

## AVOCATS SANS FRONTIÈRES

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Speech at the Inauguration of the European Circuit: 22 March 2001 by His Honour Judge John Toulmin CMG, QC., at The Old Hall Lincoln's Inn.

It is a singular honour to be invited to give the talk at the launch of the European Circuit. May I begin by congratulating all those concerned with the launch. May I also congratulate the Bar Council on recently opening an office in Brussels. I am sure that both ventures will be successful and will benefit the bar as a whole.

It is a particular honour to share a platform with Lord Slynn of Hadley and David Vaughan QC. Lord Slynn was successively Advocate-General and Judge at the European Court of Justice before returning to London as a judge of the House of Lords. He will be regarded as one of the most influential judges of the 20<sup>st</sup> century. He appears in this story on two occasions.

David Vaughan QC is one of the two leading European practitioners of the last 30 years and is a pioneer of legal practice on the European circuit. It is entirely appropriate that he should become the first leader of the circuit. May I add my warmest congratulations.

As a member of the International Committee of the Bar from 1972 - ,and as successively alternate to David Calcutt QC, barrister member of the UK delegation to the CCBE in my own right from 1983 , leader of the UK delegation from 1987 and then Vice President and President of the CCBE in 1993, I had a grandstand seat at the development of European legal practice. The CCBE ( Council of The Bars and Law Societies of the European Union) with delegations from all the European legal professions is the body recognised by the European institutions — the Commission, the Parliament , the Council of Ministers and the Court of Justice as well as the European Court of Human Rights as representing the legal profession in European matters. Since 1994 I have been Vice Chairman and then Chairman of the Board of

Trustees of the European Law Academy in Trier and have kept in touch with developments.

Although this is primarily an overview of the developments that have taken place in liberalising European legal practice, I thought it would be interesting to fit into the general picture some events in which I participated personally which appear to be particularly noteworthy. This will give a small taste of the working of the European institutions and the British Government in practice.

The Treaty.

In the background lawyers have had throughout to bear in mind the following provisions of what in 1972 was called the Treaty of Rome but later, as amended, became the Treaty of European Union and subsequently incorporated the Treaty of Maastricht, the Treaty of Amsterdam and the Treaty of Nice. The fundamental principals are set out in the early Articles.

Article 3(c) sets the objective of “the abolition, as between Member States, of the obstacles to free movement of goods, persons, services and capital.”

I emphasise removal of obstacles.

Article 5 ( now Article 10) requires the Member States to take all measures necessary to ensure the carrying out of obligations under the Treaty. “They shall refrain from any measures likely to jeopardise the objectives of the Treaty”.

Article 7 ( now Article 6) provides that “within the field of application of the Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.”

We were also concerned particularly with the Articles of the Treaty dealing with the right of a lawyer to establish in another member state (Articles 52-58, now Articles 43-48) and the equivalent provisions relating to the provision of services (Articles 59-66, now Articles 49-55).

The issues.

Increasingly as legal practice has become more global, we have had to address a number of inter-related questions involving not only the right to practice within the European Union but also the right to practice world wide.

The range of topics is wide.

1. The right of a lawyer who is a national of one Member State to establish an office in another Member State.
2. The right of such a lawyer to provide services in another Member State from his home office or chambers.
3. The conditions under which such a lawyer is permitted to appear in court in another Member State either as a locally established lawyer or from his or her home state as a provider of services.
4. The rules of professional conduct and discipline to which the migrant EU lawyer should be subject.
5. The requirement that the migrant lawyer should become a full member of the bar or law society in the place where he or she wishes to establish or be required at least to register his presence.
6. The right of the home state lawyer to enter into partnership with (MNPs) or to employ the migrant lawyer.
7. The right of the EU migrant lawyer to enter into partnership in the host state with professionals who are not lawyers (MDPs).
8. The rights of EU lawyers to practice outside the EU particularly in the United States of America.
9. The rights of non-EU lawyers to practice within the EU.

Questions 8 and 9 may also raise the questions in 1 - 7.

As the practice of the law has become more European and more global, the demand from the legal profession itself for answers to these questions has become more intense. Both the legal profession itself and the regulatory framework which supports it, have changed radically in the last 30 years. Even though this is the case, much legal practice in the European Union is still carried out by single practitioners or very small firms. Many rightly see their traditional forms of practice under threat from large firms and governments. This process of practice by larger firms (and larger sets of Chambers) has gone much further in England and Wales than in many other parts of the European Union. The English Bar has also changed radically over the past 30 years and this process is not complete.

The early years.

In 1972 the United Kingdom had not yet joined the Common Market which then had 6 members, all civil law countries with similar systems of law and organisation of their legal professions. Practice was local, the rule of unicité de cabinet prevailed. A group of lawyers or a firm was permitted to have only one office. If the matter required the assistance of a lawyer in another part of the country, or even 10 miles away within the jurisdiction of another Bar, the matter normally had to be referred to another lawyer.

As David Vaughan and I sat in the Bar Council's offices in Carpmael Buildings in 1972, at meetings of the International Practice Committee, this did not seem very surprising. It was only in the late 1960s that the English Bar had abolished circuit rules which required a QC off-circuit to appear with a junior from the circuit and also required a junior from another circuit to pay a fee to the circuit in order to appear in a case on it. Solicitors had only recently in 1969 been permitted to have more than 19 partners. A few had small offices staffed largely by ex- pats, in Paris and Brussels.

In the United States there were no national law firms, and very few firms had offices outside the state where the main office was established. A few firms had small offices in Washington, a very few had token offices in London Paris or Brussels.

The one major exception to purely local practice was the English Bar practising overseas. English barristers appeared regularly in Hong Kong and Singapore, and in the Caribbean and Bermuda. They were also entitled without examination to become members of the New York Bar. This overseas practice has diminished as local bars have become stronger and the countries concerned more legally independent.

Court of Justice.

Most of the early progress towards freedom of movement for lawyers within the European Union was accomplished by the European Court of Justice. It is perhaps not surprising that the early landmark cases were essentially local disputes which crossed national boundaries.

In 1974 there were two landmark decisions. *Reyners v Belgium* [1974] ECR 631, [1974] 2 CMLR 305, concerned a lawyer born in Brussels of Dutch parents who retained his Dutch nationality. He was refused permission to be admitted to the Belgian Bar and establish practice in Brussels on the grounds that he was not Belgian and did not come within the exceptions permitting non-nationals to be admitted to the Belgian Bar. *Van Binsbergen* [1974] 1 ECR 1299, [1975] 1 CMLR 298, concerned a Dutch lawyer who moved his residence to Belgium and was refused permission to provide the service of representing his client before the Dutch court because he was no longer resident in Holland. The issues in both cases may have been local, but the results were far-reaching.

Apart from the fundamental provisions of the Treaty which I have already set out in detail, the Court in *Reyners* had to consider the title on Establishment and in particular Article 52 of the Treaty. The Article provided that restrictions of the freedom of establishment of nationals of a Member State in the territory of another Member State shall be progressively abolished. "Such progressive abolition shall also extend to restrictions on the setting up of agencies, branches or subsidiaries by a national of any member state established in the territory of any Member State." Article 52 (now Article 43) made it clear that "freedom of establishment shall include the right to engage in and carry on non-wage earning activities under the conditions laid down by the law of the country of establishment for its own nationals". There are similar provisions in Article 59( now Article 49) in relation to services.

There appeared to be an exemption under Article 55 ( now Article 45) which might apply to lawyers. "Activities which in any State include, even incidentally, the exercise of public authority shall so far as that State is concerned be excluded from the application of the provisions of this Chapter" ( ie relating to establishment.)

The Court decided in *Reyners* and *Van Binsbergen*:

1. Articles 52 and 59 were of direct effect even in the absence of Directives implementing their provisions.
2. The practice of law was not an exercise of public authority under Article 55 and therefore lawyers were not exempt from the provisions of the Treaty.
3. A Member State was not permitted to enact legislative provisions which gave its own nationals privileges over nationals from other Member States - *Reyners*.
4. Certain restrictions were justifiable if they were for the general good, i.e. those relating to organisation, qualification, professional ethics, supervision, and liability

which were binding on any person established in the State in which the service was provided - *Van Binsbergen* at para 14.

5. By the same token rules to ensure the due observance of rules of conduct and respect for professional ethics might be justified.

The two cases were followed in 1977 by *Patrick*, an English architect who wished to reside and practice in Paris. The Court of Justice held that where, as in this case, there were bi-lateral conventions between English and French architects, they provided the yardstick by which a court would judge whether a restriction was reasonably justified or not. In this case they held that it was not.

Also in 1977 the European Court held in *Thieffrey v Conseil de L'Ordre de Paris* [1977] ECR 765, [1977] 2 CMLR 373, that a Belgian lawyer who held a Belgian diploma, which had been recognised by the University of Paris as the equivalent of the French diploma, could not be refused admission to practice at the Paris Bar on the grounds that he did not have the French Diploma. In effect the Court made it clear that the framing of rules in a way which discriminated in practice against foreign EC nationals from taking up and pursuing activities in a Member State was prohibited. The decision in *Thieffrey* did make it clear that it was permissible for a Member State to retain its own requirements for admission to its Bar or Law Society, provided 4 conditions were met - those requirements were justified in the public interest, were applied without discrimination, genuinely furthered the objective that was being pursued and were proportionate to that objective. These requirements were confirmed in later cases. In *Gullung* [1988] ECR 111 paras 24-31 the Court held that the requirements could include a requirement that incoming lawyers should register with the host Bar. See also *Kraus v Land Baden-Wurtemberg* [1993] ECR I - 1663 at 1697(para 32).

#### Early Legislation.

By the time of the first Directive relating to lawyers, the Lawyers' Services Directive of 22 March 1977 (EEC 77/249), the European Court had already set many of the parameters of legal practice in *Reyners* and *Van Binsbergen*. The requirements of the Council of Ministers to issue Directives to further the objective of abolition as between Member States of obstacles to free movement was contained in the Treaty itself. Little had happened as far as the legal profession was concerned.

Article 57(1) of the Treaty required the Council of Ministers, on a proposal from the Commission, and after consultation with the Parliament, to issue Directives regarding mutual recognition of diplomas, certificates and other qualifications. Article 57(2) required the Council to issue Directives regarding the co-ordination of legislation and administrative provisions of Member States concerning the engagement in and exercise of non-wage earning activities.

On 7 July 1964 the Council had issued a Crafts Directive providing that in accordance with the principle of free movement, vocational training and participation in a particular branch of a craft or trade (e.g.welding) without interruption for a certain number of years, was sufficient for a person to be entitled to pursue the same activity in another Member State. The Advocate-General in *Thieffrey* pointed out that cases involving employed persons brought under Article 48 provided useful guidance for the implementation of the Treaty. There are echoes of this concept in the debates of the next 30 years.

In 1969 the Commission published a draft Directive giving lawyers extensive rights to provide services in other Members States by giving legal advice and appearing in Court in those Member States under the disciplinary rules of the host Member State. It was not adopted by the Council of Ministers. The legal profession relaxed. In the succeeding years little progress was made until in the mid-1970s a somewhat similar Draft Directive was introduced. In 1976 David Vaughan and I, in the Bar's International Relations Committee, saw drafts of the Lawyers' Services Directive and heard reports from John Hall QC, leader of the UK delegation of the CCBE, of its progress. It reached thirteen drafts before eventually the 11<sup>th</sup> draft was adopted as Council Directive (EEC) 77/249.

It seemed to be modest in scope and, for the United Kingdom at least, not to require any changes in the way law was practised. But it had far-reaching consequences which were not appreciated at the time. It permitted a lawyer established in London to provide services by going to another Member State to advise on any law including local law using the English professional title. The English lawyer was also permitted to appear in court in conjunction with a local lawyer qualified to appear before that court. When the migrant lawyer was doing advisory work he was subject to the rules and discipline of his home state but was required to respect the rules in the host state especially those rules concerning the incompatibility of the exercise of the profession of lawyer with other activities in that

state, professional secrecy, relations with other lawyers, conflicts of interest and advertising. For court work the migrant lawyer was subject to host state rules. The only exclusions from the right to provide services related to the notarial activities of conveying land and the winding-up of estates.

The far-reaching consequences were that you could not impose a lesser degree of adherence to rules of conduct of the host state from the migrant lawyer actually established in the host state than were to be imposed upon the lawyer providing services who remained in the home state but went occasionally to the host state. If the migrant provider of services was required to respect host rules as part of his obligation, it was impossible logically to argue that the migrant established lawyer could disregard them at will.

As a post script, in 1988, to the considerable surprise of many lawyers, including I suspect many of those who had approved the provision in 1977, the European Court held in *Commission v Germany* 25 February 1988, [1988] ECR 1123, that acting in court in conjunction with a local lawyer meant no more than that a migrant lawyer must be introduced by a lawyer qualified to appear before that court who could assure the court that the incoming lawyer could conduct the case effectively and would respect the applicable rules of court and professional conduct.

Lawyers' Establishment Directive: the early years.

Soon after the 1977 Directive was agreed Comte Davignon, the relevant EEC Commissioner wrote to David Edward QC, as he then was, the current President of the CCBE, and asked the CCBE to work on a draft establishment Directive. It took over 20 years to agree and implement such a Directive. After the initial work there were 2 early drafts known as Zurich 10/80 and Athens/5/82 from the dates and places on which they were completed. These set out alternative proposals and pointed up the fundamental differences of philosophy within the legal professions of the Member states. The differences included the following mutually conflicting views often held by different Bars and Law Societies as a matter of principle.

1. A reluctance to recognise a category of lawyer other than that of a fully admitted member of the local legal profession. This view was taken particularly to emphasise that all lawyers within a jurisdiction should be subject to precisely the same professional rules and discipline.

2 A reluctance to recognise as a full member of the local legal profession those who were not fully conversant with the national law of the host Member State. Such lawyers, it was felt, should only be able to use the professional title of the state in whose laws they were fully qualified.

3. A reluctance in France and Germany in particular to breach the rule of unicité de cabinet.

4 A fear by migrant lawyers that if migrant established lawyers were subject to host rules and discipline, those rules would be used by the host profession to discriminate against the migrant lawyer.

5, Despite the Lawyers' Services Directive, a feeling that migrant established lawyers should not be permitted to advise on host state law.

This was the position when I became a full member of the UK Delegation to the CCBE in October 1983.

In terms of the real need of the legal profession for rules governing practice in another Member State, the situation had not changed much since 1972. There was little more demand for English lawyers to practice in Paris and Brussels but in any event there were few restrictions there which caused problems. Both the English Bar and Law Society had entered into conventions with the Paris Bar in December 1975 (these conventions were terminated by the Paris Bar in 1985 in anticipation of the reforms of the French legal profession - see below). English lawyers in Brussels were permitted to practice under their own title and carry on advisory work. The local situation had not changed in France or Germany either; practice was still local. Similarly there was little demand as yet from US lawyers for additional rights. They practised in a small way in London, Paris and Brussels and were not looking for expansion into other Member States.

1984 - Klopp

Things were about to change. In a landmark opinion in *Klopp* [1984] ECR 2971. [1985] 1 CMLR 99, delivered on 10 May 1984, the Advocate-General Sir Gordon Slynn declared unicité de cabinet to be unlawful if it prevented rights of freedom of movement secured by the Treaty. A German lawyer who had all the qualifications for admission to the Paris Bar was refused admission because he proposed to retain his professional office in Dusseldorf. Sir Gordon Slynn's opinion was followed by the full Court in its judgment on 12 July 1984. It declared such a

refusal to be unlawful because it prevented the lawyer from exercising rights of freedom of movement to which he was entitled. It left open the question of whether or not the migrant lawyer could have not only an establishment in his home state but more than one establishment in France. Soon after the decision in *Klopp* a court in Marseilles held that the rule that lawyers were permitted to have only one establishment was unlawful under French domestic law.

#### The Diplomas Directive.

On 28 June 1984 at Fontainebleau, the Commission launched the programme entitled "The Peoples' Europe". An important part of it was the programme for the completion of the single market by 31 December 1992. This was initially the responsibility of Lord Cockfield who was called to the Bar by the Inner Temple in 1942. He decided that progress for providing freedom of movement by sectoral Directives for individual professions was too slow and that what was required was a Framework Directive based on mutual recognition of higher education diplomas. This would enable suitably qualified professionals to use their existing qualifications to become full members of the equivalent profession in another Member State, any deficiency would be made up by an aptitude test or a period of adaptation. The original proposal for the Diplomas Directive was published on 16 July 1985. This was a few days before the Council Regulation 2137/85 of 25 July 1985 which set up European Economic Interest Groupings, (EEIGs) which enabled independent firms from different countries to set up a legal structure to pool resources for marketing, libraries and referrals, and was a form of association used by some medium sized firms of solicitors.

At first the legal professions were not fully aware of the determination of the Commission to enact the draft Diplomas Directive. In November 1985 the Bar European Group hosted a meeting in the Inner Temple which was presided over by Lord Justice Goff, at which Lord Cockfield left those present (who included Lord Slynn and David Vaughan) in no doubt that he intended to pursue his objective with determination. He did say, with some reluctance, that the Commission would be prepared to consider pursuing an equivalent Directive for lawyers alone if it was agreed by the Euro legal profession as a whole and by the Council of Ministers.

The CCBE suspended work on a draft Establishment Directive and worked hard to reach agreement on its own draft Diplomas Directive. It forwarded its own

text to the Commission on 31 July 1986. The Commission did not reply until December 1986 when it told the CCBE that it would not propose a separate Directive for the legal profession.

1986 generally.

1986 was an important year . It saw both the Single European Act and the start of the GATT Round which provided the context within which the legal profession would be developed. On 17 February 1986 the single European Act was signed in Luxembourg. It provided a significant step towards European integration and marked the watershed between Europe as a purely economic free-trade entity and one which had as a real goal, rather than a pious hope, the ever-closer union between the Member States. For lawyers Article 8A was important “ the Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992..... The internal market shall comprise an area without internal frontiers in which the free movement of goods, services, persons and capital in ensured in accordance with the Treaty.”

#### The GATT Round - Preliminaries

Also in 1986 a new GATT Round for the liberalisation of world trade was launched at Punta del Este in Uruguay. In early 1987 the American chamber of Commerce on behalf of US lawyers made five demands of the Japanese government.

1. US law firms in Japan should be permitted to have Japanese lawyers as partners.
2. US law firms in Japan should be permitted to employ Japanese lawyers in their offices in Japan.
3. US law firms should be permitted to practice law in Japan under the name by which the firm was generally known.
4. Migrant US lawyers should be able to count practice at their offices world wide against the requirement that they must have completed five years' practice before they could be registered in Japan as foreign legal consultants.
5. US lawyers should have the right to handle foreign arbitrations in Japan.

These demands reflected a significant change which was starting to take place in American legal practice. Foreign offices were starting to be set up by US law firms in much greater numbers to do full scale legal practice. This process

accelerated rapidly. By the early 1990s, for example one US law firm had 50 lawyers in its Paris office alone. A similar change was taking place in European practice. English solicitors were also establishing offices in larger numbers within Europe and also in Hong Kong and Tokyo. Dutch law firms were starting to expand world wide and also to forge close links with Belgian firms and others on the continent. The demands of the US Chamber of Commerce in Japan were also supported by the European business community in Japan in July 1989.

It was not clear in 1987 whether, despite the US demands, legal services would be included in the GATT Round. In early 1987 the EC Commission retained a firm of accountants as outside consultants to prepare a study which would form the basis of its decision. In due course the CCBE was able to assist in the study. By early 1988 it was clear that the Commission was determined to include legal services and it was important for the CCBE to co-operate with the Commission in a positive way. I had no doubt that any agreement in the GATT Round on legal services would have an impact on European law practice since a number of Member States did not permit other EC lawyers to establish offices in those States. If as a result of agreements in the GATT Round, US lawyers were permitted to open offices in those Member States even on a limited basis, the same rights could hardly be refused to lawyers from other Member States. For a long time a number of my colleagues were trapped in their own logic. They were unable to believe that the GATT Round had any relevance for lawyers. For them the logic was simple: the negotiations concerned trade, lawyers were not tradesmen so it could not concern them. I shall return to the negotiations later.

#### Diplomas Directive Part 2.

Meanwhile the CCBE having been refused its own sectoral Directive at the end of 1986, had serious problems with the draft Diplomas Directive. There was a local UK concern that it would exclude from its provisions barristers and solicitors who did not have a University law degree. David Vaughan QC played an important part in ensuring that it was the higher professional qualification and not the University degree, which gave rights under the Directive. A more general concern among lawyers was the provision in draft Article 4 which gave the migrant professional not the host profession the right to choose whether the migrant professional must undergo a period of adaptation for not more than three years or to take an aptitude

test in order to become a full member of the host profession. The lawyers' argument was that where the system of law and rules of professional ethics were different in the host state, the host state was entitled to satisfy itself that the migrant was competent in host state law and practice. This meant that host state should be able to require the migrant lawyer to take an examination or test in order that it could be so satisfied. Otherwise a migrant lawyer who had spent three years in a branch office in the host state of the firm established in his home state, would have been able to become a full member of the host state profession without any knowledge of local law or ethics. The CCBE (with crucial assistance from others) secured the following derogation in Article 4; "by way of derogation,... 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 of the host member state, may stipulate either a period of adaptation or an aptitude test". All states in the end specified an aptitude test. There was endless debate at the time as to what the tests could include. In the event the provision has worked well.

In June 1988 the Council of Ministers agreed a common position including the special provision for lawyers. In October 1988 the Parliament deleted the special provision. They were overruled by the Council in December 1988 and the special provision was restored to the draft. Council directive EEC 89/48 of 21 December 1988 came into force on 4 January 1991 two years after it was notified to the member states.

The insertion of the special provision was a considerable achievement for the CCBE and the legal professions at a time when in the "High Noon" of Thatcherite economics all professions, including the legal profession, were being looked at as traders where the market should dictate the conditions in which those services would be provided. This philosophy was predominant in the general thinking of a large part of the Commission.

Having said that, I should qualify it immediately as far as officials with whom we dealt were concerned. For the GATT Round we dealt with DG1, dealing with external affairs. For the internal market we dealt with DGIII and subsequently with DGXV. In the United Kingdom we dealt with the Department of Trade, which was the lead department for the Diplomas Directive and the GATT Round, and with the Lord Chancellor's Department. The officials at the Commission dealing with the GATT

Round, all non-lawyers, were outstanding. None more so than Arnaud Bordes of DG I who was dealing in the later stages of the negotiations not only with legal services but also with audio-visuals, one of the most contentious parts of the Round. We received similar co-operation from most but not all the officials dealing with the internal market in DGIII and DG XV and all those in the Department of Trade and the Lord Chancellor's Department.

#### Lawyers' Establishment Directive Part II.

At the beginning of 1988 work was resumed on the draft Lawyers' Establishment Directive. The President of the CCBE, Denis de Ricci of France, in an effort to make progress, asked for three texts to be prepared reflecting the differing positions of the legal professions in the member states. Michel Gout of France prepared a draft which required the incoming lawyer to become a full member of the host legal profession. This was in line with the law which had been drafted in France whose purpose was to integrate the positions of *avocat* and *conseil juridique* and, for the first time, to give the new unified French legal profession a monopoly on the giving of legal advice. I was asked to produce a draft reflecting the view of a number of City of London solicitors that lawyers should be entitled to establish offices in the host Member State using their home state title and subject only to such rules of their home Bar as their home Bar chose to impose upon them. Heinz Weil, a German *Rechtsanwalt* living in Paris, and Niels Fisch-Thomsen President of the Danish Bar, produced a draft permitting establishment under home State title but subject to all the rules of conduct of the host Bar.

At the plenary session of the CCBE in Copenhagen on 28 May 1988 a vote was taken. The French proposal and the compromise each received four votes, my draft received two votes - the UK and Holland. There were two abstentions. The four authors of the drafts met in a corner of the room and after a short discussion proposed that they should have a short time to see if they could find a way out of the impasse, not acting as members of their respective delegations, but as "experts of the Presidency". We agreed to meet on the weekend of 2/3 July 1988 initially at the house of Michel Gout in Rochefort-en-Yvelines just south of Paris.

I thought that a new approach was needed to avoid the debate being bogged down yet again in what were described as “principles”. I went to see Richard Bain, who had practised for a number of years on the Western Circuit and had then emigrated to France and was practising from Linklater’s Paris office and was one of the most prominent members of the English legal community in Paris. We devised twenty-five questions which an establishment Directive had to answer if it was to respond to the needs and concerns of both the incoming lawyers and the host Bars. They were designed to deal with practical matters e.g. should a lawyer be required to register with the host Bar? Answer “Yes”. Should such a lawyer have a right to be registered subject to a certificate of good standing? Answer, “Yes”.

We spent Saturday 2 July 1988 in Rochefort working through the questions and talking around the issues. It became clear that we would be able to reach agreement on a draft. We spent the Sunday in Paris producing the first draft. This required considerable courage on the part of Michel Gout since any acceptance of the right of a lawyer to establish in France without becoming a full member of the local Bar ran contrary to the draft French law which prohibited establishment under home state title and which was in due course enacted and came into force on 1 January 1992.

Our joint proposal had a better prospect of success than previous drafts not only because, coming from different points of view, we were all able to subscribe to it as individuals, but also because one area of unease was about to be lifted.

On 28 October 1988 in Strasbourg a common code of professional conduct was adopted by the CCBE after many years of work. It dealt with a) General principles; e.g. Independence of the lawyer, personal integrity confidentiality and personal publicity; b) Relations with clients; c) Relations with Courts and d) Relations between lawyers. The Code managed to reconcile differences of philosophy between the common law and the civil law. The code owed much to the work of Hamish Adamson, Secretary of the working group, who was also international secretary of the Law Society of England and Wales, and Secretary of the UK delegation to the CCBE. He has, incidentally, written a book entitled “Free Movement of Lawyers” which is the authoritative work on the subject. Originally the CCBE code only applied to cross-border activities between lawyers from different member States.

These rules of professional conduct have since been incorporated into the rules of professional conduct of all the Member States, the countries of the European Economic Area, Cyprus, the Czech and Slovak Republics, Poland and Turkey. The adoption of these rules helped to allay the fears of migrant lawyers that the rules of the host bar would be used to discriminate against them. The Code was amended in Lyon at the CCBE plenary session on 27 November 1998 and is now to be applied to professional conduct between lawyers from the same Member State. It has long been incorporated in the Conduct of the English Bar.

There were a number of important developments in the European legal profession in 1989.

1989 was the year of the White Paper on the reform of the legal professions in the United Kingdom. In Germany the constitutional court on 14 July 1987 had invalidated the German Bar rules as being unconstitutional. In 1988 a German law society committee had decided by an overwhelming majority that national partnerships were permissible. It was in 1989 that German law firms in different parts of the country began to re-organise themselves by amalgamating or by setting up branch offices in other parts of Germany. This enabled the German profession to strengthen itself and thus to play its full part as a leading European legal nation. From this time discussions on liberalising the profession ceased to be largely theoretical but mattered to increasing numbers of practising lawyers in Europe.

#### Lawyers Establishment Directive Part III.

In 1989 and 1990 important progress was made on the experts' draft Establishment Directive. There was an important meeting at the EC Commission on 27 January 1989. A delegation of the CCBE met Herr Martin Bangemann, Commissioner responsible for the internal market, DGIII, and M Beuve-Méry, Head of the Division dealing with legal services. They said that they were reluctant to take up sectoral Directives for professionals particularly since the Diplomas Directive had only just been adopted. They said that would consider doing so only if three conditions were met a) It enlarged rights recently given to lawyers under the Diplomas Directive; b) it was generally agreed by the legal professions and c) that it

was generally agreed by the Member States, During 1989 work on the draft Directive continued. This included meetings with the Commission.

On 25 January 1990 at meetings with Herr Bangemann, M Beuve-Méry and Mme Kirschbaum, the Commission gave the CCBE draft a warm welcome although they recognised that it had not yet been voted upon by the delegations or been considered by the Member States. At the same meeting, they expressed informal objections to the French law which withdrew the right to lawyers from other Member States to establish an office in France using their own professional title, a right which had been exercised by English lawyers since before the First World War.

### The GATT Round Part II : Substantive Discussions

We must leave the story of the Establishment Directive in 1990 and return to the GATT Round whose discussions were running in tandem. It was clear towards the end of 1989 that in principle the Commission intended to include legal services in the Gatt Round but nothing had been decided beyond that. At a meeting with the Commission, DGI, in November 1989, it appeared that the EU offer might well include private litigation before the courts and notarial activities in addition to legal advice. Discussions intensified from the end of 1989. The Round was originally due to end in December 1990. On 21 December 1989 I attended a relatively low level meeting with officials of DGI at the Commission to consider what was described as a "Panorama on Legal Services". I only attended because no member of the Presidency of the CCBE was available. The meeting was, in the event, of considerable significance. The draft Panorama was in tradesmen's' jargon. I managed to introduce a substantial number of amendments, emphasising the overriding duty of lawyers to the court in litigation and the duty of professional responsibility in advisory work which could override the duty to one's client. I based my suggested amendments on the CCBE Code of Conduct. These amendments were accepted. This was the start of my responsibility for the negotiations on the GATT Round on behalf of the CCBE as a whole. It continued until 15 December 1993 when the Round was in fact completed. The continuity was invaluable.

Once the EC Diplomas Directive had been enacted there was intense lobbying by US lawyers to include mutual recognition in the GATT Round. In June

1990 the Commission responded by asking us to provide a list of obstacles for EU lawyers in the rest of the world. This we did. At the same time we amplified to the Commission the distinction between court work which we said was work in the furtherance of justice, and should be excluded from the EU offer altogether, and legal advisory services which we accepted were an adjunct to the furtherance of trade. The distinction had been foreshadowed by the amendments to the Panorama in December 1989. The officials made it clear that they understood the distinction which we were making. We formed the impression that there might well be outside political considerations which would decide whether or not they were able to accept it in practice.

In July 1990 court related services were in fact included in what was called "The Central Product Classification List". For the time being therefore they were included, although the CCBE view that they should be excluded was shared by the relevant committee of the Council of Ministers.

In August 1990 there was meeting of the representatives of the ABA at which they made detailed demands of everyone else to liberalise but made no offer or even acknowledgment that changes needed to occur in the US.

The US annexe on legal services of October 3 1990 maintained world-wide the demands which had been made of the Japanese in 1987. It also included demands that American lawyers could participate in multi-disciplinary practice outside the US and that there should be no unnecessary barriers to US lawyers becoming full members of the foreign host state legal profession. It excluded the right of lawyers not admitted in the foreign jurisdiction to appear in court.

At a meeting of the liberal professions in Brussels on 16 November 1990 the attitude of the Commission as a whole still seemed to be that there was little difference between lawyers and tradesmen and that lawyers' services should be treated no differently from other business services. The date for the conclusion of the Uruguay Round passed without agreement. On 7 December 1990 the discussions at government level had been adjourned for the duration of the Gulf War. They were in fact resumed in March 1991.

Work at lower levels continued. We had a long and wholly constructive meeting at the Commission on January 29 1991. It lasted for 2 and a half hours and was extremely successful. The deficiencies in the US offer which included access for

foreign lawyers in only 9 states, was discussed. We also discussed the draft WTO Framework Agreement as a whole.

A follow-up meeting of the liberal professions to the disappointing meeting of November 1990 took place on 11 June 1991. At that meeting I suggested to the Commission officials present that if progress was to be made in the very detailed individual negotiations for each profession, the Commission (who really did not have the manpower to cope on their own) needed the assistance of individual sectors and that the CCBE was prepared to give that assistance. To my surprise and delight my offer was immediately and warmly accepted by the very senior member of the Commission present. The Commission's offer for the legal profession proceeded thereafter on the basis of legal advice only in the law in which the migrant lawyer was qualified and international law. This remained the Commission's offer on behalf of the Member States. I return to the conclusion of the GATT Round later.

Lawyers' Establishment Directive 1991-1993.

I left the Lawyers' Establishment Directive at the end of 1990 with the draft still under discussion within CCBE but having received a general welcome from the Commission. The year 1991 saw some further progress but no conclusions. The Court of Justice gave important guidance in the case of *Vlassoupoulou* [1991] ECR I-2357, [1993] CMLR 221. Opinion of A-G Van Gervan 28 November 1990, Judgment of Court 7 May 1991. The Court made it clear that in judging the equivalence of qualifications the host Member State, in effect the host Bar or Law Society, must even before the Diplomas Directive took effect, take into account all the knowledge and experience acquired by the migrant lawyer in both the Member State of origin and in the host Member State when deciding the extent of the deficiency of knowledge which the migrant lawyer must rectify before being admitted as a full member of the host profession.

On 10 May 1991 at the CCBE Plenary Session in Dublin there was a vote on the draft Establishment Directive. The four-four-two split with two abstentions of Copenhagen in 1998 was transformed into eight votes in favour of the experts' draft, three against and one abstention. This was a substantial step forward but was not enough for the draft Directive to be adopted by the CCBE or to satisfy the condition

of the Commission that the draft had been generally accepted by the EU legal professions.

Discussions continued. After January 1992 they took place against the background that from January 1992 multinational partnerships were permitted in England and Wales for solicitors.

The breakthrough came after a constructive intervention from the Bâtonnier of Paris, Georges Flécheux, then in his last year of office, at the Plenary Session of the CCBE in Barcelona in May 1992. As a result of minor changes in the draft, the French delegation were able to vote for the draft Directive at the Plenary Session in Lisbon on 23 October 1992. The draft Directive was adopted by the CCBE by ten votes in favour to two against. Spain voted against for the rather strange reason that the draft was not liberal enough. Luxembourg voted against on principle and because it feared that the Luxembourg Bar would be swamped by foreign lawyers.

On 9 December 1992 the members of the Presidency met M Perrissich, the Director of DG III, who warmly welcomed the draft which had been adopted and told us that it would be put into the work programme for the Commission for 1993. It was clear that the Commission accepted that the first and second conditions had been met, i.e. the draft Directive gave new rights over and above the Diplomas Directive and had achieved general acceptance from the legal professions in the Member States,

Some progress was made in early 1993. On 27 March 1993 a delegation from the CCBE saw a senior lawyer in the Legal Services Directorate, M Etienne, from Luxembourg. He congratulated us on agreeing the draft Directive and said it was a model for other professions. He said he would give an unequivocal opinion that the draft complied with European law. Sadly he was about to retire.

On 1 April 1993 there was a ministerial meeting in Brussels to consider whether the third condition had been met, namely that the draft Directive was generally acceptable to the Member States. Thanks, at least in part to very effective representation by the Lord Chancellor's Department, this was achieved.

There was then a period when nothing appeared to be happening. On 1 January 1993 the dossier had been passed from DG III to DG XV as a result of re-organisation within the Commission. Our draft appeared to have got stuck. Eventually we asked for a meeting with the Commissioner. On 15 December 1993 we met with M Verderame, the Commissioner's chef de cabinet. He promised us that

the Commission Draft Directive would be published in the new year 1994. It did not happen. The Commission draft was not finally published until December 1994, two years after the CCBE draft Directive had been presented to M Perrisich. In the meantime, the French delegation at the CCBE had done a volte- face and was no longer in favour of the Directive.

#### GATT Round: Conclusion.

The EC Commission's offer to give access to foreign lawyers within the European Union (either by way of establishment or services) to advise on the law in which the migrant lawyer was qualified and international law, was challenged by the US lawyers as discussions within the Round were drawn out.

The deadline of 31 December 1990 had been put back to the end of 1992 with the Round due to be completed during the Bush Presidency. It became clear that even that date would not be met, and the date was put back to the end of 1993. From November 1992 discussions on legal services further intensified. In four separate meetings both CCBE and ABA representatives had separate discussions with representatives of the Japanese Bar and with each others. The EC Commission and the US Trade Representation were pressing the Japanese for improved access to Japan for foreign lawyers. The ABA representatives were also concerned that if and when the draft Directive on Rights of Establishment was implemented, it would put US law firms at a competitive disadvantage with their European counterparts.

In November 1992 a distinguished Brazilian lawyer, Dr. Durval de Noronha Goyos Jr., whose firm had and has offices, inter alia, in Brazil, Miami, London and Lisbon, wrote an article in the November issue of the magazine "Lawyers in Europe" entitled "Derisory Progress". In it he set out the restrictions on foreign lawyers establishing themselves in the US as foreign legal consultants. He pointed out that there was no access at all in 34 States, and in the remaining 16 states and the District of Columbia there were only 196 legal consultants of whom 160 were established in New York. He exposed the barely concealed restrictions on practice in California and Texas in the shape of onerous insurance requirements which severely inhibited foreign lawyers from establishing offices in those important States. There were only six registered foreign legal consultants in California and one in Texas. These figures were to be compared with over 1000 legal consultants in London at the time and over 500 in Brussels.

The problems for foreign lawyers in the United States were emphasised by the CCBE delegation at meetings with the ABA Committee. At least partly as a result of this pressure, the ABA Committee drafted a model rule on foreign legal consultants which was adopted by the ABA at its Convention in August 1993. It was described by Steven Nelson, the very able leader of the ABA delegation, as a “goodwill gesture that the US hoped would lead to substantive negotiations”. It was certainly a considerable step forward but in practice it could be no more than a goodwill gesture because individual States had exclusive jurisdiction over who was able to practice in that State. The real problem for some States was not as they saw it a few foreign lawyers, but lawyers from other States in the US who would come in in large numbers. My conclusion at the time was that I was rather pessimistic about the chances of the Model Rule receiving general acceptance.

As a result of assistance from the Commission at the highest level, a meeting was arranged at Evian-les-Bains on the shores of Lake Geneva on 15 and 16 October 1993. The delegations from the ABA, CCBE and Japan were accompanied by senior officials concerned with the negotiation of the GATT Round. Delegations had no authority to agree anything, but the discussions might well be reflected in agreements made in the Round. In any event agreements could be made between the Japanese and US governments and the European Union in the Round relating to legal services whether the lawyers agreed or not. The discussion did not in the event result in agreement. The officials were no doubt much clearer as to the reasons for the sticking points after the intensive series of meetings. The US regarded the talks as a failure; I did not. I was in no position to negotiate away deeply-held views, nor could I properly demand that European lawyers in Japan should have the right to take Japanese lawyers into partnership or employ them in their offices when such rights were not generally available to Japanese lawyers resident in Europe. The US and the Japanese lawyers also had their difficulties which made a wider agreement impossible.

In the end the European offer made in the GATT Round was a modest one, namely the right of lawyers from other participants in the GATT to establish offices in the Member States from which they could advise on the laws of the countries in which they were qualified and in public international law. Even this modest offer was subject to derogations from some member States including France. The offer did not include the right for non-EC lawyers to practice EC law. EC law was to be treated as

part of the domestic law of the Member States. In the same way that US Federal Law is part of the domestic law of the United States. Negotiations in the GATT Round were concluded on 15 December 1993. The agreement was signed in Marrakesh in April 1994. There were 125 participating countries.

I felt it was very important that legal services should remain in the GATT Round so that the modest levels of commitment could be built on later. I now believe that with the adoption of the European Directive on Lawyers' Rights of Establishment, the time has come to re-visit these issues. I know that the US is anxious to do so. At the end of 2000 the US Government submitted a paper to the WTO emphasising that legal services are important to the world economy in their own right and underpin commercial activity world-wide. I agree. I note too that bi-lateral discussions are taking place with the US to try to ease the qualifications required of English lawyers to be admitted to the New York Bar ( see Law Society Gazette, 15 March 2001, page 8)

In addition to liberalising access for lawyers the participants in further talks should discuss the adoption world wide of a professional code of conduct similar that adopted by the CCBE in 1988 and amended in Lyon in 1998. Having studied both the US and Japanese codes of conduct I do not see any serious impediment to such negotiations reaching a successful conclusion. The task is obviously not for the exclusive prerogative of these participants, but the lack of difficulty in relation to these codes would no doubt be mirrored by a study of other professional codes.

#### Lawyers' Establishment Directive: Final Phase.

I ended my Presidency of the CCBE at the end of 1993 with a promise from the Commission of a draft Establishment Directive in early 1994. In fact it took the intervention of the Legal Affairs Committee of the European Parliament to achieve progress. In September 1994 Herr Willi Rothley, a distinguished German lawyer and MEP, as temporary chairman of the Legal Affairs Committee, summoned the Commissioner to explain the lack of a Commission Draft. The Commissioner responded by promising a draft by the end of 1994. Eventually on 21 December 1994 the draft appeared. In an attempt to accommodate the French opposition to the CCBE draft, the Commission produced a proposal which contained the unlawful provision that there should be only a temporary right to establish in another Member State under home state title for five years. At the end of that time, the migrant lawyer

would be required either to qualify as a full member of the host legal profession or to go home.

For a long time there was no progress, but in *Gebhard* [1996] 1 CMLR 603 (Opinion of A-G Léger 20 June 1995) [1995] -I-4186, Judgment on 30 November 1995, the European Court of Justice came to the rescue. The Court concluded on a reference from Italy that a right of establishment under home title without full integration into the host profession did exist. It defined what was meant by establishment and services, and held that where a national pursued an activity on a stable and continuous basis that should be governed by the title of establishment rather than services. "The temporary nature of the provision of such services is to be determined in the light of the duration, regularity, periodicity and community. However the provider of services may equip himself with the infrastructure necessary to perform the services in question".

At the CCBE meeting in Dresden in November 1995, two weeks before the European Court's decision, but after the Advocate-General's opinion, a further compromise was reached in the Presidency of Heinz Weil, one of the original experts of the Presidency. The five year limitation on establishment under home title was deleted, but admission as full member of the host Bar was made easier. The vote in the CCBE, now enlarged to include the countries which acceded to the European Union in 1994, had France, Spain and Luxembourg voting against, but it was not enough to block agreement.

A considerable amount of constructive work was then done by a sub-Committee of the European Parliament chaired by Mme Nicole Fontaine, MEP. Vice-President of the Parliament, which took note of the ruling in *Gebhard* and the CCBE proposed compromise in Dresden. The Committee succeeded in agreeing a text to be voted on by the Parliament on 19 June 1996.

On the day before this debate took place, there was a debate in the House of Lords on 18 June 1996 on a report on Lawyers Rights of Establishment by the House of Lords Select Committee on the European Communities, chaired by Lord Slynn of Hadley. The importance of this Committee should be better appreciated. Such is its standing within the European Union that it is one of the very few national bodies before whom EC Commission officials regularly appear. In the past it has produced influential and distinguished reports on among other subjects, the Diplomas Directive, the Court of First Instance and the 1996 Inter-Governmental

Conference. I have little doubt that this report played an influential part in the final outcome of the establishment Directive. It was also noteworthy that in the debate introduced by Lord Slynn, Lord Irvine of Lairg, Lord Lester of Herne Hill and the then Lord Advocate, Lord Mackay of Drumadoon, made constructive speeches in support of the concepts set out in the draft Directive as amended. It is interesting that the Lord Advocate stressed the importance of the common code of conduct in imposing standards..

On the following day, 19 June 1996, the European Parliament approved the Sub - Committees amended text by a large majority. On 24 September 1996 the text was accepted by the Commission subject to a report by a working group of the Council of Ministers, which was set up to look into the economic consequences.

On 25 April 1997 the final text of the Establishment Directive went to the Council of Ministers. Political accord on the text was unanimous except for Luxembourg which remained resolutely opposed. Luxembourg referred the case to the European Court but failed to have the Directive annulled.

On 16 February 1998 the final text was adopted. On 14 March 1988 the text was published in the Official Journal. The Directive came into effect on 14 March 2000 as Directive 98/5/EC.

The underlying principles were not so very different to those discussed in Rochefort-en-Yvelines nearly ten years before. In an excellent article in a Festschrift to Pierre Van Ommeslaghe, Batonnier Georges Albert Dahl of Brussels remarked (page 758) that the long years of controversy had undoubtedly permitted improvements to be made, but had also resulted in many complications". It was appropriate that agreement should have been reached during the Presidency of the CCBE of Michel Gout, one of the original experts of the Presidency.

Put briefly, the Establishment Directive gives a right to lawyers to establish a practice in another Member State and pursue the activities of giving legal advice and representing a client in legal proceedings using their home title provided that where such activity is reserved to lawyers in the host Member State, it shall be undertaken in conjunction with a locally qualified lawyer. The Directive (Article 5) specifically gives Member States the right to laydown specific rules for access to Supreme Courts such as the use of specialist lawyers. The migrant lawyer is required to register with and has a right to be registered by the competent authority of the host Member State with special provisions to deal with Barristers and solicitors in the

United Kingdom and Ireland (Article 3). All other states except Denmark have divided professions but Notaries are excluded altogether from the Directive.

There are rules relating to the applicable rules of conduct and requirements relating to professional indemnity insurance (Article 6), Disciplinary proceedings (Article 7) and Salaried practice (Article 8).

Article 10 gives the established lawyer additional rights to be admitted to the host State bar to those given under the Diplomas Directive. This applies once the lawyer has effectively and regularly pursued for at least three years a professional activity in the host Member State.

Article 11 deals with joint practice and Article 12 gives a right to use the name of the firm used in the lawyer's home Member State.

I was asked to chair a Committee of the Inns of Court to advise on the steps which the Inns should take to implement the Directive. David Vaughan was a member of the Committee. We met in a room in Middle Temple less than 100 yards from the room in Carpmael Buildings where we had started nearly 30 years before..

#### Conclusions

Looking at the range of topics with which I started, 1) a migrant EC lawyer who is a national of one Member State, now does have a right to establish an office and practice in another Member State; 2) a migrant EC lawyer has the right to provide services in another Member State; 3) the migrant EC lawyer has the right to appear in the Court of another Member State; 4) the disciplinary rules to which the migrant EC lawyer will be subject have been settled; all Bar Rules must conform to the principles set out in the CCBE Code of Conduct; 5) the migrant lawyer is not required to become a full member of the Bar or law Society of the place where he or she is established; 6) the provision of multi-national practice is governed by Article 11 of the Establishment Directive which has not changed since the Experts' Draft. It is generally permitted except where such a grouping is incompatible with the fundamental rules laid down in the host state. In other words, it is not permitted for barristers in the UK and Ireland because they are not permitted to form partnerships among themselves. Solicitors can form partnerships among themselves so under the Directive ( as well as under domestic law) they can form partnerships with lawyers from other Member States. I should add that one of the guiding principles has been that the division of the legal profession in the UK into barristers and solicitors is an internal matter. Nothing should be done by way of European Directives which would

alter the balance between barristers and solicitors by a side-wind.7) Multi-disciplinary partnerships were the subject of a hostile declaration adopted unanimously by the CCBE in Brussels in November 1993 during my Presidency. The subject is not satisfactorily resolved at least as far as accountants and some consumer organisations are concerned. Article 11 (5) of the Lawyers Establishment Directive provides that where a Member State prohibits MDPs it may prohibit lawyers who are part of an MDP from establishing as such within its territory.

There is still much work to be done in developing the legal profession but hopefully the stage is now set for a successful expansion in the practice of barristers on the European circuit now that the basic framework is in place. I congratulate you and wish you every success. I end with a modest question. Should the Bar and the Inns consider whether there is any way in which the Inns could reflect the new legal order by doing more to welcome lawyers and Judges from other Member States into their midst ?

Under the European Communities (Lawyers Practice) Regulations 2000 the matter is regulated for migrant established lawyers but could something be done for those who wish to provide Services and for Judges from other jurisdictions ?

22 March 2001.