

## Multidisciplinary Practice in the International Context: Realigning the Perspective on the European Union's Regulatory Regime

George C. Nnona

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# Multidisciplinary Practice in the International Context: Realigning the Perspective on the European Union's Regulatory Regime

George C. Nnona†

*Multidisciplinary practice (MDP) and the controversy surrounding it have ebbed in the wake of the Enron scandal and the subsequent enactment of the Sarbanes-Oxley Act. However, legal professionals continue to debate the viability of MDP and rules that currently prohibit lawyer fee-sharing arrangements and partnerships with non-lawyers—some of the rules that aim to safeguard lawyer independence from external influences. This Article addresses one of the most common arguments supporting MDP, namely, that the pervasive propagation of MDP in Europe will inevitably exert an overwhelming influence and pressure to conform on regulators of the legal profession in the United States. The Article challenges this position by presenting a nuanced vista of the European Union's regulatory terrain—a terrain in which MDP, though accepted domestically in some European Union member states, is far from being a dominant or prevalent trend. This proposition is especially true at the EU's institutional level, where even pre-Enron developments evinced reticence towards MDP. Toward that end, the Article analyzes EU legislation and key decisions of the European Court of Justice in the legal services area, as well as selected decisions of member states' courts, indicating how those decisions reinforce the principle of lawyer independence that lies at the root of the United States' prohibition of MDP.*

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† Associate Professor, Roger Williams University School of Law. In pursuing the subject matter of this article, I have benefited from discussions with Professors Detlev Vagts, Thomas DeLong, William Alford, Frederick Schauer, David Wilkins, Colleen Murphy, Ed Eberle and Peter Marguiles, for which I am very grateful. Equally beneficial have been contributions by participants at the Harvard Law School Graduate Colloquia series where some of these ideas were first presented, especially Professors Hal Scott, John Coates, Frank Michelman and Anne-Marie Slaughter, all of whom I owe a debt of gratitude. I am also indebted to Virginia Wise, Lecturer on Law for Legal Research at Harvard Law School, for facilitating my research on the subject. All errors, however, are mine. This article grew out of a chapter of a doctoral dissertation that I presented to Harvard University towards an SJD degree (2003).

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## Introduction

*The French lawyer is simply a man extensively acquainted with the statutes of his country; but the English or American lawyer resembles the hierophants of Egypt, for like them he is the sole interpreter of an occult science.*<sup>1</sup> Alexis de Tocqueville.

Rule 5.4 of the American Bar Association's (ABA) Model Rules of Professional Conduct<sup>2</sup> prohibits multidisciplinary practice (MDP)<sup>3</sup> in the United States. The American Bar Association's MDP Commission (the "Commission"), established in 1998 to explore and chart the legal profession's responses to the questions raised by MDP,<sup>4</sup> led a recent debate con-

1. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 277 (Alfred A. Knopf ed., Everyman's Library 1994) (1835).

2. Rule 5.4 prohibits lawyers from sharing fees with non-lawyers, forming law partnerships with non-lawyers, and practicing law in a professional corporation owned or controlled by a non-lawyer. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983). While some states, such as New York, adopted the earlier ABA Model Code of Professional Responsibility of 1969, the relevant provisions are substantively similar to the 1983 version. Compare *id.* R. 5.4(a), (b), (d), respectively, with MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102, 3-102(B), 5-107(C) (1980).

3. Multidisciplinary practice (MDP) may be defined as joint practice by lawyers (on the one hand) and members of other professions (on the other hand), where their professional activities in pursuit of such practice involve offering legal services to the public. Depending on the context, the term may also mean the professional grouping or entity under which or through which such joint practice is undertaken. This Article will employ the term in both these senses even though, generally, it can also encompass joint practice by two or more non-legal professionals. MDP must be distinguished from a situation involving an individual professional with dual qualifications who is licensed to practice law and another profession. Model Rule 5.7, dealing with a lawyer's responsibilities regarding law-related (ancillary) services, substantially governs such a professional. See MODEL RULES OF PROF'L CONDUCT R. 5.7 (1983).

4. See ABA, *About the Commission*, at [http://www.abanet.org/cpr/mdp\\_abt\\_commission.html](http://www.abanet.org/cpr/mdp_abt_commission.html) (last visited Nov. 9, 2003).

cerning Rule 5.4's possible de-proscription. Although Report 10f,<sup>5</sup> which a group of state and local bar associations proposed and the ABA's House of Delegates subsequently adopted in July 2000,<sup>6</sup> formally ended the Commission's work, it by no means fully resolved the questions that the Commission had sought to address. Meanwhile, various states, given their primary regulatory power over the profession,<sup>7</sup> and notwithstanding the ABA's considerable influence, continued to vigorously debate the questions through committees and commissions.<sup>8</sup>

Following Enron's bankruptcy in December 2001,<sup>9</sup> and the resulting

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5. This Report affirmed, among other things, that "the sharing of legal fees with non-lawyers or permitting ownership and control of the practice of law by non-lawyers threatens the core values of the legal profession." *Annual Report of the Illinois State Bar Association Presented Jointly with the New Jersey State Bar Association*, 125 A.B.A. at 343 (2000) [hereinafter *Annual Report*]. By adopting Report 10f, the House of Delegates rejected the MDP Commission's July 2000 report, which called for a relaxation of Rule 5.4 of the Model Rules of Professional Conduct. See *Proceedings for the Annual Meeting of the House of Delegates*, 125 A.B.A. at 24-25, 183 (2000). The Report discharged the MDP Commission and ended discussions on MDP in that forum. *Id.* at 25. The House of Delegates, however, went further to declare the following:

[T]he standing committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions, and committees undertake a review of the Model Rules of Professional Conduct ("MRPC") and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles in this Recommendation.

*Id.* This statement indicates a willingness to consider less radical forms of inter-professional cooperation than MDP.

6. *Id.* at 21-25; *Annual Report*, *supra* note 5, at 343.

7. This regulatory power is exercised by the highest court of a state (with the exception of California and New York, where legislative participation is more extensive) on the theory that the regulation of lawyers is part of the judicial power vested in courts by state constitutions. See GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 859 & n.20 (3d ed. 1999). The courts have essentially viewed the regulation of lawyers as part of their inherent judicial authority based on the doctrine of separation of powers. *Id.* at 859; see also Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—the Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989-90) (discussing the doctrine of inherent powers).

8. As of July 6, 2000, forty-four states and the District of Columbia had appointed committees or task forces to consider the MDP issue and make recommendations. See ABA, Center for Professional Responsibility, *Report from the ABA Commission on Multidisciplinary Practice*, at <http://www.abanet.org/cpr/mdpstats.html> (last visited Feb. 10, 2004). Arizona, Colorado, and Minnesota had taken favorable steps towards approving pro-MDP reports issued by the committees. *Id.* In four other states (Maine, Oregon, South Carolina, and South Dakota) and the District of Columbia, pro-MDP reports had been submitted but the bars had taken no steps towards approval. *Id.* As of April 2, 2003, committees or other responsible authorities in seven states (Arizona, California, Colorado, Maine, North Carolina, and South Dakota) and the District of Columbia had taken some steps toward the ultimate approval of MDP; those in twenty-four states had rejected MDP, and the remaining states were at various stages of disinterest or indecision. See ABA, Center for Professional Responsibility, *MDP Information—April 2, 2003*, at [http://www.abanet.org/cpr/mdp\\_state\\_summ.html](http://www.abanet.org/cpr/mdp_state_summ.html) (last visited Apr. 2, 2003).

9. The tabloids in late 2001 and the first two quarters of 2002 were replete with news items on Enron and related issues. See, e.g., Tom Hamburger et al., *Staff Saw Document Shredding at Enron*, WALL ST. J., Jan. 22, 2002, at A3. An early item with a measure

accounting scandals implicating the “Big 5”<sup>10</sup> accounting and professional services firms, which had previously been the primary champions of MDP in the United States,<sup>11</sup> some of the momentum behind the quest for the deproscription of MDP was lost. However, as some commentators recognize, the fundamental questions concerning MDP have not been resolved and thus remain relevant,<sup>12</sup> given that the Sarbanes-Oxley Act of 2002 (the Act), the most important regulatory step taken in response to the Enron affair, did not specifically address the question of lawyer independence.<sup>13</sup> The Act merely blunted the edge of the pro-MDP movement by barring accountants from combining auditing functions with certain other services they offered to public corporations.<sup>14</sup> However, it did not address the funda-

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of comprehensiveness is *The Fall of Enron*, BUS. WK., Dec. 17, 2001, at 30. Good coverage of the matter focusing on the evolution of the accounting industry and its political activities in pursuit of laissez-faire regulation is *The Accountants' War*, THE NEW YORKER, Apr. 22 & 29, 2002, at 64.

10. The “Big 5” refers to Deloitte & Touche, Ernst & Young, KPMG, PricewaterhouseCoopers, and Arthur Andersen. Notwithstanding the functional demise of Arthur Andersen LLP in August 2002 in the wake of the Enron scandals, I will use the term “Big 5” throughout this Article to refer collectively to the major global accounting firms because the term is still accepted industry-wide as a ready referent for this class of firms, and because several of the documents referred to in this Article reflect that terminology.

11. Jennifer R. Garcia, Comment, *Multidisciplinary Practices: What is Wrong with the Legal Profession's Ethics Rules?*, 44 ST. LOUIS L.J. 629, 643 (2000) (stating that “[t]he Big Five were the first major proponents of MDPs in the United States” and for years the Big Five have been attempting to practice law in the United States”).

12. For example, section 201(h) of the Sarbanes-Oxley Act, which allows accounting firms to perform tax services for the same audit client if the client's audit committee approves of this in advance, is of concern to those who oppose any overlap between firms' tax and accounting functions. See Bernard Wolfman, *Auditors: Stick to Your Auditing*, 96 TAX NOTES 298 (2002) (noting that, with regard to tax advice and tax planning, “[t]he line between the legitimate and the questionable is sometimes clear and sometimes fuzzy,” and thus implicitly recognizing that the gates have not been completely shut against accountants on the MDP issue). See also Robert Lennon, *MDP's Executioners*, AM. LAW., Mar. 2002, at 18, 19 (arguing that, while many rushed to the judgment that MDP had met its Waterloo immediately after Arthur Andersen found itself entangled in the Enron scandal, MDP in the United States may yet be realized).

13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).

14. See *id.* § 201. Section 201 is the key section affecting MDP activities. It amends section 10A of the Securities Exchange Act of 1934, 15 U.S.C. § 78j-1 and makes it unlawful for a registered public accounting firm (or any associated person of that firm) that performs audit functions for issuers pursuant to federal securities laws to provide to that issuer, contemporaneously with the audit, any non-audit service, including legal services or any other services that the Public Company Accounting Oversight Board, the body established under the Act, determines to be impermissible. *Id.* § 78j-1(g)-(h). However, the language of the Sarbanes-Oxley Act may be read to permit accounting firms to accept non-audit work, thus opening the door for their association with other professionals, including lawyers, in performing such work. See *id.* § 201(b) (amending 15 U.S.C. § 7231). Specifically, the express language of section 201(b) of the Act empowers the Public Company Accounting Oversight Board to “exempt any person, issuer, public accounting firm or transaction from the prohibition” against the provision of certain services by accounting firms, “to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. . . .” *Id.* Thus, the Act does not permanently shut the lid against the propagation of

mental question lying at the core of the MDP debate: Is there any basis for shielding lawyers as a group from *unrestrained* collaboration with other occupational groups through partnerships and other types of arrangements? Rule 5.4 of the Model Rules of Professional Conduct and related rules explicitly state that the answer is yes,<sup>15</sup> while proponents of MDP assume the opposite.<sup>16</sup> The Sarbanes-Oxley Act avoids the question, instead focusing largely on provisions aimed at enhancing auditor independence, as distinct from lawyer independence. This situation necessitates the continued examination of the premises underlying the MDP debate, particularly the assumption that MDP treatment in Europe should guide regulators of the legal profession in the United States.

Transnational practice in the international arena provides the background to the debate on MDP in the United States. This is understandable, given that the major law firms interested in such practice constitute one of the most influential norm-generating segments of the legal profession.<sup>17</sup>

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MDP by the Big 5, for the opportunity to render such services is tantamount to an opportunity to engage in MDP, since the Act does not restrict lawyers in the same manner as it does auditors. See *id.*

15. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983). Implicit (and sometimes express) in MDP opponents' arguments is the belief that the profession has features that make it quite worthy of protection from the pernicious consequences of unrestricted collaboration with non-lawyers. See, e.g., Lawrence J. Fox, *The Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1099-1106 (2000). See generally Lawrence J. Fox, *Written Remarks of Lawrence J. Fox: You've Got the Soul of the Profession in Your Hands*, at <http://www.abanet.org/cpr/fox1.html> (last visited Mar. 26, 2004).

16. Implicit in the reasoning of MDP supporters is the belief that nothing about members of the legal profession makes them deserving of protection beyond that afforded other players in the market; hence, the need to rid the profession of the limitations on inter-professional collaboration is enshrined in Model Rule 5.4, MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983), and related rules. See, e.g., Stefan F. Tucker, *Written Remarks of Stefan F. Tucker Submitted to the Commission on Multidisciplinary Practice*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 280, available at <http://www.abanet.org/cpr/tucker1.html> (last visited Mar. 26, 2004).

Alternatively, proponents of MDP argue that even if the legal profession deserves special protection, sanctioning MDP would not affect its special nature. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 142 (arguing that the theory that "lawyers are special" suffers from a number of flaws, given that law firms are already run like businesses whose ultimate goal is maximizing profits; that profit-maximization actually benefits clients and society; that lawyers are generally ethical regardless of the business environment in which they work; that strains on lawyer regulatory organizations existed long before the rise of MDP; that ethical infractions will continue to be prosecuted; and that lawyers will continue to perform pro-bono work); see also, e.g., Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced into the United States, What Could or Should Be the Role of General Counsel?* 9 FORDHAM J. CORP. & FIN. L. 1, 37 (2003) (arguing that if MDP were adopted in the United States, there is no reason why law firms could not easily prevent ethical violations from occurring). For example, "General Counsel would be well-situated within a law firm environment to help both the client and the MDP professionals overcome the ethical hurdles around: 1) confidentiality and the attorney-client privilege, 2) lawyer independence, and 3) conflicts of interest". *Id.* at 37.

17. See ROBERT L. NELSON, *PARTNERS WITH POWER* at xi (1988) ("The large law firm has . . . been a central institution in the development of the distinctive norms and cul-

Significantly, international transactional practice constitutes a major, if not *the* major, point of interest for the Big 5 firms in their quest to capitalize on MDP.<sup>18</sup> Proponents of MDP point to developments within the European Union ("EU") as a focal point of their deregulation platform because of such developments' perceived capacity to influence the MDP debate in the United States.<sup>19</sup> In so doing, they often rely on the premise that MDP has become a *fait accompli* within the EU.<sup>20</sup>

This Article examines and challenges that premise by surveying the EU regulatory terrain, a terrain in which MDP, though accepted domestically in some EU states, is far from dominant or prevalent, particularly at the EU institutional level. Toward that end, the Article analyzes EU legislation and decisions of the European Court of Justice (ECJ) in the legal services area, as well as selected decisions of member states' courts, focusing on how these decisions reinforce, rather than undermine, the principle of lawyer independence that lies at the root of the prohibition of MDP in the United States

Part I of this Article explores the general terrain of transnational practice—the context in which MDP questions primarily arise. It shows how developments in transnational practice in the era of globalization can deceptively engender the notion that the general trend in the EU toward the more liberal regulation of professions portends the acceptance of MDP by regulators in the United States and other countries. Part II explores the regulatory situation in the EU and its member states in connection with their attempts to grapple with MDP. These attempts are relevant both because of the EU's intrinsic value as a major international legal market experienced in MDP and because its responses to MDP issues facilitate reflection on the future of MDP in the United States.

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tural understandings that define the ideal of professionalism for American lawyers . . . ."), *quoted in Note, Why Law Firms Cannot Afford to Maintain the Mommy Track*, 109 HARV. L. REV. 1375, 1378 n.19 (1996).

18. See Peter C. Kostant, *Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 48-50 (noting that "[t]hroughout the world, the Big Five accounting firms are aggressively competing with law firms for legal business. . . . MDPs [i.e., major accounting firms offering legal services] often advise on complex, international transactions for highly sophisticated clients involving an inextricable mix of finance, accounting, law and other disciplines") (quoting Tucker, *supra* note 16, at <http://www.abanet.org/cpr/tucker1.html>) (internal quotations omitted).

19. For example, developments within the Paris Bar were crucial in directing the attention of the U.S. legal profession towards MDPs. Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589, 606 (2002).

20. See *infra* notes 86-87 and accompanying text.

## I. Transnational Practice and the Debate on Multidisciplinary Practice: The Current Context

### A. Liberalization and Its Implications for Deontology

#### 1. *The Current Contours of Transnational Practice*

International legal practice has always been peculiar as an apparent sub-disciplinary focus of practicing lawyers. It is perhaps the only practice area where practitioners do not share a common core of substantive legal knowledge underpinning their endeavors. In the case of a corporate lawyer, for instance, corporate law and related substantive areas of knowledge undergird his practice. In contrast, while international law may be a distinct area of academic inquiry, and even practice in a limited sense,<sup>21</sup> it is not the substantive focal point of international law practitioners. Rather, international lawyers are defined by the locus of their practice and the entailed processes. They typically deal with legal issues straddling political and jurisdictional boundaries because of the peculiarities of the involved parties, objects, conduct, and effects. The process typically involves an interface with a wide spectrum of people, places, and institutions, often necessitating extensive travel to and interaction with disparate lands and cultures, which lend international law an exotic hue that many find alluring. This exotic and somewhat glamorous hue is perhaps another peculiarity of this practice precisely because it evokes images of travel to distant lands and make-or-break negotiations upon which the fate of people and enterprises rest. This perception is especially evident in the context of the transnational practice of business law.

As exotic as it may appear and although its growth has primarily occurred since the 1980s,<sup>22</sup> transnational practice is not new.<sup>23</sup> However,

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21. Diplomats and their advisors are exceptions to this rule; they deal with substantive international law issues, and thus may accurately be labeled "international law practitioners."

22. See Jonathan D. Greenberg, *Does Power Trump Law?*, 55 *STANFORD L. REV.* 1789, 1798 (2003) (arguing that international law's "exponential growth" is evidence of "an emerging sense of global community") (quoting THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 5-6, 10-11 (1995)). Laurel S. Terry notes the acceleration of transnational practice and gives statistics from the U.S. Department of Commerce's Bureau of Economic Analysis, which "show[s] a twenty-fold increase—from \$97 million to \$1.9 billion—between 1986 and 1996 with respect to the export of U.S. legal services." Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 *DICK. J. INT'L L.* 1, 4 (1999). Likewise, "[t]he U.S. import of foreign legal services also grew significantly from 1986 to 1996, increasing from \$40 million to \$516 million." *Id.* at 4. Notwithstanding this high rate of growth, most lawyers still work within the confines of their countries' borders, and transnational practice still constitutes a relatively small—although important—segment of the legal services market. *Id.* at 5.

23. See Richard L. Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 *CASE W. RES. L. REV.* 737, 738 (1994) (noting that "Coudert [Brothers] opened its Paris office more than a century ago"). Behind this specific piece of statistical information is the broader fact that with the wave of legal expansion during the colonial times of the mid- and late nineteenth century, transnational practice evolved as well. *Id.* at 742-43. This was certainly so in the regions constituting the then British empire, with incessant appeals to the Privy Council sitting in London and the attendant need to pro-



it is transnational practice's rapid growth—more than the actual substance of the practice—that has attracted the attention of lawyers and laypersons during the last three decades. The developments constituting this growth include the opening of new law offices in major cities around the world,<sup>24</sup> heightened inter-firm alliances across jurisdictions,<sup>25</sup> the stream of noteworthy law firm mergers,<sup>26</sup> the emergence of new arenas of transnational practice,<sup>27</sup> and the emergence of international agencies and forums addressing transnational practice and allied issues.<sup>28</sup>

The recent growth in international legal practice is a paradigm shift for the legal profession, considering how this growth has changed the way the profession is organized and regulated.<sup>29</sup> This paradigm shift becomes considerably accentuated when viewed within the broader context of globalization. For international lawyers, globalization has added a sense of urgency to the process of internationalizing their practice, rendering imperative what were, until just a few years ago, optional indicia of professional progress. For example, potential clients may treat the number of foreign offices a firm boasts as a proxy for that firm's stability, in terms of its

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cure the services of British attorneys. See Barry Phillips, *British Commonwealth Case Note*, 88 AM. J. INT'L L. 775, 775 (1994). Indeed, some British lawyers exercised an early, even if formally unarticulated, form of the right of establishment and set up practices within the colonies. Abel alludes to this broader point when he writes of the "continuing role of Parisian firms in Francophone Africa" and the "roving band of QCs who accept briefs throughout the former Empire." Abel, *supra*, at 743.

Of course, it could be argued that such activity was not transnational in nature, given that the transactions involved procurement of legal services from within the same jurisdiction—i.e., the British Empire. This is, however, debatable, given that the relationship between Britain and the constituent territories of the empire was variegated: some were colonies, while others were protectorates under Britain's influence but not formal legal suzerainty. An example of the latter is Brunei, which voluntarily sought British protection in 1888 and became a protectorate out of fear of absorption by Sarawak, retaining its status as a Sultanate. See ASHISH NANDA, *THE SAGA OF PRINCE JEFRI AND KPMG (A): MYSTERY OF THE MISSING BILLIONS I* (1999).

24. Randall S. Thomas et. al., *Megafirms*, 80 N.C. L. REV. 115, 138-146 (2001).

25. See *Law Firm Networks*, PARTNER'S REPORT FOR LAW FIRM OWNERS, Mar. 2004, at 8.

26. Although the overall annual number of firm mergers has declined in the past few years, Christine Hines, Special Report, *Think. Then Act; Law Firms Witnessed a Few Famous Flameouts—and So They Grew Cautiously*, LEGAL TIMES, Dec. 22, 2003, at 35, some observers believe the current economic downturn will "encourage more law firm mergers, including unions between some of the huge international firms . . ." David E. Rovella, *Living on the Edge*, NAT'L L.J., Nov. 19, 2001, at A24.

27. One noteworthy example of the constantly expanding and evolving nature of transnational practice involves the new legal relationship among the three NAFTA countries. As Mark A. Drumbl points out, "NAFTA creates a demand for lawyers in one NAFTA jurisdiction who can advise clients in another NAFTA jurisdiction regarding the law of one of the other NAFTA parties, or on matters of the new NAFTA supra-law." Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053, 1056 (1998).

28. See, e.g., Donald H. Rivkin, *Transnational Legal Practice*, 32 INT'L LAW. 423, 425 (1998) (discussing the advent of the Forum on Transnational Practice for the Legal Profession).

29. See Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635, 640-41 (1997).

diversification across geographical and legal boundaries and the diversity of its local clientele.<sup>30</sup> Cross-border marketing of services is similarly no longer a cavalierly undertaken sideshow, but a major aspect of a firm's long-term strategy.<sup>31</sup> The perceived globalization of the legal world, therefore, compels practitioners and even academic administrators to respond to new developments in the international arena.<sup>32</sup> Richard Abel captures this air of excitement and compulsion:

[C]ompetitive pressures inspire fear—even terror—of being left out of mergers. Law firms sometimes appear to be seized by the adolescent angst that all your friends are at a party to which you haven't been invited—it is unbearable not to be there, even if you know you would have a terrible time. For many American firms, the foreign office is a loss leader, an outpost to entertain visiting firemen, a way of showing the flag, an address to add to the letterhead and a discreet form of advertising.<sup>33</sup>

Vagts writes along the same lines:

One hears a great deal about the globalization of the law. As I write, I have before me the holiday greetings card of a major law firm showing a map of the world with star-like points of light to indicate where its offices are located. As a professor of law I am the target of glossy brochures from different law schools announcing how global they have become, with students

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30. See Abel, *supra* note 23, at 739–40 (postulating that the rapid growth of transnational practice may to some extent be because “new offices in exotic locations constitute surrogate measures of the quality of legal services, which is very hard to evaluate” and “[b]eing the first on your block to open in a country or city offers an added cachet” and “can confer unique privileges”); see also Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 *Nw. J. INT'L L. & Bus.* 487, 504 (2003). Silver notes that all seventy-one of the firms she examined, which were among “the largest and most international law firms,” supported at least one foreign office in 2000, up from forty-three in 1985. *Id.* The total number of foreign offices for these firms in 2000 was 343, almost triple the 1985 figure. *Id.*

31. It is almost inconceivable for a major international law firm to be without an Internet website or marketing personnel. Besides being another surrogate index of quality, a website is a veritable global marketing tool. See Michael M. Boone & Terry W. Conner, *Change, Change, and More Change: The Challenge Facing Law Firms*, 63 *TEX. B. J.* 18, 24 (2000) (noting that “[t]he Internet will become increasingly powerful in marketing and delivering legal services because of its easy access, speed, and unlimited boundaries” and that “[b]randing will become more important as major law firms attempt to establish dominant regional, national, or international franchises”).

32. Abel, *supra* note 23, at 741; Dr. Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 *DICK. J. INT'L L.* 493, 503 (2000) (noting that the “proliferation of international courses” at law schools has not been accompanied by an increase in student enrollment in those courses, indicating that the degree of compulsion felt by academic administrators is not proportionally related to actual student interest).

33. Abel, *supra* note 23, at 741. That foreign offices tend to be loss leaders initially is not news to scholars of the professions. Indeed, it is to be expected. That Abel seemingly regards such losses as detracting from the functionality of such offices is, however, curious and perhaps represents the sort of thinking that has led to the relatively stunted international presence of law firms *vis-a-vis* advertising, accounting, and consulting firms. See generally *id.* at 745. A foreign office, even if permanently a loss leader, can nevertheless be an indispensable strategic tool that enables a firm to obtain competitive leverage in the cross training of professionals and in the global quest for new clients and engagements and the defense of existing ones.

and visiting faculty from all over the world and a wide range of courses on international and comparative law. All of that runs parallel with the perception that the world's economy is becoming one unified whole, freed from nationalistic limitations and tied together by a radically new set of technologies.<sup>34</sup>

Freedom from nationalistic limitations borne on the wings of radically new technologies is an essence of the liberalization that constitutes a major component of globalization.<sup>35</sup> Globalization is the progressive construction of a global village atop deconstructed nationalities. Such deconstruction eliminates the rules that once helped to shape peoples and entities from different jurisdictions and kept them distinct through regulation of their interactions, whether in commerce, leisure or otherwise.<sup>36</sup>

The arena of deconstruction includes such agencies of global economics and politics as the Organization for Economic Cooperation and Development (OECD), the EU, the Organization of United Nations (UN), the World Trade Organization (WTO), numerous non-governmental organizations (NGOs), and other agencies around the globe. Several functions of these bodies, ranging from the drafting of uniform laws and multilateral agreements to litigation and mobilization of international civil society, increasingly constrain the independence of individual states while liberalizing international activities.<sup>37</sup> Professions and professional services have received generous attention from these agencies, especially in the context of the new focus on services as objects of international trade, first within the EU,<sup>38</sup> and subsequently within the WTO<sup>39</sup> and the OECD.<sup>40</sup> Such

34. Detlev F. Vagts, *The Impact of Globalization on the Legal Profession*, in *THE INTERNATIONALIZATION OF THE PRACTICE OF LAW* 31 (Jens Drolshammer & Michael Pfeiffer eds., 2001).

35. *Id.*

36. See Bernard L. Greer, Jr., *Professional Regulation and Globalization: Toward a Better Balance*, in *GLOBAL LAW IN PRACTICE* 182-83 (J. Ross Harper ed., 1997) (arguing that the transition from national to super-national regulation in the wake of MDP is necessary because "protectionist concerns" are subservient to "public interests, including the interests of the increasing numbers of direct participants in the global economy"), quoted in Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 *VANDERBILT J. TRANSNAT'L L.* 931, 937 n.28 (2001).

37. See Donald M. McRae, 95 *AM. J. INT'L L.* 981, 984 (2001) (book review) (reviewing *THE EU, THE WTO AND NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* (J.H.H. Weiler ed., 2000) (observing that "[h]armonizing domestic regulation as a result of the expanding ambit of trade regulation has implications for the autonomy of states and raises questions about the concept of statehood under international law").

38. See Consolidated Version of the Treaty Establishing the European Community, Nov. 10 1997, O.J. (C 340/03), art. 49 (ex Article 59), 55 (ex Article 66) (1997) [hereinafter *EC TREATY*] (freedom to provide services).

39. See General Agreement on Trade in Services, Apr. 15, 1994, Makkaresh Agreement Establishing the World Trade Organization, Annex 1B, available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf) (last visited Apr. 20, 2004).

40. See Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 *MINN. L. REV.* 1547, 1549 nn.4 & 5 (2000) (noting that following the adoption of the GATS, the OECD held conferences in 1995, 1996, 1997 to reduce barriers to trade in professional services and that the GATS Working Party on Professional Services, predecessor of the Working Party on Domestic Regulations, has leveraged on the work of these conferences). See generally ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT ["OECD"], LIBERALIZATION

attention and the attendant liberalization have constituted the crucible within which developments relating to MDP have been propagated. Together with the technologies that propel them, these forces frame the global contention on MDP<sup>41</sup> and provide psychological reinforcement—if not impetus—for MDP proponents, as indicated by the discussion below.

## 2. *Multidimensional Liberalization: Cross-Jurisdictional and Cross-Professional*

The internationalization of legal practice has resulted in the proliferation of questions of deontology concerning the professional rules that govern lawyers practicing in jurisdictions with different regulatory regimes.<sup>42</sup> When, for instance, is a lawyer who is admitted in one jurisdiction authorized to practice law in another, and with what safeguards and limitations? Which jurisdiction's rules govern a lawyer's conduct when he practices outside the jurisdiction of his bar admission? Do the ordinary rules of

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OF TRADE IN PROFESSIONAL SERVICES (1995); OECD, *INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ASSESSING BARRIERS AND ENCOURAGING REFORM 2* (1996); OECD PROCEEDINGS, *INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ADVANCING LIBERALIZATION THROUGH REGULATORY REFORM 2* (1997).

41. For a sampling of the contentious and often inconclusive writings on MDP, see, for example, Thomas R. Andrews, *Non-Lawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 *HASTINGS L.J.* 577, 578–79 (1989) (arguing that it does not necessarily follow from the prohibition against the practice of law by non-lawyers that lawyers should not provide expertise in non-legal capacities); Daniel Brennan & Ramon Mullerat, *Financial Threat to Impartial Justice*, *FIN. TIMES*, Oct. 12, 1999, at 14 (arguing that, among other potential problems, an MDP regime would compromise the attorney-client privilege and lawyers' ethical duties); Charles L. Briant, *Is It the End of the Legal World as We Know It?*, 20 *PACE L. REV.* 21, 24–25, 31 (1999) (arguing that the fact that many lawyers have themselves chosen to step outside traditional areas of legal practice and instead offer expertise in other capacities such as business consultants demonstrates that the legal profession is going through a natural evolution that regulators should not thwart); Michael Chambers, *American Lawyers Say 'No!': Another Setback for Accountants*, *COM. LAW.* (London), Sept. 1999, at 40, (arguing that the ABA's MDP commission was ill-equipped to discharge its responsibility of reviewing the ABA's policy regarding MDPs); Jack F. Dunbar, *Multidisciplinary Practice Translated Means "Let's Kill All the Lawyers,"* 79 *MICH. B.J.* 64, 67 (2000) (summarizing various writers' viewpoints on MDP and arguing that no one has proven that clients prefer "one-stop shopping," and that the conflicts of interest inherent in MDPs are irreconcilable); Gary A. Munneke, *Lawyers, Accountants, and the Battle to Own Professional Services*, 20 *PACE L. REV.* 73, 83 (1999) (arguing that regulation of non-legal professionals is crucial to set the boundaries of the legal profession, many of which do not change through the generations); Darryl Van Duch, *Big Six in Hot Pursuit of Legal Biz*, *NAT'L L.J.*, Aug. 18, 1997, at A1 (reporting that the lines demarcating law firms from accounting firms have become blurred in recent years); Talha A. Zobair, *Multidisciplinary Practices—Firms of the Future*, 79 *MICH. B.J.* 64, 65 (2000) (arguing that cost-conscious corporations are turning to MDPs in order to eliminate the transaction costs imbedded in employing multiple professional organizations and increase efficiency).

42. Timothy P. Terrell asserts that MDP is the only area of legal practice in which individual lawyers—as well as factions within the ABA—diverge dramatically with regard to questions of legal ethics. Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics*, 49 *EMORY L.J.* 87, 94 n.24 (2000).

conflict of laws apply?<sup>43</sup> International lawyers and their organizations, in conjunction with national and supranational authorities, have tackled these and related questions, primarily through various professional codes, supranational legislation, and bilateral agreements.<sup>44</sup> This has resulted in the progressive relaxation of several countries' rules, enabling lawyers to practice across jurisdictions.<sup>45</sup> Such relaxation constitutes the legal basis underlying the proliferation of branch offices of international law firms around the globe and, to a lesser extent, the migration of lawyers across jurisdictions.<sup>46</sup>

In addition to this liberalization along jurisdictional lines (cross-jurisdictional liberalization) is liberalization along a second axis: cross-professional liberalization. Only the concurrence of these two forms of liberalization could ground lawyers' projection of self and activities across boundaries. In essence, this concurrence is a sine qua non for the globalization of legal services.

With regard to transnational legal practice, cross-professional liberalization is necessitated by differences in education, function, and even the public perception of lawyers in various jurisdictions.<sup>47</sup> For example, the training given to an English solicitor<sup>48</sup> is distinct from that of a French *conseil juridique*,<sup>49</sup> not to mention that of a German *Rechtsanwalt*,<sup>50</sup> even if arguably their functions overlap. Likewise, a New York notary is clearly

43. For a well-rounded analysis of these issues, see Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 689 (2000).

44. See *id.* at 689-94 (discussing Rule 8.5 of the ABA's Model Rules of Professional Conduct, provisions of the Code of Conduct for Lawyers in the European Community, and Article 6 of the EU Directive 98/5 [hereinafter the Establishment Directive]). Rule 8.5 addresses questions of jurisdiction and conflict of laws in inter-state practice, and Article 6 of the Establishment Directive prescribes rules for EU lawyers practicing in a host state under their home state professional titles. *Id.* at 690-93. For an example of a bilateral agreement, see the agreement between the American Bar Association and the Brussels Bar Councils, approved by the ABA Board of Governors on August 3, 1994, in New Orleans, Louisiana. *Annual Report of the Board of Governors*, 119 A.B.A. REP. 69 (1994).

45. For a summary of the evolution of legal structures within different states and the attempts to bridge the gaps, see HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS* 7-11 (2d ed. 1998).

46. See Dzienkowski & Peroni, *supra* note 16, at 88 n.29 (noting the demand for cross-border legal services) (citing E. Leigh Dance, *How to Compete with MDPs*, 13 MARKETING FOR LAWYERS 3 (1999)).

47. *Id.* (pointing out that "[t]he precise parameters of the practice of law are not easily articulated," in that the range of definitions inquires into "whether a person is acting in a representative fashion, whether a person is counseling or advising another in connection with their legal rights and duties, whether one is exercising legal judgment, and whether the relationship is one of trust based on legal advice") (internal quotations omitted).

48. See Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1222-23 (1995) (discussing the stages of education and training required in order to practice as a solicitor).

49. John Cary Sims, Book Review, 16 TRANSNAT'L LAW. 395, 397-98 (2003). In 1992, the profession of *conseil juridique*, or French legal advisers, was fused with that of *avocat* to form a single profession. ADAMSON, *supra* note 45, at 14-15.

not of the same caliber as a German *Notar*, though the similarity in their titles may suggest otherwise.<sup>51</sup>

Furthermore, even though equivalents of the term “lawyer” exist in various languages, their meanings are not interchangeable, because lawyers from different jurisdictions often do not perform exactly the same range of functions.<sup>52</sup> Indeed, the legal profession in many countries is variegated, quite unlike the unified profession in the United States.<sup>53</sup> In many countries, for instance, at least two distinct legal professions exist: one often deals with litigation and related issues, while the other deals with commercial transactions. For example, before their reform and unification between 1971 and 1992, at least five branches of the legal profession existed in France: the *avocat*, *avoué*, *notaire*, *conseil juridique*, and *huissier de justice*.<sup>54</sup> The *conseil juridique*, whose closest common law equivalent is the English solicitor, handled non-litigation advisory work and did not require legal training.<sup>55</sup> Sweden presents a current example of a country where people without legal training may perform non-litigation legal work.<sup>56</sup> As a final twist, while most European countries require that prospective lawyers have professional experience before joining a legal profession, in Spain one may become an *abogado* without having any prior experience.<sup>57</sup>

Given these differences in the structure of the legal profession in many countries, the implementation of a uniform code of regulations has required legal professionals from disparate jurisdictions to dispense with or de-emphasize features of their practice that were previously essential to

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50. Dr. Martin Henssler & Laurel S. Terry, *Lawyers Without Frontiers—a View from Germany*, 19 DICK. J. INT'L L. 269, 285-86 (2001).

51. Carol D. Rasnic, Book Review, 7 TEMP. INT'L & COMP. L.J. 149, 149 n.1 (1993) (explaining that the “*Notar* in Germany bears little resemblance to its American counterpart, the notary”).

52. See generally Kelly Charles Crabb, Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1779-83 (1983) (contrasting the practice of law in five countries).

53. See Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 448 (1993) (noting that the Founding Fathers specifically intended the Judiciary Act of 1789, 1 Stat. 73 (1789), to abolish the traditional British distinction between solicitors and barristers and unify the profession so that “members of both branches were accorded the right to appear in federal courts”) (quoting *Solina v. United States*, 709 F.2d 160, 166-67 (2d Cir. 1983)). Colonial New York however, did have a division between barristers and solicitors, identical to England. Brieant, *supra* note 41, at 21.

54. See New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*, 193-94, 193 n.16 (2000) [hereinafter MacCrate Report].

55. See discussion *infra* Part II.C regarding the reforms in the French legal system.

56. See NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, REPORT 275 (2000).

57. Dr. Julian Lonbay, *Lawyer Ethics in the Twenty-First Century: The Global Practice Reconciling Regulatory and Deontological Differences—The European Experience*, 34 VAND. J. TRANSNAT'L L. 907, 910 (2001).

their identities.<sup>58</sup> This has been especially true in Europe, where recent Council Directives<sup>59</sup> and decisions of the European Court of Justice in the area of lawyer regulation required abandoning or modifying long-standing features of the legal professions in member states.<sup>60</sup> The ECJ decisions,

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58. See, e.g., Shigeru Kobori, Paris Forum on Transnational Practice for the Legal Profession, 18 DICK. J. INT'L L. 109, 122-23 (1999). In arguing that MDP will perniciously cause lawyers to become divorced from their function as advocates of the public interest in their particular country of origin, Kobori states as follows:

Each nation has its own unique legal system imposing its own particular ethical and social responsibilities on its lawyers, and these stem from its own history and culture. These responsibilities may not necessarily be identical to those of another nation's legal system. In this light, it is, in principle, reasonable not to permit a lawyer qualified to practice law in one country . . . to exert control over lawyers in another country . . . by owning or investing in their law firms.

*Id.*

59. See Council Directive 77/249, 1977 O.J. (L 78) 17 [hereinafter Lawyers' Services Directive]; Council Directive 89/48, 1989 O.J. (L 19) 16 [hereinafter Diplomas Directive]; and Establishment Directive, supra note 44, at 36.

60. Pertinent ECJ decisions include Case C-2/74, *Reyners v. Belgian State*, 1974 E.C.R. 631 (striking down the requirement that bar applicants be nationals of the host state); Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299, 1 C.M.L.R. 298 (1975) (Neth.) (striking down the requirements that bar applicants be residents of the host state); Case 71/76, *Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris*, 1977 E.C.R. 765, ¶ 19 (holding that it is an unjustified restriction on freedom of establishment for a host member state to deny admission to a particular profession to an EU citizen who holds a diploma that the host state's competent [academic] authority recognizes as an equivalent qualification, and who has also fulfilled the specific conditions regarding professional training in force in that host country, solely because the person concerned does not possess the host state diploma corresponding to the diploma which he holds); Case 107/83, *Ordre des Avocats au Barreau de Paris v. Onno Klopp*, 1984 E.C.R. 2971, ¶ 22 (invalidating as restrictive of the right of establishment a 1972 rule of the Paris bar which stipulated that an *avocat* can establish chambers only in one place, which must be within the territorial jurisdiction of the regional court where he is registered); Case 292/86, *Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et de Saverne*, 1988 E.C.R. 111 (holding that a person who is a national of two member states and who has been admitted to a legal profession in one of those states may rely, in the territory of the other state, upon the provisions of the Lawyers' Services Directive if he satisfies the conditions for the application of the directive); Case C-340/89, *Vlassopoulou v. Ministerium für Justiz*, 1991 E.C.R. I-2357 (taking the *Thieffry* decision further by ruling that Article 52 of the EEC Treaty requires the national authorities of a host member state to examine the compatibility between the diploma requirements of the host member state and the country of origin, where a lawyer admitted in his country of origin applies to practice as a legal advisor (i.e., foreign legal consultant) in the host member state, and in so doing, effectively sidestepping the requirement in *Thieffry* that the competent authority in the host state recognize the academic equivalence of the foreign diploma to that of the host state before the applicant can seek professional recognition of the diploma). Case *Säger v. Dennemeyer & Co.* involved a claim by a German *Patentanwalt* (patent agent) that a UK company's offering of computerized patent-monitoring and renewal services remotely from the UK into Germany infringed German legislation reserving such services to specified German professionals. C-76/90, *Säger v. Dennemeyer & Co.*, 1991 E.C.R. I-4221. The ECJ held that Article 59 of the EEC Treaty precludes provisions of a member state that prohibit a company established in another member state from providing such services; such a prohibition is disproportionate to the member state's interest in protecting its consumers from unqualified service providers, given the character of the services at issue, which did not involve providing professional opinions but rather simple ministerial acts of notification and renewal. *Id.* ¶ 20. See also Case C-55/94, *Geb-*

spanning two decades, established and sustained a tendency toward progressive liberalization of the EU regime for lawyer regulation.<sup>61</sup> However, notwithstanding the abiding influence of these cases, the liberalization they embody no longer proceeds apace, as indicated by the cases examined in Part II.D of this Article.

The foregoing adjustments and modifications to the structures of the different legal professions raise conceptual issues which may implicate and ground arguments for the de-proscription of MDP. Since the EU maintains a lead in the ongoing liberalization of lawyer regulatory regimes around the world, it becomes inevitably an attractive reference point for constituencies interested in exploring and advancing the notion that the heightened liberalization of lawyer regulatory regimes necessarily implies the liberalization of the restrictions against MDP. While this notion is erroneous, this Article proceeds by making the best possible case for such a notion by exploring, in Part I.B below, the way in which the pervasive air of liberalization can engender such a notion by raising cardinal questions concerning the regulatory treatment of similarly-situated professions. This is in essence an attempt to account for the existence of that notion.

## B. Functional Equivalence and Equal Treatment of Professions

The pervasive air of liberalization apparent in the EU institutions' work in the area of legal services, as well as the activities of bar associations in the EU and beyond, seemingly provide a reinforced pedestal to claims in favor of de-proscribing MDP. This situation stems from foreign lawyers' natural interest in seeking equal treatment *vis-à-vis* local law-

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hard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165. *Gebhard* involved a disciplinary action against a German lawyer on the grounds that he pursued a professional activity in Italy on a permanent basis in chambers set up by himself using the title *avvocato* and appearing before Milan courts, contrary to 1982 Italian legislation implementing the Lawyers' Services Directive that, while authorizing other member states' lawyers to pursue lawyers' professional activities in Italy on a temporary basis, barred them from permanently establishing a practice in Italy. *Id.* at I-4168-71. The ECJ, while declining to pronounce expressly on the propriety of the specific Italian measures in issue, took pains to expound upon several important issues of Community law in this area. *See id.* at I-4171-75. Among other points, it opined that the Treaty chapters on the free movement of workers, the right of establishment, and the provision of services are all mutually exclusive; that laws protecting the freedom of establishment apply equally to resident nationals of other member states as to that state's own nationals; and that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective. *Id.*

61. See Robert K. Christensen, Note, *At the Helm of the Multidisciplinary Practice Issue After the ABA's Recommendation: States Finding Solutions by Taking Stock in European Harmonization to Preserve Their Sovereignty in Regulating the Legal Profession*, 2001 *BYU L. Rev.* 375, 396-97 (discussing the European Union's approaches to harmonization of the legal profession).



yers.<sup>62</sup> Technically, foreign lawyers are not considered lawyers of the foreign jurisdiction in which they seek recognition and rights of practice. Indeed, the lay character of a foreign lawyer *vis-à-vis* a domestic lawyer in a jurisdiction in which the former seeks recognition is accentuated because, under the current EU regime, the foreign lawyer does not have to seek admission to that branch of the domestic jurisdiction's legal profession that corresponds to the branch of his home country's legal profession. For example, a Spanish *abogado*, instead of seeking recognition or registration as an advocate in Ireland, may seek recognition or registration as a solicitor, although the Irish solicitor is closer to a Spanish *procurador*<sup>63</sup> than an *abogado*. This situation is further complicated in some countries where the legal profession is closely aligned with certain professions that are regarded as distinct in other countries. For example, the German *Wirtschaftsprüfer* (auditor) and *Steuerberater* (tax adviser) are regarded as quasi-legal professions closely related to the legal profession.<sup>64</sup>

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62. The agitation for equal treatment is true as well for lawyers hailing from jurisdictions within the same country, as is the case with attorneys licensed in different states of the United States. Some courts have been receptive to these concerns. See *In re Waring*, 221 A.2d 193, 197 (1966) (finding that "legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but . . . there may be multistate transactions where strict adherence to this thesis would not be in the public interest"). However, in a more recent and widely noted case, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, the Supreme Court of California upheld lower courts' decisions holding that a fee agreement for legal services performed partly in New York and partly in California by lawyers licensed to practice in New York, was unenforceable as to the portion of the services rendered in California, because the New York lawyer had engaged in the unauthorized practice of law by rendering his services in California. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998).

63. That the Lawyers' Services Directive, *supra* note 59, and subsequent measures did not recognize the Spanish *procurador* and similar professional titles in other civil law jurisdictions does not attenuate the force of this example. See ADAMSON, *supra* note 45, at 8-9, 26, 46 (discussing the nature of the *procurador's* functions and its non-recognition under the Lawyers' Services Directive). What is significant is that the Spanish *abogado* can cross over to a branch of the Irish legal profession (solicitor) that is far removed from the branch of the Spanish legal profession that originally admitted him.

64. ADAMSON, *supra* note 45, at 18. This nexus between auditing and legal work in Germany explains the accommodation traditionally afforded MDP under German law. See Terry, *supra* note 40, at 1560-67 (discussing the regulation of MDP in Germany where there have been no restrictions against such practice structures). This example is without prejudice to the fact that under the Lawyers' Services Directive and the Establishment Directive as well as ECJ jurisprudence, only the mainstream legal professions—barrister, solicitor, *avocat*, and related titles—are recognized as the subject of the EU's regime of lawyer regulation. See Lawyers' Services Directive, 59, at 17; Establishment Directive, *supra* note 44, at 38. The work of the notary is, for instance, taken as an aspect of the respective states' public functions that should not be amenable to such regulation. See Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945, 945 (1998) (noting that the rationale for this distinction is that "[n]otarial functions may still be reserved to enrolled lawyers, as with Services. This is because notaries deal with national matters of public law, especially the transfer and ownership of immovable property within State boundaries") (quoting JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 193 (2d. ed. 1990)). But see Laura Picchio Forlati, *Cross-Border Licensing*, 43 S. TEX. L. REV. 373, 382 (2002) (arguing that in the case of Italian notaries, "the exercise of a public function such as authentication

It should be noted that the question of recognition to practice law in a jurisdiction is conceptually distinct from that of the organizational form that such practice should take. Thus, recognizing foreign lawyers as qualified for admission to a member state's bar is not tantamount to permitting them to form partnerships with domestic lawyers—the latter is the MDP question. By contrast, the question of admission is related to issues surrounding the unauthorized practice of law. That said, both issues overlap in the context of the present inquiry, in that the EU has not restricted liberalization only to the recognition of a foreign lawyer's right to practice in another jurisdiction, but it has also extended it to the right of such a lawyer to form partnerships and other associations with local lawyers<sup>65</sup> because of his status as a non-lawyer in the foreign jurisdiction.

A question that naturally arises is whether the standing of a foreign lawyer, seeking recognition in another jurisdiction, is materially different from that of another professional, say an accountant (foreign or domestic), seeking recognition to offer legal services in the same jurisdiction—especially those services that lie at the boundary between law and other professions. This question extends to situations where such recognition is sought by an entity comprised of individuals who belong to different professions—that is, an MDP. The movement towards cross-jurisdictional recognition of lawyers, which examines differences and similarities of legal professions across jurisdictions, opens up the wider question of the similarity of qualifications across professional lines: Is it not possible that other professions (domestic or foreign) could possess some of the very characteristics that make the foreign lawyer comparable to the domestic lawyer? If regulators in a given jurisdiction are able to examine and consider the disparate qualifications of lawyers from various foreign jurisdictions in order to ascertain whether such lawyers are comparable with or equivalent to domestic lawyers, surely they should not be averse to objectively comparing domestic lawyers with non-legal professionals to ascertain whether they too possess any equivalent expertise. After all, the non-lawyer is no more a lay person than the foreign lawyer. The cross-jurisdictional and the cross-professional dimensions of the issue thus converge.

Evidence of this convergence can be found in the inclusion of non-EU lawyers—who for this purpose are akin to non-recognized foreign lawyers *vis-à-vis* EU domestic lawyers—in a lawyers' multinational partnership (MNP), rendering MNPs subject to Article 11(5) of the Establishment Directive, which deals with MDPs.<sup>66</sup> In essence, a combination involving

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of documents could be performed just as well by a duly qualified citizen of another Member State").

65. See generally ADAMSON, *supra* note 45 (giving details of the types of associations and practice groupings facilitated by the EU regime). Notable among these are practice groupings that include two or more lawyers from the same country, such as the European Economic Interest Grouping (EEIG) created by European Council Regulation (EEC) 2137/85 in July 1985. *Id.* at 149-50. In the same vein, although English barristers may not form partnerships with members of any other profession, including English solicitors, foreign lawyers may form partnerships with such solicitors. *Id.* at 28.

66. *Id.* at 154.

an EU lawyer and a non-EU lawyer is ipso facto an MDP, just as would be a combination between a Belgian lawyer and a Spanish lawyer under Belgian law but for the recent liberalization.<sup>67</sup> The MDP question, therefore, is pervasive and unavoidable, lodged at the very center of current efforts to facilitate the cross-jurisdictional projection of lawyers and their activities.

Getting more specific, one can indeed extend to MDPs important questions already raised regarding MNPs. Analyzing the special difficulties troubling the international practice of American law firms, Vagts considers an arrangement between an American firm and a European group that constitutes a "firm," and contemplates whether the uniquely American concept of "Chinese walls"<sup>68</sup> separates the New York and Paris portions of the firm.<sup>69</sup> Further, if the firm's Berlin office is, under German law, legally obligated to disclose a client's intention to commit a crime, can it—and should it—disclose information obtained from the New York office, even though U.S. law would forbid such disclosure?<sup>70</sup>

These pertinent questions invite related questions in the MDP context: Is there any conceptual distinction between the scenario involving the New York and Paris branches of such a law firm, which operate under different ethical regimes, and two branches of an MDP (whether or not within the same country), one of which—the legal practice branch—operates under the ethical rules of the legal profession, while the other branch operates under the rules of a different profession? Just as the Paris and New York branches of an international law firm operate under different ethical regimes, would not the same hold true for an MDP? Thus, where the legal branch of an MDP is situated inside the United States and the non-legal branch operates from a different country, could not the legal arm treat every foreign professional (whether lawyer or non-lawyer) as a non-lawyer for U.S. purposes? This example clarifies the apparent similarity between

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67. Terry explains the pre-European Integration policy of the Belgian Bar in the following way:

In 1984, the Brussels Bars created a special status, called the B List, for foreign lawyers who were not *avocats*. Among other provisions, the new B List contained "scope of practice" provisions which permitted B List lawyers, including U.S. lawyers, to practice European Community law. The B List rules also relaxed the rules prohibiting registered Belgian lawyers from associating with foreign lawyers, although there still were many restrictions which limited the usefulness of the "B List." Within five years of the creation of the B List, a number of American, English, Dutch, German, and Japanese lawyers were employed by, or had become partners of, Belgian *avocat* firms. In 1991, the Brussels Bars further relaxed their ethics rules when they permitted Belgian lawyers acting as partners at the law firm of Cleary, Gottlieb, Hamilton & Steen, Brussels . . . to become tableau lawyers, provided several conditions were satisfied.

Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bar*, 21 *FORDHAM INT'L L.J.* 1382, 1405-06 (1998).

68. Black's Law Dictionary defines a "Chinese wall" as a "fictional device used as a screening procedure which permits an attorney involved in an earlier adverse role to be screened from other attorneys in the firm so as to prevent disqualification of the entire law firm . . ." *BLACK'S LAW DICTIONARY WITH PRONUNCIATIONS* 240 (6th ed. 1990).

69. See Vagts, *supra* note 43, at 694.

70. *Id.*

the international law firm and MDP scenarios. If the law currently accommodates the former scenario, why not the latter, given their similarity?

In response to this line of questioning, which is engendered by the pervasive liberalization of the rules for lawyer regulation in the EU, MDP proponents conclude that developments in Europe will necessarily lead to the pervasive de-proscription of MDP in European jurisdictions.<sup>71</sup> In drawing this conclusion, they make a mental leap from broad generalizations reflected in the changing EU regulatory terrain to state-specific outcomes not supported by the details of the EU regulatory regime. The leap is based on a macro view of a broad trend with little or no examination of the micro factors reflected in specific legislation, judicial pronouncements and related developments. The discussion in Part II of this article is to a considerable extent an elucidation of the EU regulatory terrain, provided in order to clarify its true nature.

Perhaps in recognition of the potency of questions such as those posed in the foregoing paragraph, the CCBE (Council of the Bars and Law Societies of the European Union), which has traditionally opposed MDPs,<sup>72</sup> has undertaken a program of articulating the unifying essence of lawyerhood, an essence that transcends jurisdictional boundaries. For instance, Article 1 of the CCBE's Code of Conduct for Lawyers in the European Union<sup>73</sup> (CCLEU) describes the functions and obligations of a lawyer,<sup>74</sup> while the

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71. See, e.g., Robert K. Christensen, *supra* note 61, at 393 (arguing that the twin influences behind the march toward blanket European acceptance of MDP are that "international market forces and consumer trends demand the liberalization of regulations on lawyers . . . [and that] Community principles of competition demand the deregulation of the legal profession").

72. See Carl Beverage, *Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 89, 96 (1999).

73. CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION (2002), at [http://www.ccbe.org/doc/En/code2002\\_en.pdf](http://www.ccbe.org/doc/En/code2002_en.pdf) (last visited Feb. 18, 2004). Although primarily addressed to the lawyers of eighteen European Union CCBE member bars, the Code's influence is much wider. The Bars of Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Former Yugoslav Republic of Macedonia, Hungary, Poland, Romania, the Slovak Republic, Slovenia, Switzerland, and Turkey are, for instance, represented at the CCBE by Observer delegations. See CCBE, *What Is the CCBE?*, at [http://www.ccbe.org/en/ccbe/ccbe\\_en.htm](http://www.ccbe.org/en/ccbe/ccbe_en.htm) (last visited Feb. 18, 2004). Additionally, the CCBE enjoys a consultative status with the Council of Europe. *Id.* CCBE also maintains a Permanent Delegation to the Court of Justice and the Court of First Instance of the EU and the European Free Trade Area (EFTA) Court. *Id.* A stated objective of the CCBE is also to represent the Bars and Law Societies of the European Economic Area (EEA) to other legal organizations, institutions and bodies such as the Union Internationale des Avocats, the International Bar Association, and the Association Internationale des Jeunes Avocats. *Id.* The CCBE maintains close relationships with other international professional legal organizations such as the American Bar Association (ABA), Japanese Federation of Bar Associations (JFBA), and others. *Id.*

74. Article 1.1 provides as follows:

In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser.

CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION, *supra* note 73. The Code then lists that a lawyer has legal and moral obligations towards the client, the courts, and

second paragraph of Article 1.2.2 is particularly apposite, as it emphasizes the common foundation of ethical rules and the values that animate them, notwithstanding divergent details.<sup>75</sup> To further the goal of uniformity across jurisdictions, Article 5.1.2 urges lawyers to recognize their counterparts in other member states as colleagues.<sup>76</sup> Since the composition of the EU is malleable, in the sense that nations can join or leave the union (though the latter has not happened before), one can assume that the basis for recognizing other lawyers as colleagues exists even before a country joins the EU, and remains even after that country has left the union.<sup>77</sup> If one accepts this premise as true, then the same rationale behind recognizing EU lawyers as colleagues would likely accommodate the recognition of lawyers from other jurisdictions as “colleagues-at-law”—thereby making the CCBE’s initiative on lawyer collegiality one of universal character.<sup>78</sup> It is clear that the provisions of the CCBE Code relate more to a lawyer’s function as an advocate defending civil liberties and human rights, a desideratum of civilized societies in liberal legal thought, than to his multifarious transactional and quasi-administrative functions, which constitute the bulk of legal work, especially in the international context.<sup>79</sup> Yet, it is in

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other authorities before whom the lawyer pleads his client’s cause or acts on his behalf; the legal profession; and the public. *Id.*

75. Article 1.2.2 provides:

The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation [sic] and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application. The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation.

*Id.* art. 1.2.2.

76. *Id.* art. 5.1.2.

77. A study by the McCrate Commission determined that among the four values common to all those in the legal profession are “striving to promote justice, fairness, and morality” and “striving to improve the profession.” *Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development: An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR 138-41 (cited in H. Lee Hetherington, *Negotiating Lessons from Iran: Synthesizing Langdell & McCrate*, 44 CATH. U. L. REV. 675 (1995)). Collegiality is arguably a necessary goal inherent in both of these values. *Id.* However, it could also be true that this “collegiality” is derived from certain transformative processes—such as the comprehensive training of lawyers upon their countries’ accession to the EU treaty.

78. *See id.*

79. Concerning the latter, Daniel R. Fischel wrote the following:

Lawyers offer services that, in certain areas, duplicate those offered by other professionals. Lawyers or accountants can offer tax advice; lawyers or investment bankers can structure defensive tactics in response to a tender offer; lawyers or financial planners can provide estate planning services; lawyers or other investigators can marshal facts from corporate employees in response to a regulatory investigation.

Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5 (1998). *See also* David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in 2 EVERYDAY PRACTICES AND TROUBLE CASES 68 (Austin Sarat et al. eds., 1998). Wilkins emphasizes that “[c]orporate lawyers have always provided a complex mix of business and legal advice to their clients,” just as other professionals—notably account-

relation to a lawyer's substantive, rather than idealistic, functions that most professionals base their arguments in favor of cooperation with lawyers through MDPs.

Historical factors conceptually reinforce the perception that the distinction between non-lawyer professionals and foreign lawyers is small, so that the de-proscription of MDP should readily result from a general trend towards liberalization. This is especially true in the accounting field. The most important players in the global legal and accounting arena are firms with origins in common law jurisdictions.<sup>80</sup> Features specific to common law jurisdictions were conducive to the growth and expansion of professional legal and accounting firms in a way that was not readily possible in civil law countries.<sup>81</sup> For the legal profession, these features include the absence of the national-residence requirement and the related single-residence (*unicité de cabinet*) requirement, which were respectively at issue in the ECJ cases of *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*<sup>82</sup> and *Ordre des Avocats au Barreau de Paris v. Klopp*.<sup>83</sup> Important to all professions, however, is the higher level of autonomy from

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ants, investment bankers and management consultants—have “stepped up their efforts to compete with lawyers” in advising multinational corporations concerning their global operations. *Id.* at 88. Drawing out the implications of this trend, Wilkins acknowledges that the mixed advice proffered by practicing lawyers to their clients (even outside the corporate arena) pragmatically undermines the assumption that law is autonomous in practice, just as the widely accepted view that “law is at least moderately indeterminate, and that legal decisions partially rest on contested political, moral, economic, sociological, cultural, and psychological assumptions” theoretically undermines the assumption that law is distinct and autonomous from these influences. *Id.* at 87.

80. Dutch firms have begun to make inroads into the international arena, given the relatively liberalized regulatory structure of the Dutch bar vis-à-vis other European bars. See ADAMSON, *supra* note 45, at 23–24. However, Dutch firms are unlikely to become as established or geographically extensive as firms of common law origin. See Abel, *supra* note 23, at 795 (pointing out that the Netherlands’ small size and the fact that Amsterdam is “neither a major financial center, like London, Paris, and Frankfurt, nor a regional capital, like Brussels,” impede Dutch firms’ expansion into the transnational market). The WTO Secretariat reports that large law firms are still a phenomenon limited to a small number of common law countries: “In 1988 the first 91 law firms by number of partners were from the United States, Canada, the United Kingdom and Australia. The top twenty firms included 17 from the United States (including the top three), two from Canada (4 and 15) and one from the United Kingdom (8).” See WTO Council for Trade in Services, *Background Note by the Secretariat, S/C/W/43*, ¶ 21 (July 6, 1998). Furthermore, all of the Big 5 accounting firms originated in the United States, the United Kingdom, or Canada (KPMG also has roots in Amsterdam). See Christine E. Earley, et al., *Some Thoughts on the Audit Failure at Enron, the Demise of Andersen, and the Ethical Climate of Public Accounting Firms*, 35 CONN. L. REV. 1013, 1029 (2003) (discussing the founding of Arthur Andersen); *About Ernst & Young*, at <http://www.big4.com/big4/B4AboutEY.aspx> (last visited Apr. 9, 2004); *About Deloitte & Touche*, at <http://www.big4.com/big4/B4AboutDT.aspx> (last visited Apr. 9, 2004); *About KPMG*, at <http://www.big4.com/Big4/B4AboutKPMG.aspx> (last visited Apr. 9, 2004); *About Price-waterhouseCoopers*, at <http://www.big4.com/big4/B4AboutPWC.aspx> (last visited Apr. 9, 2004).

81. See Abel, *supra* note 23, at 741–42.

82. Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299, 1 C.M.L.R. 298 (1975) (Neth.).

83. Case 107/83, *Ordre des Avocats au Barreau de Paris v. Onno Klopp*, 1984 E.C.R. 2971.

the state in common law jurisdictions than in civil law jurisdictions.<sup>84</sup> It is thus significant that the nexus between accounting and law in the primal common law country, England, is a strong one, where accounting is a progeny of the law.<sup>85</sup>

This historical nexus invites additional questions: If the professions of law and accounting were once the same (in the sense of one having been nurtured within the other), does not this suggest the possibility, even the likelihood, that these professions can interact in the context of MDP? Could the differences really be so fundamental and insuperable as to be amenable to no solution? These questions, in turn, invite a reconsideration of the bases for the fundamental distinction between the two professions, as articulated by those opposed to MDP. In arguing that the bases for reuniting the professions are more persuasive than those for retaining their distinction, MDP proponents conclude that the prospects of cooperative practice within an MDP are significant and that Europe shows that merging the two is the way forward. However, a detailed examination of European jurisdictions in Part II below points to a contrary conclusion.

While the foregoing analysis has focused on accountants (who are the chief propagators of MDP), it clearly extends to other professions that are potential beneficiaries of a liberalized MDP regime. For if the regime were to become liberalized for accountants despite the difficult deontological dilemmas presented by accountancy in the MDP context, the move towards MDP between the legal profession and other professions, which in compar-

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84. Abbott, exploring this difference, refers to the "quasi-free markets characteristic of Anglo-American Professions." See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* 157 (1988).

85. Yves Dezalay captures this nexus when he writes as follows:

Victorian Solicitors wheedled their way into the privacy of the dominant classes to become their confidants and men of business. But, from the strength of this position, they practised [sic] a number of professions: from bankers, debt collectors, estate agents or managers, to politicians or lobbyists for the more fortunate. One could have said that 'beneath the attorney's wig sleeps half a dozen professionals'. . . . It is from this point that we need to begin our attempts to understand the ambiguity between lawyers and accountants. The distinction was far from obvious a hundred years ago. Accountancy was a technique rather than a profession, and solicitors, for the most part, kept their clients' accounts in order.

Yves Dezalay, *Introduction: Professional Competition and the Social Construction of Transnational Markets*, in *PROFESSIONAL COMPETITION AND PROFESSIONAL POWER* 1, 16 (Yves Dezalay & David Sugarman eds., 1995). This outgrowth of accounting from law, especially lawyers specializing in receivership, is also noted in ANDREW ABBOTT, *supra* note 84, at 94, 106 (1988). One might quarrel with the rather-too-recent period (late nineteenth century) in which Dezalay locates the inchoate character of the accounting profession. Keith M. MacDonald notes for instance that, as a specific occupation, accounts were prominent in Scotland, and quite a few could be found in the city directories of Glasgow and Edinburgh in the late eighteenth century. KEITH MACDONALD, *THE SOCIOLOGY OF THE PROFESSIONS* 191 (1995). However, the first practicing firm of accountants was founded in 1780 by Josiah Wade, in Bristol, who "built up a practice auditing the books of merchants in the city." *Id.* See also DEREK MATTHEWS ET AL., *THE PRIESTHOOD OF INDUSTRY* 17-18 (1998) (arguing that through "the latter part of the eighteenth century, there was a gradual growth in the number of independent firms offering accounting services [in England and Scotland], often of a basic bookkeeping nature to those unwilling or unable to provide their own").

ison present relatively attenuated deontological problems, should be even less constrained.

## II. MDP in the European Union

The questions raised in Part I.B, which flow from the pervasive liberalization of the regime for legal services, have contributed to a feeling in many quarters that MDP has become a *fait accompli* in Europe<sup>86</sup> in the sense of its being poised to completely usurp the delivery of legal and related services.<sup>87</sup> Because there are no legal bases for this conclusion, except for the fact of the liberalization itself,<sup>88</sup> it is imperative to test this conclusion by exploring the EU regime of lawyer regulation, as well as related practical and theoretical questions emanating from MDP in the EU context. Indeed, this analysis is important, not just because of the size and

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86. See Donald H. Rivkin, *Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 55, 72-73 (1999) (arguing that consequently, "American lawyers and law firms will be at a serious competitive disadvantage in the global legal marketplace if the existing rules prohibiting [MDPs] are not repealed or relaxed"); Zobair, *supra* note 41, at 65.

87. See, e.g., John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1274, 1300 (2000). The authors state the following:

These larger accounting firms, taking advantage of the pro-MDP regulatory system overseas, have significant legal practices throughout Europe, with lawyers on staff or attached to the accounting firms through some variety of contractual obligations. In some European markets, these accounting firms are already among the largest providers of legal services for businesses. And this development is not likely to be curbed by the legal profession if it does not alter its regulation; the GATT treaty, which governs most international trade matters, claims jurisdiction over these professions through the World Trade Organization—an organization historically biased against self-interested regulation.

*Id.* at 1300. See also ABA, Commission on Multidisciplinary Practice, *Report to the House of Delegates*, 1999 A.B.A. REP. 5 app. C, at C4-C5 & n.8 (discussing MDP developments outside of the United States); HAZARD ET AL., *supra* note 7, at 1047 (observing that change in MDP treatment may come as part of a treaty between the United States and the European Community); James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1160 n.3 (2000). This observation implicitly assumes that through such a treaty, Europe would put pressure on the United States to open its borders to MDP. For a response to Hazard's suggestion, see Bernard Wolfman, *Testimony Before the ABA Commission on Multidisciplinary Practice*, at <http://www.abanet.org/cpr/wolfman4.html> (Feb. 12, 2000). Wolfman writes as follows: "Much has been made of the presence of non-lawyer controlled MDPs in Europe. The impression given is that they are a great success, serving the public interest and with benefit to all." *Id.* See generally Martha Neil, *Multidisciplinary Growing Pains in Europe*, CHI. DAILY L. BULL., Jan. 21, 2000, at 3, LEXIS, Nexis Library (describing MDPs as "[p]ermitted but still controversial in Europe"); Delos N. Lutton, *Remarks to American Bar Association Special Commission on Multidisciplinary Practice*, at <http://www.abanet.org/cpr/lutton.html> (Aug. 8, 1999) (stating that one of the phenomena of MDP is its rapid spread in many large, industrialized advanced societies, such as Germany, France, and Spain. Although many countries continue to debate about "the legality of some of these moves by consulting firms, [ ] the growth is real, it persists, and it is affecting clients and their lawyers every day in a growing number of arenas").

88. A factual basis for such conclusion is, however, often given by reference to the extensive legal practices of the Big 5 within Europe. See, e.g., Lutton, *supra* note 87.



inherent importance of the EU market for legal services, but also because any success would vindicate MDP as a template for future professional practice and would pressure other jurisdictions, including the United States, to acknowledge and accept MDP.

#### A. The Establishment Directive

The headnote of the EU's Establishment Directive describes its purpose as facilitating "the practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained."<sup>89</sup> It is the third in a trio of instruments aimed at liberalizing the cross-border practice of law within the EU. The first is the Services Directive,<sup>90</sup> which vests EU lawyers with the right to provide legal services to clients situated in another member state, while maintaining physical residence in their home state, and to perform lawyerly functions in that host state through temporary physical presence (visits), acting under their home state's professional title.<sup>91</sup> The second is the Diplomas Directive,<sup>92</sup> which, though not specific to the legal profession, mandates the mutual recognition of lawyers' qualifications across jurisdictional boundaries within specified guidelines. It effectively permits the full integration of a lawyer into the legal profession of the host state through assessment of the legal training obtained in the lawyer's home country, supplemented by remedial examinations (i.e., aptitude tests) or practical training (i.e., a period of practice) within the host state to correct for any deficiencies *vis-à-vis* the home state's training. The Establishment Directive takes this liberalization even further. Article 10 of

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89. Establishment Directive, *supra* note 44.

90. Lawyers' Services Directive, *supra* note 59. This directive, which facilitates the effective exercise by lawyers of the freedom to provide services, ostensibly enabled EU lawyers to provide advice on their home state and community law under their home state title.

91. Since Article 1 of the directive refers to the "provision of services," the parameters of which are not expressly defined in the directive, the ECJ has had to glean the details by construction. Relying on the nature of Article 60 of the Treaty of Rome, in the context of related provisions, the right to provide services through visits to the host state has been interpreted as being inherently limited in the sense that a foreign lawyer can only render legal services for a temporary period in the host state if he seeks to be covered by the treaty provisions on services. See Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165. The Lawyers' Services Directive—as expressly stated in its preamble—does not contemplate a right of establishment; nor does it contemplate the recognition of home lawyers' qualifications (diplomas) in the host state. Lawyers' Services Directive, *supra* note 59. Thus, it covers only temporary visits into the host state as well as the rendition of services into host state from home state. *Id.*

92. Diplomas Directive, *supra* note 59. A second Diplomas Directive, which supplemented Directive 89/48 and established a general system for the recognition of professional education and training to supplement Directive 89/48/EEC, was promulgated to augment the first directive by establishing a system for the recognition of diplomas obtained after education of between one and three years. See Council Directive 92/51, 1992 O.J. (L 209) 25; ADAMSON, *supra* note 45, at 85. But this has little relevance to lawyers, apart from potential indirect effects on the activities of paralegals, court bailiffs, process servers, and the like. *Id.* at 85.

the Establishment Directive enables a lawyer practicing under his home state's title to apply for full membership in the host state's legal profession if he has practiced that state's law within its borders for three years.<sup>93</sup> Where a lawyer has practiced in the host state for three years, but his practice has not been in that state's law, the host state's authorities may grant him full membership if he meets supplementary requirements.<sup>94</sup> The Directive thus exempts such a lawyer from the examination requirements of Article 4(1)(b) of the Diplomas Directive, relying instead on practical experience as a peremptory basis for full integration into the host state's legal profession.<sup>95</sup>

As part of the liberalization process, the Establishment Directive addresses what forms the professional associations involving lawyers can take. This is necessary to ensure that the regulation of lawyers' groupings by their home state does not become a means of impeding competition in the legal services arena through indirect restraints on the forms of professional associations (groupings) open to lawyers in a host state.<sup>96</sup> Several provisions of the Directive in this regard are noteworthy.<sup>97</sup> However, of direct relevance to the MDP question is Article 11.<sup>98</sup> This provision autho-

93. The lawyer who did not practice host state law for three years is not automatically exempt from Diplomas Directive 89/48 Article 4(1)(b) requirements, but host state authorities have discretionary power to grant him admission without his having to meet these requirements. Establishment Directive, *supra* note 44, art. 10, at 41.

94. See Establishment Directive, *supra* note 44, art. 10(3), at 41. This provision presupposes that the three years of practice in the host state has not been in host state law but rather in international law, or the law of some other member state.

95. *Id.* at 41.

96. *Id.* at 41-42.

97. Articles 8, *id.* at 40, and 12, *id.* at 42, of the Directive are apposite. Article 8 permits a lawyer practicing in a host state under his home state professional title to do so as a salaried employee of another lawyer, firm, or other entity. In essence, it permits such a lawyer to practice as a member of a team of in-house counsel in the form of a lawyer grouping. Article 12 permits lawyers, practicing in a host state under their home state professional title, to use in the host state the name of any grouping to which they belong in their home state.

98. Article 11 reads in part:

Where joint practise [sic] is authorised [sic] in respect of lawyers carrying on their activities under the relevant professional title in the host Member State, the following provisions shall apply in respect of lawyers wishing to carry on activities under that title or registering with the competent authority:

(1) One or more lawyers who belong to the same grouping in their home Member State and who practise [sic] under their home-country professional title in a host Member State may pursue their professional activities in a branch or agency of their grouping in the host Member State. However, where the fundamental rules governing that grouping in the home Member State are incompatible with the fundamental rules laid down by law, regulation or administrative action in the host Member State, the latter rules shall prevail insofar as compliance therewith is justified by the public interest in protecting clients and third parties.

.....

(5) Notwithstanding points 1 to 4, a host Member State, insofar as it prohibits lawyers practising [sic] under its own relevant professional title from practising [sic] the profession of lawyer within a grouping in which some persons are not members of the profession, may refuse to allow a lawyer registered under his home-country professional title to practice in its territory in his capacity as a

rizes the host state to determine what types of legal practice groupings or structures are permissible in its jurisdiction. This power of the host state is subject, of course, to the fundamental principle of non-discrimination between host state and home state lawyers in the application of any rules regarding permissible practice structures.<sup>99</sup> In this regard, Article 11 echoes paragraph fifteen of the Directive's preamble, recognizing the possibility that prohibitions against certain forms of practice groupings can be used as a pretext to prevent or deter home state lawyers from establishing themselves in a host state, but nevertheless emphasizing the need to allow member states to "take appropriate measures with the legitimate aim of safeguarding the profession's independence."<sup>100</sup>

Other aspects of Article 11 are also instructive as they indicate the broader thinking on MDP in EU regulatory framework. One of these facets is the treatment, on the one hand, of a host state's refusal to permit a form of home state practice grouping in general, and, on the other hand, its refusal to permit a home state grouping which qualifies as an MDP.<sup>101</sup> Under Article 11(1), lawyers practicing in a host state under their home state professional title, who belong to the same professional grouping (say, a law firm) in their home state, may be prohibited from practicing under a branch or agency of that grouping in the host state if "the fundamental rules governing that grouping in the home Member State are incompatible with the fundamental rules . . . in the host Member State."<sup>102</sup> However, the

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member of his grouping. The grouping is deemed to include persons who are not members of the profession if

- the capital of the grouping is held entirely or partly, or
- the name under which it practises [sic] is used, or
- the decision-making power in that grouping is exercised, *de facto* or *de jure*, by persons who do not have the status of lawyer within the meaning of Article 1(2). Where the fundamental rules governing a grouping of lawyers in the home Member State are incompatible with the rules in force in the host Member State or with the provisions of the first subparagraph, the host Member State may oppose the opening of a branch or agency within its territory without the restrictions laid down in point (1).

Establishment Directive, *supra* note 44, at 41-42. Under Article 1(2) of the Directive, "home member state" is defined as the member state in which a lawyer acquired the right to use one of the recognized professional titles for lawyers (*avocat*, barrister, *rechtsanwalt*, *dikigoros*, etc.) before practicing the profession of lawyer in another EU member state. "Host member state" is defined as the member state in which a lawyer practices (or seeks to practice) pursuant to the Directive. *Id.*

99. While Article 11(5) is express on the need for non-discrimination, Article 11(1) is not. It stands to reason, however, that, given the cardinal place of non-discrimination as an (if not the) organizing principle of the EU and similar economic arrangements, non-discrimination is nevertheless implicated in the application of Article 11(1) of the Directive. Establishment Directive, *supra* note 44, at 41.

100. *Id.* at 38.

101. See Lonbay, *supra* note 57, at 925-26.

102. Establishment Directive, *supra* note 44, at 41. At least two scenarios are possible under this provision. One is the possibility that such a practice grouping is generally banned in the host state—as is the case with the prohibition of partnerships between English barristers, although barristers are not prohibited from sharing chambers with one another and may even work on the same matter as another barrister in their chamber, a situation which may operationally resemble a partnership. See Carole Silver, *Mod-*

host state's rules preventing lawyers from practicing in a grouping govern only "insofar as compliance therewith is justified by the public interest in protecting clients and third parties."<sup>103</sup>

In essence, a host state's prohibition of an MDP under Article 11(5) is less constraining because it does not require states to consider the public interest.<sup>104</sup> It requires only that if MDP is prohibited in that jurisdiction, the prohibition must affect host state lawyers and not just foreign lawyers.<sup>105</sup> Such language implicitly recognizes that MDPs are beset by problems so apparent that they need not be positively proven when a host state's prohibition of MDP is challenged; courts assume that public interest considerations drive the host state's prohibition. The disparity in legal protection clearly favors the establishment of branches of law firms or professional corporations over MDPs because the host country can only justify the prohibition of such branches on the public interest grounds of client and third party protection, thus narrowing the host country's discretion as compared with the broad discretion afforded in prohibiting MDPs.

Indeed, Article 11(5) effectively puts MDPs at a disadvantage *vis-à-vis* non-lawyer entities (e.g., investment banks) established in one EU member state that seek to offer legal services in a host country through a branch office. Since such entities are not associated with lawyers, they presumably do not fall under the Establishment Directive. As such, they would be governed by more general EU rules relating to services and the right of establishment.<sup>106</sup> Subject to host state rules on the offering of legal services by non-lawyers, such entities could offer legal services without coming within the ambit of Article 11(5). The provisions of Article 11 are aimed at providing host states with the capacity to check the propagation of MDPs—well beyond what would ordinarily be their capacity under general rules of the EU regime—while simultaneously facilitating the propaga-

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*els of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37, 85–86 n.123 (1996) (citing John Kendall, *Barristers, Independence and Disclosure*, 8 ARB. INT'L 287, 288–99 (1992)). Assuming practice in a partnership is allowed to French *avoués*, the regulatory authorities of the English legal profession can, as the host state, validly prohibit a French *avoué* from practicing in England in partnership with another *avoué*, the prohibition of partnerships between advocates (whether called barristers or some other name) being a fundamental English rule of professional regulation. A more intriguing possibility is that an EU country would authorize a particular practice grouping as to members of the host country's legal profession and other EU lawyers, but not as to lawyers of another EU country whose legal requirements governing such groupings are incompatible with those of the host state.

103. Establishment Directive, *supra* note 44, at 41.

104. *Id.* Article 11(5) of the Establishment Directive provides, in part, that "[w]here the fundamental rules governing a grouping of lawyers in the home Member State are incompatible with the rules in force in the host Member State or with the provisions of the first subparagraph [i.e. contrary to the public interest], the host Member State may oppose [its] opening. . . ." *Id.* (emphasis added).

105. *Id.*

106. The Charter of Fundamental Rights of the European Union provides that "[e]very citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State." 2000 O.J. (C 364) 1, art. 15(2), available at [http://www.europarl.eu.int/charter/pdf/text\\_en.pdf](http://www.europarl.eu.int/charter/pdf/text_en.pdf) (last visited Apr. 10, 2004).

tion of other practice groupings that exclusively involve lawyers by giving the host state less leeway in constraining such practice structures.<sup>107</sup> The policy reasons justifying this dichotomy are not expressed, but the capacity given host states to constrain the formation of MDPs is consistent with the EU legislature's acceptance of the potentially pernicious consequences of MDPs on lawyer ethics, especially on lawyer independence.<sup>108</sup>

Also instructive is Article 11(5)'s definition of MDP as a grouping wherein "the capital . . . is held entirely or partly, or the name under which it practises [sic] is used, or the decision-making power in that grouping is exercised, *de facto* or *de jure*, by persons who do not have the status of lawyers within the meaning of Article 1(2)" of the Establishment Directive.<sup>109</sup> This definition clearly brings several professional arrangements that otherwise might not have qualified as MDPs within the reach of the host state's regulatory authorities. The breadth of this definition evinces the intent of the EU legislature to provide to the host state a catch-all provision which can be used in much the same way that the United States Securities and Exchange Commission (SEC) has used Rule 10b-5 of the Securities and Exchange Act of 1934—as a tool for enjoining a wide-ranging and perpetually evolving range of acts and omissions coming under the loosely defined rubric of insider trading.<sup>110</sup> The similarity is more than a passing one, for the breadth of the SEC's power, which flows from the gen-

107. The peremptory language of provisions of Article 11(2) and 11(3) of the Establishment Directive addresses the constraint on host states in relation to practice structures exclusively involving lawyers:

(2) Each Member State shall afford two or more lawyers from the same grouping or the same home Member State who practise [sic] in its territory under their home-country professional titles access to a form of joint practice. If the host Member State gives its lawyers a choice between several forms of joint practice, those same forms shall also be made available to the afore-mentioned lawyers. The manner in which such lawyers practise [sic] jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.

(3) The host Member State shall take the measures necessary to permit joint practice also between:

(a) several lawyers from different Member States practising [sic] under their home-country professional titles;

(b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.

The manner in which such lawyers practice jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.

Establishment Directive, *supra* note 44, at 42.

108. Implicit in such acceptance is the realization by the EU authorities that lawyer ethics embody societal values worthy of protection even at the risk of impairing competition. *Infra* Part II.D addresses this issue, discussing the ECJ decision in Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577, [2002] 4 C.M.L.R. 27 (2002).

109. Establishment Directive, *supra* note 44, at 42.

110. See Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 459 (1989) (reviewing MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988)) (explaining that "Section 10(b), even as explicated in SEC Rule 10b-5, is broad and vague, deciding few cases at the rule-making level, and leaving most cases to be decided in common law fashion as they arise").

erality and looseness of that provision's definition of the offense, is evidence of the U.S. legislature's intent to broadly empower the SEC to hunt down a range of activities about which the legislature was, rightly or wrongly, very concerned.<sup>111</sup> Similar to Rule 10b-5, a liberal reading of Article 11(5) would grant host states a broad power to enjoin a range of practice groupings (whatever shape they may take or evolve into) under the EU regime.

Of particular importance in relation to the definitional scope is the fact that Article 11(5) defers to host states' authority to prohibit de facto arrangements that give decision-making power in a practice grouping to a non-lawyer.<sup>112</sup> Given the modus operandi of international MDP firms, involving an assortment of ingenious arrangements<sup>113</sup> that may not always possess the full features of de jure control or decision-making power, this element of the definition is far-reaching. It can, for instance, encompass an arrangement for the licensing of intellectual property by a firm of information technology consultants to an ostensibly independent firm of lawyers, where the license arrangement ties the consultants' fees to the profitability of the law firm and as a corollary gives the consultants considerable influence over the affairs of the law practice; the fees paid under the license agreement are but a camouflaged remittance of partnership profits. De facto decision-making power can similarly result from a credit arrangement under which the lender retains the power, even if residual, to direct or influence the affairs of the practice grouping. Here, the arrangement may also be one in which "the capital of the grouping is held entirely or partly" by a non-lawyer.<sup>114</sup> The different elements of the definition may therefore be seen as mutually reinforcing.

That the definition of MDP also encompasses arrangements in which non-lawyers are entitled to use the group's name further demonstrates the considerable leeway that the Establishment Directive gives host states to

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111. For a comparative examination and critique of the broad character of U.S. insider trading norms and their amenability to the control and prosecution of an ever-evolving range of activities, see generally George C. Nnona, *International Insider Trading: Reassessing the Propriety and Feasibility of the U.S. Regulatory Approach*, 27 N.C. J. INT'L L. & COM. REG. 185, 186-94 (2001).

112. Establishment Directive, , *supra* note 44, at 42.

113. See Marc N. Biamonte, Note, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1192 (2001). In discussing law firms' methods to stretch the language of the Model Rules as far as possible to cover their actions, Biamonte asserts as follows:

Many law firms are branching out into law-related businesses and using Rule 5.7 as a shield. Rule 5.7 allows law firms to operate "law-related services" if the service is provided in conjunction with, and in substance relates to, the provision of legal services. Such services have included document management, litigation consultation, technology solutions, investigative work and real estate services. MDP proponents are pushing the definition of "law related services" to meet their needs and expand their firms' practices into non-traditional areas.

*Id.*

114. Establishment Directive, *supra* note 44, at 42.

enjoin MDPs in their various manifestations.<sup>115</sup> When juxtaposed with recent developments in the United States in the area of permissible practice structures, it shows the EU regime as being far more restrictive than commentators indicate.<sup>116</sup> Article 11(5) would, for instance, make it legitimate for a host state to prohibit in its territory establishment of firm branches involved in ancillary business activities currently permitted to U.S. law firms under Rule 5.7 of the ABA Model Rules of Professional Conduct.<sup>117</sup> Though not MDPs in the sense of a direct partnership between lawyers and non-lawyers for the provision of legal services (the preoccupation of most U.S. MDP commentators), they nonetheless implicate the same concerns.<sup>118</sup> Thus, Article 11(5) does not distinguish between the two forms of practice groupings.

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115. *Id.* Article 11(5) states that “[t]he grouping is deemed to include persons who are not members of the profession if . . . the name under which it practises [sic] is used . . . by persons who do not have the status of lawyer . . .” *Id.* Thus, if a member state decides, for example, that the combined firm name of McKee, Nelson, Ernst & Young “can be viewed as a misrepresentation as to the relationship of the law firm with the accounting/consulting firm,” Brit McAfee, *Whether You Think MDP Stands for Most Discussed Problem or Most Discussed Potential, Multidisciplinary Practice Should Have Your Attention*, 2 *TRANSACTIONS* 25, 30 (2001), such a misrepresentation could be actionable under the Establishment Directive. See also discussion *infra* notes 119–27 and accompanying text.

116. See, e.g., *supra* notes 86–87 and accompanying text.

117. Rule 5.7 permits lawyers to offer law-related non-legal services to clients, either by themselves or through a separate entity controlled jointly with non-lawyers. MODEL RULES OF PROF'L CONDUCT R. 5.7 (1983). Interestingly, in the latter case, there is no specification as to the necessity for the separate entity to have a name distinct from that of the lawyer or law firm. However, the lawyers that form part of that entity must constantly remind clients that they do not practice in their capacity as lawyers when they offer ancillary business services. Hazard notes that Rule 5.7 is a compromise position between those who wish to totally prohibit ancillary business activities and those who felt that ancillary business services were a necessary corollary of law practice, both on account of the opportunity they present for high-quality integrated services to clients and on account of the needs of some lawyers—especially solo practitioners—who have traditionally performed such services as a standard source of income. See HAZARD ET AL., *supra* note 7, at 1044.

118. Given the similarity of the issues involved, the debate about the propriety of permitting ancillary services in the United States was heated before it became supplanted in the late 1990s by the new debate on MDP—taking the term MDP to mean a direct partnership between lawyers and non-lawyers for the provision of legal services, rather than similar arrangements for rendering non-legal services that nevertheless give non-lawyers de facto control over lawyers. The tone of the ancillary business activities debate is indicated by the following statement by Fox, an opponent of ancillary business practices and therefore MDP:

[T]he ancillary business movement introduces non-lawyers into positions of influence and control of the profession. All the safeguards one can imagine do not overcome the reality that those who come to prominence and success in the operations of the ancillary business will end up with real power in the governance of the overall enterprise. Quite simply, money talks, and dependence on money changes perspectives in a way that people of the utmost good will cannot overcome.

HAZARD ET AL., *supra* note 7, at 1043 (quoting Lawrence J. Fox, *Restraint Is Good in Trade*, NAT'L L.J., Apr. 29, 1991, at A17). Those who support ancillary business activities make arguments similar to those adopted currently by MDP supporters. Hazard refers to the arguments of such a proponent, James Jones:

The debate surrounding the formation in 1999 of the law firm of McKee Nelson Ernst & Young in the United States District of Columbia—an arrangement involving the international accounting and professional services firm of Ernst & Young—sheds light on how the provisions of Article 11(5) of the Establishment Directive constrain the expansion of MDP practice groupings within the EU.<sup>119</sup> Professor Wolfman captures the circumstances surrounding the establishment of McKee Nelson Ernst & Young:

There has been a great deal of Ballyhoo about the significance, the precedent making significance, of the affiliation between Ernst & Young and Bill McKee and Bill Nelson and their colleagues. . . . Yet the public has no real idea of the nature of the affiliation. We are told that the firm name, McKee Nelson Ernst & Young is lawful as a trade name, but that Ernst & Young is but a financier in the transaction, not a partner or joint venturer. In the same breath, however, [Ernst & Young] tells us that now they have a firm in which their clients will be able to receive legal services. Neither the lawyers nor the accountants have been willing to make public their underlying documents, even in redacted form with the dollar amounts deleted. The press releases and interviews have emphasized that E&Y has no equity interest in the firm, notwithstanding the misleading implication of the firm name to the contrary. They insist that E&Y has merely financed the start-up, so-called independent law firm. But they will not divulge the terms of the so-called "financing."<sup>120</sup>

This affiliation presented members of the bar with the difficulty of determining how to go beyond the mere concurrence or similarity in the names of the two firms in ascertaining whether the new law firm was indeed under the influence and control of the accounting firm.<sup>121</sup> Presumably, the District of Columbia authorities did not encounter these difficulties since they could request from the law firm any information they reasonably required in order to ascertain the true workings of this affilia-

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[T]he practice of law 'has become far more complex and diverse' than could be imagined some years ago: the underlying economic and social activity is more complicated, requiring the tools and knowledge of other disciplines, and the law's efforts to regulate under these circumstances is infinitely more complex and requires the skills of specialized lawyers 'working in tandem' with professionals from other disciplines. This interdisciplinary collaboration, Jones argues, is best carried on in organizations that give equal status and rewards to nonlawyer participants.

*Id.* at 1044.

119. See Wolfman, *supra* note 88.

120. *Id.*

121. See *id.* There was a general belief that the new firm chose the District of Columbia (DC) as its place of establishment because of the relatively relaxed rules of that jurisdiction on inter-professional associations involving lawyers and non-lawyers. However, the firm's lack of transparency regarding the details of its financing and relationship with the accounting firm prevented a full evaluation of the permissibility of the practice structure under the DC rules of professional regulation, given that such partnerships, unlike corporations, were not obliged to make mandatory filings that would enable a third party to discern the details of the financing arrangements and ownership structure. *Id.*



tion.<sup>122</sup> There is always a possibility, however, that the law firm would hedge and be less than forthcoming, given that the right to form cooperative associations with non-lawyers is not a completely unfettered one under the District of Columbia version of Rule 5.4 of the Model Rules of Professional Conduct,<sup>123</sup> and the requested disclosures could expose the firm to sanctions in some respects. For instance, the District of Columbia mandates that an association restrict itself to the provision of legal services, in connection with which the non-lawyers' sole function would be to provide input when legal questions arise that implicate their expertise.<sup>124</sup> However, uncovering the facts necessary to determine that such an association has contravened this (or any other) restriction may require District of Columbia authorities to become embroiled in costly, protracted litigation. By contrast, in the same circumstances, by relying on the mere resemblance between the names of the new law firm and the accounting firm, an EU host state could legitimately decide to enjoin the association under Article 11(5).<sup>125</sup> Beyond questions bordering on information discovery, the host state can, upon learning the facts, rely on any evidence of de facto control as a basis for enjoining the practice grouping.<sup>126</sup> It is not clear that reliance on such evidence of de facto control is possible under Model Rule 5.4.<sup>127</sup>

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122. *Id.*

123. DC MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (1991).

124. *Id.* at 5.4(b)(1).

125. See Establishment Directive, *supra* note 44, at 42.

126. *Id.*

127. Wolfman's comments on the McKee Nelson Ernst & Young law firm suggest, however, that it should be possible to rely on evidence of de facto control, especially evidence of loans made to the law firm on less-than-commercial terms:

We all know that the law looks behind mere labels to discover the substance of privately structured arrangements. The label of "debt" has long been penetrated to see if it is but a cover for equity. McKee and Nelson and their co-author Whitmire have described the state of the law succinctly and accurately in their treatise, *Federal Taxation of Partnerships and Partners*.

An arrangement that lacks economic substance or business reality is a sham and is not recognized for any tax purposes.

A little later, dealing with a decided case, the book says correctly

Even if an unconditional promise is made to repay an advance at a time certain or on demand, debt-equity principles may apply to characterize a 'loan' as equity. Thus, an ostensible loan to a partnership without adequate security or pursuant to noncommercial terms may be characterized as equity and the lender may be treated as a partner.

The principle of substance-over-form which underlies the McKee-Nelson-Whitmire statements in their treatise is not limited to tax cases, and I've not heard that the doctrine is inapplicable either to Bill McKee or to E&Y, or to any other lawyers or accountants when it comes to the law and ethics of legal practice. Surely McKee and E&Y would allow the Commission to examine their constitutive documents, and the Commission should do so. The Commission's job is not to police, but it is to find out what is happening, and not to base its findings on speculation or surmise.

Wolfman, *supra* note 88 (quoting ROBERT L. WHITMIRE ET AL., *FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS* ¶¶ 3.03[3] & 3.03[3][b] (2d. ed. 1993)) (internal citations omitted).

The EU formulation of Article 11(5) may have been driven in part by the Danish experience in the litigation between the Danish Bar Association and Arthur Andersen over the Andersen-affiliated law firm, Arthur Andersen Advokataktieselskab.<sup>128</sup> The Danish Bar Association argued in its suit before Copenhagen's Maritime and Commercial Court, among other things, that the use of the name "Arthur Andersen Advokataktieselskab" with the addition of the name "Arthur Andersen & Co. SC" on the company's letterhead decisively showed that the law firm was not independent.<sup>129</sup> The Bar Association thought that the establishment and subsequent running of the law firm amounted to a circumvention of Section 124 of the Administration of Justice Act 1916, a Danish statute which prohibited the practice of law in partnership with non-lawyers.<sup>130</sup> The Court, reflecting the views of the Danish Ministry of Justice, indicated that there was no ground to indict the law firm for an infringement of Section 124.<sup>131</sup> Notwithstanding the use of the Arthur Andersen name, the Court accepted that the firm was a financial entity that was independent of Arthur Andersen SC and all other participants in the network, including Arthur Andersen, Chartered Accountants.<sup>132</sup> Even though the firm did not accept any suggestion that it lacked independence, it did accept that the use of the firm name may be misleading and subsequently changed the name.<sup>133</sup> The Danish regulatory authorities could more easily enjoin the activities of a firm like Arthur Andersen Advokataktieselskab, acting based on its name only, under the provisions enacted in line with Article 11(5) of the Directive.<sup>134</sup>

## B. Other European Instruments

In addition to the Establishment Directive, other pronouncements of European institutions are important to facilitate an understanding of how the European regulatory authorities address the cardinal issues of the legal

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128. *Advokatraadet v. Arthur Andersen Advokataktieselskab*, SH 24 November 1995 (Den.), *Ugeskrift for Retsvæsen*, 1996.729SH 729-32. The defendant law firm was an affiliate of Arthur Andersen & Co. SC, a Société Cooperative incorporated under the laws of Switzerland with the purpose of administering, coordinating, and developing an international network between a very large number of undertakings that provide professional advice. The affiliated undertakings were divided into three groups: auditing and other consulting business, including tax advice; information technology consulting; and legal advice. Legal advice was the newest and smallest area. The lawyers who made up the defendant firm had been before the establishment of the law firm employed by Arthur Andersen, Chartered Accountants, the accounting and tax consulting affiliate of the Arthur Andersen & Co. SC, Société Cooperative in Denmark. I am grateful to Erik Kjaer-Hansen of the Danish Bar for information and translation of this case.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Ramón Mullerat reports that Arthur Andersen eventually discontinued its relationship with the firm and developed a loose association with a firm of another name, Advokatfirma RØnne Lundgren. Ramón Mullerat, *Report on Multidisciplinary Practices in Europe*, para. VI(8), at <http://www.abanet.org/cpr/mullerat1.html> (Apr. 19, 1999).

134. *Id.*

profession. The documents discussed in this section indicate the problems and prospects of MDP in both the EU and the wider European area.

### 1. Council of Europe Recommendation Rec (2000)21

Notable among such instruments is the Recommendation of the Committee of Ministers of the Council of Europe to Member States on the Freedom of Exercise of the Profession of Lawyer adopted on October 25, 2000.<sup>135</sup> The Recommendation reaffirms “the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason.”<sup>136</sup> It goes on to recommend that “the governments of member states take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the principles contained in the recommendation.”<sup>137</sup> The Recommendation then enunciates six broad principles<sup>138</sup> among which Principle V, governing lawyers’ associations, is particularly germane to the question of MDP. It provides in part as follows:

1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.
2. Bar associations or other professional lawyers’ associations should be self-governing bodies, independent of the authorities and the public.

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135. Council of Europe, Committee of Ministers, Recommendation Rec(2000)21 of the Committee of Ministers of the Council of Europe to Member States on the Freedom of Exercise of the Profession of Lawyer [hereinafter the Recommendation], at <http://cm.coe.int/ta/rec/2000/2000r21.htm> (Oct. 25, 2000).

136. *Id.*

137. *Id.*

138. Principle I describes general principles on the freedom to exercise the profession of lawyer; Principle II addresses legal education, training, and entry into the legal profession; Principle III describes the role and duty of lawyers; Principle IV affirms that all persons have the right of access to a lawyer; Principle V governs lawyers’ associations; and Principle VI covers disciplinary proceedings. *Id.* The first two paragraphs of Principle I emphasize the need for lawyers to be free of interference from the authorities or the public in the exercise of their profession, and that access to the profession should be controlled by independent professional authorities. *Id.* Principle III, in paragraphs one and two, recommends that (1) “[b]ar associations or other lawyers’ professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly”; and (2) “[p]rofessional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.” *Id.* Other aspects of the Recommendation emphasize the need for lawyers to avoid conflicts of interest, take up pro bono work, and respect several of the incidences of legal practice that have traditionally constituted animating norms of the legal profession. *Id.* Overall, the Recommendation clearly reaffirms the traditional values that have animated the legal profession in liberal Western societies—especially professional independence of lawyers in its various ramifications as a fundamental requirement of a free society under the rule of law.

3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.
4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers . . . .<sup>139</sup>

These provisions, which emphasize the independence and protection of lawyers, are relevant to the MDP debate because many MDP proponents assume, implicitly or expressly, that lawyer independence is either unnecessary or not sufficiently fundamental to merit protection from the potential impact of professional groupings, even where stresses inherent in MDPs place that independence at risk.<sup>140</sup> Beyond the criticism of independence in the context of MDP is a broader skepticism in U.S. academic commentary concerning the value of independence and the need for its maintenance at relatively strict levels.<sup>141</sup> By contrast, the Recommendation is indicative of contrary thinking in influential European circles. The Recommendation places lawyers' independence at the forefront of social values and, in so doing, departs from the position held in U.S. academic circles. It effectively places a major obstacle on arguments that predicate the emergence and acceptance of MDP on the needlessness or amenability to compromise of lawyer independence. Such arguments are unsustainable in the European context, thus creating a less conducive atmosphere for the propagation of MDPs than many MDP proponents assume. The cross-cutting and broad membership of the Council of Europe, as well as its established track record in articulating and championing social values and human

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139. *Id.*

140. The form and nuances of this depreciation of the importance of lawyer independence are quite variegated. Some MDP proponents emphasize that the benefits flowing from MDP outweigh the costs of reduced independence or compromised confidentiality for lawyers, confidentiality itself arguably being an indicator of lawyers' independence from authorities and persons from whom they may otherwise withhold information. See generally Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213, 1216-19 (2000) (arguing generally that the attenuated client loyalty, confidentiality, and attorney-client privilege requirements for lawyer-accountant MDPs would bode well for corporate clients by making the corporation's lawyers better able to challenge the inside managers and "disrupt" internal misconduct by them). See also Kostant, *Paradigm Regained*, *supra* note 18, at 44-47. Other MDP proponents, while tacitly accepting values such as confidentiality and the avoidance of conflicts of interest, refuse or fail to recognize the link between these principles and the broader principle of independence of lawyers. It follows from this thinking that the principle of professional independence, even if accepted, should not compel the "isolation" of lawyers from other professionals, a practice that is neither universal nor fundamental. See Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1116-18 (2000). A strand of the argument here appears to be that the core values are not threatened by practice groupings like MDP that involve lawyers and non-lawyers in joint practice. *Id.* at 1144-45.

141. For a questioning of the value of lawyer independence from regulatory oversight by authorities other than bar associations and a discussion of the various bodies that could exercise regulatory power and effective control over lawyers, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 812-14, 853-73 (1992). See generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (challenging some aspects of lawyer independence, while reinforcing others).

rights in the wider European area, makes its position on lawyer independence a very influential one, perhaps even more influential than the position of the EU itself.<sup>142</sup>

## 2. Council of the Bars and Law Societies of the European Union's Code and Resolutions

The Commission Consultative des Barreaux de la Communauté Européenne (CCBE), as the consultative organization of the bar organizations of the European Union and other European states, is quite influential in European legal circles, maintaining consultative status at the Council of Europe and analogous relationships with other European institutions, including the European Court of Justice.<sup>143</sup> The CCBE “strongly opposes the concept of multi-disciplinary partnerships”<sup>144</sup>—an opposition that has been manifest in its initiatives over the years. One of the initiatives is the Declaration on Multidisciplinary Partnerships unanimously adopted in plenary session in Brussels on November 26, 1993.<sup>145</sup> On November 12, 1999, the CCBE met in plenary session in Athens and produced a report that further reinforced its opposition to MDPs. Reiterating the value of lawyer independence and the relevance of the core values that support such independence, including the principle of confidentiality and the rule against conflict of interests (values incompatible with the realities of MDP, especially in connection with accountants), the CCBE concluded as follows:

[I]n the jurisdictions with which it is familiar, the problems inherent to integrated co-operation between lawyers and non-lawyers with substantially differing professional duties and correspondingly different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded, and that inroads upon both, as a result of exposure to conflicting interests served within the relevant organization, are adequately avoided.

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142. Founded in 1949, the Council of Europe had 41 members as of April 1999, cutting across countries of Eastern and Western Europe and extending as far east as Turkey. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 789 (2d ed. 2000). Its object is “to promote democracy, the rule of law and greater unity among the nations of Western Europe.” *Id.* It has initiated and promulgated several highly influential international instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. *Id.* at 786-87.

143. For institutional affiliations of the CCBE and the multi-state reach of its activities, see *supra* text accompanying note 73.

144. See Bevernage, *supra* note 73, at 96.

145. See Mullerat, *supra* note 133. See also Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589, 622 (2002) (stating that CCBE adopted two declarations in 1993 and 1996 strongly opposing MDPs). “A majority of the Member State delegations endorsed a resolution in 1998 that would have softened the tone of the opposition, but that resolution fell short of the required supermajority vote.” *Id.*

The legal profession is a crucial and indispensable element in the administration of justice and in the protection available to citizens under the law. Safeguarding the efficacy and integrity of this factor within a democratic society, is a matter of the highest concern and priority. It is part of CCBE's mission to ensure, that both are given their due.

CCBE consequently advises that there are overriding reasons for not permitting forms of integrated co-operation between lawyers and non-lawyers with relevantly different professional duties and correspondingly different rules of conduct. In those countries where such forms of co-operation are permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.<sup>146</sup>

Beyond such resolutions, the CCBE's Code of Conduct for Lawyers in the European Union<sup>147</sup> contains several provisions that reiterate CCBE's opposition on MDPs in Europe. Article 3.6 ("Fee Sharing with Non-Lawyers") provides that "a lawyer may not share his fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws of the Member State to which the lawyer belongs."<sup>148</sup> Although this provision, like many provisions of the CCBE Code, is semi-peremptory in the sense that it does not have a definite prohibition of fee-sharing arrangements with non-lawyers, it nevertheless reinforces the overall CCBE position as articulated more expressly in its plenary resolution opposing MDPs and is in tandem with the provisions of the Establishment Directive, effectively leaving to each jurisdiction the prerogative of regulating MDPs. By examining other provisions of the Code, such as lawyer independence and client confidentiality, CCBE's position on MDP becomes clear. Article 2.1.1 emphasizes that "[t]he many duties to which a lawyer is subject require his *absolute independence, free from all other influence*, especially such as may arise from his personal interests or *external pressure*"<sup>149</sup> irrespective of whether the context is litigation or non-litigation services. Article 2.3 speaks of confidentiality as being the essence of a lawyer's function and enjoins a lawyer to "require his associates and staff and anyone engaged by him in the course of providing professional services to observe the same obligation of confidentiality."<sup>150</sup> These two peremptory provisions clearly stand as impediments to the formation of MDPs.

### 3. *Resolutions of the Federation of European Bars (La Fédération des Barreaux d'Europe)*

On May 23, 1992, the Federation of European Bars (FBE) was founded in Barcelona and opened its membership to all bars established in member

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146. CCBE, POSITION OF CCBE ON INTEGRATED FORMS OF CO-OPERATION BETWEEN LAWYERS AND PERSONS OUTSIDE THE LEGAL PROFESSION 3-4, at <http://www.ccbe.org/doc/En/mdpuk.pdf> (Nov. 12, 1999).

147. CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION, *supra* note 73.

148. *Id.*

149. *Id.* (emphasis added).

150. *Id.* art. 2.3.4.

states of the Council of Europe.<sup>151</sup> FBE succeeded the Conference of Principal Bars of Europe, established on June 27, 1986, in Paris, by the Bars of Amsterdam, Barcelona, Brussels, Geneva, Milan, Paris, Frankfurt, and the Order of Portuguese Lawyers, joined a little later by the Bar of Krakow.<sup>152</sup> “Bars eligible for membership of the Federation are national, regional or local Bars depending on the organization of the legal profession in each member state of the Council of Europe.”<sup>153</sup> The major distinction between the FBE and the CCBE is that the former focuses on and accepts as members local bars, e.g., the bars of cities and other domestic sub-divisions within countries. Apparently not as internationally conspicuous as the CCBE, its activities nevertheless elicit some attention, especially in view of the grassroot character of its membership.

On May 3, 1997, in Berlin, the FBE’s General Assembly passed a resolution on multidisciplinary partnerships.<sup>154</sup> While the resolution exhibits some ambivalence on combinations between lawyers and non-lawyers,<sup>155</sup> it does sufficiently indicate the Federation’s opposition to MDP. Paragraph four of the resolution stipulates the following: “In accordance with the CCBE decision on 26th November 1993 multi-disciplinary partnerships between lawyers and non-lawyers with the exception of specific legislation taking account of the plurality of function of the lawyer and the notary, should not be permitted.”<sup>156</sup> Apart from the intrinsic importance of the declared opposition to MDP, this resolution reinforces the CCBE’s opposition by expressly acknowledging it and relying thereon.

### C. Operation of MDP in Specific European Jurisdictions

It may be argued that by claiming that MDP has become established in Europe some commentators on MDP merely emphasize the de facto position within some European jurisdictions, rather than the largely de jure inter-European position, which has been the focus of this Article. Such emphasis on country-specific de facto positions is strictly speaking immaterial, given that the operation of an MDP in disregard of the rules of law operating within a jurisdiction is not, and should not be, a legitimate, normatively acceptable basis for articulating the existence of a right to do so or the general position of the law on the subject. It is conceivable that the law

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151. THE FEDERATION OF EUROPEAN BARS, STATUTES OF THE EUROPEAN BARS FEDERATION art. I, at <http://www.fbe.org> (last visited Feb. 4, 2004).

152. *Id.*

153. *Id.* art. V. “A Bar in a state which is not a member of the Council of Europe can be admitted as an observer if it declares that it acknowledges and will observe the principles set out in the[ ] statutes” of the FBE. *Id.*

154. See Mullerat, *supra* note 133, para. IV(2).

155. Paragraph three of the resolution provides that “the exercise in one location of the profession of lawyer and other professions if it is permitted should be accompanied by precautions to avoid all confusion and to respect the fundamental [sic] professional ethic of the lawyers['] profession[.] particularly independence, professional secrecy (privilege) and conflict of interest.” E-mail from Nathalie Campagnet-Karsch to the author (July 16, 2002) (on file with author). See also Mullerat, *supra* note 133, para. IV(1)-(2).

156. See e-mail from Nathalie Campagnet-Karsch to the author, *supra* note 155.

would become strictly enforced in the future and the offending activities effectively checked, thereby bringing the de facto position in line with the legal position.<sup>157</sup> However, it is a fact that the legal position within some specific European countries is permissive of MDPs, and to the extent that such de jure permission (or even tolerance) of MDP is the emphasis in the claims made for MDP in Europe, such claims have substance. For instance, Germany, France, and Spain are jurisdictions in which MDPs have received some legal recognition, albeit in situations contextually and historically far removed from the U.S. situation because of differences between the common law and civil law traditions in their conceptualization of the role of professions. England, on the other hand, with jurisprudence closer to that of the United States, is a jurisdiction where a lot of deliberation has taken

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157. De-emphasizing the implications and importance of the de facto situation in these countries may be criticized as being formalistic, in the sense of ignoring some of the non-legal material out of which the law on MDP would ultimately grow. This line of reasoning, if accepted, necessarily invites a factual inquiry: To what extent have MDPs sprung up in specific European jurisdictions? What percentage or portion of the market for legal services is served by MDPs? What is the degree of demand for legal services offered by MDPs? These questions in turn invite answers to difficult, if not impossible, definitional and statistical questions, which are not uniform. For instance, how to define "legal services" for determining the existence of demand for legal services offered by MDPs? Does MDP include only the fully integrated MDP or does it include intermediate forms other than the fully integrated MDP? ABA's MDP Commission has noted these difficulties in its work. The Commission, after a period of speculation about the demand for MDP services within the United States, ultimately sought through the American Bar Foundation the assistance of expert economists in quantifying demand for MDPs that provide legal services. See Annual Report, *supra* note 5, at 192. This proved futile, however, as none of the contacted top economists thought it feasible to compute the demand for MDP legal services in the present circumstances. *Id.* The Institute for Social Research (ISR) at the University of Michigan similarly advised the Commission on the related question of whether changes to the legal profession's ethics, permitting MDPs, would "further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients." *Id.* The ISR replied "that 'public interest,' 'independence,' 'loyalty,' or 'conflict of interest' were, as a practical matter, incapable of definition in a manner that was independent of perception." *Id.* These efforts by the ABA Commission point to the inherent indeterminacy of broad social facts under consideration.

Laurel Terry, examining the nuts and bolts of German MDPs, similarly bemoaned the lack of reliable data on MDPs in Germany, concluding that his studies did not "'prove' the acceptability or unacceptability of MDPs" in Germany. See Terry, *supra* note 40, at 1569-71, 1609-11. This is notwithstanding that *Bundesrechtsanwaltsordnung* (BRAO) Section 59a approved MDP in Germany. *Id.* at 1561 & n.65. For conflicting surveys quantifying demand or desire for MDP services in England, see Michael Chambers & Richard Parnham, *Accountants in the Legal Market: Has the Strategy Failed?*, COM. LAW. (London), June 21, 1998, at 40. The survey indicated that out of the 350 largest British corporations, surveying heads of legal departments (95 responded) and finance directors (34 responded), 88% of lawyers (84 persons) and 85% of the finance directors (29 persons) opposed MDPs that render legal services. *Id.* at 40, 43. The Financial Times backed a survey of one hundred senior executives at U.S. and UK financial institutions. See Jim Kelly, *Long Arm of the Law*, FIN. TIMES (London), Sept. 9, 1999, at 29. The survey indicated that even though two-thirds of the interviewed executives "preferred buying legal services in the traditional way . . . through a law firm," more than fifty percent of them indicated that they would be willing to accept a firm that combined lawyers and accountants. *Id.* Among U.S. financial companies this figure was seventy-five percent. *Id.*



place over the MDP question, but the fundamental restrictions remain in place. This needs, however, to be distinguished from an assertion that the supranational norms of the EU or any other international organization constrain the specific countries in their decision on whether to permit or prohibit MDPs, an assertion unsupported by EU legislation or jurisprudence.

Since 1994, Germany explicitly recognized MDP as a permissible practice structure in the governing legislation: *Bundesrechtsanwaltsordnung* (BRAO), i.e., Federal Lawyers Act, section 59a.<sup>158</sup> The legislation permits MDPs of certain regulated professions such as tax consultants, patent lawyers, and accountants.<sup>159</sup> At least since 1968, such practice structures had been permitted by virtue of judicial pronouncement by the German courts.<sup>160</sup> Because of its relatively long-standing recognition in Germany, the MDP scene in that country seems quite settled. It is instructive, though, that the professions involved were to some extent regarded as different branches of the legal profession, which in Germany (as in many other civil law countries) is variegated, with different branches performing functions that are integrated under a single profession in the U.S. system.<sup>161</sup>

France formally permitted MDP after a March 14, 1998 decision of the National Bar Council, which allowed collaboration only between lawyers and members of other regulated professions.<sup>162</sup> The immediate result of such recognition was the fractionalization of the French legal profession into several branches and the repeated attempts of the French government to forge a strong unified legal profession. Such a unified profession, it was felt, would be better situated to compete with foreign law firms in the French and global marketplaces and, perhaps more importantly, would act as a bulwark against the steady erosion of French legal values by U.S. and British law firms who have a considerable presence in France.<sup>163</sup> One of the moves toward such a unified profession was the creation in 1971 of the *conseil juridique*, as part of the 1970 reform of a regulated profession.<sup>164</sup> The *conseil juridique* could not practice before the Court and his activities were restricted to advisory work on legal aspects of business and related

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158. Terry, *supra* note 40, at 1561.

159. *Id.* at 1561-62.

160. *See id.* at 1560-61 (discussing German cases that addressed the MDP issue).

161. *See supra* text accompanying notes 53-55.

162. *See* MacCrate Report, *supra* note 54, at 208.

163. *See id.* at 209-10. Exploiting these sentiments, *Juri-Avenir*, the professional association of the Big 5 in France, called MDPs "the most efficient vehicle for the development of French law internationally, designed 'to reinforce the status of French Business Law against the threat of Common law hegemony.'" *Id.* at 209 n.64. The report further stated that "[i]t is the American and British firms established in France rather than the Big [5] that promote the Anglo-Saxon legal system in France." *Id.* at 209-10 (internal quotation marks omitted). Paradoxically, the Big 5 are purveyors of common law traditions, given that most of them originated from the UK and United States, apart from currently extensively practicing in these jurisdictions.

164. *Id.* at 195.

transactions.<sup>165</sup> A subsequent 1990 reform unified the *conseils juridiques* with the *avocats* into a single profession of *avocats*.<sup>166</sup> This, however, implicated difficult issues of MDP because many of the *conseils juridiques* were members of the “Big 5” multinational professional service firms and their integration into the *avocat* profession, while they were still members of the Big 5, meant that the 1990 reform implicitly sanctioned MDPs. Indeed, some accountants counted themselves among the former *conseils juridique*. The resultant arguments and debate pressured regulatory authorities and led to the National Bar Council’s (*Conseil National des Barreaux*) formal recognition of MDP in France in 1998.<sup>167</sup>

The terrain, however, remains murky in some respects. For instance, the requirement that lawyers in an MDP use a firm name different from that of the non-lawyer firm with which they are associated means that France does not permit fully integrated MDP. Furthermore, the extent of the French bar authorities’ power in regulating MDPs involving other professions is not clear. Thus, the *Juri-Avenir*, the professional association of the Big 5 in France,<sup>168</sup> had contended that “the [French] National Bar Council does not have the jurisdiction to monitor or control any internal MDP agreement or regulation relating to rules of ethics and professional responsibility,” and that these are within the jurisdiction of local bar associations.<sup>169</sup> If correct, this implies that the Council rules relating to MDP operation, such as the avoidance of certain names or conflicts of interest, are without effect, leaving local bars (like the bar of Nanterre (Hauts-de-Seine), seventy percent of whose membership consists of lawyers associated with the Big 5) with authority over these salient issues. These factors perhaps account for the abiding uncertainty as to whether MDPs in France operate *de facto* or *de jure*.<sup>170</sup>

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165. See *id.* at 194–96. Before 1970, *Conseils Juridiques* (*Conseils juridiques et fiduciaires*—i.e., legal and tax consultants) had existed as a new, unofficial profession. *Id.* at 194. As such, until the 1970 reform, the title was not protected. *Id.* at 195. *Conseils juridiques* covered the areas of transactional practice that had been neglected by the more traditional branch of the legal profession, the *avocats*, who focused on litigation to the exclusion of business advisory services. See *id.* Such advisory work was not considered an aspect of legal practice, so that non-lawyers (which technically included the foreign lawyers and law firms in France) could practice in that area. *Id.* at 195–96. Following the 1970 reform, the *conseil juridique* became a protected title by virtue of Law 71-1130 of December 31, 1971. *Id.* at 195 & n.20.

166. *Id.* at 198. All persons who were *conseils juridiques* as of December 31, 1991 became *avocats* by operation of law on January 1, 1992. *Id.*

167. *Id.* at 208. “By its decision of March 14, 1998, the National Bar Council officially allowed all *avocats* to form associations and partnerships with members of other regulated professions including accountants and auditors,” thus officially recognizing MDPs in France. *Id.* at 208. A major aspect of the decision was the requirement of a distinct firm name. *Id.* In its decision of March 1999, the French National Bar Council affirmed the 1998 decision permitting MDPs, which required that “lawyers in an MDP . . . use a firm name distinct from the name of the MDP.” *Id.* at 204. Fidal, the legal practice affiliate of KPMG in France, has reportedly challenged this decision in the courts. *Id.* at 203–04.

168. *Id.* at 209.

169. *Id.* at 210.

170. See ADAMSON, *supra* note 45, at 157.

In the wake of the 1998 decision of the National Bar Council, the French Prime Minister commissioned the Nallet Report,<sup>171</sup> the purpose of which was to study how France could reconcile legal ethics considerations with the demands of MDP as a union of several professions providing legal and other services.<sup>172</sup> The report notes the presence of the Big 5 in the French legal market through their control of substantial law practices.<sup>173</sup> It states that prohibiting MDPs in France is out of the question and makes recommendations for their regulation.<sup>174</sup> Salient aspects of the recommendations include the creation of a national commission having jurisdiction over matters of professional ethics with authority "to prescribe ethical rules where there were conflicts or gaps in the rules [ ], and to resolve particular ethical cases where existing disciplinary bodies lacked jurisdiction."<sup>175</sup> The report also recommends improvements in the financing of law firms through the introduction of passive investments to better enable French firms to obtain the means and attain the size necessary to compete internationally.<sup>176</sup>

With regard to Spain, it has been asserted that "although there are in theory bans on MDPs, they seem to exist de facto."<sup>177</sup> This underscored the fact that MDP was neither expressly permitted nor prohibited in Spain under the General Statute for Lawyers (*Estatuto General de la Abogacia Espano\_la*) of 1982,<sup>178</sup> as amended. A 2001 review of this legislation<sup>179</sup> embodies provisions for MDP. Article 29 of the revised legislation allows lawyers to form MDPs with members of liberal professions that are compatible with the practice of law.<sup>180</sup>

171. The Nallet Report was named after Henri Nallet, the French legislator and ex-justice minister responsible for the report. See MacCrate Report, *supra* note 54, at 192.

172. *Id.* at 211-12.

173. *Id.* at 192-93, 212.

174. *Id.* at 212.

175. *Id.*

176. See *id.* MacCrate Report, *supra* note 54, at 214-15; see also Sydney M. Cone, III & François Berbinau, *The Nallet Report and Multidisciplinary Practice*, at <http://www.abanet.org/cpr/nallet.html> (Sept. 30, 1999). A summary of the Nallet report was prepared for the Symposium on Multidisciplinary Practice organized by New York Law School's Center for International Law held on October 25, 1999 in New York. See Symposium, *Multidisciplinary Practice*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 153, 190 (2000).

177. See ADAMSON, *supra* note 45, at 156. See generally Mullerat, *supra* note 133, para. VI(3).

178. *Estatuto General de la Abogacia Espano\_la*, R.C.L., 1982, 2294 y 2656. The Royal Decree 2090 of July 24, 1982 approved the first General Statute for Lawyers. See Mullerat, *supra* note 133, para. IV(3). I am grateful to Farina Rabbi of Gibson Dunn & Crutcher LLP, New York, and Maria Isabel Köpcke Tinturé of the Spanish Bar, Barcelona, for translation of Spanish materials.

179. See Real Decreto 658/2001, de 22 de junio por el que se aprueba el Estatuto General de la Abogacia Espano\_la, B.O.E., 2001, 164, available at <http://www2.cgae.es/es/cgae/docftp/egae.pdf> (last visited Feb. 27, 2004); see also Ramón Mullerat, *Multidisciplinary Practices and the Public Interest: Is There a Possible Solution?*, 15 TEMP. INT'L & COMP. L.J. 31, 35-36 (2001) (discussing proposed amendments to Spanish General Statute for Lawyers).

180. *Estatuto General de la Abogacia Espano\_la*, *supra* note 178, art. 29.

In addition to the above legislation, the General Council of the Spanish Lawyers (*Consejo General de la Abogacía Española*) approved on June 30, 2002 the Ethical Code of the Spanish Legal Profession, the *Código Deontológico*.<sup>181</sup> The Ethical Code has no force of law but contains behavioral guidelines that nevertheless can be important in internal disciplinary matters.<sup>182</sup> Articles 2 and 6 of the Ethical Code stipulate lawyer independence from external influence and institute firm-wide imputation for disabilities (incompatibilities) affecting members of the bar.<sup>183</sup> The exhortation to independence may be taken as a censure of MDP, at least in some of its forms.

In the United Kingdom, the legal profession is functionally split between barristers and advocates, on the one hand, and solicitors on the other, as well as geographically between England and Wales, Scotland, and Northern Ireland.<sup>184</sup> The profession, except for solicitors in England and Wales,<sup>185</sup> disfavors MDP, supporting the position of CCBE on the issue.<sup>186</sup> It is, however, the solicitors in England and Wales who currently constitute the most numerical and, perhaps, most influential branch of the legal profession,<sup>187</sup> though they have historically occupied a lower position than the barristers in terms of prestige and social influence.

Notwithstanding apparent support from English solicitors and ostensible leeway in that regard in § 66 of the Courts and Legal Services Act of 1990,<sup>188</sup> the current position in England is that MDPs are prohibited, whether involving barristers or solicitors.<sup>189</sup> While partnerships between solicitors have been permitted, the Solicitors' Practice Rules 1990 have prohibited such association between solicitors and barristers or any other profession.<sup>190</sup> However, the Law Society of England and Wales (the umbrella

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181. CÓDIGO DEONTOLÓGICO (2002), at <http://www2.cgae.es/es/cgae/docftp/cod-deo.PDF> (last visited Feb. 27, 2004).

182. *See id.*

183. *Id.* at 9, 11.

184. MacCrate Report, *supra* note 54, at 216.

185. *Id.*

186. Neil Rose, *European Lawyers Vote for MDP Ban*, L. SOC'Y GAZETTE, Nov. 17, 1999, at 1.

187. MacCrate Report, *supra* note 54, at 216; *see also* ADAMSON, *supra* note 45, at 27.

188. Courts and Legal Services Act, 1990, c. 41, § 66 (Eng.).

189. Section 66 repealed the prior Act prohibiting solicitors from entering into partnership with non-solicitors, but left the Law Society with the discretion to prohibit such partnerships. *Id.* § 66 (2). It similarly declared that no common law rules prevent barristers from forming unincorporated associations with non-barristers, but left the General Council of the Bar with the discretion to prohibit such association. *Id.* § 66 (5)(6). Both the Law Society and the General Council of the Bar retain such prohibitions. Rule 205 of the Code of Conduct of the Bar of England and Wales prohibits practicing barristers from supplying services through and on behalf of any person, except under the limited exceptions for employed barristers under Rule 502. CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES R. 205 (7th ed. 2000). Rule 7 of the Solicitors' Practice Rules 1990 similarly prohibits fee-sharing and partnerships with non-lawyers. *See* THE LAW SOCIETY, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS 22 (Nicola Taylor et al. eds., 8th ed. 1999).

190. *See* ALLISON CRAWLEY, THE LAW SOCIETY OF ENGLAND AND WALES, WRITTEN REMARKS TO THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE para. 4 (1999), at

organization of solicitors with statutory regulatory powers)<sup>191</sup> has, since at least 1999, examined the need for a relaxation of the Practice Rules against MDP.<sup>192</sup> It has done so partly out of self-interest in expanding solicitors' opportunities for business development and partly out of apprehension that antitrust regulators may view the prohibition of MDP as being anticompetitive and move against the rules directly, thus denying the Society of a meaningful role in shaping the rules for MDP.<sup>193</sup> Because of this, and because of the existence of law practices sponsored by the Big 5 in England, one may think that England and Wales have formally permitted MDPs. This is, however, not the case. Indeed, the most recent thinking within the bar regulatory circles indicates that, notwithstanding the Law Society's stated policy that solicitors should be able to practice within MDPs, such practice would require the government to introduce legislation, which is not likely to happen in the near future.<sup>194</sup>

The Big 5 can legitimately offer legal services to the public in England and Wales, given that the legal profession in these jurisdictions never enjoyed a monopoly over legal services, except for court advocacy and the preparation of conveyance and probate documents.<sup>195</sup> Solicitors merely had a monopoly of their professional titles.<sup>196</sup> Thus, non-lawyers (including accountants) may validly render legal services not connected with litigation, if they do not represent themselves to the public as being solicitors or barristers.<sup>197</sup>

The Big 5 did not follow this approach in penetrating the legal market because identifying themselves as employers of non-lawyers wishing to offer legal services would present them in an unfavorable public light. Instead, the Big 5 have sought to sponsor and associate themselves with "independent" firms of solicitors under varying arrangements, the full details of which are sometimes undisclosed to the public.<sup>198</sup> The best known firms associated with the Big 5 in England include Garrett & Co.

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<http://www.abanet.org/cpr/crawley.html> (last visited Feb. 4, 2004). Recent liberalization of the regime for lawyer regulation has led to an odd situation where solicitors can form partnerships with foreign lawyers from other EU countries (who, strictly speaking, were originally non-lawyers under the law in England and Wales) but may not do so with English barristers. See *id.*; see also ADAMSON, *supra* note 45, at 28. Barristers under rules 403.1 and 1001 of the Code of Conduct of the Bar of England and Wales are in a similar situation—they may form partnerships with non-English lawyers but not with English solicitors. See CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES, *supra* note 189, R. 403.1, 1001.

191. CRAWLEY, *supra* note 190, para. 3.5.

192. See MacCrate Report, *supra* note 54, at 218-21.

193. See CRAWLEY, *supra* note 190, para. 6.

194. See Correspondence from Nicola Taylor, Policy Executive, Professional Ethics Division of the Law Society, to the author (July 26, 2002) (on file with author).

195. See CRAWLEY, *supra* note 190, para. 2.1-2.3.

196. *Id.* para. 2.1.

197. See ADAMSON, *supra* note 45, at 28; see also CRAWLEY, *supra* note 190, para. 2.

198. Dzienkowski and Peroni note that in the United Kingdom, while lawyers may not partner or share legal fees with a non-legal entity, deregulation in the 1980s facilitated the formation of alliances between solicitor groups and accounting firms. Dzienkowski & Peroni, *supra* note 16, at 115-16. Accounting firms have taken advantage of the liberalization trend:

(part of the former Arthur Andersen legal network), KLegal (associated with KPMG), and Arnheim, Tite & Lewis (associated with PricewaterhouseCoopers).<sup>199</sup>

The Netherlands is the only country in civil law Europe with a culture of large international law firms of sufficient size and strength to compete with U.S. and British law firms.<sup>200</sup> Under the current regulations, the Netherlands allows MDP between lawyers and professions recognized by the General Council of the Bar.<sup>201</sup> To date, only two such professions have been approved: civil law notaries and tax consultants. The Council's refusal to recognize accountants for this purpose spawned the ECJ litigation in the *Wouters* case discussed in Part II.D of this Article.<sup>202</sup>

The table below gives a snapshot of the situation in many other countries of Western Europe.

COUNTRY	MDP STATUS	GOVERNING LAW	REMARKS
Austria	Prohibited	Section 21g of the Rechtsanwaltsordnung as amended on 5/1/2002. <sup>203</sup>	Minor exceptions exist for succession to a lawyer's interest in a firm by family members and for retention of such interest by former lawyers.
Belgium	Prohibited	Article 8 of the National Bar Association Regulation of September 1, 1990 on the exercise of the profession of advocate in partnership made pursuant to powers granted by Article 496	The National Bar Association ( <i>Nationale Orde van Advocaten/ Ordre National des Avocats</i> ) has ceased to exist. Its

[A]ccounting firms have initiated the creation of "captive" law firms that serve the clients of the accounting firms exclusively. Recently, however, there has been a movement to change the rules to allow the creation of "legal practice plus" and "linked partnerships." These new practice concepts will allow solicitors to join with non-lawyer partners and allow the formation of stronger alliances than are currently permitted.

*Id.* at 116. Canada and Australia are following suit. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 *GEO. J. LEGAL ETHICS* 217, 220 n.5 (2000).

199. These firms operating in England may indeed have inspired the 1999 establishment in the United States of the firm of McKee, Nelson, Ernst & Young, ostensibly established with the financial assistance of Ernst & Young, though the full details of the association were undisclosed. See generally Wolfman, *supra* note 87. Following the 2002 Enron scandals in the United States, which involved Arthur Andersen LLP, legislatures and global markets put pressure on many arrangements of this type. As such, the terrain is uncertain and is likely to change.

200. See ADAMSON, *supra* note 45, at 23.

201. See Samenwerkingsverordening 1993, arts. 3, 4, 6 (Neth.).

202. See *infra* Part II.D.

203. § 21g RAO Rechtsanwaltsordnung RGBI 96/1868 (Ger.), available at <http://www.rechtsanwaelte.at/downloads/rao.pdf> (last visited Feb. 27, 2004). I am grateful to Dr. Alexander Christian of the Austrian Bar Association (Oesterreicher Rechtsanwaltskammertag) for assisting me with information on the Austrian position.

COUNTRY	MDP STATUS	GOVERNING LAW	REMARKS
Belgium (cont'd)		of the <i>Gerechtigd Wetboek/Code judiciaire</i> (Code of Judicial Organization, Civil Procedure, etc.) as amended by Law of July 4, 2001. This Regulation provides that only the General Council of the National Bar Association is authorized to determine with what other liberal professions lawyers may enter into partnerships. No such professions have been designated.	successors have not, however, made any regulations authorizing MDP. <sup>204</sup>
Denmark	Prohibited	Section 124, paragraph 1 of the Danish Administration of Justice Act ( <i>Retsplejeloven</i> 124, stk. 1) 1916, as amended.	Breach of Section 124 is a criminal offence. <sup>205</sup>
Finland	Prohibited	Section 5, paragraph 2 of the Act on Advocates, 1958. It prohibits a partnership with non-lawyers unless the Board of the National Bar Association grants a permit based on specific grounds. No such permit has been granted. <sup>206</sup>	No change of attitude towards such permits is anticipated. <sup>207</sup>
Iceland	Prohibited	Article 19 of the Icelandic Attorney Law No. 77/1998. The prohibition is also contained in Codex Ethicus of the Icelandic Bar Association in Article	The Ministry of Justice can give an exemption under special circumstances. <sup>209</sup>

204. See *Règlement du 18 juin 2003 Relatif à l'exercice en Commun de la Profession d'avocat (Fr.)*, available at <http://obfg.be/deo/REGLEMENT%20DU%2018%20JUN%202003%20RELATIF%20A%20L.pdf> (last visited Feb. 27, 2004). The former National Bar Association has been replaced by a Dutch-speaking bar association (Orde van Vlaamse Balies) and French-speaking Bar Association (Ordre des barreaux francophone et germanophone), regulating lawyers in the Dutch and French areas of the country. Neither of these bodies has made any provision for MDP under the enabling powers they inherited. There are, however, law firms linked ostensibly and informally to some of the Big 5, notably KPMG and Ernst & Young. I am grateful to Kurt van Damme, Researcher with the Orde van Vlaamse Balies, Brussels, for his research assistance on this issue.

205. I am very grateful to Erik Kjaer-Hansen of the Danish Bar (L.L.M. candidate, Harvard Law School) for information and the patient translation of Danish materials. I am also grateful to Henrik Bonne of the Danish Bar and Law Society, Copenhagen, for responding to my inquiries on MDP. See also IAIN PATERSON ET AL., INSTITUTE FOR ADVANCE STUDIES, ECONOMIC IMPACT OF REGULATION IN THE FIELD OF LIBERAL PROFESSIONS IN DIFFERENT MEMBER STATES: REGULATION OF PROFESSIONAL SERVICES 136, at [http://euro.pa.eu.int/comm/competition/publications/prof\\_services/prof\\_services\\_ihs\\_part\\_2.pdf](http://euro.pa.eu.int/comm/competition/publications/prof_services/prof_services_ihs_part_2.pdf) (Jan. 2003) (discussing regulation of law firms in Denmark).

206. Advocates Act of 1958, AsK 496/1958, available at <http://www.asianajajat.fi/asp/empty.asp?> (last visited Feb. 6, 2004).

207. Olli Tarka of the Finnish Bar Association provided information on the Finnish situation, for which I am grateful.

208. See Icelandic Attorney Law No. 77/1998 (on file with author); CODEX ETHICUS art. 38, available at <http://www.lmfi.is/code.asp?menuid=18> (last visited Feb. 28, 2004).

COUNTRY	MDP STATUS	GOVERNING LAW	REMARKS
		38. <sup>208</sup>	
Italy	Permitted	Law No. 1815 of November 23, 1939, adopted by the Parliament. <sup>210</sup>	
Ireland	Uncertain	Section 59 of the Solicitors Act 1954, as amended, effectively prohibits solicitors from having agencies and partnerships with non-lawyers in the course of practicing as solicitors. However, it is not expressly stated that, when not holding themselves out as solicitors, lawyers may not offer legal services with non-lawyers, especially as employees. <sup>211</sup>	Section 59 seems primarily designed to prevent lawyers from aiding unauthorized practice <i>as solicitors</i> by the laity. In reality, it seems highly improbable that a partnership with non-lawyers would not infringe the provisions, even if they do not hold themselves out <i>as solicitors</i> . This may turn ultimately on the nuances of lawyers' internal codes of ethics concerning do's and don'ts even when a solicitor is not using his official title.
Liechtenstein	Uncertain	Code on Lawyers, Art. 10, 11 RAG. These provisions are not express on the subject.	Although MDP is not expressly forbidden, the conclusion from a reading of salient provisions of the Code on Lawyers seems to be that it is forbidden. <sup>212</sup>
Luxembourg	Prohibited	Tacit prohibition by Article 34 (1) of the Law on Legal Profes-	

209. I am very grateful to Ingiridur Ludviksdottir and Birgir M. Ragnarsson for information on the Icelandic situation.

210. See Law of 23 November 1938 No. 1815 (on file with author). The information was derived from a table on MDP prepared by the CCBE and provided by Peter McNamee, a legal assistant with the CCBE, Brussels, entitled "National Situations Regarding Multidisciplinary Partnerships—Table Based on Information Given by the CCBE National Delegations" (Sept. 6, 2000) (on file with author).

211. See Solicitors Act of 1954, available at <http://www.irishstatutebook.ie/front.html> (last visited Feb. 6, 2004). The Irish position is somewhat analogous to the English position because lawyers enjoy no monopoly of legal advice, but rather that of professional title. There are, however, "independent" law firms with more or less formal affiliations to some of the Big 5. Alma Clissmann, Parliamentary and Law Reform Executive, Irish Law Society, provided useful information on Ireland, for which I am grateful.

212. See Letters from Dr. Ursula Wachter of the Liechtenstein Rechtsanwaltskammer to the author (Aug. 12, 2002 & Oct. 10, 2002) (on file with author).



COUNTRY	MDP STATUS	GOVERNING LAW	REMARKS
		sion of August 10, 1991. <sup>213</sup>	
Norway	Permitted	Sections 231 and 232 of the Courts of Law Act, Chapter 11. Legal practice may be carried on by virtue of a license other than the advocate's license. In that scenario, § 231 permits combinations between advocates and the non-advocates who practice without the advocate's license. <sup>214</sup>	
Norway (cont'd)			
Sweden	Prohibited	Chapter 8, §§ 2 and 4 of the Swedish Code of Judicial Procedure 1942, as amended. <sup>215</sup> The Council of the Swedish Bar Association is authorized, upon application, to grant an exemption from this restriction. Section 3 of the Code of Conduct for Lawyers, issued by the Council on November 9, 1984, reinforces this by stipulating that a law partnership or company may have only the practice of law as its business. <sup>216</sup>	In line with Bar Council policy statements, exemptions will be made only for foreign lawyers from jurisdictions with a comparable deontology. <sup>217</sup>

The above survey of key European jurisdictions indicates a regulatory environment in a state of flux. Like every new idea, views and positions differ on this issue. Legal recognition of MDP exists in some jurisdictions, notably Germany and France. In many other jurisdictions, including Denmark and England, MDP is expressly prohibited. Yet, in a third group of countries, uncertainty exists as to whether there is a legal prohibition—uncertainty leading either to de facto prohibition or de facto permissibility, depending on the balance of social forces and norms. For example, until the 2001 revision of the relevant laws, Spain was a jurisdiction where MDP

213. Law A-N58 of Aug. 10, 1991, 1991 J.O. 1116 (Lux.). The information was derived from a table on MDP prepared by the CCBE and provided by Peter McNamee, a legal assistant with the CCBE, Brussels, entitled "National Situations Regarding Multidisciplinary Partnerships—Table Based on Information Given by the CCBE National Delegations" (Sept. 6, 2000) (on file with author).

214. Wenche Siewers of the Norwegian Bar Association, Den Norske Advokatforening, graciously provided information and materials on the regulatory situation in Norway (on file with author).

215. See Swedish Code of Judicial Procedure (1942), reprinted in 24 AMERICAN SERIES OF FOREIGN PENAL CODES (Anders Bruzelius & Krister Thelin eds., rev. ed. 1979).

216. SWEDISH BAR ASSOCIATION, CODE OF CONDUCT FOR LAWYERS art. 3 (Nov. 9, 1984), available at <http://www.advokatsamfundet.se/platform/components/upload/consume/streamFile.asp?id=308> (last visited Mar. 22, 2004); see also Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 IND. INT'L & COMP. L. REV. 405, 441-42 (2003) (discussing provisions of Swedish Code of Conduct).

217. Katarina Rosen of the Swedish Advokatsamfundet provided useful information on the Swedish position, for which I am grateful (on file with author).

was permissible de facto even though the laws did not clearly authorize it, whereas Ireland seems to be a place where it is prohibited de facto, since the laws appear not to expressly prohibit it despite indications to the contrary. In many countries where MDP is permitted, the permission is narrowly drawn and restricted to certain regulated professions—for example, Netherlands and Germany, where it is restricted to a few law-related professions. That these regulated professions largely perform functions that in the U.S. system would fall within the lawyer's province should ordinarily give pause to proponents of broadly conceived MDP; for it is arguable that the character of the professions permitted to form MDPs with lawyers in these European jurisdictions is indicative of a quest to achieve synergy of a type that the U.S. legal profession has already achieved through an integrated bar. A measure of mootness may, therefore, attend the proposals for MDP in the United States, to the extent that they are predicated on the situation in European jurisdictions.

The MDP situation in Europe will remain in flux for some time, with jurisdictions adjusting their positions as necessary. Even in Germany, for instance, where MDP is fairly well established, recent developments have opened the possibility for regulatory reviews.<sup>218</sup> What is clear, however, is that de-proscription of MDP is not a bandwagon upon which most jurisdictions have jumped. From the active participation of European regulators in the hearings before the ABA MDP Commission, the developments in the United States would seem to influence many European jurisdictions.

A major conceptual obstacle in determining the degree to which MDP has become pervasive in Europe and elsewhere is the constant conflation of MDP and the surrounding issues with the question of unauthorized practice of law. Both issues are, however, conceptually distinct, even if related. The rules relating to unauthorized practice pertain to the lawyer's monopoly on the right to offer legal services to the public. Such rules seek to prevent non-lawyers from offering legal services to third parties. MDPs, on the other hand, pertain to the right of non-lawyers to collaborate with lawyers in offering legal services to third parties. It is thus possible to have one without the other. A jurisdiction may permit "unauthorized" practice, in the sense of granting non-lawyers the right to offer legal services, while at the same time prohibiting lawyers from partnering with such non-lawyers in the practice of law. A good example is the English solicitor who has traditionally not been permitted to practice law in partnership with non-lawyers, even though solicitors enjoy no monopoly over legal services.<sup>219</sup> It is also conceptually possible to permit MDP while prohibiting unauthorized practice. This would be the case where only those non-lawyers who collaborate with lawyers are allowed to practice law. A good example is Germany, where a lawyer who is qualified in another EU jurisdiction (technically a non-lawyer in Germany) is permitted to represent clients in court

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218. See e-mail from W. Eichele, Bundesrechtsanwaltskammer, to the author (Aug. 1, 2002) (on file with author) (indicating that MDP with auditors may be reviewed in light of the Enron Corporation accounting scandals in 2002).

219. See *supra* text accompanying note 190. ,

under the EU Services Directive, subject to the requirement that such a visiting lawyer practice in conjunction with a German lawyer.<sup>220</sup> The failure to make this conceptual distinction leads to an inflation of the degree to which MDP has become a feature of several jurisdictions—the absence of rules regarding unauthorized practice is equated to the absence of prohibitions against MDP.<sup>221</sup>

#### D. European Judicial Pronouncements on MDP

Key decisions of European courts, especially ECJ, have significantly helped to shape the current liberalized regime of trade in legal services in Europe. ECJ's cases in this area stretch from *Reyners v. Belgian State*,<sup>222</sup> decided in 1974, to the more recent *Conte v. Rossi*<sup>223</sup> and *Criminal Proceedings Against Ardiuno*,<sup>224</sup> decided in 2001 and 2002 respectively. The

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220. The Lawyers' Services Directive permitted the host country to require a visiting lawyer to act in conjunction with a local lawyer for purposes of court representation (Art. 5) but did not impose such a requirement for legal advisory work. See Lawyers' Services Directive, *supra* note 59. Even in relation to court representation, however, the decision of the ECJ in Case 427/85, *Commission v. Germany*, E.C.R. 1123 (1988), has curbed the German restriction through a restrictive interpretation of Article 5 of the Lawyers' Services Directive. *Id.* at 1159. The ECJ held that Germany could not require such a visiting lawyer to practice in conjunction with a German lawyer in situations where a litigant is entitled to represent himself in court. *Id.* Similar restrictions exist in all EU countries, except Denmark, Finland, and Sweden. See ADAMSON, *supra* note 45, at 48. It has been suggested that, if expanded, this ruling potentially nullifies the effect of Article 5, since in the UK, for instance, a litigant is entitled to represent himself in most cases before the courts. *Id.* at 53.

221. See Mullerat, *supra* note 133, para. VI (9) (reporting that an MDP survey by the International Bar Association (IBA) showed that banks and insurance companies that render legal services were counted as MDPs); see also Ward Bower, *Multidisciplinary Practices—The Future*, in GLOBAL LAW IN PRACTICE 155, 158 (J. Ross Harper ed., 1997) (providing details of a similar report of an IBA survey).

222. Case C-2/74, *Reyners v. Belgian State*, 1974 E.C.R. 631. For some of the subsequent cases decided in the liberalizing spirit of *Reyners*, see *supra* cases accompanying note 60. See also ADAMSON, *supra* note 45, at 34.

223. Case C-221/99, *Conte v. Rossi*, 2001 E.C.R. I-9359. The case involved a claim of professional fees, which were charged according to a scale of fees and emoluments for engineers and architects laid down by decree of the Minister for Justice. The issue was whether Articles 5 and 85 (now Articles 10 and 81) of the EC Treaty preclude national legislation that provides that the members of a profession may set at their discretion the fees for certain services. *Id.* para. 27. The Court opined that the services involved in this case were effectively services in respect of which architects had discretion to charge specific fees for each service rendered and could not promote anticompetitive agreements. *Id.* The Court held that Articles 5 and 85 do not preclude national legislation allowing professionals to set discretionary fees. *Id.* para. 28.

224. Case C-35/99, *Criminal Proceedings Against Ardiuno*, 2002 E.C.R. I-1529. The issues in the case were whether Articles 5 and 85 (now Articles 10 and 81) of the EC Treaty preclude a member state from adopting a law or regulation that approves, on the basis of a draft produced by a professional body of the bar, a tariff, fixing minimum and maximum fees for professionals, and whether that approval forms part of a procedure that left ultimate approval authority for the tariff in the hands of public authorities, even if the governing statutes (as in this case) did not expressly lay down public interest criteria which the professional body must take into account in setting the tariff. *Id.* ¶ 32. The Court answered this question in the negative, thus saving the Italian state measure in issue. *Id.* para. 44.

*Reyners* case effectively invalidated the nationality requirement for admission to the bar of member states.<sup>225</sup> It established that the legal profession was amenable to EC trade disciplines in the same way as other areas of enterprise, notwithstanding that the profession may at times qualify for exemption from those trade disciplines under Article 55 of the EC Treaty for activities that are connected with the exercise of official authority. It opened the way for a series of subsequent liberalizing decisions applying the EC Treaty provisions on the right of establishment and services to the legal profession on the same terms as other professions and enterprises. In both the *Conte* and *Arduino* cases, however, the ECJ, in rather narrowly drawn decisions, held that certain measures by the Italian government devolving minimum and maximum fee-setting powers to professional groups did not offend relevant Community legislation.<sup>226</sup>

Although the decisions in *Conte* and *Arduino* are limited to a particular set of facts, they are nonetheless significant. Together they indicate a halt in the long march of liberalization evinced by nearly three decades of ECJ jurisprudence—a turning point in the long line of cases liberalizing the professional services regime through the abrogation of laws and professional rules perceived to inhibit competition. They mark the ECJ's shift toward the establishment of an optimal regulatory regime for professional services within the EU, indicating that the threshold has been reached where liberalization may have to be more substantially attenuated by considerations going beyond market economics.

While the foregoing cases are key in the area of professional services, forming a backdrop against which issues pertaining to MDP are likely to be examined and decided, their effect on the MDP question is indirect. More important is the case *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, decided on February 19, 2002, the same day as *Arduino*.<sup>227</sup> *Wouters* reinforces, within the MDP context, the new direction indicated by prior cases and is all the more important because it deals directly with MDP, not just legal services.

### 1. *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*

The Netherlands Council of State (the *Nederlandse Raad van State*) referred *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* to the ECJ for a preliminary ruling on several questions of Community law.<sup>228</sup> Brought before the Netherlands Council of State on appeal from the lower courts, this case concerned the legality of a 1993 regulation adopted by the Bar of the Netherlands (the *Nederlandse Orde van Advocaten*). The regulation at issue effectively prohibited lawyers from entering into multidisciplinary partnerships with accountants, while allowing such partnership between lawyers and other selected professions, notably tax

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225. See *Reyners*, 1974 E.C.R. 631.

226. See *Conte*, 2001 E.C.R. I-9359; *Arduino*, 2002 E.C.R. I-1529.

227. Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577, [2002] 4 C.M.L.R. 27 (2002).

228. *Id.* ¶ 1.

consultants, notaries, and patent agents.<sup>229</sup> The *Nederlandse Raad van State* referred nine questions, also raised by the parties at the prior proceedings, to the ECJ for a preliminary ruling.<sup>230</sup>

A threshold question decided by the ECJ was whether the Bar of the Netherlands qualified as an association of undertakings under Article 85(1) of the EC Treaty (now Article 81(1)) and, if so, whether Article 90(2) (now Article 86(2)) applied to it.<sup>231</sup> Article 90(2) contains an exemption for undertakings entrusted with the operation of services of general economic interest, where the application of EC rules (especially the rules on competition) would obstruct the performance of the particular tasks assigned to such undertakings. The ECJ had to address these issues in this case, which it had side-stepped in *Conte* and *Arduino*—where questions had also arisen as to whether the professional associations involved in those cases qualified as associations of undertakings under Article 85 of the EC Treaty. The Court held that registered members of the Netherlands bar carry on an economic activity and, as a consequence, the Bar of the Netherlands is an association of undertakings within the meaning of Article 85, notwithstanding that the association exercised regulatory powers in implementing its rules, such as the 1993 regulation.<sup>232</sup>

The most pertinent questions raised in the *Wouters* case were whether a prohibition on multidisciplinary partnerships involving members of the

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229. *Id.* ¶ 22. In 1991, Mr. Wouters, a member of the Amsterdam Bar, became a partner in Arthur Andersen & Co. Belastingadviseurs (a partnership of tax consultants). *Id.* ¶ 24. Late in 1994, he informed the Supervisory Board of the Rotterdam Bar that he wanted to enroll at the Rotterdam Bar and to practice there under the name of “Arthur Andersen & Co., advocaten en belastingadviseurs.” *Id.* On July 27, 1995, the Supervisory Board found that the members of the partnership Arthur Andersen & Co. Belastingadviseurs were in professional partnership under the 1993 Regulation with the members of the partnership Arthur Andersen & Co. Accountants, that is to say with members of the accounting profession. *Id.* ¶ 25. Accordingly, Mr. Wouters breached Article 4 of the 1993 Regulation, *id.*, that precluded members of the bar from entering or maintaining any professional partnerships, unless the primary purpose of each partner’s profession was the practice of law. *Id.* ¶ 16. Mr. Wouters, Arthur Andersen & Co. Belastingadviseurs, and Arthur Andersen & Co. Accountants appealed the decision. *Id.* ¶ 26. Mr. Savelbergh, a member of the Amsterdam Bar, similarly informed the Supervisory Board of the Amsterdam Bar in the beginning of 1995 that he intended to enter into partnership with “Price Waterhouse Belastingadviseurs BV, a subsidiary of the international undertaking Price Waterhouse, which includes both tax consultants and accountants.” *Id.* ¶ 27. On July 5, 1995, the Supervisory Board declared that the proposed partnership was contrary to Article 4 of the 1993 Regulation, *id.* ¶ 28, which allowed lawyers to form professional partnerships only with other members of the Netherlands bar or with foreign lawyers under certain conditions. *Id.* ¶ 17. All parties ultimately appealed the decision up to the *Nederlandse Raad van State*, but Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants had to withdraw from the proceedings on procedural grounds. *Id.* ¶¶ 35, 37. The specific procedural reason is not clear from the text of the ECJ decision itself because the decision not to allow them to participate in the appeal was taken at the national court level. See MacCrate Report, *supra* note 54, at 223 (stating that the district court rejected the appeal by Arthur Andersen because it did not make “an intermediate appeal of the supervisory body decision to the Order’s General Council”).

230. *Wouters*, 2002 E.C.R. I-1577, ¶¶ 1-2.

231. *Id.* ¶ 44.

232. *Id.* ¶¶ 49, 58, 71.

bar and accountants constitutes a restriction on competition, the right of establishment, or the freedom to provide services.<sup>233</sup> The Court ruled that the prohibition of MDPs with accountants restricted competition and intra-Community trade.<sup>234</sup> Echoing the major thrust of the broader arguments of MDP proponents, the Court observed the following:

As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation [sic], management and operation of their business (the 'one-stop shop' advantage).

Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.<sup>235</sup>

Nevertheless, the Court went on to conclude that regulation does not infringe Article 85(1) of the EC Treaty because the Netherlands bar could reasonably have considered that the regulation, despite its inherent restrictive effects on competition, "is necessary for the proper practice of the legal profession."<sup>236</sup>

In essence, the Court opined that the purpose of the Regulation was not necessarily to inhibit competition within Article 85, even if the Regulation did in fact have anti-competitive results. Here at last was judicial recognition, albeit within the context of EU statutory provisions, that the rules of a bar organization restricting competition by prohibiting MDP could embody other values that suffice to justify their retention.<sup>237</sup> Thus, in this

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233. *See id.* ¶¶ 39 (4)-(8).

234. *Id.* ¶¶ 86, 90, 94.

235. *Id.* ¶¶ 87-89. In reaching its conclusion, the Court disagreed with the Luxembourg Government (one of the interveners in the case) that the prohibition of MDP had a positive rather than a restrictive effect on competition. *Id.* ¶ 85. The Luxembourg Government argued that by forbidding bar members from entering into partnership with accountants, "the national rules in issue in the main proceedings made it possible to prevent the legal services offered by members of the Bar from being concentrated in the hands of a few large international firms and, consequently, to maintain a large number of operators on the market." *Id.* The Court rejected this argument by pointing out that MDPs could increase the range of services, the interpenetration of national markets, and the cost of services. *Id.* ¶¶ 87-89. The Court went on to conclude that, though unlimited multidisciplinary partnerships between the legal profession and a highly concentrated accountancy could lead to a decrease in competition, a measure short of absolute prohibition could guarantee a "sufficient degree of competition on the market in legal services." *Id.* ¶¶ 93-94.

236. *Id.* ¶ 110.

237. *Id.* ¶ 97.

decision, the Court further reinforced its new disposition towards liberalization, as marked by the *Arduino* and *Conte* decisions, and delivered a *coup de grâce*: It made an important distinction between the anticompetitive effect of a professional rule or regulation and the purpose of the rule, the former being something that is not necessarily a function of the latter.<sup>238</sup> MDP commentators do not emphasize this distinction; rather, they routinely conflate the anticompetitive effect of a ban on MDP with an anticompetitive purpose of the organized bar.<sup>239</sup> For such commentators, anticompetitive effects are coterminous with anticompetitive intendment. The Court's ruling essentially rejects the arguments of those who seek to ascribe an anticompetitive intent to the bar's rules on MDP solely from their anticompetitive effects and to dispose of those rules on that account, as if such anticompetitive effects were mutually exclusive with other benign purposes and dispositive of the matter. For such MDP proponents, anticompetitive effects seem incapable of juxtaposition with other values, a consideration of which would diminish the import of such effects.

On the question of whether the 1993 Regulation infringed Articles 52 (now Article 43) and 59 (now Article 49) of the Treaty, which confer the right of establishment and freedom to provide services, the Court first assumed that these provisions applied to a prohibition of any multidisciplinary partnerships between lawyers and accountants and that the Regulation constituted a restriction on one or both of those freedoms.<sup>240</sup> The ECJ then held that the restriction would in any event be justified based on the Court's analysis of Article 85(1).<sup>241</sup> The Court reasoned that "not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty."<sup>242</sup> Courts should consider the context of the rules, their effects and objectives, "whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives," and the relevant legal framework.<sup>243</sup> In addition, the Netherlands bar was entitled to consider that its members would not be able to give independent legal advice if they were part of an organization that was also responsible for financial affairs of the client on the same matter.<sup>244</sup> The Court concluded that the resulting restrictions on competition did not go beyond what was necessary for "the proper practice of the legal profession."<sup>245</sup>

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238. *See id.*

239. *See* Daniel R. Fischel, *Multidisciplinary Practice*, 55 *Bus. Law.* 951, 969-73 (2000).

240. *See* *Wouters*, 2002 E.C.R. I-1577, ¶ 122.

241. *Id.*

242. *Id.* ¶ 97.

243. *Id.* ¶¶ 97-98. The Court emphasized that the members of the Netherlands bar are required to be independent from public authorities and third parties and that, by contrast, accountants are not subject to comparable requirements of professional conduct. *Id.* ¶¶ 100-103.

244. *Id.* ¶ 105.

245. *Id.* ¶¶ 107, 109.

This aspect of the ECJ's decision was in effect a ruling based on the proportionality test developed earlier by the Court.<sup>246</sup> The bar regulation in *Wouters* was justified because it was reasonably necessary for the proper practice of the legal profession as organized in the Netherlands.<sup>247</sup> The Court sidestepped a consideration of the exception pertaining to the right of establishment, as enshrined in Article 55 (now Article 45) of the Treaty, for activities connected with the exercise of official authority. Thus, an opportunity was lost to consider in depth the social policy imperatives that can legitimately inform the prohibition of MDP in a jurisdiction. The ECJ's decision on Article 85(1) obviously touched this issue, but its focus was clearly on the purpose behind the prohibition of lawyer-accountant MDPs by the Dutch bar, as an indication of a lack of anticompetitive purpose by the bar. While the implications of such purpose can be drawn out to cover an enunciation of the social policy imperatives behind the prohibition of MDP (as the Court did in the *Wouters* case), the exception in Article 55 provides more ample opportunities to do so not only by looking at the bar's purposes in prohibiting MDP, but, more importantly, by looking at the connection between such purposes and the broader imperatives of ordering and securing the body politics. The latter is an exercise within the realm of politics and political theory, while a focus on the bar's rules and their contours in and of itself is substantially an economic<sup>248</sup> (or at the least non-political) justification.

The relevant portion of Article 85(1) focuses largely on the object behind the rule or regulation, and a party, in order to comply, can show that an otherwise anticompetitive rule by an association of undertakings has an alternative competitive purpose. That alternative purpose need not have any political dimensions, quite unlike a consideration of those purposes as a dimension of the exercise of official (political) authority under the exception in Article 55. Indeed, even with regard to a business and economic justification, a consideration of the exception in Article 90(2) would likely have yielded richer results. The ECJ, however, declined to consider the question of whether the Bar of the Netherlands fell under the exception of Article 90(2). It is instructive, however, that Advocate General Leger accepted that "lawyers may be regarded as undertakings 'entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty.'"<sup>249</sup>

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246. See, e.g., Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165. The ECJ held that national measures that can hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EC Treaty must fulfill four conditions. *Id.* ¶ 37. The measures must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and the measures must not go beyond what is necessary in order to attain the objective. *Id.*

247. *Wouters*, 2002 E.C.R. I-1577, ¶¶ 107, 109.

248. The Court's ruling in *Wouters* could be interpreted as confirming that the bar's rules prohibiting MDP were in conformity with the usual terms by which market participants' rules are validated.

249. Opinion of Mr. Advocate General Leger in *Wouters*, 2002 E.C.R. I-1577, ¶ 172.



A pertinent aspect of the *Wouters* case is that it goes beyond the threshold question of whether MDP should be permitted, even though the Court did not consider this question, perhaps on the tacit understanding that it was well within the prerogative of any EU jurisdiction to prohibit the formation of MDPs as permitted by Article 11(5) of the Establishment Directive.<sup>250</sup> Indeed, commenting on the import of some other jurisdictions' comparable treatment of MDP, the Court indicated the following:

[T]he fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law . . . . Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means . . . .<sup>251</sup>

In addition, beyond the threshold question of MDP permissibility, this case raises the issue of determining the detailed contours of the regulations governing MDP, especially the occupational groups with which lawyers may form MDPs. It is arguable, however, that the ECJ's confirmation that the bar can regulate MDPs in this manner is an implied confirmation that, upon showing the necessity, the bar can place an absolute prohibition on MDPs irrespective of the profession involved, such prohibition being but one form of regulation. In reality, no supranational rule of EU Treaty law or ECJ jurisprudence prevents a state from prohibiting MDPs.

## 2. *Prince Jefri Bolkihah v. KPMG*

*Prince Jefri Bolkihah v. KPMG*,<sup>252</sup> though not a decision of the ECJ, is one of the cases that shaped the debate on MDP in Europe. So widespread was its impact that it has been the subject of a series of case studies on professional service firms.<sup>253</sup> The case involved an application for breach of confidence brought by Prince Jefri against KPMG, asking to restrain KPMG from acting for the Brunei Investment Agency (B.I.A.) and any other person who had an interest adverse to that of Prince Jefri.<sup>254</sup> The Court of First Instance granted the application.<sup>255</sup> Upon appeal by KPMG to the English Court of Appeal, the first court's order was vacated, but the House of Lords granted Prince Jefri's appeal and effectively reinstated the

250. See *supra* text accompanying note 97.

251. *Wouters*, 2002 E.C.R. I-1577, ¶ 108.

252. *Prince Jefri Bolkihah v. KPMG*, 2 A.C. 222 (1999). The case began at the Chancery Division before Judge Pumfrey. See *Prince Jefri Bolkihah v. KPMG*, 1 BCLC 1 (Ch. 1999), available at <http://www.lexisnexis.com>. Judge Pumfrey ruled in favor of the plaintiff, whereupon the defendant appealed to the Court of Appeal. See *Prince Jefri Bolkihah v. KPMG*, 1 BCLC 1 (C.A. 1999). The House of Lords decision—the most important and most referenced of the three decisions—resulted from defendant's subsequent appeal.

253. See NANDA, *supra* note 23.

254. *Prince Jefri Bolkihah*, 2 A.C. at 223.

255. *Id.*

order.<sup>256</sup>

The facts of the case and the surrounding circumstances are as long as they are interesting.<sup>257</sup> Prince Jefri was chairman of the B.I.A., which was established in 1983 to hold and manage the general reserve fund and external assets of the Government of Brunei and to provide the government with money management services.<sup>258</sup> Since 1983, KPMG annually audited the agency's core funds and provided consulting services to B.I.A.<sup>259</sup> While acting for B.I.A. in these capacities, KPMG accepted a retainer from Prince Jefri to perform substantial investigation in connection with litigation involving Prince Jefri's companies and certain Manoukian brothers (the "Manoukian litigation").<sup>260</sup> For the purpose of this investigation (named "Project Lucy"), KPMG rendered forensic accounting services to Prince Jefri, examining and acquiring a detailed knowledge of his personal finances, including identity and location of assets and the vehicles in which they were held.<sup>261</sup> This was necessary to enable KPMG to compile an expert report—a key product of the broader litigation support services rendered by KPMG to Prince Jefri for purposes of the Manoukian litigation. The litigation support services interviewed witnesses, searched for documents, investigated the facts, participated in conferences with counsel, reviewed draft pleadings, and prepared questions for cross-examination—all core aspects of a solicitor's function in the litigation context.<sup>262</sup> Altogether, KPMG deployed 168 personnel and earned approximately £4.6 million for services rendered to Prince Jefri between 1996 and 1998.<sup>263</sup>

In June 1998, after the Brunei Government relieved Prince Jefri of his position as B.I.A. chairperson and the Manoukian litigation had been settled, a finance task force was appointed to investigate the activities of B.I.A.<sup>264</sup> KPMG was retained by B.I.A. to assist in investigating special transfers of assets from B.I.A. ("Project Gemma").<sup>265</sup> Under the circumstances, it was obvious that the interests of Prince Jefri were adverse to those of B.I.A. and that some of the confidential information obtained by KPMG in the course of Project Lucy would be relevant to Project Gemma.<sup>266</sup> KPMG did not inform Prince Jefri of this assignment, nor did it seek his consent to the firm's acceptance of the assignment.<sup>267</sup> KPMG employed approximately fifty people on Project Gemma, eleven of whom had worked for Prince Jefri. KPMG contended, however, that none of the

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256. *Id.*

257. For an account of the historical and political circumstances that formed a background to the litigation, see NANDA, *supra* note 23.

258. *Prince Jefri Bolkihah*, 2 A.C. at 228.

259. *Id.*

260. *Id.* at 229.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 230.

265. *Id.* at 230-31.

266. *Id.*

267. *Id.* at 231.

employees possessed information confidential to Prince Jefri.<sup>268</sup> More broadly, KPMG averred that it had set an ethical screen, more popularly referred to as a “Chinese wall,” between those who had worked on Project Lucy and those who worked on Project Gemma to prevent dissimulation of confidential information concerning Prince Jefri between the two groups.<sup>269</sup> The Chinese wall had two components: First, only those who did not possess confidential information were permitted to work on Project Gemma, and second, steps were taken to avoid the risk that such information could become available to those working on Project Gemma in the future.<sup>270</sup>

Judge Pumfrey, at the Chancery Division, took some bold juridical strides. First, he observed that it was fair to say that KPMG had taken all the steps that could be expected to minimize or avoid any disclosure of Prince Jefri’s confidential information.<sup>271</sup> However, the ultimate issue was whether these steps were indeed sufficient. To answer this question, the Court observed that prior cases did not address the issue of the ethical standards to be applied when accountants undertake forensic services.<sup>272</sup> Nevertheless, because prior cases addressed the position of solicitors undertaking such activities, the Court had no qualms about extending the law on solicitors to accountants undertaking the same services,<sup>273</sup> notwithstanding the differences between accountants and solicitors—the latter being officers of the Court.<sup>274</sup>

Having established that the same standards of confidentiality applied to accountants and solicitors performing forensic services, the Court stated that, where accountants have received confidential information in the course of providing forensic services, “the burden [was] upon the accountant to establish that there [was] no real risk of a communication of any of the relevant information.”<sup>275</sup> The Court also shared the skepticism expressed by other courts that Chinese walls could be efficient, stating that “the intrinsic difficulty with Chinese walls is that, while they are well adapted to deal with foreseeable or deliberate disclosure of information, they are not well adapted to deal with disclosure which is accidental, inadvertent or negligent.”<sup>276</sup> The Court concluded that, because there was evidence that some confidential information may be disclosed if KPMG were allowed to proceed and because no compelling reasons warranted its dis-

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268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 232.

272. See *Prince Jefri Bolkiah v. KPMG*, 1 BCLC 1 (Ch. 1999), available at <http://www.lexisnexis.com>.

273. *Id.*

274. *Id.* The Court pointed out that there was no rational basis for distinguishing between the duty owed by an accountant to his client and that owed him by his solicitor or counsel in the context of forensic services, performance of tasks which can be undertaken by solicitors, giving and receiving of advice, and in relation to the conduct of litigation or threatened litigation. *Id.*

275. *Id.*

276. *Id.*

closure, the former client should not be exposed to the risk of inadvertent disclosure.<sup>277</sup> The House of Lords unanimously endorsed the reasoning of the Chancery Division and emphasized that an effective Chinese wall must be established as an aspect of the organizational structure of the firm and not created ad hoc, as was the case with Projects Lucy and Gemma.<sup>278</sup>

The significance of this case for the MDP debate stems in large part from the centrality of Chinese walls to the operations of the global accounting firms and similar organizations that champion the propagation of MDPs. This structure has played a primary, though not exclusive, part in enabling such firms to grow into behemoth enterprises, transcending comparable law firms in size and global influence. The wide acceptance and use of Chinese walls in the accounting and financial services sector has meant that in some situations, such as Project Gemma, where considerations of conflict of interest or risk to client confidentiality would be sufficient to dissuade a law firm from accepting an engagement, financial services and accounting firms could proceed undeterred, relying on the assumed efficacy of Chinese walls. In the context of the MDP debate, a central issue has always been whether the joint practice between legal and other professions, especially accounting, would jeopardize ethical principles related to confidentiality and conflicts of interest. The primary response of MDP proponents to this argument has been that the procedures, such as Chinese walls, adopted by accounting and other firms are sufficient to address these risks.<sup>279</sup> The decision in *Prince Jefri Bolkiah* effectively neutralizes such arguments by exposing the inherent weaknesses of Chinese walls. It eliminates an important element in the wider framework for global interprofessional expansion of the major accounting firms that are the chief proponents of MDP.

It is instructive that *Prince Jefri Bolkiah* was decided in the context of the more liberal English rules relating to conflicts of interest and confidentiality. Lord Millet, who delivered the opinion of the House of Lords, suggested the possibility of adjustment to these liberal rules, but declined to affirm them except for the standards applicable to solicitors (and by extension accountants) regarding former client confidentiality.<sup>280</sup> The Court

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277. *Id.*

278. See *Prince Jefri Bolkiah v. KPMG*, 2 A.C. 222, 239 (1999).

279. The other major alternative approach is to question the value and justification of the legal profession's rules on confidentiality and conflict of interest. This is, however, not a common approach outside the legal academia. For works that question values of confidentiality, see Fischel, *Lawyers and Confidentiality*, *supra* note 79, at 33; see also HAZARD ET AL., *supra* note 7, at 334-36. For a brief review of academic works that question the disinterestedness of lawyers' professional values, see Wilkins, *Everyday Practice Is the Troubling Case*, *supra* note 79, at 82-83.

280. *Prince Jefri Bolkiah* overruled the decision in *Rakusen v. Ellis, Munday & Clarke*, 1 Ch. 831 (1912), which held that a court will not intervene in favor of a former client who seeks to enjoin a solicitor from accepting a new client whose interests are adverse to his, unless the court is satisfied that there is a "reasonable probability of real mischief." See *Prince Jefri Bolkiah*, 2 A.C. at 236-37 (discussing the *Rakusen* test). The Court, yielding to the criticism of this rule in some jurisdictions, concluded that the rule imposed an unfair burden on the former client, exposed him to a potential and avoida-

rejected the “absolute rule, such as that adopted in the United States, which precludes a solicitor or his firm altogether from acting for a client with an interest adverse to that of the former client in the same or a connected matter.”<sup>281</sup> It also rejected the wide rule of imputation of conflicts available in the United States, stating that “there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case.”<sup>282</sup> This rejection was based on the fact that English courts’ jurisdiction in cases where a former client seeks to enjoin a solicitor from acting for a new client is premised not on the avoidance of conflicts of interest, real or perceived, but on the duty of confidentiality.<sup>283</sup> When the client-solicitor relationship ends, the solicitor has no obligation to defend or advance the interest of his former client.<sup>284</sup> A solicitor’s duty of confidentiality, whether founded on equity or contract, is, however, an unqualified duty to keep the information confidential, “not merely to take all reasonable steps to do so.”<sup>285</sup> That the English House of Lords, within this milieu of relatively liberal professional ethics, could not find Chinese walls adequate is indicative of the attenuated chances for those who offer legal services within MDPs in other common law jurisdictions with stricter rules of confidentiality or conflict of interest to successfully hide behind Chinese walls.

Also significant is the House of Lords’ rejection of the factual basis of KPMG’s claim. Like all “Big 5” firms, KPMG argued for some deference to its internal control processes. It argued that it was accustomed to the protection of client confidences across practice areas and jurisdictions, given the size of its operations.<sup>286</sup> Effectively, it argued for the Court’s acceptance of its *ipse dixit* as to the adequacy of its processes, not just in terms of the industry or other standards, but also in terms of the real capacity of these processes, notably the Chinese wall, to safeguard client confidentiality.<sup>287</sup> Lord Millet’s rejection of its argument showed an uncommon understanding of the practical, workaday operations of a multidisciplinary practice, especially of the “Big 5” type.<sup>288</sup>

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ble risk to which he did not consent, and failed to give him sufficient assurance that his confidences would be respected. *Id.* at 236. The Court then articulated a new test that effectively strengthened confidentiality regarding former clients—“the court will intervene unless it is satisfied that there is no risk of disclosure.” *Id.* at 237.

281. *Prince Jefri Bolkiah*, 2 A.C. at 234.

282. *Id.* at 235.

283. *Id.* at 234.

284. *Id.* at 235.

285. *Id.* at 235.

286. *Id.* at 238.

287. *See id.*

288. The Court observed the following:

It is one thing, for example, to separate the insolvency, audit, taxation and forensic departments from one another and erect Chinese walls between them. Such departments often work from different offices and there may be relatively little movement of personnel between them. But it is quite another to attempt to place an information barrier between members all of whom are drawn from the same department and have been accustomed to work with each other. I would expect

The House of Lords thus recognized the problem of perpetual personnel turnover in a large Big 5 firm. Because the Court of Appeals agreed with KPMG's arguments regarding the capacity of the Big 5 to maintain reliable structures for the control of confidential information,<sup>289</sup> it overlooked what position the staff flexibility occupies in the overall strategy of the Big 5 and the difficulty of subjugating that need for flexibility to the demanding dictates of lawyers' professional ethics. By being able to rearrange and deploy staff flexibly, the Big 5 attain efficiency levels which they otherwise could not attain. However, this pursuit of efficiency can trump other considerations, including questions of confidentiality, in the day-to-day business of the organization, as the facts of *Prince Jefri Bolkih* demonstrate.<sup>290</sup>

Finally, the case is significant in its reinforcement of the abiding, fundamental character of the ethical rules on confidentiality and conflicts of interest that ground the independence of the legal profession. Indeed, it effectively establishes the rule pertaining to confidentiality as a universal rule applicable to all those who render legal services. The rule becomes akin to an obligation assumed by anyone who chooses to render legal services to the public—thus transcending its characterization in some quarters as simply self-serving rules made by lawyers for lawyers' interests.<sup>291</sup> The Chancery Division clearly expressed this point in its judgment,<sup>292</sup> but it is also implicit in the decision of the House of Lords, endorsing the extension of solicitors' confidentiality standards to accountants who choose to render legal services. Thus, opinions of both courts reinforce the core values of the legal profession.

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this to be particularly difficult where the department concerned is engaged in the provision of litigation support services, and there is evidence to confirm this. Forensic accountancy is said to be an area in which new and unusual problems frequently arise and partners and managers are accustomed to share information and expertise. Furthermore, there is evidence that physical segregation is not necessarily adequate, especially where it is erected within a single department.

*Id.* at 239.

289. Commenting on the judgment of Chancery Division, Lord Woolf (Waller dissenting) stated as follows:

[The opinion] underestimates the effect of exhortation and a culture where the importance of the preservation of confidence is given high priority and therefore results in the judge attaching too much importance to not exposing the former client to 'the risk of inadvertent or careless or negligent disclosure unless there are powerful reasons for saying that he should.'

*Prince Jefri Bolkih v. KPMG*, 1 BCLC 1 (C.A. 1999). The judgment of Woolf and the concurring judgment of Otton are suffused with expressions of faith in the culture and processes of accounting firms. *Id.*

290. Those who are familiar with the workaday activities of Big 5 employees would confirm that in the hustle and bustle of their average workday the confidentiality concerns and related questions that preoccupy sedate lawyers would, as a matter of necessity, be relegated to the background, if not entirely ignored.

291. See Green, *The Disciplinary Restrictions on Multidisciplinary Practice*, *supra* note 140, at 1145.

292. See *Prince Jefri Bolkih v. KPMG*, 1 BCLC 1 (Ch. 1999), available at <http://www.lexisnexis.com>.

## Conclusion

Some of the incidences of the current preoccupation with globalization and liberalization of trade in services may be seen as lending conceptual support to the need for MDP and the fairness of de-proscribing it. They suggest that MDP may not be as radical a concession as it is sometimes thought to be, given conceptually similar concessions claimed and received by lawyers across jurisdictions. Conclusions drawn from such generalized suggestions are, however, misleading—there being as yet no indication in transnational professional practice generally that MDP has become imperative; nor is there such an indication within the context of the specifics of the EU regime for legal services. The EU regime, in particular, under the Establishment Directive and through the ECJ's most recent case law, leaves considerable room for each of its jurisdictions to restrain the propagation of MDPs. Some have chosen to restrain it, while others, by no means a preponderance of states, have chosen to permit such structures for legal practice. Yet, in other states the regulatory situation is unclear, either because the legislature has not completely articulated the regulatory framework or because permission to engage in MDP is partial or half-hearted. Ultimately, the decision to constrain or allow MDP would depend on each jurisdiction's view of what is beneficial to its legal services sector. It should never be presumed, however, that a particular position is compelled or indicated by EU law or even by the exigencies of intracommunity competition in the internal legal services market of the EU.

The recent jurisprudence of the ECJ is particularly germane. It indicates the terminal point of the long march toward the market, which was sanctioned and orchestrated by the Court's earlier jurisprudence between the 1970s and 1990s in this area. Having established the legal profession's amenability to the basic dictates of the market in its offer of legal services to the public, the ECJ seems now set to delineate the parameters of the profession's amenability to the market, by reinforcing the core attributes that make the profession something more than a business. This new jurisprudence is not very fertile ground for the propagation of MDP.