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A US Perspective on Europe's Right of Establishment Debate

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A US perspective on Europe's right of establishment debate

Sydney M Cone, of Cleary, Gottlieb, Steen & Hamilton, New York, looks at the debate between UK and European lawyers on the proposed EU right of establishment directive from a US perspective.

The long delay in preparing the proposed EU Directive on the establishment of lawyers can be viewed in terms of unreconciled English and French doctrines on the matter. This is a view that finds support in a 1995 report by a House of Lords Select Committee, called The Right of Establishment for Lawyers (the Lords report).

The English legal profession, it says, seeks to change two features of the present (EU Commission) draft of the proposed Directive in order to assure, first, the right of English lawyers to establish themselves and to practise throughout the EU under home-country title (as barristers or solicitors) rather than as members of another EU legal profession (for example, as members of the Paris bar) and, second, the right to require continental lawyers (such as French *avocats*) established in England to pass a substantive examination on English law before being permitted to practise as barristers or solicitors.

Contrasting positions

The Lords report contrasts this position with that of the French legal profession, which wants the proposed Directive firstly to eliminate or limit the period during which an EU lawyer established in a host country (for example, an English solicitor established in Paris) may practise without becoming a member of the local legal profession (here, a member of the Paris bar) and, secondly, to facilitate the process of integration into the local legal profession by providing in these circumstances for an abbreviated examination limited to matters of host-country procedure and professional ethics.

Were the French approach to be adopted, an English solicitor established in Paris, or a French *avocat* established in London, might be permitted for a limited number of years to practise as a solicitor in Paris or an *avocat* in London, but, by the end of that period, each would be required either to become a member of the host-country legal profession by passing the abbreviated examination or, if the solicitor or *avocat* failed to pass the examination and to join the host-country legal profession, to cease practising law altogether in the host country (in France or England, as the case might be).

On the basis of 85 pages of minutes of evidence as well as the Select Committee's own analysis, the Lords report is fully supportive of the English approach and considers the French position seriously defective.

The Lords report might, however, have explored more fully one major underlying issue: the extent, if any, to which a foreign lawyer established in a host country, though not a member of the host country's legal profession, can be expected and should be permitted to practise host-country law. On this point, after reciting with very little discussion "the extent to which problems may call for advice on interacting legal systems", the Lords report rejected an Irish suggestion that foreign lawyers should be prohibited from advising on host-country law, and that, in particular, "a [non-Irish EU] lawyer [established in Ireland and] exercising a right to advise on Irish law without any training in Irish law would not be in the interest of the consumer." Although the French position on this point is left largely unexplored, the minutes of evidence allude to the French situation in (for example) the following exchange between the chairman of the Select Committee (Lord Slynn of Hadley) and the chairman of the General Council of the English Bar (Peter Goldsmith):

> Lord Slynn: It might be said, might it, that there is a danger if you go and practise in another member state and say, "I am only going to do English law, Community law and international law", slowly you go down the slope and you begin to advise people on French law because you have read it up in the books, and unless you insist on a host qualification people might begin to trespass into other areas of law? Is that a possibility or not?
>
> Mr Goldsmith: It seems to us from the point of view of consumer protection what matters most is that members of the public should know what they are getting. They should know that an English solicitor means someone who has either qualified in a way which involves a thorough knowledge of English law, or has been through another process which has provided the same degree of assurance. If . . . a Belgian *avocat* . . . wishes to advise on English law then it is important that the public should know that is who this person is and therefore we are not receiving the same degree of assurance as to knowledge . . . The concern is, and this is one of the vices under the proposal [the present draft of Establishment Directive] that after five years that Belgian lawyer, though he will only perhaps have been practising in a relatively narrow way, is required and entitled to call himself an English solicitor, and that would give rise to a great risk of confusion in the public's mind.

Note that the response was couched in terms of the protection of consumers in England in respect of continental lawyers established for five years in England,

although the chairman had asked about an English lawyer established in and practising French law in "another member state" (presumably France).

French view

For a French view of the question that the chairman actually asked, there exists a report that was prepared for the French minister of industry to examine the transnational performance of professional services (the minister's report), which says:

> All in all, the blessing [by the proposed Establishment Directive] of the use of home-country title by the [home-country] lawyer established [in a host country], a blessing that would result in authorization to use that title permanently [in the host country], does not seem to be in the public interest or in the interest of the professionals themselves: . . . such usage would mislead the public into entertaining the illusion that these professionals establish themselves for the sole purpose of practising their home-country law, whereas it is in reality impossible to impose or monitor a strict separation between the practice of local law and the practice of some other law, a mixture of legal disciplines being most often dictated by the world of business.

Although this "mixture of legal disciplines" represents a key to understanding the French position, it is not analyzed further in the minister's report, much as "interacting legal systems" are left largely unexplored in the Lords report. A somewhat fuller discussion can be found in an American Bar Association report concerning international legal practice (the ABA report):

> Practice at the transnational level inevitably involves advice on transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions . . . As a practical matter, it is simply not feasible to break that advice down into independent elements to be advised upon separately by different lawyers . . . [I]t is important to bear in mind that legal advice is frequently rendered by lawyers practising in firms and other cooperative relationships in which it is neither necessary nor practicable to segregate the different elements of the advice being given or even to identify the original author of many of such elements. Particularly in the context of international transactions, the advice thus rendered takes on the aspect of a seamless web.

The ABA report thus recognizes:

- the interweaving of applicable laws by legal practitioners advising on their clients' cross-border transactions;
- the exigencies of cross-border legal practice that cause foreign lawyers established in a host country to "read [host-country law] up in the books" (in Lord Slynn's phrase) in order to provide legal services involving that law; and
- the reality of transnational law firms offering to their clients a panoply of legal services including those requiring a knowledge of the law of the country where the services are being rendered.

Different conclusions

The "interacting legal systems" of the Lords report, the "mixture of legal disciplines" of the minister's report and the "seamless web" of the ABA report all convey the same thought, but each report reflects a quite different doctrine and therefore arrives at a quite different conclusion. The minister's report invokes the "mixture of legal disciplines" as a basis for asserting that foreign lawyers should become members of the host-country bar on the assumption that that bar should serve as the common regulator of all practitioners established in, and entitled to advise on the law of, the host country. The ABA Report conjures up a "seamless web" to advocate that host countries not only should permit the establishment of foreign legal consultants, but also should authorize them to advise on local law without being subject to an examination or being required to join the host country's legal profession. As for the Lords report, it leaves the reader to digest certain observations made to the Select Committee by the chairman of the Law Society's International Committee, Fiona Woolf. She had this to say about "the reason why English solicitors are interested in having clear rights to establish offices in other member states":

> What led to the export drive was the need for [solicitors] to be able to provide the services of English solicitors, particularly in the writing of agreements under English law in foreign countries. Indeed, the whole drift of the [proposed Establishment] Directive was to enable them to do that under their home title and to practise their own law. In the vast majority of cases — perhaps 99 per cent — that is what English solicitors still want to do. We found ourselves talking about integration at a time when the new French law was being passed. It appeared to us that we were looking at an integration route because the French decided to merge their [*conseils juridiques*] and *avocats* and require integration . . . When I talk to my constituents in Europe (if I may refer to them as such) they say that they are primarily interested in the right to practise English law. A few of them have historically developed practices in local law. One may say: 'Fine, if you want to do that in a big way it is a little difficult to argue that you should be allowed to do it wearing your hat as an English solicitor, and maybe the integration route, or a fast track into that, is appropriate and you should be forced down that route.' Primarily, I believe that what the United Kingdom looks for in export aspirations is the ability to practise English law.

Whether the quantification be "99 per cent" or "primarily" (or something else), it arguably should tally with listings in law firm directories. One prominent listing suggests that in the Paris offices of five firms of London solicitors there are 110 lawyers (partners or employed lawyers) identifiable as French-educated *avocats*, which is rather a lot of French-educated *avocats* to have on hand unless the offices are heavily engaged in work involving French law. Unlike Woolf, however, the Lords report does not suggest that, under the proposed

Establishment Directive, these five firms (and others like them) should be "forced down [the integration] route," while a different rule (or route) should apply to the EU practitioner who only advises on home-country law.

Individual practitioners versus firms

Much of the analysis in the Lords report seems to be in terms of individual practitioners, along the lines of comments made by Peter Goldsmith. As regards continental lawyers in London, he told the select committee: "[T]here is no impediment on anybody coming to London and . . . advising on English law, so long as they did not claim to be a solicitor when they were not and so long as they did not perform any of the activities which are by statute reserved for solicitors . . ." Similarly, Goldsmith, referring to an English solicitor practising in France who might "provide some advice in relation to French law", said: "[W]e believe that the necessary consumer protection would be given by the fact that he would not be able to hold himself out as an expert in that law the same way as an *avocat* could . . ." (This, of course, is not the French profession's view of the matter.)

In reality, the overwhelming bulk of transnational legal practice is carried on not by individual practitioners but by firms, and a number of firms with offices outside their home countries have developed host-country one-stop shops where the shopping need not stop short of host-country law because (to use Woolf's words in a different sense) the firms have followed "the integration route" by including in their host-country offices not only home-country but also host-country and often third-country lawyers. These offices may compete with each other, and — more to the point when one is considering the realities of the proposed Establishment Directive — they may compete with law firms based principally in the host country.

The vital feature omitted from the Lords report is the way in which practitioners establish law offices to meet the demands of clients that can be satisfied only through "a mixture of legal disciplines" or "advice on interacting legal systems". The five London firms referred to above with (among other lawyers) 110 French-educated *avocats* in their Paris offices can synthesize the legal disciplines and advice demanded by their clients and can transmit the advice through any qualified Paris-based lawyer irrespective of whether he or she had been originally trained as an English solicitor, a French *avocat*, or some other legal professional.

The Lords report sheds no light on the manner in which a French law firm might set up a one-stop shop in London — on whether the firm might be obliged to create a multinational practice (MNP) in accordance with the statutorily authorized rules of the Law Society. Under these rules, only the MNP, but not the French firm as such, could employ junior solicitors, and in order to create the MNP the French firm would be required to have a solicitor as a partner in the MNP. When these MNP restrictions were adopted, one English observer suggested that they were designed to preserve the practice of English law as "a monopoly for English solicitors". (In addition, the Law Society says that French candidates for the solicitors examination may not take it on the basis of having passed the examinations to become an *avocat* but must wait until after completing a *stage* as an *avocat*.) In any event, the restrictions would seem to have a direct practical bearing on the Anglo-French dispute over the examination that continental lawyers must take in order to become barristers or solicitors, and, indirectly, that English lawyers must take in order to become *avocats*.

Examinations

In this dispute, each side claims that the purpose of subjecting (as the case may be) English/French lawyers to an examination — *any* examination in the French/English language on French/English law — is protectionist and intended to inhibit the English/French from establishing and maintaining law offices in France/England. The complaint is familiar, echoing as it does the comments of American lawyers on the much harder examination — the *examen de contrôle des connaissances en droit français* — that they must take to become *avocats*.

There is this basic difference, however: the English objective is overtly offensive, as indicated by Woolf's candid reference to an "export drive," while the French position is mainly defensive, and with equal transparency has been aimed at enabling the Paris bar to retain responsibility for the practice of law in Paris, and to curb the extent to which that responsibility gets transferred to London.

In whatever shape the Directive emerges from this clash of objectives, it is unlikely to benefit US firms competing with English solicitors in the EU, or attempting to cope with French measures applicable to legal practice in Paris. This is largely because it will not accord any EU rights to the US national who has passed the examination to become an English solicitor, or the *examen* to become a French *avocat* (or, for that matter, any combination of examinations administered in the EU). Instead, the Directive will probably stimulate the American legal profession to try to further its EU interests through one-off bilateral and inter-bar arrangements.

In addition, to the extent that the Establishment Directive that finally emerges touches on the related issues mentioned above of cross-border practice by law firms and the practice of local law by foreign lawyers, the American legal profession is likely to view the Directive in terms of its global impact. US interests are not limited to the EU, and the same issues must also be addressed in a variety of contexts including the General Agreement on Trade in Services, Nafta, the continuing, decade-long discussions with Japan, the latest discussions with China and, perhaps above all, in the debates about foreign legal consultants both within and outside the US. ❑

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