Représentant les avocats d'Europe
Representing Europe's lawyers

CCBE RESPONSE TO THE EUROPEAN COMMISSION COMPETITION QUESTIONNAIRE ON REGULATION IN LIBERAL PROFESSIONS AND ITS EFFECTS

Conseil des Barreaux de l'Union européenne – Council of the Bars and Law Societies of the European Union
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QUESTIONNAIRE

GENERAL INFORMATION

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Organisation: CCBE (Council of the Bars and Law Societies of the European Union)

Replying in quality of: private consumer / business / professional / professional body / public sector regulator / academic / other (please specify)

The Council of Bars and Law Societies of the European Union (CCBE) is the representative body of over 500,000 European lawyers through its member bars and law societies.

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Do you request that your submissions be treated anonymously?

Yes ☒ No

Does your reply contain confidential information?

Yes ☒ No

If so, please state your reasons and mark it clearly.

It should be noted that the response below addresses the European dimension of the questions raised in the questionnaire, but does not concern any individual national rules or regulations of our Member Bars.

SECTION 2: QUESTIONS FOR PROFESSIONALS AND PROFESSIONAL BODIES

A. Questions concerning a specific profession

In your reply, please always specify which profession (see **List 1** below) and which country you are referring to.

Feel free to reply for more professions, but in this case, clearly separate your reply for the two (even replying to two separate questionnaires).

LIST 1: PROFESSIONS

a) Lawyer
b) Notary
c) Engineer
d) Architect
e) Accountant
f) Auditor
g) Tax consultant
h) Pharmacist
i) Medical practitioner
j) Patent agent
k) Real estate agent
l) Interpreter/translator
m) Other (please specify)

Please note that the responses given below relate to the profession of lawyer across the European Union.

15. Would you like to indicate which, in your view, are the essential rules that a professional must comply with? You may wish to take into account that the e-commerce Directive[1] lists the examples of independence, professional secrecy and fairness towards clients and other members of the profession, as professional rules to be complied with.

We will explain below the rules which we think are essential for the legal profession. Before addressing them, though, we would like to comment on the underlying approach of the question. We do not believe that asking for a list of essential rules will help to advance knowledge of the competitive nature of the legal profession, and this for three reasons given below. Nearly all our remarks are drawn from the landmark judgment of the European Court of Justice – *Wouters*, Case 309/99. We find it troubling that the study and the questionnaire do not take into account the principles set out in *Wouters,* which

[1] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1.

bind the Commission. We will quote the relevant part of the *Wouters* judgment at the end of this answer.

There are three reasons why a list of essential rules does not help towards the judgment of the competitive nature of the legal profession, and they are as follows:

(1) First, it seems to us that to ask for a list of rules, without asking for the reasons for the rules, will not lead to an understanding of the context of regulation of the legal profession (or possibly other professions, but we are concerned only with the legal profession). We are aware that, in question 19, the 'goal' - which is not the same as the reason - of certain listed rules is sought. But, without the context of the overall purpose of regulating lawyers, we would argue that the questionnaire itself is in danger of missing the point that the rules governing lawyers are generally adopted in the public interest, which is often linked to the role lawyers play in a democratic society. We find ourselves defending these rules repeatedly against governments that want to remove them or cause us to break them – in this case, the questions are being asked because of competition, in others because of attempts to reach our clients through us, such as in anti-money laundering legislation. We are concerned that neither in the study which led to this questionnaire, nor in this questionnaire itself, are we asked for reasons. It is a major omission in both documents. Both documents create the impression of being based on the assumption that the reason for, or the aim pursued by, the rules regulating the legal profession is the restrictions of competition.

(2) Second, the question by its phrasing does not lead to the Commission being informed of the public interest that is at stake. The questionnaire is only based on economic criteria, and does not allow for the explanation of the non-economic criteria which are at stake. This again is to miss the point that rules are adopted in the public interest, often linked to the role lawyers play in a democratic society.

(3) Third, the examples quoted as rules in the question above are more principles than rules. In our view, this is not a matter of semantics at all. It is part of the same flawed approach to the questionnaire already noted in the first two reasons, looking at rules without asking for the reasons (as in (1) above) or without allowing for explanation of the public interest (as in (2) above), and now without understanding that rules only come about as the reflection of underlying principles. Regulation in the legal profession exists not to protect the interests of the lawyers as the providers of the service, but to protect and promote the public interest in securing that a variety of principles – detailed below - are observed.

For these three reasons, we feel that it is vital for the Commission to first establish the context of the regulation of lawyers in the Member States, and the principles which support them. It is only after having established the context of the regulation in the Member States and the principles which support them that one can have a proper view of the professional rules.

As the Commission knows, the legal profession plays a key role in democracies that are based on the rule of law. If it is necessary to cite support for such a well-known and widely accepted notion, we would refer to just three of doubtless many documents. First, the European Parliament in a resolution of 5 April 2001 concerning the particular role of liberal professions in society, and in particular that of lawyers stated that it *'considers that liberal professions are the expression of a democratic fundamental order based on law*

and, more particularly, an essential element of European societies and communities in their various forms'. The European Parliament further notes that *'the legal profession in particular is one of the pillars of the protection of the fundamental right to defence and the putting into effect of the principle of the rule of law.'* Second, the Council of Europe Recommendation (Rec(2000)21 of the Committee of Ministers to member states) on the freedom of exercise of the profession of lawyer underlines **'***the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms*' and states that the Council of Europe desires '*to promote the freedom of exercise of the profession of lawyer in order to strengthen the rule of law, in which lawyers take part, in particular in the role of defending individual freedoms*'. Third, the United Nations Basic Principles on the Role of Lawyers refers to lawyers '*cooperating with governmental and other institutions in furthering the ends of justice and public interest*' and describes the role of lawyers as '*essential agents of the administration of justice*' and '*promoting the cause of justice*'.

There are doubtless various factors which go to the make-up of democratic societies. The rule of law is one. A free market economy is doubtless another. The central issue for us thrown up by the study and the questionnaire is the extent to which these two key factors in our society inter-relate. Our concern at both the study and the questionnaire arising out of it, as stated above, is that they are looking at the role of lawyers - if they look at it at all - through the eyes of a free market economy, without recognition of the fact that there are other criteria by which such societies live. These criteria cannot be reduced to a list of professional rules (although such rules may reflect the criteria), but require an understanding of the constitutional context and rules of the society in question in which the professional rules are embedded.

To explain further, we consider it self-evident that, for the rule of law to operate, citizens must be able to:

- rely on the expertise of people whom they consult in relation to legal questions;
- rely on their lawyer remaining independent of any outside influence;
- rely on their lawyer's undiluted loyalty to their interests;
- rely on the fact that their business with a lawyer will remain confidential, so that the opposing party or third parties do not get to hear of their confidences.

The first of the bullet points is dealt with by bar admission and training rules, which exist to ensure that lawyers will have sufficient qualifications, training and expertise. The second, third and fourth bullet points usually go by the name of independence, avoidance of conflicts of interest and professional secrecy which were recognised by the *Wouters* case among the essential core values of the legal profession. In other words, lawyers' professional rules have grown up out of society's recognition that the rule of law needs these principles to be protected if it is to flourish.

The above principles clearly serve the interest of the public at large, and not just the individual client nor the self-interest of the individual lawyer. This is obviously the case with the first bullet point. The requirement of the minimum necessary expertise is a measure taken in the interest of the consumer. The confidence in the rule of law and administration of justice is of utmost importance for the confidence of the consumer. Considerations of market forces will be of little comfort to a "consumer" who has been

sentenced to jail because his defence lawyer failed to act in accordance with the essential core values which we have mentioned.

The importance of the public interest which is at stake, when one discusses the rules governing lawyers, has been illustrated by the *Wouters* judgment from which we now quote some paragraphs in support of our case:

'*97.*

However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

……..

99.

As regards members of the Bar, it has consistently been held that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83 Klopp [1984] ECR 2971, paragraph 17, and Reisebüro, paragraph 37). For that reason, the rules applicable to that profession may differ greatly from one Member State to another.

100.

The current approach of the Netherlands, where Article 28 of the Advocatenwet entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.

101.

Those obligations of professional conduct have not inconsiderable implications for the structure of the market in legal services, and more particularly for the possibilities for the practice of law jointly with other liberal professions which are active on that market.

102.

Thus, they require of members of the Bar that they should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

103.

By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct.

……

107.

A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

108.

Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96 Mac Quen and Others [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, Reisebüro, paragraph 41).

109.

In light of those considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession (see, to that effect, Case C-250/92 DLG [1994] ECR I-5641, paragraph 35).

110.

Having regard to all the foregoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

As follows from the *Wouters* judgment, there are two ways to regulate the profession. Either the State has empowered the bar association to regulate the profession without the State being fully involved, or it is the State which retains the power to adopt the professional rules applicable to the legal profession in the last resort. Regarding the latter, the professional rules will be considered as state measures, and will therefore not fall under the scope of EC competition law at all.

It is also important to note that the judgment distinguishes between two kinds of rules: those that are considered necessary in order to ensure the proper practice of the legal profession, and those which do not pursue that goal**.**

Turning to the essential rules, we must point out now that we cannot list the essential rules exactly, because, as the judgments in the *Reisebüro Bröde* and *Wouters* case point out, they differ in Member States, and they are allowed to differ by the judgments of those cases. But we can say that the essential rules are those which, in the view of bars and law societies delegated to draw them up and enforce them, protect the core values of expertise, independence, avoidance of conflicts of interest, and professional secrecy.

16. The e-commerce Directive also mentions 'the dignity and honour of the profession'. What exactly do you understand by 'dignity and honour of the profession'? To what extent do you think this is an important factor for the proper practice of the profession?

We think that, at any rate for lawyers, there is no difference between the answer to Question 15 and the answer to Question 16. There are certain core and essential values of the legal profession, which we have outlined in answer to the previous question. The defence of these is vital for the rule of law. The dignity and honour of the legal profession mean no more than the reflection of these core values. Once again, such rules exist not to protect the interests of the lawyers as the providers of the service, but to protect and promote the consumer and public interest in securing that these principles are observed.

17. To what extent do you feel that the following rules act *in or against your interests* as a provider of the services?

We would like to point out that this question is flawed in its application to professional bodies, at any rate in the legal field, for two reasons:

(1) First, neither the CCBE nor its member bars and law societies are themselves providers of services. Therefore, we do not have interests as providers.

(2) Second, the question is based on a false assumption that the rules listed have anything to do with the interests of the providers of legal services as opposed to the recipients or our societies at large. As repeatedly stressed in the answer to question 15, lawyers have a special and widely-recognised role in democratic societies, in ensuring the rule of law. When lawyers' professional bodies are empowered or required by law to regulate their members, they do so in the public interest. There may be arguments about whether they succeed in doing this in particular cases. For these arguments to be judged, criteria would need to be used – as stated before – which go beyond economic criteria.

(3) If the question was meant to ask whether the rules act in or against the interests of the individual *members* of our professional bodies, it should be pointed out that rules may be to the disliking of some individual members. This is, however, true for all laws and regulations that are being adopted in the general/public interest. Moreover, given that regulation is adopted in the public interest, whether it is also perceived as protecting - or as adverse to - the interests of individual professionals should be immaterial, in our view.

Please indicate ☒ on a scale from –2 to +2 the importance of each rule or regulation (where a value of –2 indicates it is against your interest and value of +2 indicates it is in your interest, and 0 indicates a neutral position).

TYPES OF RULE OR REGULATION	Negative	Positive

	-2	-1	0	+1	+2
(1) compulsory fixed prices, fixed minima and/or maxima					
(2) recommended prices or recommended minima					
(3) prohibition to make the price of service dependant on outcome of a procedure/an action					
(4) territorial restrictions on scope of activity					
(5) rules on number/type of customers					
(6) rules on advertising					
(7) rules on types of undertakings professionals may form					
(8) rules on inter-professional co-operation					
(9) rules on access to the profession, including sponsor system for entry to profession					
(10) tying the purchase of one service to another					
(11) other (please specify)					

B. Questions relating to specific rules or regulations

In your reply, please always specify which profession (see **List 1** above), which type of rule or regulation (see **List 2** below) and which country you are referring to.

Examples:
- "Reply concerning advertising restrictions applicable to lawyers in [country X]"
- "Reply concerning the sharing of territory for [other profession] in [country Y]"

LIST 2: TYPES OF RULE OR REGULATION

(1) compulsory fixed prices, fixed minima and/or maxima
(2) recommended prices or recommended minima
(3) prohibition to make the price of service dependant on outcome of a procedure/an action
(4) territorial restrictions on scope of activity
(5) rules on number/type of customers
(6) rules on advertising
(7) rules on types of undertakings professionals may form
(8) rules on inter-professional co-operation
(9) rules on access to the profession, including sponsor system for entry to profession
(10) tying the purchase of one service to another
(11) other (please specify)

It should be noted that we will refer in the answers given below solely to the rules set forth in the CCBE's own Code of Conduct. The CCBE Code was first adopted in 1988 due to the continued integration of the European Union and the increasing frequency of cross-border activities of lawyers, and since then has been amended and is the subject of regular review. The CCBE Code of Conduct, which aims to ensure the proper

performance by the lawyer of his function in society, sets out the general principles and rules that lawyers are to observe in their relations with clients and courts. It is a Code which applies to the cross-border activities of lawyers across Europe, including those non-EU countries which have observer-status with the CCBE. The Code is intended to be (indirectly) binding on all EU lawyers – as is stated in Article 1.3.2 of the Code *'the organisations representing the legal profession through the CCBE propose that the rules codified in the following articles (…) be adopted as enforceable rules in relation to the cross-border activities of the lawyer in the European Union and the European Economic Area (…).'* Adherence to the CCBE Code is a condition of CCBE membership for bars and law societies from other European countries.

The CCBE Code lays out a minimum set of rules shared by substantially all our member bars and applicable to cross-border practice. The fact that a specific rule in effect in a given Member State may not be found in the whole or in part of the CCBE Code should not suggest that such rule does not protect the core values of the profession, given the principles outlined in the *Wouters* and *Reisebüro Bröde* cases about permissible differences in Member States.

"Reply concerning prohibition to make the price of service dependant on outcome of a procedure/an action applicable to lawyers in Europe"

18. This reply concerns the rule of "prohibition to make the price of service dependant on outcome of a procedure/an action" for the profession of lawyers in Europe.

19. In your opinion, what is the goal of the rule or regulation you are considering?

As with other professional rules regulating lawyers, the goal of this rule is to protect consumers. 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. The many duties to which a lawyer is subject require absolute independence, free from all other influence, especially such as may arise from personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. Further, there are two kinds of conflict of interest to which a lawyer might become subject – a conflict of interest between two clients, and a conflict of interest between lawyer and client. This rule is trying to prevent the latter, which is often the more serious of the two kinds of conflict.

20. If you know the source of the rule or regulation in question, please indicate it (law, code of conduct, other)

The rule appears in the CCBE's Code of Conduct, as follows:

'Pactum de Quota Litis

A lawyer shall not be entitled to make a pactum de quota litis.

By «pactum de quota litis» is meant an agreement between a lawyer and his 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.

The 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 competent authority having jurisdiction over the lawyer.'

21. In your view, could this rule or regulation be justified as a measure to protect consumers? In particular, to what extent do you think it protects the small, one-off consumer?

Please see the answer to question 19 above. In our view, it does protect small, one-off consumers as much as business, continuous consumers and sophisticated users.

22. In your opinion, would businesses, continuous consumers, sophisticated buyers, need such protection?

Yes, there is no distinction in this case. The possible conflict faced by the lawyer would act equally against all kinds of consumers.

23. In your view, does this rule or regulation promote or hinder competition in the market? Why?

We think that there is a misunderstanding in relation to the legal profession. We refer to the *Wouters* judgment already referred to in support of our contention that, even when looked at specifically from the angle of competition, the bars are entitled to regulate the avoidance of conflicts of interest as a core principle. As is stated in the response to question 19, the prohibition of contingency fees serves to protect consumers. The principles of avoidance of conflicts of interest and the independence of lawyers are key principles in that context. The *Wouters* judgment made clear that the regulation of our core principles could override competition rules, given the importance of such principles.

The European Parliament in its resolution of 5 April 2001 also pointed out *'that rules which are necessary in the specific context of each profession, in order to ensure the impartiality, (…) of the members of that profession or to prevent conflicts of interest (…), and which, in addition, do not represent barriers to the free movement of services, are not considered to be restrictions of competition within the meaning of European Competition law.'*

24. In your view, what is the role of this profession in safeguarding the public interest? What exactly do you understand by 'public interest' (for example: the correct administration of justice, public health, public safety, protection of the environment)?

Please see previous answers, in particular the answer to question 15. As stated before, the key role lawyers play within the correct administration of justice and for the protection of consumer interests is paramount.

25. To what extent could the same purposes be attained by less restrictive measures?

The *Wouters* judgment made clear that bars have a regulatory lee-way in regulating core values such as avoidance of conflict of interest. In any case, we do not believe that the same purpose could be attained by less restrictive measures.

26. What is the effect of such rule or regulation on the market?

Whatever effect such a rule might have on competition, the *Wouters* judgment made it clear that a rule adopted to protect the legal profession's core values falls outside the scope of EU competition law.

27. In your view, to what extent does this rule or regulation limit the possibilities for cross-border services or affect the possibilities of professionals to enter new markets?

The rule contained in the CCBE Code only deals with cross-border practice. However, we would like to point out that most domestic regulations also provide for a prohibition of pactum quota litis. We are, therefore, not adding anything at a European level, which is not already present at a national level. To the extent that national rules allow for pactum quota litis, it should be noted that this will in any case be based on access to justice and public interest grounds, pertaining to the particular constitutional context and set-up of the country in question.

"Reply concerning rules on advertising applicable to lawyers in Europe"

18. This reply concerns the rule of "rules on advertising" for the profession of lawyer in Europe.

19. In your opinion, what is the goal of the rule or regulation you are considering?

As with other professional rules regulating lawyers, the goal of this rule is to protect consumers. The limitations to the entitlement to personal publicity set forth in the CCBE Code of Conduct are both found in most European legislations on the subject ('accurate and not misleading') and protective of the core values which were recognised in the *Wouters* case ('obligation of confidentiality and other core values of the profession').

20. If you know the source of the rule or regulation in question, please indicate it (law, code of conduct, other)

The CCBE's Code of Conduct states as follows:

*'**Personal Publicity***

2.6.1 A lawyer is entitled to inform the public about his services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.

2.6.2 Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.'

21. In your view, could this rule or regulation be justified as a measure to protect consumers? In particular, to what extent do you think it protects the small, one-off consumer?

The aim of lawyer regulations on publicity is no different to that of all legislation in relation to advertising, in particular unfair competition laws in this regard – namely, to protect consumers. It is well-known that the issues which bring small, one-off consumers to lawyers are often the most stressful in life – criminal cases, divorces, house purchases. At such times, when consumers are faced with decisions which will have a major impact

on their lives and resources, it is vital that they can obtain information about the lawyer who will represent them, and that that information is accurate, not misleading and in accordance with the core values of the profession.

22. In your opinion, would businesses, continuous consumers, sophisticated buyers, need such protection?

The rule protects businesses, continuous consumers and sophisticated buyers as much as anyone. They, too, need to know that the information is accurate and not misleading – for instance, that the lawyer or law firm has the expertise that it offers. They also need to be sure, as another instance, that their private business affairs, or even maybe the fact that they are clients of a particular lawyer, will not be used in publicity (which explains the reference to the obligation of confidentiality in advertising).

23. In your view, does this rule or regulation promote or hinder competition in the market? Why?

We refer to the *Wouters* judgment already referred to in support of our contention that, even when looked at specifically from the angle of competition, we are entitled to regulate the obligation of confidentiality and other core principles. The *Wouters* judgment made clear that the regulation of our core principles could override competition rules given the importance of such principles.

24. In your view, what is the role of this profession in safeguarding the public interest? What exactly do you understand by 'public interest' (for example: the correct administration of justice, public health, public safety, protection of the environment)?

Please see previous answers. As stated before, the key role lawyers play within the correct administration of justice and for the protection of consumer interests is paramount.

25. To what extent could the same purposes be attained by less restrictive measures?

The *Wouters* judgment made clear that bars have a regulatory lee-way in regulating core values such as the obligation of confidentiality. In any case, we do not believe that the same purpose could be attained by less restrictive measures.

26. What is the effect of such rule or regulation on the market?

The purpose and effect of the rule is to avoid misleading and inaccurate advertising.

27. In your view, to what extent does this rule or regulation limit the possibilities for cross-border services or affect the possibilities of professionals to enter new markets?

We can see no reason why any such limitation should occur.

"Reply concerning rules on inter-professional co-operation applicable to lawyers in Europe"

18. This reply concerns the rule of "rules on inter-professional co-operation" (usually known in the legal services field as Multidisciplinary Partnerships (MDPs)) for the profession of lawyer in Europe.

19. In your opinion, what is the goal of the rule or regulation you are considering?

As with other professional rules regulating lawyers, the goal of this rule is to protect consumers, in particular to avoid conflicts of interest. A rule prohibiting MDPs was considered by the European Court of Justice in the *Wouters* case, and, as explained in the earlier quote from the case, the Court said that such rules were permissible for the protection of the core values of the legal profession, which themselves serve the public interest, no matter whether they affect competition.

20. If you know the source of the rule or regulation in question, please indicate it (law, code of conduct, other)

The CCBE Code of Conduct states:

*'**Fee Sharing with Non-Lawyers***

3.6.1 Subject as after-mentioned a lawyer may not share his fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws of the Member State to which the lawyer belongs.

3.6.2 The provisions of 3.6.1 above shall not preclude a lawyer from paying a fee, commission or other compensation to a deceased lawyer's heirs or to a retired lawyer in respect of taking over the deceased or retired lawyer's practice.'

21. In your view, could this rule or regulation be justified as a measure to protect consumers? In particular, to what extent do you think it protects the small, one-off consumer?

The *Wouters* case laid out the rationale for this rule in the interests of consumers. It involves the protection of the core values, in particular the avoidance of conflicts of interest and the duty of confidentiality (to the extent that other professions are bound by rules that cannot be reconciled with the core values of the profession). A small, one-off consumer is protected by the knowledge that the lawyer consulted is subject to a single, consistent code, enforced by the local bar. Although there are Member States where certain inter-professional co-operations are permitted, as stated in the CCBE rule, those Member States have found ways to overcome the difficulties mentioned. The *Wouters* case made clear, however, that Member States and bars and law societies could legitimately come to different conclusions in this area on the protection of the core values.

22. In your opinion, would businesses, continuous consumers, sophisticated buyers, need such protection?

The Enron case and other financial scandals in America provide the answer to this question. It is commonly believed that the conflicts of interest faced by an auditors' firm in both supplying consultancy services and acting as auditor were a significant cause of the market failure of Enron. There could not be a more perfect example than Enron of a continuous consumer and sophisticated buyer, and its shareholders and creditors clearly needed the protection of a rule such as the one under discussion.

23. In your view, does this rule or regulation promote or hinder competition in the market? Why?

We refer to the *Wouters* judgment already referred to in support of our contention that, even when looked at specifically from the angle of competition, bars are entitled to regulate the obligation of confidentiality and other core principles. The *Wouters* judgment made clear that, when regulating our core principles, competition was not the decisive factor, given the importance of such regulation.

24. In your view, what is the role of this profession in safeguarding the public interest? What exactly do you understand by 'public interest' (for example: the correct administration of justice, public health, public safety, protection of the environment)?

Please see previous answers. As stated before, the key role lawyers play within the correct administration of justice and for the protection of consumer interests is paramount.

25. To what extent could the same purposes be attained by less restrictive measures?

The *Wouters* judgment made clear that bars have a regulatory lee-way in regulating core values such as the obligation of confidentiality. In any case, we do not believe that the same purpose could be attained by less restrictive measures.

26. What is the effect of such rule or regulation on the market?

The rule prohibits MDPs (unless permitted by the rules of the bar to which the lawyer belongs). It is not intended to restrict competition but to protect the core values of the profession (independence, professional secrecy and the avoidance of conflicts of interest). Such a rule is found in many jurisdictions in and outside Europe (including the United States). Whatever its effects on competition, the *Wouters* judgment made clear that a rule adopted to protect these core values falls outside the scope of EU competition law.

27. In your view, to what extent does this rule or regulation limit the possibilities for cross-border services or affect the possibilities of professionals to enter new markets?

We refer to the response given to question 26 above. To the extent that this question addresses the issue of freedom to provide services and the freedom of establishment, we simply refer to the *Wouters* judgment.

28. Finally, are there any other remarks you would like to make?

We are concerned that, although comparative conclusions on the competitive nature of the legal profession have been drawn in the Austrian Institute study which forms the basis of the questionnaire, and in comments of the Commission after the publication of the Austrian Institute study, there is no occasion in the questionnaire for us to comment on these conclusions. We are referring in particular to the point about there being a variety of density of regulation of the legal profession across Europe, and what this might mean for consumers in the north and south of Europe. We are disappointed that there were no questions which would have allowed the CCBE and national Bars to address this most important point.

As a result, we are using the answer to question 28 to emphasise the following:

(1) Methodology of the Austrian Institute report – we wrote to both the Austrian Institute and the Commission during the Austrian Institute report to point out the extremely short time period allowed for the answers. We were ready to assist in the drawing up of the report by meeting its authors to discuss in detail the regulation of our profession. We were also ready to discuss the report's conclusions before they were published. None of our comments made the slightest difference. We were not consulted in person. The Commission in a meeting with us on 6 November 2002 said that it wanted just a snapshot, and confessed that there was just a short time and low budget available for this study. Yet, on the basis of the report, important provisional conclusions are already being drawn. We reserve the right, once we have had the time to study it properly – because yet again the Commission has given us an extremely tight time limit of just a few weeks – to point out any methodological shortcomings of the Austrian Institute report. We have already pointed out, in our answers above, the flaw of judging by economic criteria factors in regulation which the European Court of Justice has itself said should not be judged by such criteria. We would also like to know on what basis the medical profession was withdrawn from the scope of the study, despite initially being within the list of professions to be studied.

(2) Definitions used by the Commission – the Commission has drawn preliminary conclusions in relation to the legal services market without defining its terms. For instance, the Commission says that there has been no 'market failure' in relation to lawyers, without saying how this would be judged. Numbers of lawyers disciplined? Numbers of lawyers who have gone bankrupt? Numbers of complaints of negligence against lawyers? None of these figures were asked for in the Austrian Institute study, and we do not believe that the Commission has them itself (since it has told us that the reason for the Austrian Institute study was to obtain information in an area where it had none), and yet the Commission feels able to draw sweeping conclusions without proper data. We talk below about another of the Commission's terms, the consumer in Europe.

(3) Comparative conclusions – the Austrian Institute study, and the Commission itself, have drawn comparative conclusions about the legal profession in Europe without taking into account basic factors in relation to it, as follows:

(i) The legal profession differs from most, if not all, of the other professions because the nature of law differs in each Member State. The construction of building or the treatment of an illness are more or less the same in each Member State, but the law is not. It is well-known that there are different legal systems and cultures across Europe. It is, therefore, dangerous to draw sweeping conclusions without taking into account these inherited differences.

(ii) European jurisprudence itself recognises this difference (*Reisebüro Bröde, Arduino* and *Wouters* cases), and allows both Member States to legislate differently for the same circumstances, and bars and law societies to come to different but legitimate conclusions in regulating the same circumstances. Recognition of this difference is nowhere reflected in the Austrian Institute study or the Commission's response to it. Yet it is crucial to conclusions about differing ways of regulating the legal profession in the Member States. In essence, both Member

States and the legal professions are allowed a certain discretion in their legitimate legislation and regulation.

(iii) European jurisprudence also recognises that there is no uniform consumer across the European Union, and that consumer behaviour and consumer expectations differ from one Member State to another. Where is that reflected in the study or the Commission response? As a result of this difference in Member States, the north of Europe is generally more liberal and less regulated than the south, and consumer expectations will accordingly be different in the north and the south. It does not follow from this, as the Commission seems to assert, that what has worked in the north, at least as far as regulation of the legal profession is concerned, will also work in the south and is therefore required in the south.

We believe that these various points demonstrate the very significant flaws in both the research undertaken by the Austrian Institute into the legal profession, and the conclusions drawn by the Institute and the Commission from the findings.

We would urge the Commission, if it seriously wants to investigate the competitive nature of the legal profession, to do the following:

(a) to obtain more information on the legal profession by organising a broad discussion on this topic with the full participation of representatives of the legal profession; and

(b) to take account of well-known European jurisprudence relating to the law and legal systems of the EU (such as the discretion in relation to legislation and regulation mentioned above), so that ill-conceived generalisations are not made in drawing conclusions.