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COMMENTS ON THE COMMISSION'S LEGAL ANALYSIS IN ITS REPORT ON COMPETITION IN PROFESSIONAL SERVICES

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I. Introduction

This paper provides comments from the Council of the Bars and Law Societies of the European Union (CCBE) on the Commission Communication titled "Report on Competition in Professional Services", published on February 9, 2004 (the "Report"). The CCBE, through its member bars, represents over 700,000 European lawyers to the European institutions.

The paper is divided into two parts. First, there is a general commentary on the background to the Commission's work over the last two years in relation to the liberal professions. Second, the paper focuses on the Commission's analysis of the Community legal framework within which the allegedly restrictive State or professional bodies' regulations have to be analyzed.

II. Background to the Commission's work on competition in the liberal professions

The CCBE has already sent to the European Commission its own economic critique of the research carried out for the Commission as part of its stock-taking in advance of issuing its Report. The research for the Commission was carried out by the Institute for Advanced Studies, Vienna and was entitled 'Economic Impact of Regulation in the Field of Liberal Professions in Different Member States' (the "IHS study"). The CCBE's critique of this, undertaken by an independent firm of economists, concluded that the flaws in the research were such that it was not safe to base policy conclusions on it.

It might be argued that it is too late now to rehearse problems related to the background research, but the CCBE feels that it is important to re-state that the Commission has based its findings on inadequate information. As a sample of its criticisms, both from the original critique sent to the Commission and other responses to the background research, we would point out that:

- the purely economic approach taken omits to take account of the reason for regulation, whereas on several occasions the European Court of Justice has recognized that regulation may be necessary to protect overriding public interests, such as access to justice;

- deregulated markets are taken as the benchmark in the research without any enquiry as to whether the demand for legal services is comparable in such markets with that in more regulated markets, whether access to justice is better in them, whether the quality of problem-solving is equivalent, and whether consumer protection is at least equally good;

- there was a bias in the research against looking at whether certain regulations improved consumer protection;

- as an example of this bias in favour of deregulation without further analysis, the case of Finland was quoted, without citing key facts such as that providers of legal expenses insurance in Finland require a lawyer to be involved, that the state guarantees access to a lawyer through 67 legal advice centres in which 10% of lawyers are employed and which 75% of the population can use free of charge, and that there is literature which criticizes the quality of legal services provided by non-lawyers in Finland;

- the markets were defined as liberal or illiberal through professional regulation alone, without regard to the substantive law and legal system in which the lawyers operated, and which might have necessitated a difference of approach in terms of professional regulation;

- the research is characterized by a lack of knowledge of the legal profession; it ignores a wide body of existing literature on the legal professions in the Member States, and it is based on data which has to be questioned because it has been obtained in response to a questionnaire which itself was worded in a way potentially leading to misunderstandings by recipients, all the more so given that it was available only in English; besides, it was not received by all Bars, and not all Bars responded to it;

- the CCBE's members have forwarded to us numerous examples of errors in the factual conclusions of the research (Austrian lawyers, for instance, appear in the list of countries providing minimum prices in the Commission Report although minimum prices do not exist in Austria for lawyers; Italy**,** contrary to what is stated in the IHS study, does not forbid most forms of advertising);

- regarding barriers to entry, the research has misinterpreted the findings – for instance, it highlights examinations and duration of training without observing that in, for instance, Spain, where it is possible to become a lawyer without any qualification after a university law degree, Spanish law graduates are forced to work in law firms for no or very little money to acquire the practical training necessary for them to move up the ladder; and the research has overlooked that these entry requirements have been put in place in the various countries to safeguard the quality of services to be provided by future lawyers;

- regarding remuneration methods, the research ignores the social and legal context in which fixed fees for lawyers have been established by certain Member States to improve access to justice.

The CCBE does not believe that it is too late to make these comments, nor that they are irrelevant now that the Commission has decided to issue its Report. While the CCBE welcomes the consultation of representatives of the liberal professions recently undertaken by the Commission, it regrets that the Commission felt the need to come to conclusions by issuing the Report before completing its analysis and reflection on the need for regulation in the liberal professions.

The CCBE would add three general comments. First, we believe that the Commission should not attempt to apply EU competition law to matters that, 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), such as access to justice, which includes issues like the representation before the courts or fee schedules to be applied by courts to liquidate lawyers' fees. Unless the Commission clarifies this point, there is a serious risk that, on the basis of the Report, national competition authorities will embark on ill-founded initiatives. The Commission ought to bear in mind that certain professions play an important role in society because they guarantee access to constitutionally guaranteed rights (such as doctors, who, not surprisingly, are outside the scope of the Report, and lawyers). The key role the legal profession plays in democracies based on the rule of law has been recognised at a European level by the European Parliament and the Council of Europe[1].

Second, we are surprised that neither the Commission's Report nor the IHS study on which it was based contain any traditional competition law analysis, as mandated by the case law of the European Court of Justice - and the Report does not even state that such an analysis must be conducted. Such an analysis would start by an identification of the relevant market (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. For instance, there is no appreciable discussion in the Report of the significant

[1] See in this context the European Parliament resolution on scale fees and compulsory tariffs for certain liberal professions, in particular lawyers, and on the particular role and position of the liberal professions in modern society of 5 April 2001 (B5-0247/2001), and 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 of 25 October 2000.

competition which exists in the market for legal services. The offer of legal services is moreover very atomized, and lawyers are therefore generally subject to their clients' bargaining power (this is particularly the case for so-called "repeat purchasers"). It is unclear why the Commission should be concerned with increasing competition in markets that are already intensely competitive or lump together professions operating in radically different market conditions (such as lawyers and accountants or pharmacists).

This does not mean that the Commission is not entitled to seek to remove existing obstacles to the freedom of establishment and the freedom to provide services that may exist (notwithstanding that lawyers are the most advanced in that respect, having two sectoral directives). However, the appropriate means to that end is an EU Parliament and Council directive, which a different directorate within the Commission has indeed recently put forward.

Third, the CCBE would like to raise the question whether it is timely for DG Competition to talk about less regulation for liberal professions after the type of scandals which have recently occurred at an international and European level, such as Enron and Parmalat. In this context, the CCBE would refer to a recent proposal of the European Commission which seems to take account of these developments, i.e. the European Commission proposal for a new Directive on statutory audit in the EU of 16 March 2004. The CCBE notes that the Commission itself states in a press release, issued on the day of publication of the proposal, that the proposed Directive would clarify the duties of statutory auditors and set out certain ethical principles to ensure their objectivity and independence. Noting that the Commission emphasises in the context of this proposal the importance of having independent auditors who comply with certain ethical standards, we would like to raise the question whether the Commission does not think that the independence of lawyers is equally important and therefore should be safeguarded as well.

III. Commission's analysis of the Community legal framework

Preliminarily, the CCBE notes that, through the Report, rather than explaining the current state of the law regarding the scope for the application of EC competition rules to professional regulations, the Commission advocates a change in the regulation of certain liberal professions in the EU Member States. To this end, the Report makes a number of statements and suggestions which do not appear to be fully in line with the case law of the Court of Justice, in particular with the seminal *Wouters* and *Arduino* judgments, handed down by the full Court.

However, as the Commission itself acknowledges,[2] in the system resulting from the modernization initiative, which will rely extensively on self-assessment by undertakings and on an increased application of EC competition rules by national competition authorities and national courts, Commission communications, such as notices and guidelines, have a crucial role to play in clarifying the application of EC competition rules. In the new system, therefore, it is essential that the Commission avoid any misunderstanding as to the meaning of the Court's case law, so as to avert misguided actions by national competition authorities or courts, which can be fraught with very serious consequences for all parties involved.

Further, the CCBE notes that the Commission has chosen not to address in the Report the potential application of Article 86(2) of the Treaty to members of the legal profession[3] and would be

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[2] See Section 3 of the Explanatory Memorandum of the Commission proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O. J. C 365/284, where the Commission states that *"[I]n the field of Community competition law, companies' task of assessing their behaviour is facilitated by block exemptions and Commission notices and guidelines clarifying the application of the rules. As a complementary element of the current reform, the Commission commits itself to an even greater effort in this area*".

[3] This Article allows undertakings which are entrusted with the operation of services of general economic interest to be subject to competition rules only to the extent that the application of such rules does not obstruct the performance of the task assigned to them. In his opinion in the *Wouters* case (July 10, 2001, [2002] ECR I-1577, para. 155-201), Advocate General Léger found that Article 86(2) of the Treaty applies to lawyers practicing in the Netherlands. The Advocate General concluded that the Dutch Bar regulation prohibiting multi-disciplinary partnerships between lawyers and auditors fell within the scope of Article 81(1) of the Treaty, without prejudice to the application of Article 86(2). He added that this provision may apply to the Dutch Bar regulation if it were determined that such measure is necessary in order to safeguard lawyers' independence and professional secrecy

interested to know whether the Commission has remained equally silent on this point in its consultations with the national authorities.

The CCBE also notes that the approach *vis-à-vis* professional regulations adopted in the Report does not seem entirely consistent with what the Commission itself has recently proposed in its draft framework Directive on services in the internal market.[4] The draft Directive clearly acknowledges that certain activities by members of the liberal professions (such as advertising) require regulation.[5] Also, the draft Directive encourages the drawing up, at Community level, of rules of professional ethics aimed at ensuring independence, impartiality and professional secrecy,[6] thus showing a generally more favorable attitude than the Report with regard to regulation by professional bodies.

A. Liability of members of the professions under EC competition rules

1. *The Commission analysis of the "Wouters exception"*

In the CCBE's view, the Report does not fully reflect the importance of the *Wouters* judgment[7] where the Court of Justice set forth the law concerning the application of Article 81 to self-regulation by a bar.

When analyzing what it calls the "*Wouters* exception", the Commission states (at para. 75) that one prong of the test to assess whether a given professional regulation falls within the scope of Article 81 (1) of the Treaty, is whether the effects restrictive of competition of such regulation do not "*go beyond what is necessary in order to ensure the proper practice of the profession*". This statement must be read together with the Commission's invitation to EU professional bodies to review the restrictions contained in their existing rules and regulations considering, *inter alia*, "*whether there are no less restrictive means to achieve*" the desired objective (para. 93 and 94).

The CCBE, however, believes that a distinctive feature of the *Wouters* judgment is precisely the Court's recognition of a margin of discretion of a bar association in deciding what it deems appropriate and necessary to protect the proper practice of the profession in the Member State concerned.

According to the Court, the assessment under Article 81 of a given professional regulation adopted by a bar must first of all take account "*of the overall context in which the decision .... 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.*"[8] Indeed, in light of its objectives, a bar regulation, albeit producing a restriction of competition, may fall outside the scope of Article 81(1). Thus, it is submitted, the Court recognizes that bar regulations participate in the protection of overriding public interests. Also, it flows clearly from the judgment that (at least in the absence of EU-level legislative harmonization) the public interests overriding EU competition principles are to be found in the legal system of the Member State in which the regulation is adopted or displays its effects, and that there is no such thing as an EU public interest test however defined.

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4 Commission Proposal for a Directive of the European Parliament and of the Council *on services in the internal market*, available http://www.europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0002en01.pdf .

5 Article 29 of the draft Directive provides, for example, that advertising by members of regulated professions "*must comply with professional rules which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consonant with the specific nature of each profession*." See also Article 39.1.a).

6 See article 39.1.b) of the draft Directive.

7 Case C-309/99, *Wouters, Savelbergh, Price Waterhouse Belastingadviseurs v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.

8 *Wouters*, para. 97.

In this respect**,** the Court has clearly stated that the fact that less restrictive rules may be applicable in certain Member States does not mean that a more restrictive rule in force in another Member State infringes EC competition law.[9] In the CCBE's view, this is because, as acknowledged by the Court, in the absence of specific Community rules in the field, each Member State remains in principle free to regulate the exercise of the legal profession within its territory.[10] As a consequence, different Member States may adopt different means of protecting the core values of the profession and accordingly professional regulations may vary from one Member State to another.

In *Wouters*, for example, the Court found that the approach in the Netherlands was to consider the following duties necessary to ensure the proper practice of the legal profession: (i) the duty to act on behalf of the client in complete independence and in the client's sole interest; (ii) the duty to avoid all conflicts of interest; and (iii) the duty to observe strict professional secrecy. There were no comparable duties imposed on auditors in the Netherlands.[11] Thus, the fact the multi-disciplinary partnerships of lawyers and auditors are allowed in some Member States was not relevant to assess whether the Dutch Bar regulation prohibiting such partnerships fell within the scope of Article 81 (1) of the Treaty since the analysis must be carried out having regard to the national context (*e.g.*, in *Wouters*, to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands).

It should also be noted that the core values of the legal profession identified by the Court as relevant to the Dutch regulation at issue is not a comprehensive list. Although such core values can be considered generally accepted by the European legal profession at large, other equally important values may be found in many Member States and indeed have been identified in EU legislation.[12]

In light of the above, frequent statements made by the Commission in the section of the Report analyzing the main categories of allegedly restrictive regulations, as to the fact that such restrictions have been removed or relaxed in certain Member States and that this might mean that there are less restrictive alternatives to achieve the desired results, should not be read as meaning that "more restrictive" regulations in other Member States may be considered contrary to EC competition law. For this reason, any existing professional code of conduct adopted at the European level (such as the CCBE's own Code, which applies only to cross-border practice) cannot be regarded as a yardstick for what is necessary to protect the proper exercise of the profession in the EU or in any Member State.

Having said this, the CCBE acknowledges that certain statements in *Wouters* indicate that a professional regulation falls outside the scope of Article 81 (1) of the Treaty if (i) its restrictive effects do not go beyond what is necessary to ensure the proper practice of the legal profession, as perceived in the Member State in question; and (ii) its objective could not be attained through less restrictive means.

However, the crucial point is that the Court in *Wouters* clearly stated that bar associations enjoy a margin of discretion to decide what is appropriate and necessary to protect the proper practice of the profession, in light of their respective national legal framework and of the prevailing perceptions of the profession in their respective Member State.[13] In other words, in the CCBE's view, the *Wouters*

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9 *Wouters*, para.108.

10 *Wouters*, para. 99.

11 *Wouters*, para. 100 to 103.

12 See Article 29 of the proposed directive on services in the internal market, quoted at footnote 2 above, and Article 8 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), available at http://europa.eu.int/eur- lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf .

13 *Wouters*, para. 108 where the Court states that *"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"* (emphasis added); and para. 107 where it concludes that *'[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*'.

judgment stands for the principle that, since they are better placed to fully evaluate whether a restrictive professional regulation is necessary to protect the core values of the legal profession, bar associations must retain the power to opt for the solution (which need not necessarily be the least restrictive) that they reasonably deem necessary to this end.

It should also be considered that bars must be able to control compliance of the rules they adopt. As acknowledged by Advocate General Léger in *Wouters*, bars cannot maintain a generalized and pervasive control over their members[14]. Accordingly, bars must be allowed to regulate in a manner that permits them to effectively police compliance.

B. Liability of Member States

1. *The absence of a proportionality test in the case law of the Court on Member States' liability under Articles 3(1)(g), 10(2) and 81(1) of the Treaty*

In the section concerning Member State liability, the Commission states that "*[A] proportionality test would seem appropriate to assess to what extent an anticompetitive professional regulation truly serves the public interest. For this purpose it would be useful that each rule had an explicitly stated objective and an explanation how the chosen regulatory measure is the least restrictive mechanism to effectively attain the stated objective*" (para. 88). This statement constitutes the basis of the invitation, contained in Section 6.1 of the Report, to the Member States' regulatory authorities to review national legislation or regulations and, in particular, to consider (i) whether the existing restrictions pursue a clearly articulated and legitimate public interest objective; (ii) whether they are necessary to achieve that objective; and (iii) whether there are no less restrictive means to achieve this.[15]

In this regard, the CCBE notes that in the case law concerning Member States' liability under Articles 3(1)(g), 10(2) and 81(1) of the Treaty, there is no mention of the need of State measures to pursue legitimate public interest objectives, as measured by an authority other than the Member State legislator, and to be proportional to the achievement of those objectives. As the Court stated in *Arduino*,[16] pursuant to this case law, although Article 81 of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, that provision, read in conjunction with Article 10(2) of the Treaty, *'none the less requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings*".[17] In particular, the Court has consistently held that Articles 10(2) and 81(1) of the Treaty are infringed where a Member State requires or favors 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.[18]

Therefore, if a Member State's measure has one of the effects described above, it infringes Articles 3(1)(g), 10(2) and 81(1) of the Treaty irrespective of whether it pursues a legitimate public interest objective --the existence of which should in any case be presumed for State legislation or regulation-- and whether it is proportional to its achievement. Conversely, if the Member State's measure does not have any of the effects mentioned above, it is not contrary to Articles 3(1)(g), 10(2)

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14 *Wouters*, Advocate General opinion, para. 194.

15 See para. 93. See also the Executive Summary of the Report where the Commission states "*[W]here a State delegates its policy-making power to a professional association without sufficient safeguards, that is without clearly indicating the public interest objectives to respect, without retaining the last word and without control of the implementation, the Member State can also be held liable for any resulting infringement*" (emphasis added).

16 Case C-35/99, *Manuele Arduino, third parties Diego Dessì, Giovanni Bertolotto and Compagnia Assicuratrice Ras SpA*, [2002] ECR I-1529.

17 *Arduino*, para. 34.

18 See Case 267/86, *Van Eycke*, [1988] ECR 4769, para. 16; Case C-185/91, *Reiff*, [1993] ECR I-5801, para. 14; Case C-153/93, *Delta Schiffahrts- und Speditionsgesellschaft*, [1994] ECR I-2517, para. 14; Case C-96/94, *Centro Servizi Spediporto*, [1995] ECR I-2883, para. 21; and Case C-35/96, *Commission* v *Italy* (customs agents' tariff), [1998] ECR I-3851, para. 54.

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.

The CCBE's reading of the case law is fully in line with the structure and letter of the Treaty. Unlike the provisions concerning the so-called "four freedoms", the competition rules of the Treaty are addressed to undertakings and not to the Member States. Absent anti-competitive conduct by undertakings, the competition rules may not apply to a state measure, whatever the purpose or effect of such measure.[19]

To conclude, the CCBE submits that there is currently no basis in EC competition law for the public interest or proportionality test proposed by the Commission at par. 88 of the Report and that, likewise, Member States are not under any duty under EU law to amend their existing restrictive regulations in order to comply with such test.

Based on the above, it is also worth noting that the possible "non-proportionality" of a state measure could not lead the competent national competition authority to disapply it. Indeed, in its recent *CIF* judgment,[20] often quoted by the Commission in the Report, the Court has stated that national competition authorities have an affirmative duty to disapply national measures contrary to EC competition rules, but has not elaborated a new substantive test to determine when a national measure is contrary to Articles 3(1)(g), 10(2) and 81(1) of the Treaty. Quite the contrary, the Court referred to its established case law concerning the obligation of each Member State to abstain from introducing or maintaining in force measures, including of a legislative or regulatory nature, that may render ineffective the Treaty competition rules applicable to undertakings.[21] As already mentioned, this case-law does not provide for the public interest or proportionality test proposed by the Commission. Any suggestion coming from the Commission that the national competition authorities may disapply state measures other than on the basis of the legality test established by the long-standing case law of the Court would have extremely disruptive effects for the EU legal system.

2. *The test established by the Court in Arduino*

In the section analyzing Member States' liability, the Commission also comments on the *Arduino* judgment. In particular, it states that in that case "*the participation of the professional association in fee-setting was limited to proposing a draft tariff and the competent minister had the power to amend the tariff, and therefore there was no challengeable delegation to private operators*"[22] (para. 86, emphasis added). Consequently, the Commission states that among the Member States' measures or practices which can be challenged under Articles 3(1)(g), 10(2) and 81(1) of the Treaty, there are, *inter alia*, "*practices whereby the authorities of a Member State are only entitled to reject or endorse the proposals of professional bodies without being able to alter their content or substitute their own decisions for these approvals*" (para. 87, emphasis added).

In *Arduino*, the Court concluded that by adopting a system whereby the scale setting the minimum and maximum fees chargeable by lawyers is adopted by the Italian Minister for Justice on the basis of drafts prepared by the *Consiglio Nazionale Forense* (the National Council of the Bar, the "CNF"), the Italian State had not divested its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere and thus was not liable under Articles 3(1)(g), 10(2) and 81(1) of the Treaty. In particular, the Court found that the Italian State had not waived its power to make decisions in the last resort merely because the CNF is only responsible for producing a draft tariff which, as such, is not compulsory. Indeed, without the

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19 Of course, as Advocate General Tesauro noted in *Meng* (Case C-2/91, [1993] ECR I-5751, opinion, para. 30), the Court's approach is not such as to grant full immunity to state rules. Indeed, a state rule affecting also one of the four freedoms will be allowed to stand only if strictly necessary for and proportionate to the pursuit of overriding public policy reasons recognized at Community level.

20 Case C-198/01, *Consorzio Industrie Fiammiferi* (CIF), not yet reported.

21 See footnote 19, above.

22 We note in passing that the Court in *Arduino* did not address the nature of the Italian National Council of the Bar and in any event did not qualify it as a "private operator".

Minister's approval, the draft tariff does not enter into force and the earlier approved tariff remains applicable. Accordingly, as the Court stated, "*the Minister has the power to have the draft amended by the CNF*" (emphasis added).[23]

Therefore, contrary to what the Commission states in the Report, in *Arduino* the authority of the Member State, *i.e.* the Minister of Justice, did not have "the power to amend the tariff" and was only "entitled to reject or endorse" the CNF's proposal. However, the Court deemed that, by refusing to approve the draft tariff with the consequence that the old tariff remained applicable, the Minister can prompt the CNF to amend its draft along the lines he indicated. This circumstance was considered sufficient by the Court to conclude that the Italian State had not waived its power to make last resort decisions.[24]

For these reasons, the CCBE believes that the Commission's description of both the facts of the *Arduino* case and of the Member States measures which are challengeable under Articles 3(1)(g), 10(2) and 81(1) of the Treaty based on the *Arduino* judgment leaves room for an interpretation not in line with the Court's case law.

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[23] *Arduino*, para. 41.

[24] The Court also gave weight to the circumstance that the Italian State had retained the power to review the implementation of the tariff. Indeed, under Italian law, fees are to be settled by the courts, having regard to the seriousness and number of issues dealt with. Fees must remain within the limits set by the scale; however, in certain exceptional circumstances and by duly reasoned decision, the court may depart from the limits set by the scale.