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CCBE ECONOMIC SUBMISSION TO COMMISSION PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES

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I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 lawyers through its member bars and law societies.

This paper represents the CCBE's economic submission in response to the Commission's progress report on competition in professional services, titled "Professional Services – Scope for more reform, Follow-up to the report on competition in professional services, COM(2004) 83 of 9 February 2004" (hereafter "the progress report")[1].

In November 2005, the CCBE already issued a response to the progress report, in which it announced a further paper concerning the economic approach of the Commission's exercise[2].

The aim of this paper is to show - with reference to the structure of the legal profession and a number of professional rules which have been questioned in the recent past, be it at a European or at a national level, that further deregulation of the profession may not generate economic advantages that can match the serious negative impacts on clients, society and access to justice.

The CCBE has drawn from various sources for this paper, in particular from the Copenhagen Economics report on "The Legal Profession, Competition and liberalisation" of January 2006[3]. This report, which has been prepared at the request of the Danish Bar and Law Society, constitutes an economic analysis of the legal services market in Denmark. Although the report is limited to the Danish legal market, there are a number of observations which can be made more generally and which could also apply to other national markets for the legal profession.

II. General observations

A. The need for regulation

Although the usual starting point for economists is that an unregulated market provides the best economic solutions, economists are aware that there are exceptions to this, and that regulation can solve market failures that would otherwise occur in an unregulated market.

When looking at the legal profession, the CCBE would like to emphasise that there are a number of aspects of both a non-economic and an economic nature which make it obvious that a certain regulation of the profession is necessary.

(i.) Non-economic aspects

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[4].

[1] The Commission report of February 2004 and the Commission progress report of September 2005 are available at the following website address: http://www.europa.eu.int/comm/competition/antitrust/legislation/#liberal.

[2] The CCBE response to the Commission progress report is available at the following website address: http://www.ccbe.org/doc/En/CCBE_response_follow_up_report_en.pdf.

[3] The report (English version) from Copenhagen Economics is available at the following website address: http://www.copenhageneconomics.com/publications/The_legal_profession.pdf.

[4] A number of international and European instruments recognise the role of the legal profession within society and the values which are inherent to the legal profession: 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; Basic Principles on the Role of

As the CCBE previously stated, one of the main concerns of the CCBE is the purely economic approach taken by the Commission, without taking account of the purpose and justification of regulation. A purely economic evaluation has to be complemented by an appreciation of the objectives pursued by professional rules and regulations. *"Insofar as provisions aim at enhancing access to justice, strengthening consumer rights and guaranteeing high-quality lawyers' services, these important concerns in the public interest cannot be sacrificed for deregulation, which would then become deregulation merely for its own sake*[5]*".* On several occasions the European Court of Justice has recognised that regulation may be necessary to protect overriding public interests, such as access to justice and the proper functioning of the legal profession[6]. Independence, absence of conflicts, integrity and professional secrecy/confidentiality are some of the core values/obligations of the legal profession which can be seen as an instrument of how access to justice and the maintenance of the rule of law can be achieved.

(ii.) Economic aspects

A vast economic literature has shown that an unregulated market for professional services may not produce efficient outcomes[7]. Copenhagen Economics also concluded in their 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*[8]*".*

The first reason for regulation is because of asymmetric information, which characterises this market. Professional services require a high level of technical information which makes it difficult, if not impossible, for many consumers to assess the quality of the legal services they are receiving. In an unregulated market, asymmetric information can therefore lead to decreasing quality. There are a number of market mechanisms which can be used to limit the problems of asymmetric information: guarantees, tests and reputation. According to Copenhagen Economics, these market mechanisms, however, will not function very well in the legal profession[9]. Thus, regulation is needed to ensure good quality from all lawyers. This is especially important for private clients and small enterprises. However, the part of this regulation that prevents conflicts of interest and ensures the client confidentiality is also very important to large business clients.

Second, the concept of externalities, whereby the provision of a service may have an impact on third parties as well as the purchaser of the service, is also relevant to the legal profession. Through their work, lawyers contribute to the development of law. Thus, they create a positive value for their clients, but also for other people and for society in general who will have an interest in ensuring that lawyers deliver good work. The obvious example of this – at any rate within systems which rely on case-law - is in the development of precedents arising out of the client's particular case.

Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; 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); European Parliament resolution on "Market regulation and competition rules for the liberal professions" of 16 December 2003 (P5_TA(2003)0572); European Parliament resolution on the legal professions and the general interest in the functioning of legal systems of 23 March 2006 (P6_TA-PROV(2006)0108).
It should also be noted that in dealings with Higher Courts around Europe, the CCBE has come across the express wish that lawyers be involved in court proceedings.

[5] 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-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.

[6] See Case C-71/76, *Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris,* {1977} ECR 765; Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, {1991} ECR I-04221; Case C-309/99, *Wouters, Savelbergh, Price Waterhouse Belastingadviseurs v. Algemene Raad van de Nederlands Orde van Advocaten*, {2002} ECR I-1577.

[7] See Article from 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.

[8] Copenhagen Economics, op.cit., p. 9.

[9] Copenhagen Economics states in this context: *"It is difficult to use guarantees because the outcome of the case depends both on the effort of the lawyer and the client's actions and because it can be difficult to determine whether the outcome was a success or not if a settlement is reached. It is not possible to make consumer tests of all the lawyers. Furthermore, private clients and small enterprises only buy legal services a few times and are therefore not familiar with the quality of the lawyer at the onset of a case. Therefore, private clients have to base their choice on the reputation of the lawyers, but this only gives a weak indication of the true quality of the lawyer."*

(iii.) Balancing of factors

When regulating the legal profession, we believe that it is of the 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 on society.

The CCBE regrets that in current discussions concerning regulation of the legal profession the non-economic aspects are often downplayed or put aside.

B. Competition in the market for legal services

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. The number of lawyers is continuously growing across Europe. At a European level, the lawyers' Directives provide a model of a liberalised market for professional services in the EU.

With regard to Denmark, Copenhagen Economics concluded that *"there are aspects on the demand side that inhibit competition while the supply side fulfils the prerequisites for effective competition*[10]*"*. Copenhagen Economics further notes that *"There are many competing lawyers on the supply side (low concentration). Furthermore, Danish lawyers compete with both other advisers and foreign lawyers on a large part of the market. However, the demand side does not put considerable pressure on the lawyers to compete on price. This is because clients are far more interested in quality than in price, and therefore, the lawyers compete more on professional capabilities and reputation than on price. Liberalising the legal profession will not change this fundamentally"* [11].

The CCBE believes that a similar picture can be drawn from the other European markets.

III. CCBE views on professional issues

A. Entry barriers

(i.) Educational requirements

At the outset, it should be noted that educational requirements are enshrined in State legislation.

The CCBE is aware that educational requirements of lawyers are often said to be restrictive of competition since they may constitute an entry barrier to the profession: the higher/stricter the educational requirements, the fewer the number of lawyers, and therefore the less competition in the legal services market.

In the CCBE's view, this simplistic way of argumentation overlooks a crucial point, namely the purpose of educational requirements, which is to ensure that clients receive high quality service. It is in the interest of the clients that lawyers have a good professional education and training, enabling them to recognise the client's problems and needs, that lawyers have the skills to give the best advice in the quickest possible time, thereby also reducing the cost for the client. A less educated lawyer, even if he/she should reach the correct result, might, for example, spend much more time on the same matter, thereby inflicting further costs on the client.

This simplistic approach also ignores the fact that educational requirements are a way to limit the problem of asymmetric information which is inherent to the relationship between lawyer and client. The client seeks a lawyer's assistance to obtain advice in matters in which the client does not have the same knowledge as the lawyer, and will therefore have to trust fully the lawyer and the lawyer's skills.

[10] Copenhagen Economics, op.cit., p. 10.
[11] Copenhagen Economics, op.cit., p. 10. It should be noted that Copenhagen Economics has used the so-called Herfindahl-Hirschman-index (HHI) to measure the concentration in the legal profession.

It may be true that the less education needed to become a lawyer, the larger the number of lawyers, and competition between lawyers therefore rises, although such a general conclusion could only be based on extensive research, after having defined the relevant market. Copenhagen Economics, for instance, concluded that the competitive effects of modifying educational requirements would be relatively modest in Denmark, causing only a modest rise in the number of lawyers[12]. When looking at statistics about the number of lawyers in Europe, the CCBE notes that there is an ever increasing number of lawyers in the Member States, which puts into question whether educational requirements do constitute an entry barrier to the profession[13].

The CCBE is of the opinion that one should be very careful when discussing education and qualification as a barrier to entry to the profession. Any changes to educational requirements could have detrimental consequences for the client.

(ii.) Representation in Court

The CCBE is aware that the lawyers' exclusive rights of audience in court, where such rights exist , is often seen as limiting competition since it prevents non-lawyers from taking cases to courts.

As with qualification requirements above, the CCBE believes it is important to look at the objective of legislation which provides for such rights. Lawyers who are qualified to appear in court serve the interest of the administration of justice best. They are qualified to deal efficiently with the rules of procedure and representation, which are designed to ensure a smooth functioning of the legal system. This will be of benefit to consumers who are ensured qualified advice on a market where the consumer finds it difficult to assess whether advice is good (asymmetric information), and indeed to society as a whole if cases are brought more efficiently and with a sound outcome.

Copenhagen Economics concluded in their 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.*[14]*"* Copenhagen Economics expect that clients would use other advisers in particular for cases of less importance and less complexity whereas lawyers would probably keep the market of large, important and more complex cases. Although at first glance it may be advantageous from an economic point of view, according to Copenhagen Economics, that other advisers come on the market, since the increased competition will lead to lower prices and more choice for consumers, Copenhagen Economics also notes that these advantages are of lesser benefit in a market with asymmetric information where consumers find it difficult to assess the quality of work. In addition, Copenhagen Economics found that there is a risk that clients take more cases to court than optimal for society from an economic point of view, given that only part of the courts' costs are paid by the parties. One would also need to take into account that new and less experienced advisers (compared to lawyers) could mean more errors (unsatisfactory legal representation) and more work for the courts. This could even lead to "wrong judgements". Bad legal precedents affect not only the parties involved in the specific matter, but also have an influence on matters of principle dealt with by the courts.

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

Finally, the CCBE notes that Finland, which has no restrictions on who can appear in court on behalf of others, is currently considering introducing exclusive rights for lawyers, as it has been recognised that the quality of representation in court has been poor[15].

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[12] Copenhagen Economics, op.cit., p. 40.

[13] In Germany e.g. there is a constant growth of lawyers of average more than 4,5 % per year. Whereas in the 1950s Germany had 12 844 lawyers the most recent figure is more than 10 times as high with 138 131 lawyers in 2006. In Greece, for example, with a population of 10,500,000 there are more than 35,000 lawyers, i.e. one lawyer per 285 citizens (including children) or one lawyer for each 75 families.

[14] Copenhagen Economics, op.cit., p. 43.

[15] See Leif Sévon, *Liberalisation of competition is the enemy of quality,* European Lawyer, Issue 38, May 2004. M. Henssler and M. Kilian (op.cit.) noted in their Position paper on the study carried out by Institute for Advanced Studies, Vienna that *"The {IHS} Study does not even analyse the deregulated Finnish market, which is presented as the ideal market, in greater detail, in order to verify if there is indeed no market failure. (…) Thus, the question remains open as to why 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*

(iii.) Ownership/non-lawyer owned firms

In June 2005, the CCBE issued a position paper on the issue of non-lawyer owned law firms, given the interest which national competition authorities and/or governments have demonstrated on this topic when carrying out their review of the legal profession[16].

The CCBE came to the conclusion that 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. It should be noted that non-lawyers are not per se bound by the same duties as lawyers. The difference of duties between lawyers and non-lawyers could lead to conflicts, with lawyers being put under pressure to comply with certain tasks imposed by the outside owners contrary to these core principles, and eventually to the detriment of the clients and society as a whole.

The CCBE notes that Copenhagen Economics specifically referred to these core principles in their report when dealing with the ownership issue. They found that any change to the ownership rule will need to ensure that the lawyers' obligations of independence[17], confidentiality[18] and avoidance of conflicts of interest are safeguarded.

The CCBE has taken note of the comments by Copenhagen Economics 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[19]. The economic advantages can be summarised as follows:

a. There is no conflict between owners and lawyers when the lawyers own the law firm themselves. This ensures efficient management, including effective decision making of the firm whilst avoiding conflicts between owners and management regarding the strategy and management of the company[20].

b. There is better control of the firm. Economic literature often indicates the legal profession as a business where it is optimal to have workers owning the firm (i.e. lawyers), since non-lawyer owners would have difficulties to assess/control the efforts of the lawyers.

c. Ownership is the best way to motivate lawyers, and an effective way of retaining lawyers who are the most important asset of the law firm[21].

d. As far as access to capital and management qualifications are concerned, law firms are not capital intensive firms and many lawyers will have leadership experience from various boards of companies which can be used in their law firms.

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*

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the supervision of the Finnish Bar Association or is "legally qualified", or who is employed by a lawyer who satisfies these requirements."

[16] The CCBE 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.

[17] Copenhagen Economics, op.cit., p. 48, states*: "A certain degree of regulation is necessary to ensure the independence of the lawyer because the clients themselves do not have the opportunity to assess whether the lawyer has conflicting interests in a specific case."*

[18] Copenhagen Economics, op.cit., p. 49, states: *"It must be ensured that the client confidentiality obligation of the lawyer is unaffected and not undermined by other owners not being subject to the client confidentiality obligation."*

[19] Copenhagen Economics, op.cit., p. 49. See also H. Hansmann, *The Ownership of Enterprises*, Harvard University Press, Cambridge Massachusetts and London, England, 1996, p. 14-15.

[20] Copenhagen Economics, op.cit., p. 50, states in this context: *"Naturally, internal conflicts can arise within the law firms owned by several lawyers and these conflicts may be expensive to the law firms. However, the scope of such conflicts should be compared with conflicts that could arise with a different group of owners."*

[21] Copenhagen Economics, op.cit., p. 50, notes in this context: *"Lawyers and other advisers can easily take their knowledge, client network and reputation to another company. Therefore, it is important to retain the lawyers, and the best way to retain lawyers is probably to ensure that the lawyers receive the whole profit of the law firm, i.e. when the lawyers are also the owners."*

applicable to the legal law firms"[22]*.* Investor ownership would also probably entail motivation and control problems.

Copenhagen Economics also notes that certain service industries could be interested in owning a law firm either to ensure a client base for their own services or to exploit their own loyal client base to sell legal services. For example, a bank might want to own a chain of law firms to refer the bank's clients to it. From a consumer point of view, there would be advantages and disadvantages to this. According to Copenhagen Economics, the advantage is that the consumer does not have to look for a suitable lawyer. However, there are two significant disadvantages[23]. The ownership could result in a lower quality of advice if the lawyer is not independent of other interests. It could also result in increased prices if other advisers refer to their own law firms. In particular private clients find it difficult to assess the quality of the lawyers and therefore base their choice on the recommendation of other advisers.

B. Regulation of conduct

(i.) Self-regulation

Self-regulation is most often used to describe systems where an industry or profession regulates its own affairs. Hence the rules which govern the market are developed, administered and enforced by the people whose behaviour is to be governed.

Self-regulation is characteristic for the legal profession in Europe. It should however be noted that no country has total and unrestricted self-regulation of the legal profession. The regulatory structure of the legal profession in Europe varies from country to country. However, there is in all European countries which are members of the CCBE a significant extent of self-regulation.

Self-regulation, conceptually, must be seen as a corollary to the independence of the profession. Self-regulation addresses the collective independence of the members of the legal profession. The principle of self-regulation is nothing less than a structural defence of the independence of the individual lawyer which requires a lawyer to be free from all influence, especially such as may arise form his/her personal interests or external pressure.

Copenhagen Economics concludes in its report that there are a number of clear advantages which speak in favour of self-regulation of the legal profession[24]. According to Copenhagen Economics, lawyers, given their special knowledge of the profession/business, are in the best position to lay down the requirements for a lawyer's work. Lawyers will feel greater responsibility for regulation if they are involved in the process of regulation. It is also easier to change rules that are adopted via self-regulation than modifying rules via legislation. The results of this are: lower administration costs for professional associations/authorities, greater acceptance of the rules (since they come from within the profession), better compliance and lower compliance costs for the firms. Lawyers are also in the best position both to observe and evaluate professional misconduct and assist the profession in sanctioning it. Lawyers will have an interest in maintaining a good reputation of the profession, and therefore will strive to ensure that lawyers live up to the requirements of the code of conduct.

(ii.) Mandatory Bar Membership

The CCBE has followed with great concern recent moves to loosen or abolish mandatory bar membership. The CCBE strongly believes that the abolition of mandatory bar membership would have serious impacts not only on the structure of the legal profession but on the entire administration of justice.

Bar membership goes together with an effective regulation of the profession and enforcement of disciplinary rules. Copenhagen Economics found that mandatory membership does not restrict competition and that mandatory bar membership should be maintained[25]. Mandatory membership

[22] Copenhagen Economics, op.cit., p. 54.
[23] Copenhagen Economics, op.cit., p. 52.
[24] Copenhagen Economics, op.cit., p. 57/58.
[25] Copenhagen Economics, op.cit., p. 62.

does not increase the entry barriers into the profession. The conditions for becoming a lawyer (education requirements) would be the same regardless of whether there is a mandatory membership. Membership fees do not constitute a significant entry barrier.

Besides, according to Copenhagen Economics, abolishing mandatory membership would lead to a number of disadvantages[26]. It could lead to decreasing quality within the legal profession. 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. This is logical in view of the fact that the objective of a disciplinary system to which lawyers are subject is to safeguard the core values of the legal profession, which directly contributes to the quality of the legal services rendered. Furthermore, the current disciplinary system would need to be fully or partially replaced by a public disciplinary system, such that clients can complain about all lawyers regardless of whether they are members of the Bar or not. Implementing a public disciplinary system would mean that lawyers would lose their independence from the State. It could also lead to higher costs for the State without a guaranteed return in terms of higher efficiency or better enforcement.

The CCBE fully subscribes to the arguments put forward by Copenhagen Economics in their report. 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.

(iii.) Multi-disciplinary partnerships (MDPs)

The questions which are related to multi-disciplinary practices, i.e. practices which bring together lawyers and other non-legal professionals to provide legal and other services to third parties, have been considered by the CCBE on several occasions.

The CCBE would like to reaffirm its views as set out in its position on "integrated forms of co-operation between lawyers and persons outside the legal profession" of 12 November 1999, its position on multi-disciplinary partnerships of June 2005, and also refer to the CCBE Code of Conduct (2002) rule on fee sharing with non-lawyers[27]. The CCBE came to the conclusion that, whilst recognising in principle the freedom of economic activity and provision of services, the problems inherent in integrated co-operation between lawyers and non-lawyers, when such other professionals are subject to substantially differing professional duties and different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded. In those countries, however, where such forms of co-operation are permitted, the CCBE notes that this is only possible because the other professions which are part of the co-operation have compatible core values.

The CCBE notes that Copenhagen Economics also concluded that cross-disciplinary companies that offer both legal services and other professional services could cause problems in maintaining the lawyers' client confidentiality obligation[28]. According to Copenhagen Economics, multidisciplinary firms could also experience problems with the independence of lawyers. Interestingly, Copenhagen Economics found that there does not seem to be a great demand for multidisciplinary advice. Copenhagen Economics noted that there are only a few law firms with co-operation agreements with other non-legal advisers today.

From an economic point of view, it is unlikely in our view that a ban on MDPs restricts competition in legal services in any material way.

First, it should be clarified that a ban on MDPs by itself does not establish a barrier to enter the market for legal services. It does limit the ways in which legal services can be sold (namely not in combination with other professional services within an MDP).

Given the highly fragmented nature of the legal services market and the intense competition between law firms, it is unlikely that legal fees are currently above competitive levels. If that is the case, lifting the ban on MDPs would not have the effect of reducing legal fees. In our view, there is also no reason

[26] Copenhagen Economics, op.cit., p. 62.
[27] The CCBE positions on multi-disciplinary partnerships are available at the following website address: http://www.ccbe.org/en/documents/positions_en.htm#mdp. The CCBE Code of Conduct is available at: http://www.ccbe.org/en/documents/code_deonto.htm.
[28] Copenhagen Economics, op.cit., p. 51.

to believe that MDPs would generate new legal services that independent law firms could or would not generate. On the contrary, as far as purely legal services are concerned, specialised independent law firms appear the most likely innovators.

The CCBE recognises that in theory there might be advantages from multi-disciplinary firms because the firm could offer its clients a wider range of services, such as that clients only have to go to one provider (one-stop-shopping).An MDP with accountants and lawyers, for example, could offer a combined package of accountancy and legal services at a discount. This could put downward pressure on prices of legal services that are separately sold, even if these prices are at competitive levels. If this is indeed the expected mode of operation of MDPs, however, there is a potential risk of anti-competitive bundling. By bundling together accountancy and legal services, the big accountancy firms may be able to leverage any market power they might enjoy in the accountancy market into the market for legal services[29]. The eventual outcome of this would be less, not more, competition in the market for legal services. Moreover, the theoretical advantage of one-stop-shopping has never been economically proven. To the CCBE's knowledge, such services have not been requested by a significant number of clients. On the contrary, concerns about conflicts of interest in the wake of the Enron and other financial scandals appear to have caused a marked decline in the demand for and supply of bundled services.

(iv.) User groups

In section 2 of the Commission progress report titled "Better defining the public interest", the Commission states in paragraph 13 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."*

The CCBE raised serious concerns with regard to the Commission's findings in this respect already in its comments of November 2005. The CCBE puts into question the Commission declaration that businesses and the public sector are the main users of legal services in all European Member States. The CCBE is opposed to the Commission's proposed distinction of service users which is solely based on how well equipped the client may be to choose a provider. The Commission is looking at lawyers only from an economic standpoint. No lawyer, from any sector of the legal profession, would consider businesses and the public sector as the 'main' users of lawyers. They may account for the most by way of value of business, but every lawyer, and probably every citizen, would consider that the rights and liberties of those accused of crime (and its victims), those seeking divorce (and the children affected by it), those seeking to make a will or to contest a claim by the state in relation to immigration or social security, those seeking compensation for loss of employment, and millions of people in similar categories have at least as great a claim to be considered as 'main' users, if not a greater claim. But the Commission appears to have overlooked their value because the fees they provide are not as great as those provided by businesses and the public sector, despite the contribution to the rule of law that is represented by their right of defence. By serving a private user or the public sector, the lawyer is ultimately serving justice. By developing case law, ensuring access to justice at fair prices, enabling a citizen or an economic entity to make full use of its rights, the lawyer is serving a "fourth user", which is the rule of law and that is the cornerstone of every democratic nation.

Although the CCBE welcomes the fact that the Commission recognises the need for certain regulation, which protects quality, the CCBE believes that this should apply to professional regulation in general. In the recent financial scandals which shook the business world – Enron, Worldcom, Parmalat – the users of professional services were very sophisticated repeat purchasers of these services, but the victims of the crimes committed were ordinary people, such as shareholders, employees, and pensioners, often numbered in thousands. These victims frequently suffered devastating financial losses. The lawyers in important commercial cases are not regulated just so as to protect the

[29] This point has also been put forward in a report by LECG for the OFT: *"Given the strong market position of the Big Five firms, there is some risk that permitting MDPs would allow them to leverage whatever market power they have from accountancy markets to legal service markets. If, however, the professions were subject to the full force of competition law…such moves could be investigated on a case-by-case basis and adverse effects remedied."* Para 325 ("Restriction on Competition in the Provision of Professional Services" A Report for the Office of Fair Trading by LECG Ltd., December 2000).

sophisticated business executives who use them (although they will also need protection), but in the public interest, which will include people who may have a direct or indirect stake in the outcome of the transaction, even though they are not the actual clients. The CCBE is concerned that the Commission's current approach does not reflect this public interest.

The CCBE therefore fully supports the recent European Parliament resolution on legal professions which reminds the Commission *"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 the law, and that for these reasons they cannot be tailored to the degree of sophistication of the client"*[30].

(v.) Pricing

The CCBE acknowledges that the fees charged for professional services are negotiated freely between practitioners and clients in most Member States. However, some Member States maintain some level regulation on fees. Where they exist, 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. Indeed, as clarified in the Arduino judgment[31], in the absence of harmonisation at the European level, Member States have the primary responsibility to define the framework in which professions operate.

In its two reports on the liberal professions, the Commission has taken the view that price regulation restricts competition between lawyers by, for example, allowing prices to remain above competitive levels and may hinder cross-border legal services[32]. Consequently, the Commission believes that fully deregulating prices would bring about significant economic and consumer benefits.

The CCBE does not have a position on the desirability of price regulation. However, it notes that the Commission does not seem to have proven its point.

As noted, 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. Liberalisations will not change this*[33]".

In any event, neither the Commission reports nor the IHS study on which they were based contain any traditional competition law and economic empirical analysis, but rather base their conclusion on the need for complete price deregulation on the mere assumption that, since there is no indication of market failures in those country where pricing is less regulated, if not regulated at all, price controls are not an essential regulatory instrument for liberal professions.

In this regard, it may be noted that, where an economic empirical analysis has been actually carried out, this has shown that, in some countries, the abolishing of price regulation has resulted in higher and less predictable litigation costs[34].

Other authors 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*"[35].

The above conclusions apply to both household and business users. Price regulation ensures access to legal advice for low-income individuals, but it is beneficial for business users too. In any event, regulated prices have no possible adverse effects against business users, since, as the Commission itself acknowledges, usually their matters are large and complex and negotiation covers not only price, but also quality and service levels; therefore, fixed prices or fee scales are often less important for

[30] European Parliament resolution on legal professions, op.cit., point 8.
[31] Case C-35/99, *Manuele Arduino, third parties Diego Dessì, Giovanni Bertolotto and Compagnia Assicuratrice Ras SpA*, {2002} ECR I-1529.
[32] For the Commission reports see footnote 1. However, see also Case C-289/02, *AMOK Verlags GmbH v A & R Gastronomie GmbH*, {2003} ECR I-15059.
[33] Copenhagen Economics, op.cit., p. 11.
[34] 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). From the same author, see also *Lord Woolf's Access to Justice: Plus ça change ...*, The Modern Law Review, vol. 58, no. 6, November 1996; *A Reform of Civil Procedure – rationing Procedure rather than Access to Justice*, Journal of Law and Society, vol. 22, no. 2, June 1995.
[35] M. Henssler, M. Kilian, op.cit.

them. Furthermore, they counterbalance any possible adverse effect of regulation with their negotiating power.

(vi.) Advertising

The provision of information by lawyers is generally not prohibited in the Member States[36]. As with other professional rules regulating the legal profession, the goal of the rules regulating forms and content of advertising is to protect the consumers from misleading claims, prevent unfair competition between practitioners and preserve professional integrity and independence. This is particularly true for the so-called proactive mass promotional activity addressed to those user groups which, according to the Commission's progress report, are most in need of protection.

A careful analysis of advertising regulations (where they exist) will show that those restrictions that exist are targeted at protecting potential users who may be deceived because of information asymmetries.

Further, even assuming that advertising would have the effect of lowering fees, evidence suggests that the incidence of price advertising would be low. Indeed "*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*".[37]

Therefore, the possible positive effects of liberalizing advertising entirely would not be significant enough to justify the risk of endangering the consumers of the professional services and the integrity of the profession.

Finally, it may be observed that transparency and price publicity are ensured in those countries where fee scale systems are in place, since fee scales are public by definition.

It would be necessary to verify on a case by case basis whether in legal systems with a fairly low regulation index regarding professional rules on advertising, lawyers really have largely unrestricted advertising possibilities, or, whether regulation is effected through unfair competition law or case law, which is indeed quite likely in view of what has been noted above.

IV. Conclusions

The CCBE welcomes the analysis made 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.

It is important to note that the rules applicable to lawyers have not as their objective to secure the rights and benefits of lawyers, but to 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, as de-regulation for its own sake could generate 'market failures'.

[36] CCBE Code of Conduct, op.cit., Article 2.6.
[37] 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.