted.⁶⁰

54. R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 105-06 (1968).

55. *See id.* at 316.

56. *Id.* at 298. In civil law systems, the jurist who studies law as a "model of reason" at the university is distinguished from the practitioner who knows procedural forms and local rules. Since the twelfth century, civil law jurists have concentrated their attention on the definition and development of substantive rights, which are considered the very essence of the law. They have left to practitioners the development of appropriate procedures to enforce those rights. *See* R. DAVID, *ENGLISH LAW AND FRENCH LAW* 56 (1980).

57. *See* R. DAVID & J. BRIERLEY, *supra* note 54, at 298. In the United Kingdom, barristers, not university professors, are typically elevated to the bench. Furthermore, until recently, legal training usually involved "listening to the lessons of judges and participation in the daily work of courts," rather than study in a university. *Id.*

58. *Id.* at 282. Private law is essentially a means of regulating private relationships between individuals. Public law deals with relationships with the Sovereign. *See generally id.* at 14-16.

59. *Id.* at 282.

60. For example, "the contract of English law is no more the equivalent of the *contrat* of French law than English equity is that of French *équité*." *Id.*

Differences in language can also present a problem to European lawyers who wish to practice in foreign EC countries. The ten member states of the EC have at least seven official or widely used languages.⁶¹ Legal practice requires a high level of language proficiency. The successful lawyer must be able to speak articulately and write persuasively. The development of such skills in a foreign language may require months, and possibly years, of consistent study and practice—a burden which may hinder even the most ardent potential transnational practitioner.

B. Differences in the Structure of the Legal Profession

Differences in the structure of the legal profession in EC countries present yet another major difficulty for European lawyers wishing to practice in EC nations other than their own. In some Member States, legal practitioners are organized as a unitary profession in which every practitioner is admitted to practice in every capacity in all jurisdictions throughout the country. In other EC nations, legal practitioners are organized into discrete professions with limited spheres of practice. Thus, a legal practitioner from one EC country may have to assume a completely different roles if he or she wishes to practice in another EC country.

In the United Kingdom and the Irish Republic legal practitioners are divided into two separate and distinct groups, barristers and solicitors. No person is entitled to practice in both professions at the same time. Barristers have the exclusive right of advocacy before the Royal Courts and House of Lords. Barristers generally receive cases only through solicitors, who retain barristers to appear in court. Barristers do not have direct contact with clients and, unlike solicitors, barristers may not form partnerships.⁶²

Solicitors advise clients on legal, personal, and business matters. They may accompany the barristers with whom they are associated to court to assist in a trial, but the role of advocate in high courts is jealously protected by the barristers. Solicitors are involved in the actual preparation of cases and they are instrumental in instructing barristers on the details of cases. Solicitors also have the exclusive right to draft certain legal documents, the most important of which are probate instruments and papers conveying interest in land.⁶³

The division of legal practitioners into separate professions is even more complex in France. The French legal system includes *avocats*, *conseils juridiques*, and *avoués*. *Avocats* provide the broadest range of legal services. They are general legal practitioners who give legal advice and plead cases in court. With

61. These languages include Dutch, French, German, Danish, Greek, Italian, English, Scottish and Irish Gaelic, and Welsh. POLITICAL HANDBOOK OF THE WORLD: 1982-1983 (A. Banks & W. Overstreet eds. 1983).

62. See Costello, *England and Wales*, in 1 TRANSNATIONAL LEGAL PRACTICE 87, 87-89 (D. Campbell ed. 1982).

63. *Id.* at 88.

the exception of courts of appeal, they may appear in any court in France. They can practice in partnership or on their own.⁶⁴ *Conseils juridiques* give legal advice, draft legal documents, and may specialize in tax law, welfare law, or corporation law. They can practice, on their own or in partnership, within any jurisdiction in France. They cannot, however, represent clients in court.⁶⁵ *Avoués* represent parties in courts of appeal. They are considered officers of the court, and thus may practice only in the courts in which they are admitted.⁶⁶

The legal profession is also functionally divided in Luxembourg into three types of legal practitioners, *agrées*, *avocats-stagiaires*, and *avocats-avoués*. *Agrées* give legal assistance and represent parties before the Peace Courts and the Arbitration Tribunals. *Avocats-stagiaires* defend parties in criminal trials and can plead, but not solicit, before tribunals and courts in civil law matters. *Avocats-avoués* can solicit and plead before all courts in the judiciary district where they are members and, in some instances, before the Supreme Court of Justice.⁶⁷

In other EC countries, the tasks performed by legal practitioners are divided into separate professional functions that may or may not be performed by the same individual. Italy and the Netherlands fall into this category. In Italy, for example, there are two types of legal practitioners, *procuratori* and *avvocati*. *Avvocati* can practice in all courts of appeal and lower courts anywhere in Italy.⁶⁸ *Procuratori*, in contrast, only practice in the court of appeal and in the lower courts of the judicial district where they are admitted.⁶⁹ The sole requirement for becoming an *avvocato* is several years experience as a *procuratore*.⁷⁰

In still other EC nations, legal practitioners are organized into a single profession. German *Rechtsanwälte* and Belgian *advokaatan* offer examples.⁷¹

There is yet another important difference in the structures of the legal professions of the EC countries. The notary exists in all Member States except the United Kingdom and the Irish Republic. Unlike the common law figure of the same name, the civil law notary serves important legal functions. The notary drafts documents such as marriage contracts, wills, mortgages, and conveyances; certifies documents which then have a special evidentiary status in court proceedings; and serves as a depository for the original copies of important documents.

64. G. Glos, *supra* note 22, at 179–80.

65. *Id.* at 181.

66. *Id.* at 180.

67. A. Huss, *Grand Duchy of Luxembourg*, in *LAW AND JUDICIAL SYSTEMS OF NATIONS* (C. Rhyne ed. 1978).

68. G. Glos, *supra* note 22, at 487.

69. *Id.* at 486.

70. *Id.* at 486–87.

71. See generally *LAW AND JUDICIAL SYSTEMS OF NATIONS* (C. Rhyne ed. 1978). It should be noted, however, that in the Federal Republic of Germany there are *Rechtsbeistand*, legal advisors of a limited practice who are not required to become bar members—eds., see *Appendix 3: Glossary of Legal Terms Defining the Function of Legal Professionals in Various Countries*.

A notary is a public official with a state-protected monopoly over some of these functions. Unlike legal practitioners, notaries are supposed to be impartial and to instruct and advise all parties involved in the transactions they handle. They often become trusted legal advisors whose assistance is sought in connection with the property aspects of marriages, divorces, and deaths of family members.⁷²

As a result of the differences among the structures of the legal profession in EC countries, an EC lawyer who is granted permission to practice in another EC nation may be required to perform unfamiliar functions and to relinquish familiar ones. If this occurs, the foreign lawyer will probably find himself or herself at a disadvantage to domestic lawyers who have had the opportunity to develop skills in these unfamiliar areas. The foreign lawyer will probably also discover that a large investment of time and effort is necessary to eliminate this disadvantage.

For example, a German *Rechtsanwalt* wishing to practice in the United Kingdom will have to choose between acting as a solicitor or as a barrister.⁷³ If he chooses to act as a barrister, he can argue in front of English high courts. However, he will have to relinquish an important function that he can perform in his home country; he will not be allowed to meet and advise clients. On the other hand, if he chooses to function as a solicitor so that he can meet clients and offer them advice, he must give up the right he had in the Federal Republic of Germany to argue his client's case before the high courts.

Similarly, an Irish solicitor wishing to practice in Belgium will have to assume unfamiliar roles. In Belgium there is no solicitor-barrister distinction, but there are notaries.⁷⁴ Thus, while the Irish solicitor will be able to argue in front of all Belgian courts, something she cannot do in Ireland, she will not be permitted to draft certain documents that she could draft in Ireland since the drafting of those documents in Belgium is reserved for notaries.

III. CONCLUSION

The Treaty of Rome's articles on the right of establishment and the freedom to provide services will have little impact on legal practitioners. It is unlikely that the Commission of the European Community will remove existing Community barriers to transnational legal practice in the near future and the European Court of Justice has mandated the removal of the barrier of degree recognition only in narrow circumstances. Even if the Commission or the Court were to issue directives or decisions removing Community barriers to transnational legal practice, national barriers would still prevent many EC lawyers from practicing in other EC countries. Differences in the legal frameworks, the structures of the legal profession, and the official languages mean that an EC lawyer venturing into

72. See G. Glos, *supra* note 22, at 30–31; Crossick, *supra* note 29, at 171.

73. See Wallace, *supra* note 27, at 843.

74. See Crossick, *supra* note 29, at 171.

another EC country is likely to be at a considerable disadvantage to domestic practitioners. Although they are likely to place limits on foreign practitioners not envisioned in the Treaty of Rome, bilateral treaties struck between EC nations with similar legal structures may present the only feasible means of promoting the transnationalization of legal practice within the European Community.