"THE ECONOMIC CASE FOR PROFESSIONAL SERVICES REFORM"

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Introduction[1]

On behalf on the CCBE, I would like, first of all, to express my gratitude to the DG Competition of the European Commission, the Finnish Competition Authority and the Finnish Presidency of the Council of the European Union for having invited a CCBE representative to participate as a panelist in this year's conference. I trust that this debate will represent the cornerstone of a new approach that the Commission will follow with regard to the legal profession.

I would like to emphasize at the outset that the European legal profession has been, and will be, at the forefront of cross-border liberalization in Europe and remains open to any necessary and reasonable reform process in the public interest. However, the CCBE believes, first, that any reforms need to be carried out by the appropriate institutions within the relevant legal framework. In addition, it is submitted that further liberalization is appropriate only where, after a rigorous analysis, it has been observed that competitive conditions are weak and that the envisioned measures do not have damaging side-effects for the public interest. We submit that this approach has not been rigorously followed so far.

Member States are better placed to define the rules of the legal profession

The CCBE believes that, as the European Parliament has recently acknowledged, as far as national professional rules are concerned, the authorities of the Member States, notably the legislative bodies, are in the best position to define the rules and regulatory frameworks that apply to the liberal professions. By virtue of the principle of subsidiarity, the Member States are in the best position to evaluate the implications and consequences of reforms for the national legal order and in particular the administration of (and access to) justice. They must indeed take into account a variety of factors of a legal and non-legal nature, which are of relevance at a national level, such as constitutional principles, rules related to the administration of justice and the application of the rule of law within the different national legal orders.

The Commission's initiatives regarding competition in the legal profession does not rest on a sound factual and legal basis

Should a harmonized process of reform be pursued at the EU level within the spirit of the Lisbon Agenda, the appropriate tools are directives jointly enacted by the EU Parliament and the Council, through which all the relevant interests at stake are properly considered and democratic accountability is guaranteed. Moreover, any reform of the legal profession should be carefully prepared and targeted in order to avoid the risk of externalities and guarantee compliance with the Court of Justice case law. The fact that the Commission is promoting a policy review of the liberal profession through an atypical tool such as the Report does not

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[1] The CCBE has already expressed, in various submissions, its concerns with regard to the approach that the Commission has followed so far with respect to liberal professions, in particular in its Report on Competition in Professional Services of 9 February 2004 (the "Report") and the Progress report of 5 September 2005 (the "Progress report"). The CCBE comments to the Report are available at the following website address: http://www.ccbe.org/doc/En/competition_legal_critique_300604_en.pdf; the CCBE response to the Progress report is available at: http://www.ccbe.org/doc/En/CCBE_response_follow_up_report_en.pdf; the CCBE Economic Submission to Progress report is available at the following website address: http://www.ccbe.org/doc/En/ccbe_economic_submission_310306_en.pdf.

relieve the Commission from a duty to base its proposals on a rigorous fact finding and competition law analysis, as it is required to do when enacting binding measures subject to judicial review. Indeed, the Commission has a special responsibility in this case since the policy statements contained in the Report have had widespread repercussions in the Member States.

By contrast, the Commission has been attempting (also by threatening to start infringement procedures) to apply EU competition law to matters, which, under the EU constitutional framework, are left to the jurisdiction of the Member States, unless and until the EU Council and Parliament legislate on them. This has been confirmed by the ECJ in the *Arduino* judgment.[2] Furthermore, the Court of Justice has consistently ignored, most recently last week in the *Cipolla* judgment, the Commission's attempt to apply a proportionality test for state measures (see Report, paragraphs 88 and 93); therefore, it should be clear by now that Member States are not under a duty under EC competition law to amend their existing regulations in order to comply with such a test.[3]

Equally regrettable is the Commission's use of article 49 EC on the freedom to provide services in order to challenge national rules to which competition law is not applicable (*Arduino*), in purely internal situations with no demonstrated effects on intra-Community trade and against the ECJ case law.[4] It is worth noting in this respect that, in *Cipolla*, the Court of Justice held that "*the protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding requirements relating to the public interest capable of justifying a restriction on freedom to provide services*".[5]

At a European level, the two lawyers' Directives already provide a blueprint for a liberalised EU-wide market in professional services. Notwithstanding this, the Commission is promoting a general principle of "less regulation, better regulation", regardless of whether this principle or any obligation to promote it exists in the EC Treaty or EC competition rules and, we believe, without sufficient knowledge of how these markets operate and the broader implications of the role of lawyers. In fact, the promotion of this principle is not stated anywhere in the competition rules or elsewhere in the Treaty.

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2 Judgment of 19 February 2002, Case C-35/99, *Arduino*, ECR I-01529.

3 Judgment of 5 December 2006, Joined Cases C-94/04 and 202/04, *Cipolla vs. Portolese*, not yet published, paragraphs 46-54, confirming the case law concerning Member States' liability under Articles 3(1)(g), 10(2) and 81(1) of the Treaty, which does not require State measures to pursue legitimate public interest objectives, and to be proportionate to the achievement of those objectives. In particular, the Court has consistently held that Articles 10(2) and 81(1) of the Treaty are infringed only where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. Conversely, if the Member State's measure restricting competition does not have any of the effects mentioned above, it is not contrary to Articles 3(1)(g), 10(2) and 81(1) of the Treaty even if, hypothetically, it does not pursue a legitimate public interest or it is not proportional with its achievement. Therefore, contrary to what the Commission argued in the Report (paragraph 79) Member State courts and competition authorities may not disapply such State measures, relying on the *CIF* judgment (cited therein).

4 See the Commission's infringement procedure against Italy concerning minimum and maximum fees and its written observations in the recently decided case C-94/04, *Cipolla vs. Portolese* (cited), on the same topic. Cfr. judgment of 11 December 2003, case C-289/02, *Amok*, ECR I-15059, which concerned a true case of cross-border application of the German law on lawyers' fees, and where the Court of Justice found that such law does not infringe Article 49 of the EC Treaty.

5 *Cipolla vs. Portolese* (cited), paragraph 64.

This, it is submitted, has not been conducive to a well-balanced approach in every Member State where a regulatory review has been conducted. The CCBE would hope that the Commission could use its influence to foster the development of a regulatory "best practice" throughout the EU and we stand ready to cooperate with the Commission to achieve this goal.

As declared by the EU Parliament, "*any reform of the legal profession goes well beyond competition law into the field of freedom, security and justice, and more broadly into the protection of the rule of law in the European Union*". A constructive approach to any reform of the legal profession requires recognition of this special context.[6] Moreover, the Commission should not lump together professions operating in radically different market conditions (such as lawyers and accountants or pharmacists) but it should instead analyze each profession according to its peculiarities.

The role of lawyers in society as recognized by the Court of Justice

It is essential to bear in mind that certain professions play a crucial role in a democratic society because they guarantee access to constitutionally guaranteed rights: lawyers have a vital role in the administration of justice and in maintaining the rule of law, both of which are essential foundations of a democratic society. This is all the more true with respect to the new Member States formerly subject to totalitarian regimes, where the independence of the legal profession guarantees the full consolidation of the rule of law.

The key role the legal profession plays in democracies based on the rule of law and the fact that that regulation may be necessary to protect overriding public interests, such as access to justice and the proper functioning of the legal profession have been recognised at a European level by the European Parliament, the Council of Europe and the Court of Justice, in particular with the seminal *Wouters*[7] and *Arduino* judgments, and most recently in *Cipolla*.

I will briefly remind you that the *Arduino* judgment clarifies that Member States have the right to regulate a profession and have the primary responsibility of defining the framework in which professions operate. As regards rules enacted by the bars themselves, the *Wouters* judgment stated that some types of rules and regulations can be considered as inherent to a particular profession and, therefore, cannot in principle be caught by the prohibition of anti-competitive agreements, decisions and practices. Without such genuine deontological rules the profession would be deprived of its essential character and could not function as such.

The Commission's policy does not appear to be fully in line with the case law of the Court of Justice. This is regrettable since, in view of the system resulting from the modernization initiative, the Commission should avoid any misunderstanding as to the interpretation of the ECJ's case law, so as to avert misguided actions by national competition authorities and courts, which can be fraught with very serious consequences for all parties involved.

No traditional competition law analysis has been carried out so far by the Commission

The CCBE deplores the fact that neither the Report nor the IHS study on which it was based contain any traditional competition law analysis, as mandated by the case law of the

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[6] In this respect, the CCBE is worried that the DG Competition suggests reforms of laws and regulations within the Member States without participation of other General Directorates of the Commission, such as the one responsible for Justice and Home Affairs, which deal with other public interests that have to be taken into account.

[7] Judgment of 19 February 2002, Case C-309/99, *Wouters*, ECR I-01577. See also Judgment of 3 December 1974, Case 33/74, *Van Binsbergen*, ECR I-01299, where the Court of Justice stated "*however, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the treaty where they have as their purpose the application of professional rules justified by the general good - in particular rules relating to organization, qualifications, professional ethics, supervision and liability*", paragraph 12.

European Court of Justice - and the Report does not even state that such an analysis must be conducted.

Such an analysis would start by identifying the relevant market(s) (one or more service markets, one or more geographic markets), followed by an analysis of the competitive conditions prevailing in such relevant market(s), in particular with reference to the economic context in which the undertakings operate, and the structure of the market, and by an analysis of the effect on competition of the rules that the study and the report identify as potentially problematic from a competition standpoint.

There is no appreciable discussion in the Report of the significant competition that exists in the market for legal services. Actually, the IHS Study – which, as noted by the EU Parliament, is outdated and lacks comprehensive validity (it does not even consider the ten new Member States), - contains some fundamental errors. For example, it lists the Italian market for legal services among the least competitive, ignoring the fundamental economic factor of the absence of entry barriers as witnessed by the fact that Italy is one of the countries with the highest number of lawyers (both in absolute terms, *pro capita* and in terms of GDP per lawyer) and that the ECJ has concluded that the entry requirements in Italy are not anticompetitive.[8]

In general, it is acknowledged that the legal services market is a highly competitive market. There are over 700,000 lawyers in Europe, competing with each other in large and small units and the number of lawyers is continuously growing across Europe. Indeed, the European legal services market has witnessed a significant growth in recent years both in terms of job creation and turnover. Furthermore, the offer of legal services is very atomized, and lawyers are therefore generally subject to their clients' bargaining power.

Low barriers and low concentration are among the hallmarks of a competitive market. It is, therefore, unclear why the Commission should be concerned with increasing competition in markets that are already intensely competitive.

The burden of proof is on the Commission - Lack of a cost/benefit analysis - No assessment of externalities

An essential element is getting lost in the debate. The burden of proof that a rule is anti-competitive rests firmly with the Commission (or the Member States' antitrust agencies). This is so also when the Commission moves policy statements such as those contained in the Report, all the more if, in parallel, it threatens to start enforcement actions based on Article 81 EC or infringement procedures based on Articles 3(1)(g), 10(2) and 81(1) EC.

A sound reform of the legal profession should be based on the outcome of a serious cost /benefit analysis. Before promoting a "deregulation crusade", the Commission should carry out an economic analysis on the functioning of the market for legal services in order to outline the pros and cons of both regulation and deregulation.

The key questions to be answered should be: is there asymmetric information in the market for legal services? Is the market able to solve such asymmetric information? If not then we need some regulation to solve market failures. Does regulation produce externalities? Would deregulation reduce externalities or would it increase them? To sum up: would the advantages of deregulation be significant enough to counterbalance the risk of increasing

[8] See Order of the Court of 17 February 2005, Case C-250/03, *Mauri*, ECR I-01267. See also Judgment of 5 December 2006, *Cipolla vs. Portolese*, cited, where the Court acknowledged that "*the Italian market..., as indicated in the decision making the reference, is characterised by an extremely large number of lawyers who are enrolled and practising*", paragraph 67.

externalities in terms of both non-economic and economic factors (*i.e.* economic efficiency, quality, independence)?

Indeed, when regulating the legal profession, we believe that it is of utmost importance to strike the right balance between non-economic and economic factors, and to carefully evaluate any impact of (de-) regulation on both the client-lawyer relationship and society. Further deregulation of the profession may not generate economic advantages that can override any serious negative impact on clients, society and access to justice.[9]

In this respect, the CCBE welcomes the analysis made by Copenhagen Economics in its report entitled "The Legal Profession, Competition and liberalisation".

Some commentators doubt that conclusions of general application to the EU can be drawn from the Copenhagen Economics Report as it analyzes the competitive conditions in a single Member State that would not be representative of the other jurisdictions in the EU.

The CCBE believes that, although the Copenhagen Economics Report focuses on the Danish legal market, it should be taken as a model because it applies the correct methodology. Moreover, it contains a number of specific observations that could also apply to other national markets.[10] Contrary to the IHS Study, it represents a well-documented economic survey of the legal profession and it properly analyzes the effects that deregulation would have in this sector.

In any event, the CCBE agrees with those who believe that it would be necessary to conduct a serious economic cost/benefit analysis across the whole of the EU.

In particular, the CCBE agrees with the EU Parliament when it urges the Commission to examine the expected impact of the full removal of unnecessary obstacles to competition more carefully.[11] Such analysis should make it possible to strike a clear economic balance between risks and opportunities for deregulation and would help to create the necessary positive reform climate.

Deregulation might generate externalities and market failures

Many economic scholars[12] agree that competition should be introduced with caution in a market characterized by asymmetric information if there are no effective tools to ensure the quality of the services.

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9 The EU Parliament affirmed (in its Resolution on follow-up to the report on Competition in Professional Services of 12 October 2006 (the "Resolution of 12 October 2006"), point J) that "*specific regulations are legitimate owing to the asymmetry of information between customers and service providers, the fact that certain professional services are deemed to provide public goods, and the fact that the provision of professional services may be linked to externalities*".

10 There do not seem to be uniform indicators suggesting that the intensity of competition in Denmark is distinctly greater than in most member States, *e.g.* that access requirements are generally lower or that outside competition pressure is greater.

11 The EU Parliament has remarked (see Resolution of 12 October 2006, point L) that a basis for well-founded statements on the economic importance of the liberal professions, as well as economic objectives for the reform process are lacking and that "*the Commission has failed to address the consequences of a systematic pro-competitive reform of the sector of professional services as regards job creation and additional growth*".

12 See, *ex multis*, Roger Van den Bergh, *Towards Efficient Self-Regulation in Markets for Professional Services, European University Institute*, Robert Schuman Centre for Advanced Studies, 2004 EU Competition Law and Policy Workshop/Proceedings; Frank H. Stephen, *The Market Failure Justification for the Regulation of Professional Service Markets and the Characteristics of Consumers*, European University Institute, Robert Schumann Centre for Advanced Studies, 2004 EU Competition Law and Policy Workshop; Leif Sévon, *Liberalisation of competition is the enemy of quality*, European Lawyer, Issue 38, May 2004; M. Henssler, M. Kilian, *Position paper on the study carried out by the Institute for Advanced Studies, Vienna, "Economic Impact of Regulation in the Field of Liberal Professions in Different Member States*", commissioned by the Hans-

As noted, neither the Commission reports nor the IHS study on which they were based contain any traditional competition law and economic empirical analysis. Rather, they base their conclusion on the need for complete deregulation on the mere assumption that, since, purportedly, there is no indication of market failures in those countries where the legal profession is less regulated, if not regulated at all, regulatory instruments are not essential for liberal professions.

However, a vast economic literature[13] has shown that an unregulated market for professional services may not produce efficient outcomes. Copenhagen Economics concluded in its report that *"there is a need for some degree of regulation of the legal profession because a totally free market will lead to serious market failures"* (page 9).

Due to lack of time, I will make only a few examples:

Representation in Court

As for the legislation providing for a lawyer's "monopoly" on representation in court, Copenhagen Economics concluded in its report that *"abolishing the monopoly will only have a limited impact on competition, but it could induce economic losses. The courts' costs will increase when more cases are taken to court, and rulings can distort the case law*" (page 43).

Competition among lawyers on litigation work is already fierce and there are no signs of 'market failures' in this respect.

The CCBE notes that Finland, which until 2002 had no restrictions on who could appear in court on behalf of others and is presented in the IHS Study as the ideal marketplace, now requires that parties be represented by lawyers, as it has been recognised that the quality of representation in court has been poor. Leif Sevon (President of the Supreme Court of Finland and former judge at the ECJ) remarks, in this respect, that "*the liberal rules in Finland and Sweden entitling parties to represent themselves before the courts, or entitling people other than members of the bar or qualified lawyers to represent parties before the courts, do not necessarily operate to the benefit of the client. Too often such representatives destroy their client's case beyond repair*".[14]

Henssler and Kilian remark that "*Finnish providers of legal expenses insurance decided in the early 1980s, in spite of deregulation of the legal services market, to include additional clauses in their insurance policies according to which the insured had a duty (!) to engage a lawyer for the legal procedure who practises under the supervision of the Finnish Bar Association or is "legally qualified", or who is employed by a lawyer who satisfies these requirements*". Clearly, this supports the fact that adequate quality and effectiveness is guaranteed only where a qualified lawyer provides the service.

Bar Membership

The CCBE strongly believes that the abolition of mandatory bar membership would have a serious impact not only on the structure of the legal profession, but also on the entire administration of justice. Bar membership goes together with an effective regulation of the profession and enforcement of disciplinary rules. Without a mandatory membership, the Bar's possibilities for ensuring high quality of the services of a lawyer could be undermined because lawyers could avoid sanctions by cancelling their membership. The current disciplinary system would need to be fully or partially replaced by a public disciplinary

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Soldan-Stiftung, Institute for Employment and Business Law of the University of Cologne, Institute for the Law of the Legal Profession at the University of Cologne, Cologne, September 2003.

[13] See above, footnote 12.

[14] Leif Sévon, *op. cit.*

system; this would mean that lawyers would lose their independence from the State.[15] It could also lead to higher costs for the State without a guaranteed return in terms of higher efficiency or better enforcement. Of course, bars must devote their full resources to the adoption and enforcement of quality-enhancing ethical rules.

Copenhagen Economics found that mandatory membership does not restrict competition (page 55) and that mandatory bar membership should be maintained. It should also be noted that mandatory bar membership is a means to ensure the professional indemnity insurance obligation of a lawyer, which operates in the consumer interest.

Self-regulation

Self-regulation, conceptually, must be seen as a corollary to the independence of the profession. According to Copenhagen Economics, self-regulation of the legal profession is preferable to legislative regulation of the code of conduct as it "*utilises that lawyers are better than the authorities to assess the quality of a lawyer's work and that the legal profession has significant interest in maintaining a good reputation and therefore emphasises ensuring a proper code of conduct*" (page 55).

Copenhagen Economics argues in its report that there are a number of clear advantages that speak in favour of self-regulation of the legal profession. Such advantages include: voluntary availability of expertise to regulate the subject matters relating to the legal profession, high level of acceptance of standards set and enforced by professional colleagues, flexibility and cost effectiveness. In any event, Copenhagen Economics concludes that "*the ethical rules for lawyers are not used to restrict competition*" (page 55).

By contrast, what would be the benefit of abolishing regulatory and representative functions of bars? What would be the aim of such reform? Exclusive direct state regulation would be incompatible with an independent legal profession.[16]

Finally, it ought be borne in mind that the importance of self-regulation as a source of rules which are fundamental not only for the law profession as such, but also for the entire society in general, has been recognized by the EU Parliament that "*Encourages professional bodies, organisations and associations of legal professions to establish codes of conduct at European level, including rules relating the organisational matters, qualifications, professional ethics, supervision, liability and communications, in order to ensure that the ultimate consumers of legal services are provided with the necessary guarantees in relation to integrity and experience, and to ensure the sound administrations of justice*".[17]

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[15] See the See in this respect the Report of the Joint Committee of the House of Lords and the House of Commons on the Draft Legal Services Bill that expresses serious concerns about the draft Bill where it provides that the handling of complaints about service will be undertaken by a new independent complaints handling body, the Office for Legal Complaints, while the handling of conduct or compliance complaints will be undertaken by the relevant approved regulator.

[16] See in this respect the Report of the Joint Committee of the House of Lords and the House of Commons on the Draft Legal Services Bill that expresses serious concerns about the level of involvement of the Secretary of State in the regulation of legal services, in particular the appointment of the chairman and members of the Legal Service Board, and suggested a number of amendments in order to ensure that the framework proposed by the draft Bill will not damage the independence of the legal profession since "*Public confidence in the integrity of the profession will not be sustained, nor will its international significance continue, if there is the perception that its independence is jeopardised in any way*". The Legal Service Bill was finally published on November 24, 2006; the Bill incorporated three out of the four key recommendations of the Joint Parliamentary Committee. Calls to modify the appointments process for the new Legal Service Board were rejected despite widespread concerns that the independence of the new body – the bulk of which will be nominated by the Lord Chancellor – could be compromised.

[17] See European Parliament resolution on the legal professions and the general interest in the functioning of the legal systems of 23 March 2006, point 9.

Price regulation and price competition

The Commission believes that fully deregulating prices would bring about significant economic and consumer benefits.

However, the EU Parliament stated that "*unregulated price competition between legal professional which leads to a reduction in the quality of the service provided operates to the detriment of consumers*".[18]

In any event, as to the incidence of pricing on competition among lawyers, it is interesting to note that, according to Copenhagen Economics, "*Lawyers compete more on professional skills and reputation than on price. The price is therefore not the most important competition parameter for lawyers. Liberalization will not change this.*" (page 11). Further, according to a prominent scholar, "*it is reasoned that consumers who are unable to assess quality ex ante (and possibly even ex post) and who observe a low price for a non-standardised service may assume that more knowledgeable purchasers have assessed the service as being of low quality. Professionals are keen to avoid such adverse signals on quality, and so it is concluded that price advertising will be uncommon in most professions*".[19]

The CCBE does not have a position on price regulation (other than *pactum de quota litis*) since regulation on this point varies significantly among Member States. The CCBE notes that where they exists, fee regulations are an integral part of a Member State's justice system, generally connected to the rule that allows the winning party to recover legal fees, as set by the judge according to a schedule. Moreover, fee regulations are mainly aimed at increasing transparency and protecting clients (especially one-off users) who, due to asymmetric information, are not in the position to evaluate what the appropriate cost of legal advice should be.[20]

Where an economic empirical analysis has actually been carried out, this has shown that, in some countries, the abolition of price regulation has resulted in higher and less predictable litigation costs. I refer, in particular, to the comparative survey of the UK deregulated system and the German and Italian regulated systems carried out by Zuckerman.[21] Moreover, a report by the "Netherlands Bureau for Economic Policy Analysis" that evaluates the impact of the deregulation process in the market for notary services in the Netherlands found that

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[18] *Ibidem*, point F. See also Judgment of 5 December 2006, *Cipolla vs. Portolese*, cited, according to which it is conceivable that, in certain market conditions (low barriers to entry and intense competition), a scale imposing minimum fees "*does serve to prevent lawyers ... from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided*", paragraph 67.

[19] Frank H. Stephen, *op. cit*. As for advertising regulation in general, we remind that, pursuant to the draft Directive of the European Parliament and of the Council on services in the internal market, "*Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession*" (Article 24(2) of the Common Position adopted by the Council on July 24, 2006 and approved, with amendments, by the EU Parliament on November 15, 2006; 2nd reading of the Council is pending).

[20] See, in this respect, Judgment of 5 December 2006, *Cipolla vs. Portolese*, cited, where the Court recognized, that "[I]*n the field of lawyers' services, there is usually an asymmetry of information between 'client-consumers' and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them*", paragraph 68.

[21] Adrian Zuckerman, *Fixed Minimum Legal Fees. Comments on Opinion of Advocate General Poiares Maduro delivered on 1 February 2006, Cases C-94/04and C-202/04* (not published).

deregulation seems to have benefited only professional consumers and not individual consumers.[22]

Finally, Henssler and Kilian have pointed out that regulated lawyers' fees are consumer-friendly as "*they allow the development of a functioning and effective insurance market, where consumers can obtain insurance at a reasonable price against the risk of having to pay legal expenses*".[23]

We are not aware that the Commission has carried out a similar analysis to prove that price regulation, where it exists, is not justified in the interest of consumers and the legal system as a whole.

As for rules prohibiting the contingency fee, or *pactum de quota litis*, *i.e.*, whereby the client undertakes to pay the lawyer a share of the result of a lawsuit, it must be pointed out that the purpose of such rules is not to regulate competition, bur rather to preserve the independence of lawyers in the interest of clients and, more generally, the functioning of the justice system.[24] It is a widely acknowledged principle that the lawyer should not have a financial interest in the outcome of the client's case, to avoid putting the lawyer in the possible position where the lawyer's own interests might conflict with those of the client. Accordingly, the introduction of contingency fees requires a delicate balancing of possible advantages and disadvantages based on reliable evidence; for example, contingency fees might result in a dramatic increase of litigation costs and encourage frivolous claims.[25]

Firm Ownership[26]

Non-lawyer owned firms bring in their train severe problems arising out of the potential conflict with the core principles of the legal profession, *i.e.* independence, confidentiality and avoidance of conflicts of interest. The introduction of outside ownership to an otherwise independent law firm may put at risk lawyers' independence, since outside owners may have a specific economic interest in certain cases and try to influence the handling of a case to the detriment of the lawyer's duties versus his clients. Outside ownership may also entail a risk for the lawyer's duty to avoid any conflict of interest. The owner may have a specific interest in a case, and the client being represented by a lawyer may have a different one. The client

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[22] R. Van den Bergh also reported the results of the *Report of the Commission on Evaluation of the 1999 Notary Act* (Hammerstein Committee) that, if, on the one hand mentions a number of benefits resulting from competition between notaries, on the other hand admits that, after the liberalization of fees in the family practice, some notaries try to save on costs by spending less time on information and advice to clients and that the fees for a number of services (*e.g.* wills, whose fees experienced an increase of 97%) have dramatically increased after the reform.

[23] M. Henssler, M. Kilian, *op. cit*.

[24] Article 3.3 of the CCBE's Code of Conduct for European lawyers (available at the following website address: http://www.ccbe.org/doc/En/2006_code_en.pdf) provides: "*3.3.1. A lawyer shall not be entitled to make a* pactum de quota litis*. 3.3.2. By* "pactum de quota litis*" is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter. 3.3.3.* "Pactum de quota litis*" does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.*"

[25] Indeed, it ought be borne in mind that "[A]*ccess to justice is different from most things. Generally, lower prices, more efficiency and more of the commodity are good. But this is not necessarily the case for access to justice and in this sense it cannot be commoditised*", see Paul A. Grout, *The Clementi Report: Potential Risks of External Ownership and Regulatory Responses. A Report to the Department of Constitutional Affairs*, July 2005.

[26] The CCBE's position paper on non-lawyer owned firms is available at the following website address: http://www.ccbe.org/doc/En/ccbe_position_on_non_lawyer_owned_firms_en.pdf.

confidentiality obligation may also be at stake, given that there may be a flow of information between the outside owner (who is not subjected to any professional secrecy/confidentiality duty) and the lawyer dealing with this issue.

Should Member States permit non-lawyer control of legal service providers, the single European market for legal services created by the lawyers' Directives could be broken up. Copenhagen Economics noted that - from a purely economic perspective - other owners (including investors) can probably not operate the law firms significantly more efficiently than lawyers, and that there are a number of clear economic advantages from lawyers owning the law firms themselves such as, in particular, absence of conflicts of interests; effective management and better control of the firm. With regard to investors as owners, Copenhagen Economics concluded that "*investor ownership will not likely entail significant efficiency gains for the law firms. This is because law firms are not heavily capital dependent and because the general advantages of investor owned companies are not fully applicable to the legal law firms*" (page 54). Investor ownership would also probably entail motivation and control problems. Therefore, Copenhagen Economics conclude that "*Economic literature regarding ownership of firms points to a number of conditions for an ownership structure to be well functioning. Many of these conditions point to the traditional law firms where lawyers themselves own and operate the law firm as the optimum ownership structure*" (page 49, emphasis added).

User groups

In its progress report titled "Better defining the public interest", the Commission states that "*The key finding is that one-off users, who are generally individual customers and households, may need some carefully targeted protection. On the other hand, the main users of professional services – businesses and the public sector – may not need, or have only very limited need of, regulatory protection given they are better equipped to choose providers that best suit their needs."*

Although the CCBE welcomes the fact that the Commission recognises the need for certain regulation to protect quality, the CCBE believes that this should apply to professional regulations in general. The EU Parliament made it clear that "*the aims of the rules governing legal services are the protection of the general public, the guaranteeing of the right of defence and access to justice, and security in the application of law, and [...] for these reasons they cannot be tailored to the degree of sophistication of the client*".[27]

Independence, absence of conflicts of interest and professional secrecy/ confidentiality are core values of the legal profession regardless of the type of client. Further, the legal profession is a single profession: a given lawyer or law firm may be assisting at the same time or at different points in time, individuals and companies, whether in litigation or in transactional advice.

In any event, regulation on matter such as prices or advertising has very limited effects (if any effect at all) on business clients. Therefore, it is not clear why regulation should be abolished given that it is needed to protect "low segment" clients and has no effect on business users.

By way of an example, price regulation, to the extent that ensures access to legal advice for low-income individuals and increase transparency and predictability of the cost of legal advice,[28] has no possible adverse effect against business users, since, as the Commission

[27] See European Parliament resolution on the legal professions and the general interest in the functioning of the legal systems of 23 March 2006, point 8.

[28] See Judgment of 5 December 2006, *Cipolla vs. Portolese*, cited, paragraph 68.

itself acknowledges, their matters are usually large and complex and negotiation covers not only price, but also quality and service levels; therefore, fee scales are irrelevant for them. Furthermore, they counterbalance any possible adverse effect of regulation with their negotiating power.

Likewise, rules that temper the principle of freedom of communication with a view to reducing the effects of the inherent information asymmetry between lawyers and users, particularly with respect to advertising through the mass-media, have no effect on competition for business clients who are not the addresses of such messages and do not rely on such advertising to select their counsel.

CONCLUSIONS

To sum up, the CCBE welcomes the methodology applied by Copenhagen Economics, and hopes that the report will start a balanced debate on competition and the legal profession taking into consideration not only economic factors, but also other important policy factors including the core values of the legal profession. Lawyers are not afraid of competition; they are used to competing on a domestic and cross-border basis. However, the rules applicable to lawyers secure the rights and benefits of their clients in the interest of effective access to justice and a sound legal order. Conclusions on the state of competition in legal services should therefore be drawn with great care: de-regulation for its own sake could generate 'market failures'. According to Leif Sevon "*it is dangerous to assume that the lowest level of regulation in any member state indicates a desirable solution to be adopted by the Community legislator*". Policy makers cannot escape from a trade-off between competition and the protection of the public interest served by the legal profession. To quote Henssler and Kilian, in pursuing a reform leading to a less regulated market, the key questions shall be "*in such a market ... will access to justice for the citizen be improved, will the citizen receive higher-quality services or at least services of the same quality and will possible disadvantages potentials be met as effectively as in a regulated market?*" The CCBE urges the Commission to address these questions head-on in its further policy review and stands ready to cooperate with the Commission in a constructive atmosphere.