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English Alternative Business Structures and the European single market

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ABSTRACT *English Alternative Business Structures (ABS) are likely to put the European legal framework on lawyer mobility and cross-border provision of legal services to its first serious test. Continental European bars are defending a reading of the applicable European Directives which would allow them to keep English ABS out of their markets. Whether the European Court of Justice (ECJ) will agree with this protectionist interpretation of the applicable European rules remains to be seen. This paper challenges the legal arguments in favour of protectionism and argues that it will be very difficult for Continental European bars to keep English ABS out of their markets.*

1. Introduction

These days, Continental European bars are haunted by the spectre of English Alternative Business Structures (ABS). English ABS are a recent and hotly debated development in the provision of legal services – for the first time in Europe law firms and legal service providers may be wholly-owned by non-lawyers and even list on the stock market. As soon as these reforms were proposed in England & Wales, Continental European lawyers – led by the German Federal Bar – made it quite clear that they were highly critical of the English experiment and even tried to influence the legislative process in order to derail the proposed reforms. These efforts were unsuccessful and the Solicitors Regulation Authority (SRA) granted the first ABS licences in March 2012.

On the Continent, the attention then turned to the question of whether European rules could enable ABS from England to do business elsewhere in Europe. Again, most Continental European bars are aghast at the threat of English ABS entering their well-protected markets. According to those critics, century old traditions of duty to clients and to the legal system could be replaced by loyalty to the London stock exchange instead. Continental European bars are therefore defending a

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reading of the applicable European directives which allows them to keep English ABS out of their markets. Still, it remains to be seen whether the European Court of Justice (ECJ) will agree with their protectionist interpretation of the applicable European rules.

Furthermore, this paper will argue that the Continental analysis is at least incomplete, if not wrong. It is simplistic to hope that a single victory in the ECJ would make the ABS threat disappear. If the English side gets its strategy right, a case that would serve as one decisive battle will not even reach the ECJ very soon. Instead, the invasion of the European Continent by English ABS is more likely to unfold in a series of skirmishes, involving a complex interplay between various judicial bodies (the ECJ being just one of them), national and European legislators and fights between liberal and protectionist forces within national bars.

When outlining the Continental resistance, a main focus will be on the German debate, for two reasons: first, as we will see, the German Federal Bar was the earliest and loudest European critic of the English reforms and continues to be one of the main drivers behind efforts to organise a united Continental defence against any attempts by English ABS to cross the channel. And second, Germany is the most important market for legal services on the Continent¹ and therefore Germany is by far the biggest prize in the game in terms of potential economic significance if ABS were to enjoy freedom of movement in Europe.

Because of these two reasons I am tempted to predict: if English ABS gain access to the German market, the rest of the Continental resistance is likely to fall apart. But even if this hypothesis overstates German significance in Europe, access to the German market for English ABS would still be a decisive turning point in the battle over ABS market access; and by implication also in the overall global battle between liberal and protectionist forces in legal services markets.

Finally, this paper does not adopt an overly serious tone and I hope the short hand labels for the two sides ‘English’ and ‘Continental’ will not offend anyone. The main purpose of these labels is to enhance the readability of this paper and give it a certain playfulness; they were also used in some of the press coverage of the conflict: of course, “Germany threatens UK law firm boycott” (Arora, 2006) made for a catchier headline than the probably much more accurate “So far, protectionist forces in the German legal establishment are more influential than advocates of free markets and competition . . .”. In my view, the conflict over whether English ABS will be able to offer their services on the Continent is not about national rivalries (whatever that means in the twenty-first century . . .) but about arguments and ideas. At its core are different views on how to regulate markets in legal services and whether to embrace competition and consumer choice.

2. A brief history of the Continental resistance to English ABS

2.1. Liberalisation in England & Wales

The 2007 English Legal Services Act has received much attention from all over the world. It is generally seen as a wide-ranging liberalisation of the market for legal

services in England & Wales.² It introduced the possibility of non-lawyers owning up to 100% of a legal service provider (so called Alternative Business Structures, ABS) which had previously only been possible in Australia. Although this liberalisation was accompanied by the introduction of a new entity-based regulatory framework,³ which was described as “Re-Regulation” by academic commentators (Flood 2011), it nevertheless elicited strong responses in other European countries. The recurring argument was that allowing non-lawyer ownership of law firms would compromise the independence of the legal profession. Instead of defending the interests of their clients lawyers would now face the temptation to give at least as much consideration to the interests of their investors.

It is not the aim of this paper to discuss the pros and cons of non-lawyer ownership of legal service providers. In a nutshell the argument in favour of allowing non-lawyer ownership stresses the point that the potential for conflicts of interest may justify regulation but not prohibition. If it were true that professionals working in entities which are owned and operated by non-professionals leads to the end of professionalism then hospitals should only allow doctors as shareholders and airlines should be owned by pilots. If this sounds ridiculous then the rest is already a debate about the details of regulation. For example, the rules in Australia make it very clear that client interest takes precedence over investor interest. Slater & Gordon, the world’s first listed law firm from Australia, told its investors in its IPO prospectus:

Lawyers have a primary duty to the courts and a secondary duty to their clients. These duties are paramount given the nature of the Company’s business as an Incorporated Legal Practice. There could be circumstances in which the lawyers of Slater & Gordon are required to act in accordance with these duties and contrary to other corporate responsibilities and against the interests of Shareholders or the short-term profitability of the Company. (Slater & Gordon Prospectus 2007).

In England & Wales the securities regulator has not explicitly stated yet that duties to investors could be subordinated to duties to clients – this is what the securities regulator did in Australia – and that worries some. It is questionable whether such an assurance is really necessary. After all, in every regulated industry it is understood that compliance with the regulation takes precedence over duties to investors. Otherwise securities regulators could decide that – say – the safety measures in nuclear power stations cost investors too much money. At least for lawyers from civil law jurisdictions this is almost self-evident. Consequently, the Continental critics never worried about stock market regulators interfering with the lawyer–client relationship, instead a recurring argument was the potential for conflicts of interest between the interests of ABS investors and ABS clients.

For example, German sceptics (Ewer, 2009, p. 659; Keller, 2012, p. 19; Weil, 2013, p. 55) explained their opposition to non-lawyer ownership by pointing out that clients would not trust an ABS to litigate on their behalf against a corporation if that same corporation is also holding shares in the ABS. These arguments do not acknowledge that ABS have to comply with conflict of interest rules and that this

duty also applies to conflicts between the interests of their clients and their investors. Already the Clementi report, when proposing LDPs (Legal Disciplinary Practices), the early experimental version of what were to become ABS, made it clear that there would be conflict of interest rules against taking clients when the outside owner had an adverse interest in the outcome and that outside owners would not be permitted to interfere with individual cases or have access to client files (Clementi, 2004, p. 124).

2.2. *Continental European bars are not amused*

The wave of Continental resistance to ABS launched with a letter dated 22 June 2006 by the then president of the German Federal Bar (*Bundesrechtsanwaltskammer*, BRAK), Bernhard Dombek, to the UK parliamentary Joint Committee on the Draft Legal Services Bill (UK Parliament 2006b, p. 289). Although acknowledging “BRAK does not want to interfere in internal affairs of another Member State of the European Union” (Ibid.) the statement made it clear that the BRAK did not like the proposed reforms and that English ABS would not be allowed to operate in Germany, the key sentence being:

... German *Rechtsanwälte* as well as solicitors and barristers established in Germany would infringe German professional rules if they became a member of such type of an ABS. (Ibid., p. 290)

The letter’s legal argument leading up to this conclusion was technically rather sloppy and misleading on the situation in Germany. It relied on §§59e, 59f BRAO (German Federal Lawyers’ Act⁴) to assert that Germany only allows Multi-Disciplinary Partnerships (MDPs) provided lawyers hold a majority in these firms. This is not true. The provisions cited by the BRAK do not apply to all law firms, only to those incorporated with limited liability (as a *GmbH*, so called *Rechtsanwaltsgesellschaft*). There are many MDPs in Germany where lawyers are in a minority, they are just not *Rechtsanwaltsgesellschaften*. This misrepresentation of the German legal requirements regarding non-lawyer ownership went unnoticed at the time. Still, even back in Germany the episode drew some criticism, with Michael Kleine-Cosack, the maverick liberal among German commentators on professional responsibility, characterising it as follows: “... in an act worthy of Don Quixote, the then president of the BRAK sent a threatening letter over the channel to the English Parliament”⁵ (Kleine-Cosack, 2007, p. 737). Could this letter really be described as ‘threatening’?

The BRAK’s statement did indeed ‘concern’ the members of the committee, who diplomatically noted the German objections in their report:

However, we were particularly concerned by the written evidence we received from the Bundesrechtsanwaltskammer (the German Federal Bar which is set up in statute as the self-regulatory body of the German legal profession). They told us of ‘certain obstacles which Alternative Business Structures would encounter in Germany’. They told us that ABS firms

which had shareholders from outside the profession and whose management would not necessarily be in the hands of a majority of lawyers would be ‘inconsistent with the requirements of German law’. They are of the opinion that ‘German *Rechtsanwälte* as well as solicitors and barristers established in Germany would infringe German professional rules if they became a member of such type of an ABS’. (UK Parliament, 2006a, p. 94)

In the English legal press the threat received some attention (Arora, 2006) and already somewhat less diplomatically a BRAK spokesperson even went so far as to say: “While we are careful not to interfere with another country’s national issues, we’re against the introduction of alternative business structures” (Ibid.). There was also some speculation that the BRAK’s position may have discouraged the English law firm Taylor Wessing from becoming an ABS, which was one of the few city firms which publicly considered selling a stake to private equity investors (Ibid.).

The issue then ceased to be a bilateral Anglo–German one and moved on to the European level. The Council of Bars and Law Societies of Europe (CCBE) threw its hat into the ring with two nearly identical responses to consultations launched by the English Legal Services Board (CCBE, 2009a)⁶ and the Solicitors Regulation Authority (CCBE, 2009b), both dated 4 September 2009.

The 2009 CCBE statements still represent the most advanced Continental public analysis of the question of whether English ABS enjoy freedom of movement in Europe. The European Lawyers’ Establishment Directive (the relevant provisions are reproduced and analysed below in Section 5.1) was interpreted in a way which would allow Continental European bars to keep out English ABS. According to the CCBE:

We expect that a large majority of jurisdictions will apply Article 11 paragraph 1 point 5 Directive 98/5/EC to ABSs. The effect would be that even advocates, barristers, and solicitors practising within an ABS could not provide legal services under their professional title in a large number of European jurisdictions. (CCBE, 2009a, p. 5)

As mentioned in this paper’s introduction, this interpretation of the Lawyers’ Establishment Directive and the accompanying notion of one decisive case in the ECJ (the ‘big ABS case’ in the terminology of this paper) then gained ground on the Continent. For example, when in 2011 the American Bar Association (ABA) invited comments on an ABS issues paper (ABA, 2011) the BRAK used the opportunity to make clear – again – that it viewed ABS as a serious threat to the independence of the legal profession and went along with the CCBE’s protectionist interpretation of the Establishment Directive:

We have closely monitored, as the ABA did, the substantial changes undertaken in England and Wales which finally led to the adoption of the Legal Services Act. Alternative Business Structures as they will be admitted soon in this jurisdiction are a major concern for us. Under German law it is prohibited for non lawyers to own law firms, subject to very limited exceptions for certain multidisciplinary partnerships. Under the English regime,

banks, insurance companies, supermarket chains and others can be the shareholders and shares may even be listed on the stock exchange. We believe this to be a serious threat to the independent professional judgement of the lawyer employed by such a firm. Those firms will not be able to practice in Germany, a point which we made clear in the course of the consultation launched by the English parliament. *The European Lawyers Establishment Directive allows a Member State not to admit on its territory such types of firms from another Member State which are unlawful under its national law.* (BRAK, 2011a, p. 3, emphasis added)

Apparently not satisfied with the Continental European anti-ABS coalition it had forged, the BRAK invited the Americans to join the club:

We were very satisfied in learning from the ABA's Issues Paper that the introduction of Alternative Business Structures along the English or Australian model is not contemplated in the US and we think our bars should join forces in order to express our common stand on the international scene. (Ibid.)⁷

The ABA Commission on Ethics 20/20 indeed rejected full-scale outside investments by non-lawyers in law firms but invited comments on a couple of very cautious options for liberalisation (ABA, 2011). Even those limited options were eventually rejected by the commission (ABA, 2012), a stance reaffirmed by the ABA's House of Delegates in August 2012 (Hyde, 2012a). The US debate on ABS is complex and different from the European one in some crucial aspects: for example, most of the ABA's special commissions tend to be more reform-minded than the ABA's membership whereas for example in Germany the BRAK tends to be much fonder of the status quo than at least the younger generation of German lawyers. And although the fact that US lawyers compete in a global marketplace is regularly acknowledged rhetorically, from my perspective the reality of legal practice in North America appears to be less multi-lingual and multi-jurisdictional (not counting US states) than in Europe and involves less supranational law (just think of European law). These important differences make it a subject beyond the scope of this paper [although I will briefly get back to the US situation in the section below on world trade law (Section 6)].

We have seen responses from Germany, the CCBE and the US to the introduction of ABS in England. In this paper I cannot take a detailed look at every single organised bar in Europe and their respective positions. A sceptical or even downright hostile reaction to the introduction of ABS in England was common,⁸ as evidenced by the CCBE's statements.

We must see whether what is really happening in England corresponds to the picture painted by the Continental sceptics and then take a look at the legal arguments put forward to deny the opportunities of Europe's single market to English ABS.

3. Meanwhile, in England: what ABS are really being used for

The Continental hostility towards ABS is at least partly motivated by the expectation that "banks, insurance companies and supermarket chains" [in the words of the

BRAK (2011a, p. 3); see also Keller (2012, p. 19)] would set up ABS and that this would lead to consolidation in the consumer segment of the legal services market. In this section I will argue that in reality this is far from what is happening in England. Instead of some robber-baron era in legal services the ABS-enabled new world emerging is more likely to resemble a ‘Legal Silicon Valley’. To a much greater extent than before it is now possible for legal entrepreneurs to try out innovative business models. Some of them may not work but others will change the way we view legal services.

The SRA issued the first three ABS licences on 28 March 2012 (Rose, 2012). One went to Co-operative Legal Services, a subsidiary of The Co-operative Group, an English consumer cooperative with over six million members, offering everything from food retailing to financial services, travel agencies, pharmacies and even funeral services. Legal services were a logical addition to this portfolio, sometimes described as comprehensive ‘life planning’. The Co-operative Group is owned by its members who receive the group’s profits. In Continental Europe it is the best known example of ABS because it fits the expectation that ABS are somehow about legal advice being offered in supermarkets. Since it is not a for-profit business in the classic sense one might wonder whether it really provides evidence for the view that ‘Tesco Law’ is just around the corner.

The two other ABS sharing the honour of “first English ABS in history”⁹ are John Welch & Stammers and Lawbridge Solicitors. When they applied for ABS licences the former was a two-partner firm who wanted to make its non-lawyer practice manager a partner, the latter had just one lawyer who wanted to give an equity stake in the firm to his wife who was also the practice manager. These two examples are hardly the stuff of “banks, insurance companies and supermarket chains” moving into legal services. The really interesting developments came later. Examine BT Claims, Riverview Law and LegalZoom and Rocket Lawyer.

BT Claims used to be an unexciting back-office function of British Telecom: it handled motor vehicle accidents for BT’s large fleet of commercial vehicles. Investing early in IT-supported efficient processes it became recognised as the leading provider of integrated motor vehicle claims management. Since it was part of BT’s legal department, it could not offer its services to other operators of large fleets of commercial vehicles. The solution: make it an ABS. This way it could offer legal services to other companies although it is owned by BT, not by lawyers. This is an interesting development: businesses with legal departments which are better than average at handling a particular type of legal work can now spin off this part of their back-office and cash in on this expertise. Instead of being viewed as overhead, legal departments can now become profit-centres.¹⁰

Riverview Law is a law firm targeting business clients with fixed price legal advice. According to its own marketing material it can do so profitably because:

- We’ve kept our overheads low
- We don’t have expensive city-centre premises to pay for
- We don’t have a large head-office or partner model to support

- We use effective end-to-end technology and workflow systems to enable our legal and support teams to work flexibly and efficiently
- We see legal services as just that, a service, and have deliberately swept the cobwebs off the traditional client/lawyer interaction
- We don't reward our people for the number of 'billable-hours' they generate
- We measure success in how effectively and quickly our teams satisfy customer legal requirements. (Riverview Law, 2013)

It is funded by several private equity investors but its largest shareholder is DLA Piper, currently the world's biggest law firm (by number of lawyers).

LegalZoom and Rocket Lawyer are currently not regulated as ABS but I think their recent launches on the UK market should nevertheless be seen as a result of the liberalisation of legal services in England & Wales. LegalZoom is one of the best known online legal document creation services, offering templates for all sorts of common legal documents. It was originally set up in the US in 2001 and in September 2012 it announced its launch in the UK via an exclusive partnership with law firm network QualitySolicitors (Baksi, 2012; *Legal Futures*, 2012a). The idea behind this is that lawyers from QualitySolicitors will help customers to use the documents provided by LegalZoom's website. QualitySolicitors has more than 400 branches all over the UK and followed up on its LegalZoom deal with an advertising campaign attacking 'faceless' legal services such as those potentially provided in future by banks and supermarkets (*Legal Futures*, 2012b).

Rocket Lawyer is also offering online legal documents and is similar to LegalZoom in a lot of respects. There is intense competition between the two of them, even culminating in a recent high-profile lawsuit filed by LegalZoom against Rocket Lawyer for false and misleading advertising, trademark infringement and unfair competition (Smith, 2012a, 2012b). Rocket Lawyer is a much-used example in talks or presentations about the future of legal services because one of its investors is Google. On the UK market Rocket Lawyer is cooperating with a panel of local law firms (Hyde, 2012b), much like LegalZoom.

The examples of LegalZoom and Rocket Lawyer show that the arrival of ABS is leading to innovation in the entire legal services sector. In the UK they can count on liberal rules beyond the availability of ABS. For example, in Germany both would face legal risks resulting from unauthorised practice of law prohibitions and from the rules on referral fees. Nevertheless, both are planning further international expansion.

Whereas the technology behind a lot of fast-growing legal start-ups is still being developed in the original American Silicon Valley, the US could lose its edge in legal innovation because its regulatory environment is not very open to innovation. LegalZoom for example is sued regularly for alleged unauthorised practice of law by overzealous state bars (Palazzolo, 2012). Against this background England could be seen as a better contender for the title of 'Legal Silicon Valley' because of its generally liberal approach to regulating legal services providers.

This is also why the legal issues analysed in this paper will be of practical relevance. Over the next years we will see a lot of innovation in England and already in one or two years it will be quite clear which new business models are successful.

Bringing them to other markets is easy money, much like a lot of German internet entrepreneurs made their money in an intellectually lazy way by just being the first to copy successful American internet start-ups in Germany. Still, they became millionaires. My prediction is that the same will happen in legal services. And then the question of to what extent English ABS enjoy freedom of movement in Europe will cease to be ‘just’ good academic fun.

4. Small European ABS cases

In the second section above we have seen that the Continental analysis has been mainly focused on Article 11 of the Establishment Directive, which is arguably applicable if an ABS with non-lawyer investors seeks to establish a presence on the Continent (‘the big European ABS case’). However, before commenting on the quality of the Continental analysis concerning ‘the big European ABS case’, I attempted to show in Section 3 that English ABS are used for much more than just tweaking the existing law firm business model by seeking outside investment in otherwise traditional law firms. These more innovative ABS could equally try to take their business model to other European markets and thereby give rise to a rather different set of questions under national and European law.

In a sense, a cartoonish view on the facts prevented the protectionists from seeing the complete picture. So let us see how a series of ‘small European ABS cases’ could turn out, before focusing – in the fifth section – on the ‘big European ABS case’.

4.1. Continental lawyers as ABS investors

First a small European ABS case: German lawyers investing in an English ABS. The BRAK said: “German *Rechtsanwälte* [. . .] would infringe German professional rules if they became a member of [. . .] an ABS”. This language reveals an incomplete understanding (to be fair: at least back in 2006) of what was proposed, because ABS do not necessarily have ‘members’. ABS are what I would call a ‘regulatory category’, the underlying legal entity could be a simple partnership or a limited liability partnership (LLP), which indeed would have members, or a limited company (Ltd) or a public limited company (plc), which would have shareholders. To get around the terminological complexity this paper uses the categories ABS, their investors, their managers and their employees; this terminology is independent of the legal entity used by an ABS.

In light of the BRAK’s statement about becoming a “member of an ABS”, what kind of involvement (to use a very broad and neutral term) with an English ABS would get a German lawyer in trouble?

It is very unlikely that a simple investment in an English ABS would get a German lawyer into legal difficulties. First, the applicable fundamental freedom in the single market would be Free Movement of Capital, which as a general rule is very difficult to restrict. Second, in Germany there are currently no specific rules on lawyers’ private investments (beyond a general duty to avoid conflicts of interest). And

third, it is difficult to imagine how the BRAK would enforce a ban on investments in English ABS by German lawyers.

It would be equally difficult for other European jurisdictions to keep their lawyers from investing in English ABS.

4.2. Continental lawyers working for an ABS on English soil

BRAK's statement about "becoming a member" of an ABS could also be interpreted as meaning that working for an ABS is incompatible with German professional rules. Here 'working' is to be understood as 'practising law' regardless of whether in management or not and regardless of any equity stake in the ABS.

This is probably within the language of the BRAK and it is surely an issue under the current system of European lawyer regulation. Under Article 6(1) of the Lawyers' Establishment Directive a European lawyer established "abroad" has to observe the host state's professional regulation "irrespective of the rules of professional conduct to which he is subject in his home Member State". This has been called the double deontology problem (Hellwig, 2008): theoretically a European lawyer can be subject to two sets of conflicting rules. Now, assuming a host member state rule prohibits legal practice in ABS-type entities, whereas the English rule obviously allows it, which rule would prevail?

In theory this is unclear, but the question only arises if the home member state rule applies to 'extraterritorial' situations at all. For example, English professional rules apply to 'overseas practice' whereas it is an unresolved question whether German professional rules – at least those regarding permitted organisational structures for law firms – apply outside Germany (Hellwig, 2012, p. 880). This means that in many European jurisdictions national courts may already say that their respective 'anti-ABS-rules' of course apply at home but do not come with extraterritorial applicability. For example, such an outcome would be quite likely in Germany (Hellwig, 2012, p. 880; Weil, 2013, p. 58). If 'anti-ABS-rules' lack extraterritorial applicability, Continental lawyers could move to England without having to worry about double deontology.

Finally, even if national courts and the ECJ were to rule that the double deontology conundrum has to be resolved by giving more weight to home member state professional rules, European lawyers heading to England for a new job with an ABS still have an easy practical solution left: they could simply hand in their national licences. Since ABS are licensed as entities the individuals practising within an ABS do not necessarily have to hold individual licences.

Still, the issue might have to be tested in court because keeping a national licence avoids legal uncertainty for those Continental lawyers practising in England in an ABS who want to provide services temporarily on the Continent under the Lawyers' Services Directive. (More about the possibilities offered by the Lawyers' Services Directive can be found below in Section 4.5.)

4.3. ABS offering non-reserved activities on the Continent

We have seen that Continental lawyers could invest in or work for an English ABS as long as the ABS itself stays in England. If the ABS wants to cross the channel it has

three main options: first, offer only services which are non-reserved activities; second, take advantage of the opportunities provided by the 1977 Lawyers' Services Directive (see Section 4.5 below) or third, try to go all in under the Lawyers' Establishment Directive of 1998 (the 'big ABS case', as in Section 5 below).

I think the invasion of English ABS will proceed along these three major avenues – non-reserved activities, provision of services, establishment – and these three avenues may even turn out to be roughly equally important in economic terms. However, as we have seen, the Continental attention has so far been focused on the third part of the ABS invasion.

Reserved activities are those activities where lawyers enjoy a professional monopoly. If a non-lawyer engages in reserved activities she could be prosecuted for unauthorised practice of law and – depending on the jurisdiction – either pay a hefty fine or even serve time in prison. The scope of reserved activities varies considerably between European countries: on the one hand, relatively 'liberal' régimes (for example in England or Denmark) with a limited list of reserved activities and, on the other hand, countries where lawyers enjoy a very broad professional monopoly (for example Germany, or – outside Europe – the United States¹¹).

If an English ABS wants to provide legal services on the continent the applicability of the two European directives on legal services (the second and third avenues of the invasion) will depend on whether the business model of the ABS relies on the provision of reserved activities or not. The CCBE acknowledged as much in two well hidden sentences in their analysis of ABS under the European legal framework:

ABSs will be able to be established abroad and provide legal services, where these services in the host state do not fall within the scope of reserved activities. The scope of reserved activities differs from one jurisdiction to another. (CCBE, 2009a, p. 5; 2009b, p. 5)

BRAK, on the other hand, did not publish anything on the opportunities ABS will have on the German market as long as they are operating outside of reserved activities. That is either because it did not see this enormous hole in its armour, despite the 2009 CCBE statements, or, since Germany has a very broad professional monopoly, it simply could not imagine that the hole could turn out to be of importance.

It could be instructive to take a closer look at Germany: even in a jurisdiction where many activities are reserved for licensed lawyers English ABS could make inroads by operating at the margin of the professional monopoly. For example, the business model of Co-operative Legal Services could be exported to Germany by modifying it. Instead of offering legal services to the public at large an imitator would have to operate on a membership only basis and could then rely on §7 RDG (*Rechtsdienstleistungsgesetz* – Legal Services Act¹²). This provision allows cooperatives or trade unions to provide legal services to their members using non-lawyers and even through wholly owned corporate subsidiaries, as long as legal services are not their main activity.

Or, BT Claims could put the reach of the so called *Annexkompetenz* (auxiliary right to provide legal services) in §5 RDG to its first judicial test. §5 RDG allows non-lawyers to provide legal services if they are “auxiliary” to another “main service” they provide. An ABS offering legal services as part of a much broader traditional business function – such as arguably BT Claims – could try to rely on this provision. The approach would not be free of legal risk because the reach of the *Annexkompetenz* according to §5 RDG was never tested in court but a case involving an English ABS or with an otherwise European dimension would greatly increase the chances of obtaining a ‘liberal’ precedent: then a German court would not only have to interpret §5 RDG in light of the German constitution, which already argues for a liberal reading of the provision, but also in light of European fundamental freedoms and possibly the 2006 EU Services Directive.

Finally, reserved activities are an area where English ABS have great potential to bring about legislative change on the Continent. In more and more member states the proper scope of reserved activities is debated on a domestic level and even in comparatively liberal England the debate is far from over (LSI, 2011). At the European level, the European Commission (EC) is currently taking a renewed¹³ look at reserves of activities in professional services across the Union (EC, 2012a). In the context of lawyer mobility one could argue that severely limiting the scope of national monopolies for lawyers would be a very important step towards the EU’s goal of fostering a single internal market in services. After all, every activity successfully ‘taken away’ from a national professional monopoly would then be open to competition from other European service providers. However, the current system of the two Lawyers’ Directives acts as a serious disincentive for liberalisation, as under these Directives access to the market for reserved legal activities in other member states depends on being a full member of the legal profession in the home member state. This puts countries with a liberal approach towards legal services at a disadvantage. For example, in Finland legal services are provided by ‘legal professionals’ and fully-fledged lawyers. As the professional monopoly for lawyers is very narrow, the majority of persons providing legal services in Finland are ‘legal professionals’. Finnish ‘legal professionals’ however cannot take advantage of the opportunities provided by the two Lawyers’ Directives [Claessens *et al.* (Panteia–Maastricht Report), 2012, p. 199f; see also Lonbay (2011, p. 1652) for a discussion of how case law under the Professional Qualifications Directive may help]. Therefore, if narrowing the scope of a given national monopoly for lawyers also leads to fewer persons choosing to qualify as fully fledged lawyers in that given member state (as presumably it would) then the ‘legal services industry’ of this member state will run into trouble accessing other European markets.

4.4. Online legal services under the E-Commerce Directive

For ABS with an internet-based business model the expansion into other European markets is fairly straightforward under the European E-Commerce Directive. According to Articles 4(1) and 5(1)(f) only the professional rules of the home state apply to “information society service providers” belonging to a regulated profession.

Even the CCBE accepts that this means cross-border online legal services are regulated by the state in which the service provider is established, i.e. the home state [CCBE, 2008, p. 10; Claessens *et al.* (Panteia–Maastricht Report), 2012, p. 67]. This means ABS can happily target clients in other European member states over the internet. As long as their presence remains virtual any protectionist local bars are powerless to stop them.

4.5. *Provision of services on the Continent*

Relying on the European Lawyers' Services Directive of 1977 will be the second major avenue by which ABS may try to cross the channel. Temporary provision of services under the Lawyers' Services Directive is not restricted to communication with clients in other member states or fly-in fly-out by staff. As held by the ECJ in the *Gebhard* case, maintaining permanent office facilities in another member state is also still covered by the Freedom to Provide Services.¹⁴ In *Gebhard* the court also somewhat mysteriously said that the "temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity".¹⁵ This has led some commentators such as Kilian (2010a, p. 1317, marginal number 2) to argue that a lawyer whose professional activity is predominantly targeted at a particular host state can no longer rely on the Freedom to Provide Services. This (protectionist) reading of the *Gebhard* case however would lead to odd results: if an English ABS targets the French market by using a French language website in England to communicate with clients and otherwise has all its lawyers based in England who never travel to France in a professional capacity, then according to this view the ABS would have to be regarded as 'established' in France because 100% of its professional activity is targeted at the French market. This view really blurs the line between temporary provision of services and establishment by treating legal services providers as established even though they have no physical presence at all. It makes much more sense to apply the E-Commerce Directive to such a situation.

Although admittedly it is not entirely clear where exactly European law draws the line between temporary provision of services and permanent establishment, English ABS could go a long way with a legal strategy relying for as long as possible on the Freedom to Provide Services and denying that their activities in other European member states amount to establishment. The Freedom to Provide Services, as shaped by the 1977 Lawyers' Services Directive and to a certain extent also the 2000 E-Commerce Directive and the 2006 Services Directive, on balance provides the most promising legal arguments in favour of ABS market access.

I start with the relevant provision in the Lawyers' Services Directive of 1977:
Article 4

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional

organization, in that State. (1)OJ No C 103, 5.10.1972, p. 19 and OJ No C 53, 8.3.1976, p. 33. (2)OJ No C 36, 28.3.1970, p. 37 and OJ No C 50, 4.3.1976, p. 17.

2. [...]
3. [...]
4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

Paragraph 1 applies to “the representation of a client in legal proceedings or before public authorities” and is probably of minor importance to ABS. Much more interesting is paragraph 4, which requires adherence to the host state professional rules only “to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility”. Are the rules on non-lawyer ownership such rules whose observance by foreign lawyers is “objectively justified”? There has been no European case on the issue. However, the BRAK unsurprisingly thinks the Lawyers' Services Directive prohibits English ABS providing services on the Continent. The CCBE, on the other hand, did not say anything about the Freedom to Provide Services in its otherwise highly anti-ABS statements, probably because it did a better legal analysis than the BRAK and therefore realised that it will be next to impossible to prevent English ABS from offering legal services on the Continent.

I have three arguments why it will be next to impossible for protectionist bars to rely on Article 4(4) to prevent English ABS from providing services in their markets:

- (1) So far, it has been the practice of host state bars under the Directive to ignore home state law firm ownership issues when other European lawyers offered services in their jurisdiction. To propose otherwise leads to absurd results, as the example of the BRAK's recent anti-ABS crusade shows: in a recent article, BRAK staff member Keller (2012, p. 19)¹⁶ argued Article 4(4) of the Directive, transposed in §27(2) EuRAG (Law regulating the activity of European lawyers in Germany¹⁷) contains a general duty to observe the rules on law firm ownership in the host jurisdiction, in Germany that would be §59a BRAO (German Federal Lawyers' Act) (Keller, 2012, p. 19).¹⁸ This reading would not only effectively close

the German market to English ABS but to all European lawyers practising in entities not meeting the requirements of §59a BRAO. And there are many such law firms in Europe. Likewise, if other protectionist jurisdictions adopted the same position, those German lawyers practising in MDPs (or otherwise not meeting the domestic requirements of another European jurisdiction) could no longer provide services in jurisdictions with stricter requirements on MDPs (or otherwise differing rules). This means those German lawyers practising in association with a notary, tax adviser or accountant (this is the case for a lot of international law firms in Germany) have to worry whether their own bar just started to close off their access to other European markets.

Therefore, a rule such as the one proposed by Keller, saying “Regardless of whatever fancy constructions are legal in your home state, if you practice in an entity that would not be allowed in the host state, stay out!”, would hurt a lot of existing cross-border working relationships, which is probably why the CCBE never ventured in this direction. Needless to say, since such an interpretation of the directive would more or less destroy the system set up by the Lawyers’ Services Directive I am quite confident that the ECJ would not go along with such an extreme position. Therefore the protectionist side would have to invent a new rule targeting only provision of services by ABS-type entities without hurting the already existing single market in legal services. That will be next to impossible.

- (2) It is difficult to see how host states would enforce a reading of the Directive allowing them to keep certain European lawyers out because they practise in entities which would be illegal in the host state. Again, the BRAK offers an instructive example: in 2011 the European Commission initiated an evaluation of the practice under the two European Lawyers’ Directives and sent a questionnaire to European national bars; the BRAK commendably made its answers public (BRAK, 2011b).

The European Commission wanted to know:

2. Temporary provision of service: Directive 77/249/EEC
 - 2.1. Who are the main users of Directive 77/249/EEC (individual experienced practitioners, young graduates, members of large firms, members of small or medium-sized firms)?
 - 2.2. What is the client base of these lawyers? Is it only/predominantly clients from their country of origin? Do they gain new clients in your Member State?
 - 2.3. Is the scope of Directive 77/249/EEC appropriate, in particular as regards the titles listed in Article 1.2?

And the BRAK responded:

Since foreign lawyers who provide legal advice in Germany in the form of a service on a temporary basis without establishing themselves in Germany are not required to get in touch with the regional Bar, the German regional Bars do not have any information

regarding Directive 77/249/EEC. Therefore, we are unfortunately unable to answer questions 2.1 to 2.3. (BRAK, 2011b)

This is the challenge, and not only to the BRAK but to all the other protectionist bars in Europe: even if there were a rule against English ABS providing services temporarily, it is unclear how such a rule could be enforced.

- (3) The 2006 Services Directive of the European Parliament and the European Council, specifically its Article 16, made it much more difficult to restrict the freedom to cross European borders to provide services. Excluded from this liberalisation however are ‘matters’ covered by the 1977 Lawyers’ Services Directive, according to Article 17 No. (4) Services Directive. How to interpret this exception, specifically the word ‘matters’ (and therefore whether the general 2006 liberalisation of the European services market applies to lawyers as well) is the subject of an extremely technical discussion in German language legal scholarship (Hellwig, 2010, p. 302 ff; 2012, p. 883; Weil 2013, p. 56f). The emerging consensus, which made its first appearance in English language in the 2012 report for the European Commission evaluating the legal framework for the free movement of lawyers [Claessens *et al.* (Panteia–Maastricht Report), 2012, p. 65], seems to be that ‘matters’ refers only to those matters specifically regulated by the 1977 Lawyers’ Services Directive and is not to be understood as a blanket exception in favour of lawyers. As the 1977 Lawyers’ Services Directive does not regulate the ‘matter’ of non-lawyer ownership, any attempts by protectionist bars to restrict the Freedom to Provide Services on the ground of non-lawyer ownership will have to get over the considerable obstacle of the 2006 Services Directive.

For these three reasons English ABS will be able to use the Lawyers’ Services Directive to provide services throughout the single market.

A small problem remains: The Lawyers’ Services Directive is based on the idea that individual lawyers move. In practice they were often part of law firms, but still the individual crossing a border was probably a licensed lawyer. In the case of English ABS the scenario that a non-lawyer employee of the ABS provides services in another member state becomes a real possibility. Would that employee be regarded as a solicitor for purposes of the Lawyers’ Services Directive because the ABS is a solicitor? In England such an employee would not be classified as a solicitor but as a ‘regulated person’, however this category does not exist under the European directives. As soon as a non-lawyer employee of an ABS crosses a border there is legal uncertainty. It is therefore recommended that Continental lawyers taking up jobs with English ABS try to keep their licences as suggested above in Section 4.2.

4.6. *Work-around constructions: channelling external investments as debt*

Before moving on to the ‘big ABS case’ – whether English ABS enjoy Freedom of Establishment on the Continent – I consider another possible consequence of the

English reforms. ABS may serve different purposes but the most hotly debated one is the possibility to attract external ('non-lawyer') investment. If the introduction of ABS in England leads to the development of a market in non-lawyer investments in law firms, could law firms with offices on the Continent still take advantage of the new funding possibilities?

For example, why not have a special purpose vehicle ('Croesus I') tailored to a specific law firm in England. The SPV is listed and channels the proceeds of an IPO to the law firm as debt with an extremely high rate of interest. The loan agreement would specify which obligations of the law firm rank ahead of debt servicing under the loan agreement, namely operating expenses, staff salaries and – of course – any claims by the law firm's clients. Provided the interest rate on the loan is high enough all the remaining revenue would flow towards the special purpose vehicle as interest payments on the loan. The shareholders in the special purpose vehicle, external investors and the law firm partners, would then receive their profits according to their capital contributions.

How could a Continental European Regulator stop this? Could it say the firm has 'disorderly finances' (provided there is such an obligation in the respective jurisdiction?) Well, not really; the law firm is stable and profitable and clients are not at risk financially. The best chance would be that an English regulator requalifies the law firm's debt as equity, because it is indeed structured to behave like equity. However, this relies on the English regulator 'knowing' what is going on here – difficult, but probably possible under the recently introduced regulatory régime – and being willing to do something about it or at least share the information. If a Continental regulator had the information, it could try to come up with its own rules on what kind of debt arrangements are permissible for law firms, allowing a credit line at the bank but disallowing 'disguised' equity investments in law firms. But could it explain where exactly is the difference in a manner satisfactory to, say, the German constitutional court?

Of course my little 'Croesus I' idea would need some fine-tuning to work in practice, but I have two arguments here:

- (1) If even a structure developed in a couple of minutes would be very hard to close down, how then about more complex work-around structures, developed by the smartest legal brains around, with paperwork running into several hundred pages?

Personally, I would not count on most Continental regulators to effectively keep these 'ABS in disguise' out of their markets.

- (2) All those work-around structures relying on the idea of 'masking equity investments as debt' raise the truly awkward question why, in the case of law firms, equity financing is seen as so much more dangerous than debt financing. This is not the conventional wisdom of corporate finance 101. In a sense one could argue that the sudden collapse of US law firm Dewey & LeBoeuf under too much debt shows why prohibiting equity financing for law firms is not making the legal profession any less 'commercial' but is instead a potentially dangerous policy: the pressures of the marketplace being what they are, law firms may take on too much debt

financing which is less transparent and less forgiving in periods of financial difficulty than equity and as a result more dangerous to clients and the reputation of the legal profession. The approach to law firm financing in most jurisdictions – complete prohibition of non-lawyer equity financing whereas non-lawyer debt financing is completely unregulated – may come under pressure sooner than most observers expect, especially if a couple of other well-known law firms go down the unfortunate road of Dewey & LeBoeuf and clients get hurt as a result of a ‘disorderly’ collapse.

However, few legal regulators have thought about the question of whether something like the collapse of Dewey & LeBoeuf could happen in their jurisdiction. For example, under the German rules of professional responsibility regulators cannot monitor the level of indebtedness of law firms on the German market. And if ‘balance sheet transparency’ is the basic question, the advanced challenge for any legal regulator would be to look beyond overall levels of indebtedness and take a closer look at the kind of debt law firms use to fill their external financing needs. Global law firms routinely sign off on very intrusive covenants in their debt instruments, for example requiring law firms to fire partners if profitability falls below a certain threshold. This is not seen as a threat to the independence of the legal profession and accordingly debt is completely unregulated (at least on the Continent) but giving equity to non-lawyers is completely prohibited. This is a great inconsistency.

4.7. *Calling the Continental bluff or which European bar would really manage to close down a major law firm if it became an ABS?*

This is the last scenario in the series of ‘small European ABS cases’: what would really happen if despite all the Continental threats an established English law firm became an ABS and sold a 30% ownership stake to a private equity investor? Although some may think this scenario is politically unlikely, it is still academically instructive to take a look at what Continental bars could really do about that, again taking Germany as an example.

Apparently, the BRAK has a battle plan on how to deal with an application of an ABS for bar membership in Germany. The competent authority to deal with such a request would be the local bar. Consequently, the BRAK sent a template to the local bars in Germany which they are supposed to use in order to decline the request (Hellwig, 2012, p. 876 f.). That is all there is in terms of preparation, which is not a remotely credible deterrence. If the BRAK wanted the English side to believe that it would go nuclear in the event an ABS tried to cross the channel, it would have to (preferably in public) prepare a response involving the only two serious weapons it has at its disposal: disbarment and unauthorised practice of law (UPL) proceedings.

This is because an application for bar membership in Germany as an entity is not necessarily going to happen, since as a general rule Germany regulates individual lawyers. Only law firms using the corporate vehicle of a *GmbH* (*Gesellschaft mit beschränkter Haftung*) have to register with the local bar as an entity (§59c BRAO).

Whether this obligation could also apply by analogy to law firms using any other German or European corporate vehicle has not been decided in court and is rejected by academic commentators (Henssler, 2009, p. 953; 2010, p. 747, Anhang §§59c ff, marginal number 21; Kilian, 2011, p. 562, marginal number 58). As an English ABS would probably use an English partnership or corporate vehicle (such as an LLP, a Ltd or a plc) there is no obligation to apply for bar membership as an ABS. Only if the ABS wants to gain rights of audience as an entity in German courts – as opposed to its individual lawyers enjoying rights of audience – does it have to register with the local bar. At the end of the day, the individual (German as well as European) lawyers of such a firm are regulated as individuals holding individual licences.

Therefore, if an established law firm were to become an ABS there is no way its German offices as such could be closed down. Instead, individual disbarment proceedings would have to be started against all the lawyers of such a firm (and, if despite having lost their licences the lawyers in question were to continue dabbling in reserved activities, UPL proceedings after that). And disbarment proceedings are difficult – politically and legally.

First, the political situation: the BRAK cannot credibly threaten a tough approach because responsibility for disbarment does not lie with the BRAK but with local bars in Germany. It is far from clear whether the BRAK controls the local bars enough to ensure a uniform response. Otherwise, the Munich bar may go nuclear but the Frankfurt bar may take a relaxed approach to ABS. The Munich bar may then threaten to disbar the Munich bar registered lawyers of the ABS who would simply register in Frankfurt in response.

Second, the legal situation: if an English law firm with offices in Germany became an ABS with appropriate safeguards and the German regional bars all collectively went nuclear and disbarred the firm's lawyers, the issue could be decided in the German constitutional court long before it reaches the ECJ. Prohibiting the exercise of a profession tends to be a hard sell to the German constitutional court. If the German regional bars relied on the arguments prepared by the BRAK they will discover that they “brought a provision to a principle fight”¹⁹ because the BRAK's analysis did not bother with constitutional law at all. In the German constitutional court it could be 1987 all over again, when – much to the surprise of the BRAK – in two landmark decisions the entire traditional system of German professional regulation was held unconstitutional.²⁰

This little scenario shows that a focus on the ECJ alone may turn out to be short-sighted. For example, in Germany, the constitutional court is at least as likely to complicate the protectionist's defence as is the ECJ, which brings us finally to the ‘big ABS case’.

5. The ‘big European ABS case’: do English ABS enjoy Freedom of Establishment in Europe?

Compared to some of the scenarios in the series of small ABS cases the question at the start of the ‘big European ABS case’ is fairly straightforward: can an English ABS with non-lawyer investors rely on Freedom of Establishment in the European Union?

5.1. *Is there a simple answer in the Lawyers' Establishment Directive?*

A suitable place to start with an analysis is the 1998 Lawyers' Establishment Directive:

Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained

Official Journal L 077, 14/03/1998 P. 0036–0043

Article 11

Joint practice

Where joint practice is authorised 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 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.
- (2) Each Member State shall afford two or more lawyers from the same grouping or the same home Member State who practise 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 aforementioned lawyers. The manner in which such lawyers practise 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 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 practise jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.

- (4) A lawyer who wishes to practise under his home-country professional title shall inform the competent authority in the host Member State of the fact that he is a member of a grouping in his home Member State and furnish any relevant information on that grouping.
- (5) Notwithstanding points 1 to 4, a host Member State, insofar as it prohibits lawyers practising under its own relevant professional title from practising

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 practise in its territory in his capacity as a 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 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).

The anti-ABS view in Europe relies on Article 11(5) of the Directive to conclude that member states could simply refuse establishment to ABS. I would argue however that a close analysis of the provision leads to more questions than answers.

One possible reading of paragraph (5) would be that “insofar as it prohibits” means: as soon as the host state allows some sort of MDPs or external ownership it can no longer justify protectionist measures under paragraph (5). Since most member states allow MDPs or external ownership under some circumstances [Claessens *et al.* (Panteia–Maastricht Report), 2012, p. 205f], this reading would dramatically limit the possibilities of protectionist bars in Europe to rely on the Directive to keep ABS out. The problem with this interpretation is the third sentence of paragraph (5), which seems to provide another justification to keep ABS out. But then, what is the relationship of the third sentence to the first sentence within paragraph (5) and of paragraph (5) third sentence to paragraph (1) second sentence? I do not have an answer. Other scholars are equally scratching their heads; Claessens (2008, p. 246) comments simply “the text of the Article (and most notably the relationship between paragraph 1 and paragraph 5 of that article) is extremely complicated”, without having an explanation either as to what the European legislator may have wanted to say here.

Another possible reading of the “insofar as it prohibits” in paragraph (5) would be: ‘insofar’ means ‘to the same extent as’. For example, under such an interpretation the provision could provide cover for Spain (which allows 25% external ownership) to keep out English ABS (up to 100% external ownership) but not Danish law firms (Denmark allows up to 10% external ownership²¹). Still, such a reading is full of problems: in the case of external ownership thresholds, is the threshold set by the rule in the home member state relevant or the threshold present in the entity trying to move? For example, could an English ABS with 20% external ownership move to Spain?

Furthermore, a convincing counter-argument to this sort of ‘numbers game’ would be that comparing rules on external ownership across jurisdictions is more

complex than that and has to take into account the regulatory arrangements in place. For example, could England keep out a Spanish law firm with 25% external ownership arguing that regulation of non-lawyer involvement in Spanish law firms does not meet the standard set by the English regulatory framework for ABS? And this only concerns external ownership, but what about MDPs? Is allowing non-lawyers to own up to 25 % ‘more’ or ‘less’ than allowing other regulated professions (tax advisers and accountants in Germany for example) to form partnerships with lawyers even if this results in non-lawyer majority MDPs?²²

A third possible reading of paragraph (5) would look at the third sentence in isolation and postulate a rule we already encountered in the discussion of the Lawyers’ Services Directive: “Regardless of whatever fancy constructions are legal in your home state, if you practise in an entity that would not be allowed in the host state, stay out!”. Whereas in the case of temporary provision of services such a rule leads to absurd results, in theory this may be a tiny bit more defensible in the case of establishment. However, even under the Establishment Directive the practice is already more liberal than that: German MDPs for example are established in other jurisdictions which would make it very difficult for Continental bars to propose such a reading to the ECJ.

At the very least, what the anti-ABS coalition would have to argue is that there is a fundamental difference between MDPs or – say – stock options for support staff and the involvement of non-lawyers as outside investors with a purely financial interest in the law firm. However, as innovative as ABS may seem, the principle of non-lawyers with a purely financial interest in law firms is also already accepted in practice. France and Austria have rules allowing close relatives of a deceased lawyer to inherit his or her ownership interest in a law firm, as do some US states. In Germany for example such Austrian or French law firms do not meet the requirements of §59a BRAO, however leading academic commentators argue that in light of the *Gebhard* test²³ such law firms enjoy full Freedom of Establishment in Germany (Henssler, 2010, p. 746, Anhang §§ 59c ff, marginal number 19; Kilian, 2011, p. 554, marginal number 37f). Curiously, no one seems to have noticed that this position has repercussions on the ABS debate and the position one can reasonably take under Article 11(5) of the Lawyers’ Establishment Directive. Since every Austrian or French law firm is just one heartbeat away from violating the ‘core values of the legal profession’ they should either not be allowed or kicked out of the country the very second one of their lawyers dies and leaves his ownership interest in the law firm to a non-lawyer, right? Of course, in practical terms there is quite a difference between English ABS and Austrian or French law firms with family member owners but to adequately deal with such differences is rather what the *Gebhard* test was designed for. Under a literal reading of Article 11(5) both scenarios look alike to me.

To conclude this short analysis of the Lawyers’ Establishment Directive: neither is the Directive itself sufficiently clear in its wording nor is its application in practice (even by protectionist bars) consistent with the idea that Article 11(5) alone would provide sufficient cover to deny English ABS their Freedom of Establishment.

Therefore, I would expect that in deciding the ‘big ABS case’ the ECJ will, at the very least, say that any national restrictions under Article 11(5) have to meet the *Gebhard* test.²⁴

Recent case law points in the same direction: In *Jakubowska*²⁵ the ECJ held that the possibility to restrict or prohibit salaried practice under Article 8 of the Lawyers’ Establishment Directive is not a *carte blanche* for member states. Instead, restrictions cannot go beyond what is necessary in order to attain the objective (of Article 8) of preventing conflicts of interest,²⁶ although such a proportionality requirement is not part of the wording of Article 8.

5.2. *Or will the ECJ apply the Gebhard test?*

In the *Gebhard* case the ECJ held that

national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil 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 it.²⁷

So the four criteria of the *Gebhard* test are: (1) non-discrimination; (2) justification by overriding general interest; (3) suitability; and (4) necessity.

Applying any restrictions on English ABS in a non-discriminatory manner will be quite a challenge for Continental bars. We have seen that any restrictions on the Freedom to Provide Services are likely to violate this criterion (see Section 4.5 above) but also restrictions on the Freedom of Establishment may fail to meet this test. Before a Continental bar denies Freedom of Establishment to an English ABS it should check whether it has also consistently denied Freedom of Establishment to Spanish, Danish and Italian ABS-type entities and how it deals with the ‘dead lawyer problem’ (see Section 5.1 above) present in French and Austrian law firms, otherwise the ECJ may already lose patience with the protectionists at an early stage in the argument.

Can restrictions on ABS be justified by an overriding general interest? Yes, the proper administration of justice is accepted as an overriding general interest by the ECJ, so this criterion is unlikely to present any difficulties for Continental bars.

The suitability criterion is also met, as a blanket ban on ABS is one of the ways, albeit a highly restrictive one, in which the interest invoked can be protected.

5.3. *Where the rubber meets the road: the necessity criterion of the Gebhard test*

The fourth criterion of the *Gebhard* test is the decisive one: restrictions must not go beyond what is necessary in order to attain the objective of the restriction. Is it really necessary to deny Freedom of Establishment to English ABS in order to preserve the core values of the legal profession and the proper administration of justice?

Predicting the ECJ's views on this issue inevitably involves much speculation. Nevertheless, four points deserve consideration.

- (1) The anti-ABS argument takes place in a data-free zone. The protectionist side argues that non-lawyer ownership could be dangerous for clients. This is pure speculation. The only study available (from Australia) shows that clients of ABS have fewer complaints than those of traditional law firms (Parker *et al.*, 2010). Of course, this hardly settles the issue, but the protectionist side should pay attention to empirical studies on ABS. The longer it takes for the 'big ABS case' to reach the ECJ, the more empirical data will be available from England. I think these data are unlikely to strengthen the Continental argument against innovation.
- (2) Then there is a pseudo-liberal argument against non-lawyer ownership of legal service providers, which goes like this: given the considerable regulatory burden on English ABS, comparable entities on the Continent need to be resisted in the interest of keeping the legal profession as independent as possible from government interference.

For example, Weil (2013, p. 55) makes the counter-intuitive claim that Germany is really deregulated and England overregulated. From a certain lawyer-centric perspective this makes sense: secure behind the high walls of an extensive professional monopoly and protected against foreign competition, a German lawyer exercises a truly 'liberal profession' with no regulator to speak of breathing down his neck. The SRA's powers to carry out unannounced inspections of law firms are, to German lawyers, an example of government intrusiveness that should be resisted on principle. Weil (2013) is quite right in pointing out that the introduction of a comparable regulatory régime in Germany would lead to fierce litigation in the German constitutional court. This perspective, however, is a bit one-sided, in that it ignores the liberal arguments in favour of opening up legal services markets and fails to weigh them against the "Re-regulation" (Flood, 2011) that would probably accompany such a market liberalisation. More importantly, it presupposes that the new regulatory system needed for ABS would be extended to the entire market, like it was in England & Wales, instead of just applying to those lawyers who choose to practise in an ABS. In the latter alternative there would be no need to change the rules for those who continue to practise in the traditional way.

Still, this argument highlights a real weakness in the English battle plan: how would ABS on the Continent be regulated and by whom? England's legal regulators would greatly improve the chances of their industry winning the 'big ABS case' if they had a convincing plan addressing the issue, which is currently not the case. (I provide some suggestions below in Section 7.1.)

- (3) Bad cases make bad law and therefore the exact set of facts before the ECJ will matter a great deal. Will the ABS at the centre of the ‘big ABS case’ represent a very cautious departure from host state orthodoxy, for example by setting up an English ABS in order to grant equity to non-lawyer support staff or in order to elect foreign (non-European) lawyers or a limited number of other professionals to the partnership? Or will it indeed be the creature of Continental nightmares, a corporate behemoth owned by the dark lords of global capitalism, entering the French and the German markets with a multi-billion Euro war chest and the stated intention to consolidate the entire consumer segment of the legal services market?

‘Europeanness’ of the factual background is likely to be important as well, for example *Wouters*²⁸ – an important case on the legal profession in the ECJ – was a domestic case lacking a cross-border element. Would the ECJ really take an extreme anti-ABS position if the ‘big ABS case’ involved a multinational bunch of recent College of Europe graduates, using an English ABS to set up a cross-border law clinic?

This idea is good news for the English side: the facts of the ‘big ABS case’ are in the hands of ABS-licensing bodies in England. By granting and refusing licences to ABS with plans to enter the Continent or even simply by granting licences in a particular order, English regulators have the opportunity to get a ‘good test case’ to the ECJ.

- (4) What about ECJ precedents? Here the portents are not good. As long as member states were not clearly subverting the implementation of the Lawyers’ Establishment Directive,²⁹ the ECJ has – at least over the last ten years or so – typically deferred to national authorities when it came to the legal profession. Let’s start with *Wouters* in 2002:³⁰ This case is often cited by those opposed to the establishment of English ABS in their jurisdictions, because the question of whether the Dutch ban on MDPs could be justified by overriding reasons relating to the public interest was not decided by the ECJ but left to the relevant Dutch professional bodies. The same was the ultimate result in *Arduino* in 2002³¹ and *Cipolla* in 2006:³² although these decisions (as well as *Wouters*) contain some liberal obiter dicta as to the general applicability of EC competition law to the professions, the central question at the heart of *Arduino* and *Cipolla* – whether mandatory tariffs for the services of Italian lawyers can be justified by overriding reasons relating to the public interest – was left to the Italian professional bodies and national courts to decide.

Morgenbesser in 2003³³ may be the exception to the rule, as this judgment had truly revolutionary potential with the ECJ holding that national authorities have to allow access to their legal profession to other Europeans still in training. However, with *Pešla* in 2009³⁴ the ECJ returned to old form: all the important details of this right are

left to national authorities, effectively making its exercise dependent on the good will of the authorities or professional bodies of the member state. The pendulum swung back a bit with *Koller* in 2010,³⁵ with the difference that this time it was about access of a fully qualified lawyer to a national legal profession by way of an aptitude test. Here the ECJ held that before ordering an aptitude test national authorities have to check whether the knowledge acquired by the applicant in the course of his or her professional experience is not capable of covering, in whole or in part, any substantial difference between the knowledge required to exercise the legal profession in the respective member states.³⁶ This so-called ‘substantial difference doctrine’ was confirmed in *Ebert* in 2011.³⁷

In-house lawyers suffered a raw deal in *Akzo Nobel* in 2010³⁸ when the ECJ denied them professional privilege and in *Prezes UKE* in 2012³⁹ when the ECJ did not allow in-house lawyers to represent their employer in European courts. By implication, both decisions strengthened the traditional professional monopoly of national bars against other providers of legal services.

Finally, concerning external (non-professional) ownership in regulated professions, *Commission v. Greece (Opticians)* in 2005⁴⁰ held that Greek restrictions on non-opticians owning optician’s shops were against European law whereas a similar ban in Germany on non-pharmacists owning pharmacies was upheld in *DocMorris* in 2009.⁴¹ Academic commentators pondering the consequences of these two judgments for the legal profession are predictably divided over the question of whether lawyers are more like opticians or more like pharmacists (coining the pun ‘Pille oder Brille?’ in German).

I do not think that the ECJ’s case law on either lawyers or external ownership in regulated professions suggests a specific outcome in the ‘big ABS case’ per se. Overall though, these decisions reveal the ECJ’s general attitude towards national legal professions, which is summed up nicely by John Flood (2010): “The ECJ has typically taken a national pro-profession line rather than a pan-European one when it comes to the legal profession”.

This is a bit puzzling to observers, since otherwise the ECJ is seen as espousing a rather liberal economic philosophy. Why then did the court defer again and again to national legal professions and provide cover for clearly anti-competitive behaviour and protectionism? Here is an attempt to explain this apparent contradiction.

The ECJ relies on national legal elites to provide it with cases and enforcement of its decisions, and hence for influence and relevance (Haltern, 2007, p. 187ff). The ECJ lacks any means to force national courts to provide it with requests for preliminary rulings under Article 267 TFEU (formerly Article 234 EC/Article 177 EEC), nevertheless more than two-thirds of all ECJ cases are preliminary rulings (Haltern, 2007, p. 198, marginal number 357). This statistic alone tends to understate the relevance of this procedure, since more than two-thirds of the well-known and important

ECJ cases were initiated under Article 267 TFEU/Article 234 EC/Article 177 EEC. The ECJ does a clever job of wooing national courts to provide it with preliminary references, but its influence has still been described as “constantly precarious” (Halter, 2007, p. 197, marginal number 356).

To this perspective I would add that the ECJ’s inability to force national courts to provide it with cases spills over into a corresponding reluctance to antagonise national legal professions. National legal professions are not only the backbone of many court systems, they may also use or not use arguments based on European law in their national courts and encourage or discourage them to file requests for preliminary rulings with the ECJ. The ECJ’s reluctance to upset them is quite understandable.

Is this a general critique? No; European jurisprudence is extremely successful precisely because it is set up this way. In the ‘big ABS case’ however, the ECJ’s general deference to national legal professions may turn out to be a huge disadvantage to the side arguing in favour of Freedom of Establishment for ABS.

5.4. *Conclusion*

Although I think the ABS-friendly side has better arguments on the merits, the protectionists may still win the ‘big ABS case’ in the ECJ, for reasons having to do with the unique institutional architecture of European Union judicial procedure. Game over regarding establishment on the Continent then? Not yet. Enter the dark horse of ABS litigation strategy: free trade agreements.

6. **Global opportunities for English ABS under world trade law?**

The General Agreement on Trade in Services (GATS) as well as numerous other international trade agreements include legal services within their coverage. The issue has received some academic attention but there is widespread scepticism as to their relevance, as Laurel Terry (2010), one of the best-known commentators on trade agreements and legal services, acknowledged:

Some may wonder (and have so aloud to me) whether the GATS and these other agreements have had any impact at all since it is difficult to point to any particular ethics rule or lawyer regulatory provision and definitely say that it has been changed as a result of the GATS.

In essence, the discussion has so far been focused on whether international trade agreements could create political pressure to relax certain rules regulating lawyers. They certainly do, but more importantly I think there is a real possibility that they may suddenly gain prominence as a venue for litigation.

The technical details are quite complex, but the basic issue is not unlike that under European law: if countries guarantee each other market access in legal services, can they still keep out lawyers practising in entities which would be illegal in the host state? Let’s take a look at GATS:

Article XVI Market Access

1. [...]
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
 - [...]
 - (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

Of course, opinions will differ on whether a rule prohibiting non-lawyer ownership can be classified as a measure falling under the market access provision. Others may try to argue that it falls under Article VI:4 GATS ('domestic regulation'), although I do not immediately see how the protectionists' argument would get much easier if such a case played out under Article VI:4 GATS. Under the market access provisions, a protectionist WTO member state may still easily win such a dispute provided it has "[specified otherwise] in its Schedule". This means restrictions on market access are perfectly legal under GATS if they were correctly listed in the WTO member state's Schedule of Specific Commitments.

If one digs through the small print of the EC's Schedule of Specific Commitments relating to legal services (or the US Schedule for that matter), one does not find a blanket prohibition of market access by ABS, regardless of the so-called 'modes of supply' – which makes sense, given that the sector-specific commitments under GATS were all negotiated before the issue of ABS appeared on anybody's radar. I think this leaves a lot of discretion to a WTO dispute settlement panel should the question ever be litigated at WTO level.

So far, there has not been a single WTO case on legal services, but a dispute involving an English ABS or its Australian cousin may just give us the first one. I refer to this as the dark horse in ABS litigation because the political considerations that make the ECJ reluctant to annoy protectionist national legal professions do not apply here. The WTO dispute settlement system does not rely on domestic legal elites for cases and hence relevance but rather on national ministerial bureaucracies, since proceedings at the WTO (or under bilateral free trade agreements) are initiated by governments. Whether the need to get a government on board (for example the Australian government) presents a significant practical obstacle is difficult to assess, though.

The details of litigating market access in legal services at the WTO are a bit more complex than this little 'teaser' suggests but I like the idea because it opens so many doors. For example, US firm Jacoby and Meyers is currently challenging New York's prohibition of non-lawyer ownership of law firms in US courts on constitutional grounds (Weiss, 2012). In a nutshell, another possible litigation strategy for Jacoby and Meyers would be to set up an ABS in Australia (an 'Incorporated Legal Practice'), restructure the US offices as branch offices of the Australian entity with local US-qualified staff, and get the Australian government on board to fight at the WTO and under the Australia–US Free Trade Agreement every attempt by protectionist US state bars to close down the branch offices of an Australian law firm just because US state bars have objections to the firm's structure in far-away Australia.

Using the WTO dispute settlement system to gain ABS market access on the European Continent would equally involve Australia, since the EU participates as a single entity in the WTO and that makes it rather unlikely that one EU member state could successfully invoke the WTO dispute resolution system against another EU member state. If Australia were to complain to the WTO because – say – a German local bar denied German lawyers the right to work for an Australian ABS we could probably watch some very entertaining politics: the European Commission would ask the member states whether it should mount a defence against the Australian claim or not. Conventional political wisdom would expect France to say yes, the UK to say no, the German government (not to be confused with the German Federal Bar) may not really know, whereas the Commission itself is likely to have rather liberal instincts on the issue. As a last thought: some observers think a comprehensive EU–US Free Trade Agreement may be just around the corner. Just imagine the possibilities if it contained some fairly liberal provisions on trade in legal services.

7. Some proposed lessons for stakeholders

7.1. The English legal services sector and its institutions

England's legal services sector will reap the economic rewards of being an early innovator in the delivery of legal services. The size of those rewards will depend to some extent on the question whether English ABS can access other European markets or not. Therefore it would make sense for the English side to put some thought into their approach to the coming battles with the Continental protectionists.

Institutionally, it is not clear who may be responsible for such a coordinated approach: the SRA? The City of London Law Society (CLLS), in regulatory matters the unofficial lobbying organisation of big City law firms? The CityUK, a lobbying organisation for UK financial services which also champions the interests of related professional services, such as the UK legal services sector? Or someone in the UK Ministry of Justice?

Let's start with the SRA. Currently it has no official position on whether it would grant a licence to ABS with plans to enter European markets (SRA, 2011), but it has already licensed Irwin Mitchell LLP as an ABS, a law firm with offices in Spain. (Theoretically other 'approved regulators' could also grant ABS licences, further complicating the picture.) I think it would make sense to develop an 'overseas licence' and spell out that regular licences only allow an ABS to do business in England & Wales. This would have the following effects.

First, as mentioned in the discussion of the 'big ABS case', it would give the English side control over the test case (or the sequence of test cases) that may set important precedents in the ECJ and various other courts. And second, by spelling out the regulatory requirements for ABS doing business abroad there would be no opportunity for regulatory arbitrage. Otherwise, if it were to remain unclear who is responsible for the regulation of ABS doing business in other European markets that would hand the protectionist side an easy argument. Politically, the SRA could

stress that it remains open to the development of a less unilateral framework of entity-based regulation of multi-jurisdictional providers of legal services but that it needed to address overseas practice of ABS to close a potential gap in its own rulebook.

There is a small problem with this idea: the English Legal Services Act has a clear jurisdictional remit relating to England & Wales (Section 212), therefore the SRA is currently unsure whether it has the power to authorise and regulate ABS outside England & Wales.⁴² It appears to me that the restriction to England & Wales was introduced in order to avoid undermining the more limited version of ABS in Scotland. However, with respect to services provided by an English ABS in other EU member states it could be argued that the SRA is nevertheless not only allowed but even obliged to exercise its regulatory powers according to Article 30 of the 2006 EU Services Directive or as a general duty under European primary law.

7.2. Businesses with an interest in open legal services markets

It is entirely possible that soon we will see an industry association of all those businesses with an interest in open legal services markets. It is a potentially very long list of businesses annoyed by the restrictions imposed upon them by out-dated professional regulation: the legal process outsourcing industry, much of the legal IT industry, a lot of the law firms with innovative business models (virtual firms, online practice) and last but not least all those English ABS who want to offer their services outside of England & Wales.

These business interests could establish a formidable think tank or lobbying organisation. For example, LegalZoom disclosed in its IPO prospectus that it has set aside five million USD to fight charges of unauthorised practice of law in the US (*WiredGC*, 2012). If businesses such as LegalZoom pool their considerable resources and embark on a coordinated strategy of fighting overly restrictive bar rules, the protectionists will be in trouble.

7.3. The European Commission

Whereas the main judicial battleground for ABS market access will be the ECJ, the main legislative battleground will be the European Commission's next proposal for an overhaul of the system ensuring free movement of lawyers in the European Union. The arrival of entity-based regulation in England shows that the problem of double deontology is yesterday's news. If more jurisdictions adopt entity-based regulation we have what I would call 'quadruple deontology' – possibly resulting in a 'triple conflict': not only are lawyers potentially subject to two sets of competing rules addressing them as individuals but there may be an additional two sets of conflicting rules addressing the entity to which the lawyer belongs. Altogether we could have four sets of rules, with three possible conflicts: a lawyer individually licensed in jurisdiction A practising as part of an entity from jurisdiction B (which is separately licensed under entity-based regulation in jurisdiction B) is working in an office of said entity established in jurisdiction C. Assuming that at least individual-based regulation and entity-based regulation in jurisdiction C are consistent with each other, we could

still end up with a conflict between B and C concerning their rules on entities, between A and C concerning the obligations they put on individual lawyers, and finally even between A and B if the individual-based rules of jurisdiction A conflict with the entity-based rules of jurisdiction B. This mess needs a solution. What could be the shape of the next reform proposals of the current European system of lawyer mobility?

First, harmonisation of the underlying rules governing lawyers and legal services providers. I would not bet any money on this option because I do not see how a European political consensus could be found on what should be allowed and what should not. The UK would never agree to a set of rules reversing the liberalisation it just achieved in England & Wales and the Continental side will need another ten years or so to relax its opposition to ABS. Furthermore, harmonisation is not only unlikely politically it is also undesirable philosophically because it would end the possibility for individual jurisdictions to experiment with new and innovative rules or (on the Continent) to potentially prove to the world that the traditional ways of providing legal services hold up better in the twenty-first century than the reformers expected.

Second, a solution of the quadruple deontology problem in favour of host state rules. According to rumours the ‘host state rules take precedence’ approach is what some bars would like to see⁴³ and it is easy to understand why: this is a very protectionist solution. Under such a rule traditionalist bars could simply turn a blind eye to what is happening in other jurisdictions on the assumption that liberalisation in other jurisdictions will not impact upon ‘their’ markets. This would be a step backwards from a liberal perspective and given the European Commission’s reputation of being in favour of open markets I would not expect such a proposal from Brussels, as much as some bars may want it. This principle would also cause a new set of double-deontology issues for those lawyers (or law firms, in the case of entity-based regulation) fully established in more than one member state.

Third, a solution of quadruple deontology by giving precedence to home state rules. In a nutshell: a lawyer is subject to the rules of her licensing body regardless of where in the single market she practises, achieving legal certainty for lawyers and their clients alike. There would also be continuing competition for ‘better rules’ between European jurisdictions. The main counter-argument to such a system would rely on information asymmetries, but host country consumers are ‘warned’ by the requirement to practise under home country title, which is already accepted in principle as the solution under the current system in Europe.

The same solution (home state rules prevail) could apply to conflicting sets of rules addressing entities. To solve the conflict between individual-based regulation and entity-based regulation European law could give individual lawyers a right against their own bar to suspend their licence while they are working for an entity which is subject to entity-based regulation.⁴⁴

Fourth, a compromise could be attempted between the two ‘ideal models’ of either resolving quadruple deontology in favour of host or home state rules. For example, a recent report commissioned by the European Commission on the “Evaluation of the Legal Framework for the Free Movement of Lawyers”

[Claessens *et al.* (Panteia–Maastricht Report), 2012, p. 116] proposes to give precedence to home state rules for temporary provision of services and to host state rules for establishment. This is a typically European political compromise, in that both camps (the liberal free traders and the protectionists) win a semi-victory. (Or both sides could see this as a semi-defeat, the first informal reactions to these proposals from representatives of the French bar suggest the latter) It would indeed resolve some problems of ‘double deontology’ (but not necessarily of ‘quadruple deontology’⁴⁵) however this solution also presupposes that it is possible to draw a clear line between provision of services and establishment, which will be very difficult.

Or fifth, legislative gridlock at the European level, resulting in no reform of the two Lawyers’ Directives in the near future. This outcome may not be entirely bad news for academic commentators, because there will be no shortage of problems to write articles about.

7.4. *The CCBE and Continental European bars*

Identifying the underlying reasons for the hostile reaction of the CCBE, the German BRAK or the French CNB towards English ABS is hard. It is impossible to predict whether ABS in Continental markets would shrink the overall volume of revenue from legal work in these markets, for example if competition by ABS in some segments leads to lower prices, or whether this would be offset by a larger overall market size because ABS may make legal services affordable to those consumers who presently do not have access to legal services. In any event, there would be winners and losers and those lawyers dominating the executive level at the CCBE, BRAK or CNB, mostly older lawyers from traditional law firms, may have concluded that they would be amongst the losers.

I personally think it is a pity – and also not my idea of what Europe should be about – that the CCBE did not try to bridge the divide between early innovators and reluctant traditionalists but instead joined one side of the battle with full force. If this paper contains a lesson for the CCBE and Continental European bars it is probably that – irrespective of their position on the merits – they could have done a better job of recognising what is really going on in England. The failure to see beyond the self-painted cartoonish picture of “banks, insurance companies and supermarket chains” (BRAK, 2011a) moving into legal services was at the origin of a deplorably incomplete legal analysis. The view that in the European single market English ABS pose essentially a Freedom of Establishment issue and that waiving a copy of the Lawyers’ Establishment Directive at the invaders would make the challenge go away became a self-perpetuating myth that was unfortunately never challenged over the years.

To do better in future I would argue that despite the underlying differences we should at least try to reach a consensus on the need to improve the level of debate in Continental Europe. On the issue of ABS the CCBE or the BRAK never launched broad public consultations or reached out to academia with a view of having their own preconceived views critically challenged, something the English Legal Services Board, the SRA or the ABA are regularly doing and as the example of the ABA shows does

not necessarily in itself lead to liberalisation. Another very good example of a balanced approach to the issue comes from The Law Society of British Columbia in Canada, whose report on ABS (LSBC, 2011) I would recommend to all Continental bars as an example that it is possible to reject far-reaching reforms and still treat the other side fairly.

After all, how did England achieve its first mover advantage in the European Union when it comes to the innovative provision of legal services? Not by being the first mover, but by being the first learner! The honour of inventing the ABS goes to Australia, not the English Law Society, the Clementi Commission or the SRA. However, the English legal profession – contrary to its Continental European counterparts – was willing to consider on the merits what was happening elsewhere. Without a bit more intellectual openness I fear some bars in Continental Europe are in for a “a violent encounter with creative destruction”.⁴⁶

Moreover, as the economist Frank Stephen (2002) argued in a well known paper, law firms from liberalised legal markets tend to be more competitive than law firms from highly-regulated legal markets. If barriers between these two markets are removed, firms from the liberalised market tend to swallow up the less-efficient firms from the highly-regulated market. The expansion of English law firms into the German legal market starting at the end of the 1990s following the removal of barriers between these two markets (for example through the 1998 Lawyers’ Establishment Directive) is a case in point. The longer the Continental bars delay an engagement with English ABS the higher the likelihood of a similar scenario repeating itself.

8. Conclusion

It will be interesting to see to what extent ABS will become a feature of the English legal services market and whether they improve access to justice. The ABS experiment may show that the traditional way of doing business withstands competition better than some people expect. Still, I think it is more likely that ABS find a market in England and as soon as it becomes clearer which ABS-enabled business models are successful there will be interest in taking these innovative business models to other European member states.

Regarding the legal issue of whether ABS can access other European markets this paper argued that there are mainly three avenues for English ABS to enter other European markets: offering services outside the scope of reserved activities, temporary provision of services and establishment. Continental European bars will not succeed in closing the first two avenues.

Whether the protectionist side could prevail in the ECJ on the question regarding whether English ABS offering reserved legal activities can rely on the European Freedom of Establishment in other European member states is uncertain. However, the English side could improve its odds in the ECJ by developing a comprehensive litigation strategy taking maximum advantage of its influence over the facts and timing of the ‘big ABS case’ in the ECJ.

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Notes

- [1] In Europe overall, the UK has the largest market for legal services, estimated at \$39.6 billion (Datamonitor, 2011a), closely followed by Germany, estimated at \$33.7 billion (Datamonitor, 2011b). Together they make up just under 50% of the total revenues of the legal services sector in Europe (UK 26.2%; Germany 22.3%); and this definition of Europe includes Russia, Turkey and Ukraine.
- [2] An important event that led to the 2007 LSA was the Clementi Report (2004). Useful background information on these developments can be found in Flood (2012a).
- [3] For a German language overview, see Kilian and Lemke (2011).
- [4] The BRAK's English translation of the statute can be found at: http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf.
- [5] "Als dann auch noch von der britischen Insel Bestrebungen zur Zulassung von Fremdkapital bekannt wurden, sah sich in einem Akt der Verzweiflung der damalige Präsident der BRAK in einer Don Quichote zur Ehre reichenden Verteidigungsakt sogar veranlasst, einen Drohbrief an das englische Parlament über den Kanal zu senden" (Kleine-Cosack, 2007, p. 737).
- [6] This discussion paper was sent to the Legal Services Board again on 25 January 2010 with a new cover letter (CCBE, 2010).
- [7] As an example of press coverage at the time see *Legal Futures* (2011).
- [8] For example the French National Council of Bars passed a resolution flatly refusing English ABS access to the French market:

LE CONSEIL NATIONAL DES BARREAUX, RÉUNI EN ASSEMBLÉE GÉNÉRALE LE
15 JUIN 2012

[...]

AFFIRME que les Alternative Business Structures ne peuvent pas être considérées comme des cabinets d'avocats, notamment dans le cas où la majorité du capital est détenue par des non avocats, et, par conséquent, ne peuvent pas bénéficier des libertés d'établissement et de circulation pour s'inscrire à l'un des barreaux du pays d'accueil. (CNB, 2012)

- [9] Not counting ABS licensed by other 'approved regulators' such as the Council for Licensed Conveyancers which granted an ABS licence to the conveyancing firm Premier Property Lawyers in October 2011.
- [10] John Flood sums it up nicely: "Turning overheads into profits? What to do with spare lawyers lying around" (Flood, 2012b).
- [11] See Campbell (2012, pp. 30–39) for an interesting account of how new providers of legal services are making inroads in the US despite a very broad professional monopoly for licensed lawyers.
- [12] Unfortunately, the BRAK does not have an English translation of this statute on its website. Maybe this is because the relatively new RDG (enacted in 2008) can be seen as a very cautious liberalisation of legal services in Germany.
- [13] The European Commission already did this once in the early 2000s (Terry, 2009).

- [14] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Gebhard)* [1995] ECR I-4165, para. 27. See also the Panteia–Maastricht Report (Claessens *et al.*, 2012, pp. 107 and 120).
- [15] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Gebhard)* [1995] ECR I-4165, para. 27.
- [16] Although Keller stressed in this article that he is writing in a personal capacity the article is widely seen in Germany as reflecting the BRAK's views because it reproduced verbatim some arguments used by the BRAK in earlier internal communication with regional bars (Hellwig, 2012, p. 876 f.).
- [17] English translation available at: http://www.brak.de/w/files/02_fuer_anwaelte/EuRAG_Eng_090615.pdf.
- [18] This is pure speculation, there is not a single German case on whether the general reference in §27(2) EuRAG includes §59a BRAO (Kilian, 2010b, p. 1321, marginal number 6).
- [19] The expression was coined by Jon Stewart on *The Daily Show* dated 29 March 2012 (referring to Obamacare in the US Supreme Court).
- [20] A very good English language analysis of these 1987 decisions can be found in Wendt (2012, p. 508f).
- [21] The thresholds are taken from the Panteia–Maastricht Report (Claessens *et al.*, 2012, p. 205f).
- [22] The Panteia–Maastricht Report (Claessens *et al.*, 2012, p. 209) (commissioned by the European Commission to evaluate the European legal framework for the free movement of lawyers) seems to propose such a reading of Article 11(5) by noting that an ABS consisting of English solicitors, English accountants/auditors and English tax advisors could enter the German market, since Germany allows MDPs between these professions.
- [23] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Gebhard)* [1995] ECR I-4165, para. 37.
- [24] Hellwig (2012, p. 881) reaches the same conclusion; the Panteia–Maastricht Report (Claessens *et al.*, 2012, pp. 10, 204, 236) is undecided.
- [25] Case C-225/09 *Edyta Joanna Jakubowska v Alessandro Maneggia* [2010] ECR-I 12329.
- [26] *Ibid.*, paras 60, 61.
- [27] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Gebhard)* [1995] ECR I-4165, para. 37.
- [28] Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-01577.
- [29] Case C-193/05 *Commission of the European Communities v Grand-Duchy of Luxembourg* [2006] ECR I-08673 and Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-08613.
- [30] Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-01577.
- [31] Case C-35/99 *Arduino* [2002] ECR I-01529.
- [32] Joined Cases C-94/04 *Cipolla* and C-202/04 *Macrino* [2006] ECR I-11421.
- [33] Case C-313/01, *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova* [2003] ECR I-13467.
- [34] Case C-345/08 *Krzysztof Peśla v Justizministerium Mecklenburg-Vorpommern* [2009] ECR I-11677.
- [35] Case C-118/09 *Robert Koller* [2010] ECR-I 13627.
- [36] *Ibid.*, paras 38, 39.
- [37] Case C-359/09 *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara* [2011] ECR I-00269, para. 33.
- [38] Case C-550/07 *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-08301.
- [39] Case C-422/11 P *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland v European Commission* [2012] ECR (as yet unpublished).
- [40] Case C-140/03 *Commission v Greece (Opticians)* [2005] ECR I-03177.
- [41] Joined Cases C-171/07 *Apothekenkammer des Saarlandes and Others* and C-172/07 *Helga Neumann-Seiwert v Saarland and Ministerium für Justiz, Gesundheit und Soziales (joined party DocMorris)* [2009] ECR I-04171.

- [42] This was communicated to me by SRA staff.
- [43] This is the impression I got from my conversations at various conferences.
- [44] For further arguments in favour of home state control and more details on such a system see Robert G. Lee (2010).
- [45] For example: a Danish lawyer working for the Dutch office of an English ABS provides services temporarily in Germany. Under either one of the ‘ideal models’ (the second and third solution in this paper) it is clear that either German (if host state rules take precedence) or English professional rules apply (if home state rules take precedence and entity-based regulation trumps individual based regulation by way of temporarily ‘opting out’ of individual-based regulation). Under the proposal of the Panteia–Maastricht Report (Claessens *et al.*, 2012) we would end up with a conflict between Dutch and Danish rules: Dutch rules take precedence over English rules because the relationship between these rules is one of establishment and Danish rules take precedence over German rules as here the connection is one of temporary provision of services. How to resolve the conflict between Danish rules addressing the lawyer and Dutch rules addressing her law firm would still be an open question.
- [46] This nice expression is taken from Bruce McEwan’s blog: <http://www.adamsmithesq.com/2012/07/supply-demand-for-123ls/>.

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