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WHEN ZEAL FOR EUROPEAN UNITY OVERCOMES COMMON SENSE: THE LAWYERS' DIRECTIVE

INTRODUCTION

One of the greatest challenges facing the European Union (EU) is the process of integrating or harmonizing the various legal systems of Member States. The divergent legal systems create problems for people seeking to move freely and practice their professions throughout the EU. Among those people most notably affected by this dilemma are attorneys who wish to practice on a permanent basis in more than one EU Member State. In order to accommodate the needs of such “migrant attorneys,” the EU Council recently adopted Directive 98/5, the Lawyers' Directive. The Lawyers’ Directive, which was drafted with regard to previous insufficient Directives, provides a comprehensive framework for attorneys wishing to practice in an EU Member State other than the one in which they were formally trained.

Though it espouses the noble goal of facilitating the movement of lawyers throughout the EU, the Lawyers' Directive is controversial because of the extent to which it goes to achieve this goal. After much contentious debate between Member States, the final form of the Lawyers’ Directive dispenses with any sort of aptitude test that Member States previously administered as a prerequisite to bar mem-

2 See id.
3 See Lawyers' Directive, supra note 1, at 36.
4 See id.
6 See Lawyers’ Directive, supra note 1, at 36.
7 See infra Part III.
bership.\textsuperscript{8} With the elimination of this test, attorneys may now gain admission to the bar of any foreign EU Member State by simply practicing in that State for three years.\textsuperscript{9}

While the Lawyers' Directive will benefit migrant lawyers by greatly facilitating their ability to practice throughout the EU, it will probably cause difficulties if incompetent attorneys (who no longer have to pass an aptitude test) easily gain admission to the bars of foreign EU States.\textsuperscript{10} This potential for incompetence is exacerbated by the stark differences between civil and common law jurisdictions, coupled with the amount of knowledge that an attorney \textit{must} possess in order to practice competently outside his or her own jurisdiction.

In order to prevent the bars of Member States from being infiltrated by incompetent attorneys, the EU should create a system to maintain vigilance over migrant attorneys seeking to permanently practice in another jurisdiction. This goal will best be accomplished by the reintroduction of aptitude tests for bar admission, as well as the establishment of an EU oversight committee to review procedures for admission to the bars of Member States.\textsuperscript{11}

Part I of this Note reviews the recent history of the EU's attempts at facilitating cross-border legal practice. Part II examines the Lawyers' Directive in detail and discusses key provisions. Part III analyzes the contentious aspects of the Lawyers' Directive and gauges the reactions of Member States, individuals, and other legal interests. Part IV advocates the reintroduction of aptitude tests for bar admission by Member States and proposes that the EU oversee the content and administration of these tests in order to ensure their fairness. Finally, this Note concludes that the Lawyers' Directive will succeed only if Member States are allowed to devise aptitude tests which enable them to retain more control over who is admitted to their bars while, at the same time, the EU is able to supervise the fairness and nondiscrimination of bar admission procedures.

\textsuperscript{8} See id.
\textsuperscript{9} See id.
\textsuperscript{10} See id. The word "incompetent" in this context is synonymous with "under-qualified."
\textsuperscript{11} See infra Part IV.
I. HISTORY OF THE LAWYERS’ DIRECTIVE

A. Directive 77/249

By the end of the 1970s, the EU legislature began to take heed of the growing importance of cross-border legal practice. The EU Council recognized that national restrictions which Member States placed on foreign lawyers posed serious obstacles to the harmonization of the EU. In March 1977, the EU Council adopted Directive 77/249 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services (Directive 77/249). The overarching goal of this early directive was to assist lawyers in their pursuit of cross-border legal practice. However, language in the preamble of Directive 77/249 illustrates a secondary concern of the Council: namely, that current national restrictions on the practice of law may enable one Member State to unlawfully discriminate against attorneys from another Member State. The preamble notes that “pursuant to the Treaty [of Rome], any restriction on the provision of services which is based on nationality or on conditions of residence ... [is] ... prohibited . . . .” Thus, in adopting Directive 77/249, the Council sought to enhance the freedom of attorneys as a means of combating illegal and harmful protectionist policies among EU Members.

Notwithstanding this anti-protectionist undercurrent, Directive 77/249 was limited in scope and in reality was deferential to the nationalist tendencies of Member States. Directive 77/249 limited itself strictly to the provision of cross-border legal services and deliberately refused to address the important issue of mutual recognition of diplomas. Therefore, Directive 77/249 did little to assist attorneys who wished to become members of the bar in another Member State; such attorneys were still constrained by the limitations individual States placed on bar membership. For example, Directive 77/249 enabled a British solicitor to provide legal services and give advice in France but

12 See Directive 77/249, supra note 5, at 17.
13 See id.
14 See id.
15 See id.
16 See Directive 77/249, supra note 5, at 17; Treaty of Rome, supra note 1, arts. 3, 7(a).
17 Id.
18 See id.
19 See Directive 77/249, supra note 5, at 17.
20 See id.; Opinion of the Economic and Social Committee, supra note 5, at 14.
21 See id.
did not grant that attorney the ability to establish a legal practice as an avocat—a member of the French bar.22

Directive 77/249 had another significant limitation: it specifically allowed Member States to require that foreign lawyers work in conjunction with a domestic lawyer licensed in that State.23 At the time of Directive 77/249, most States imposed this restriction on foreign lawyers.24 This provision of Directive 77/249 therefore inhibited the freedom of lawyers to move about and practice their profession throughout the EU.25

B. Directive 89/48/EEC

Throughout the 1980s, Directive 77/249 was the only operative document governing migrant lawyers in the EU.26 It was not until the end of 1988 that the Council adopted legislation which furthered the goal of facilitating free movement of EU lawyers.27 On December 21, 1988, the Council adopted Directive 89/48/EEC on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of At Least Three Years’ Duration (Directive 89/48).28 This Directive provided for the mutual recognition of higher-education diplomas among EU members, thus compensating for a central weakness of the earlier Directive 77/249.29

Directive 89/48 was important because it established a specific framework by which attorneys and other learned professionals could attain permanent professional recognition by the controlling authority of any other EU host State.30 For the legal profession, Directive 89/48 provided attorneys with a procedure through which they were able to attain membership to the bar of the host State as long as they had properly attained membership in their own home State.31 Under Directive 89/48, host Member States were to choose one of two ways
to admit a foreign EU lawyer to the bar: either by way of an aptitude test, which would measure the individual's competence to practice law in the host State, or by way of a three year "adaptation period," during which the individual would practice in the host State. These two mechanisms were designed to safeguard the standards of the legal profession within individual States, while at the same time, providing migrant workers with a clear path toward permanently establishing themselves abroad.

For most professions, the individual aspiring to permanent recognition in the host State is given a choice of the above two options. However, Directive 89/48 contains an exception "for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity ... [e.g., lawyers]." This exception enables host States to dictate whether the foreign lawyer must take an aptitude test or undergo an adaptation period to attain membership to the bar. In this respect, the EU Council ensured that States retained some degree of autonomy in determining which individuals would enter the bar. Subsequent to the adoption of Directive 89/48, all Member States opted for the aptitude test with the exception of Denmark, which required an adaptation period only.

C. Need for a New Directive

Though Directive 89/48 comprised a major step toward accomplishing the goals of the Treaty of Rome, it nonetheless retained restrictions on the free movement of lawyers. The aptitude test, which all EU Member States but one implemented, is a notable restriction mechanism. Furthermore, because of its lack of specificity regarding the legal profession, Directive 89/48 failed to effectively harmonize

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32 See id. art. 4(b). An adaptation period entails the time an attorney spends practicing law in the host State without possessing permanent bar membership in that State. See id. art. 1(f).
33 See id. art. 3.
34 See Directive 89/48, supra note 5, art. 4(b).
35 Id.
36 See id.
37 See id.
38 See Opinion of the Economic and Social Committee, supra note 5, at 14.
39 See Directive 89/48, supra note 5, art. 4(1)(b) (requiring lawyers to undergo an aptitude test or adaptation period).
40 See supra notes 38–39 and accompanying text.
the laws of Member States in regard to admission to the respective bars. By the mid-1990s, a movement was underway to adopt legislation specifically directed at migrant lawyers in the EU.

On December 21, 1994, the European Commission (Commission) adopted a Proposal for a European Parliament and Council Directive to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification was Obtained (Proposal). The Commission regarded this Proposal as a way to greatly reduce national restrictions on admission to the bar, and furthermore, to resolve the disparate laws regarding this issue currently in force among the various EU States. The Proposal was adopted as a uniform means "of resolving these difficulties and of affording the same opportunities to lawyers and consumers of legal services in all Member States."

The Proposal was submitted to the Economic and Social Committee (Committee), which responded on July 5, 1995. The Committee largely endorsed the Proposal, merely suggesting a few points of clarification.

II. DIRECTIVE 98/5: THE LAWYERS' DIRECTIVE

The end result of these proposals was the adoption of Directive 98/5/EC, the European Parliament and Council Directive to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification was Obtained, the Lawyers' Directive. The Lawyers' Directive is specifically designed to be an improvement upon Directive 89/48, because it enables lawyers to practice on a permanent basis in a host Member State under their home-country professional titles.

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43 See id.

44 See id. at recital 6.

45 Id.

46 See Opinion of the Economic and Social Committee, supra note 5, at 14.

47 See id.

48 See Lawyers' Directive, supra note 1, at 36.

49 See id. art. 2.
The Lawyers' Directive, therefore, has the following beneficial attributes: it greatly assists those who wish to practice cross-border law; it opens up the market for cross-border lawyers, thus providing consumers with greater choice; and it unifies the various laws of Member States regarding admission of foreign lawyers. All of these aspects conform to the Treaty of Rome's vision of an area "without internal frontiers."

Unlike previous directives, the Lawyers' Directive specifically addresses the role that migrant lawyers will have in the EU. The most striking premise of the Lawyers' Directive is that "whereas after effectively and regularly pursuing in the host Member State an activity in the law of that State including Community [EU] law for a period of three years, a lawyer may reasonably be assumed to have gained the aptitude necessary to become fully integrated into the legal profession there," and thus there is no need for an aptitude test. This presumption of competency underpins the provisions of the Lawyers' Directive; the EU Council and Parliament place much faith in the ability of migrant lawyers to adapt to a new Member State's laws.

The Lawyers' Directive's central provision is encapsulated in Article 10, which grants any lawyer the right to attain permanent membership to the bar of any host EU country after an adaptation period of three years, during which time the attorney is entitled to practice under his or her home country's professional title. Thus, using the example discussed above in Part I, an English solicitor now may indeed practice law in France and—after three years—become a fully licensed French avocat. The Lawyers' Directive is therefore a radical improvement over Directive 77/249, which restricted cross-border lawyers to merely providing legal services under their home state titles. The Lawyers' Directive also poses a significant departure from Directive 89/48, because it dispenses with the requirement of an aptitude test and thus tremendously facilitates the ability of lawyers to attain permanent membership in a foreign EU bar.

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50 See id.
51 Treaty of Rome, supra note 1, art. 7(a); see Lawyers' Directive, supra note 1, at 36.
52 See Lawyers' Directive, supra note 1, at 36.
53 Id. at 37.
54 See id.
55 See id. arts. 2, 10.
56 See id.
57 See Lawyers' Directive, supra note 1, at 36; Directive 77/249, supra note 5, at 17.
58 See Lawyers' Directive, supra note 1, art. 10; Directive 89/48, supra note 5, art. 4(1)(b).
Nonetheless, the Lawyers' Directive still imposes a number of restrictions on the migrant lawyer who aspires to achieve permanent status in a host State. When commencing the three-year adaptation period, the lawyer must register himself or herself with a competent authority in the host Member State. This registration process requires the lawyer to prove he or she is properly licensed as an attorney in the home State. Furthermore, during the adaptation period, the lawyer may be prohibited from accessing supreme courts, and may be required to work in conjunction with a local attorney when defending a client before the courts.

At the end of the adaptation period, the lawyer may request full admission to the bar from the competent authority in the host State. This process allows host States to retain control over who is admitted to the bar. The competent authority may request a review of the attorney's work in the host state, including requesting production of documentation and demanding an interview. After this process is complete, the competent authority may choose to admit or not admit the applicant to the bar, a decision that is subject to appeal under the domestic law of the host State.

Therefore, the Lawyers' Directive still includes certain features that impede the migrant lawyer's progress in attaining full membership to the bar of the host State. Nonetheless, with the absence of an aptitude test at the end of the three year period, the route toward attaining such membership is far easier to travel than ever before.

III. REACTION TO THE LAWYERS' DIRECTIVE

The Lawyers' Directive is not a regulation, and therefore relies on the national legislatures of Member States to create and implement laws. Under the terms of the Lawyers' Directive, Member

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59 See Lawyers' Directive, supra note 1, at 36.
60 See id. art. 3. The competent authority is that body or agency which governs admission to the bar. See id.
61 See id.
62 See id. art. 5.
63 See Lawyers' Directive, supra note 1, art. 2.
64 See id.
65 See id. art. 10.
66 See id.
67 See supra notes 60–66 and accompanying text.
68 See id.
States must bring into force compliant domestic laws by March 14, 2000—two years after the document was published in the *Official Journal of the European Communities*. The process of implementing the terms of the Lawyers' Directive may not be a smooth one if various States were to enact inadequate or insufficient domestic laws.

When the Lawyers' Directive was still in the planning stage, the debate centered around what would become the most controversial provision: the aptitude test (or lack thereof). In 1995, the forces against an aptitude test were marshaled by Nicole Fontaine, the French Member of the European Parliament and the designated representative of fourteen European bar associations. Ms. Fontaine felt that such a test created an unnecessary obstacle to migrant lawyers, and that imposing the test was akin to a slight on the lawyers' professional integrity. She urged that migrant lawyers are generally experienced and highly qualified attorneys who have practiced for a lengthy period of time in another Member State. Ms. Fontaine's opinion reflected that of the European Commission, which asserted that the rules of professional ethics in any Member State would deter migrant attorneys from practicing law in a host country without the proper expertise.

Nonetheless, other Member States responded to the interests of their respective bars and objected to any directive that would not entail an aptitude test. Therefore, the Lawyers' Directive as passed did not necessarily receive unanimous support, and it is possible that certain States may offer a lackluster response to its terms.

Aside from the particular issue of the aptitude test, certain Member States have in the past been reluctant to grant foreign lawyers easy

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71 See *supra* note 41 and accompanying text.
74 See Internal Market, *supra* note 72.
75 See *id*.
77 See Internal Market, *supra* note 72. German Members of the European Parliament were among this group, as were representatives of Luxembourg. See *id*.
78 See *id*.
access to their bar associations.⁷⁹ In 1995, the European Court of Justice ruled in Gebhard v. Consiglio dell' Ordine degli Avvocati e Procuratori di Milano that the Italian Milan Bar Council was not permitted—under either the Treaty of Rome or Directive 89/48—to deny a foreign attorney the right of establishment in Italy, primarily because that attorney was not a member of the bar.⁸⁰ In that case, the Milan Bar Council had brought disciplinary charges against a German lawyer who had established a law practice in Italy and was practicing under the Italian professional title of avvocato.⁸¹ Though this case pre-dates the Lawyers' Directive, it illustrates the protective nature of national and local bar associations.⁸²

Along similar lines, Luxembourg was openly hostile to the proposed Lawyers' Directive and ultimately was the sole objector to its adoption.⁸³ Luxembourgers feared that too great an influx of foreign lawyers would result from the lax standards for admission to the bar.⁸⁴ In 1995, foreigners already comprised 23% of the Luxembourg bar; native attorneys of that nation were concerned they might suffer a form of reverse discrimination by the foreigners who could easily join the bar under the new Lawyers' Directive.⁸⁵

After much debate in the European Parliament, the bar associations of all Member States with the notable exception of Luxembourg granted their support to the Lawyers' Directive in the weeks preceding its adoption.⁸⁶ The EU Council of Ministers granted approval on December 15, 1997, and the Council granted final authorization on February 16, 1998.⁸⁷ The Lawyers' Directive was lauded by Single Market Commissioner Mario Monti, who regarded it as "proof that we [the EU] can make progress in the field of recognition of qualifications on the basis of mutual trust between Member States . . . ."⁸⁸

⁸¹ See id. at 623.
⁸² See supra note 79 and accompanying text.
⁸³ See Single Market, supra note 76; Lawyers Win Right, supra note 73.
⁸⁴ See Single Market, supra note 76.
⁸⁵ See id.
⁸⁸ Monti Welcomes Adoption, supra note 87.
Private groups have granted support as well: The Law Society, which speaks on behalf of representatives of the legal system, expressed hope that the Lawyers' Directive would “be used as a model for liberalising the practice of law elsewhere in the world.”89 In March 1998, the national bar associations of France, Spain, and Germany moved into shared premises in Brussels in order to emphasize their “pro-European” stance in the wake of the Lawyers' Directive.90

IV. Proposal for an Improved Directive and Reintroduction of Aptitude Tests

The goals envisioned by the Treaty of Rome are lofty ones indeed.91 It is no simple task to take several disparate nations and merge them into an economic union free of internal borders and restrictions. The difficulties are particularly prominent when attempts are made to unify the legal profession across borders.92 The Lawyers' Directive makes a giant leap in the direction of creating such unity among European lawyers, but it has probably gone too far.93 In drafting and adopting the Lawyers' Directive, the EU has rushed too quickly in its goal to achieve European unity, and this attempt to harmonize the laws of Member States will probably be detrimental to both the legal profession and potential clients at this point in time.

The most controversial and problematic feature of the Lawyers' Directive involves the abolishment of an aptitude test.94 Although the aptitude test was discarded as an impediment to the free movement of lawyers, it served the very valuable purpose of ensuring that only qualified attorneys gained entry into the bar of a foreign Member State. A mere three-year adaptation period95 is not enough to ensure that lawyers wishing to practice under the host country's professional title possess the requisite knowledge. At the present time, Member States operate under a variety of legal systems, the most stark contrast

91 See Treaty of Rome, supra note 1, arts. 2, 3.
92 See Opinion of the Economic and Social Committee, supra note 5, at 14.
93 See supra notes 55–58 and accompanying text.
94 See id.
95 See Lawyers' Directive, supra note 1, arts. 2, 10.
of which exists between the common law jurisdictions of England and Ireland and the civil code jurisdictions of continental Europe. The Lawyers' Directive is dangerous because of its presumption that attorneys are competent enough to practice among these various jurisdictions after a mere adaptation period.96

Furthermore, the view espoused by Nicole Fontaine—that a lawyer's code of professional ethics will be enough to safeguard foreign clients and bar associations from incompetent or inexperienced attorneys—is mere optimistic foolishness.97 An aptitude test is the only way to ensure that all lawyers practicing in a Member State are fully competent to do so.

It is true that aptitude tests could plausibly be administered in such a way to keep out or discriminate against foreign attorneys.98 This Note in no way advocates such discriminatory motivations, nor does it encourage xenophobic protectionism among the European bars. The most logical solution to this problem is the reintroduction of aptitude tests for all Member State bars and the creation of an EU oversight committee responsible for ensuring the fairness of these tests.

The Member States would create their own aptitude tests and submit them to the EU oversight committee for review. The oversight committee would ensure that these tests are not discriminatory and do not unduly impede the free flow of attorneys across borders. If the oversight committee made such a finding, they would remand the test back to the Member State for revision. Such a system would allow individual Member States to prevent incompetent attorneys from practicing as a full member of the bar, while enabling the EU to ensure that the tests are nondiscriminatory in their scope and application.

Other than this failure to provide for an aptitude test, the Lawyers' Directive is a positive step toward achieving unity within the EU.99 Cross-border lawyering will continue to be of vital importance to both Europe and the world, and the Lawyers' Directive admirably encourages such a practice.100 However, the EU should adopt another Directive that incorporates the framework of the Lawyers' Directive, but also provides for the reintroduction of individual State bar apti-

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96 See id. at 36.  
97 See Lawyers Win Right, supra note 73; Single Market, supra note 76.  
98 See generally Single Market, supra note 76 (explaining Member States' ability to regulate the difficulty of aptitude tests).  
99 See Lawyers' Directive, supra note 1, at 36.  
100 See id.
tude tests and the creation of an EU oversight committee. This system would ensure that competent foreign EU lawyers wishing to practice in another Member State are not unjustly precluded from permanent bar membership.

CONCLUSION

The Treaty of Rome envisioned that people of all professions would some day be able to move freely about the EU. The adoption of the Lawyers’ Directive ensured that this goal applies to lawyers by allowing them to easily practice abroad on a permanent basis. At the present time, however, the Lawyers’ Directive goes too far. The abolishment of an aptitude test for migrant lawyers creates too many opportunities for incompetent or insufficiently knowledgeable lawyers to infiltrate foreign bars. Aptitude tests should be reintroduced for every Member State. Furthermore, in order to ensure that these tests do not unjustly exclude foreign EU lawyers, the EU should establish an oversight committee to review the content and application of these tests. This two-fold plan will accomplish the goals of the Treaty of Rome in a manner that ensures the continued integrity of the legal profession in all Member States.

MATTHEW S. PODELL