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Representing Europe's lawyers

**CCBE COMMENTS ON THE OECD REPORT ON
“COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS”
(INCLUDING COMMENTS ON THE EXECUTIVE SUMMARY OF THE OECD REPORT)**

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CCBE comments on the Executive summary of the OECD report

The CCBE regrets that the language used in the Executive Summary does not reflect the contents of the background paper, and is likely to influence national regulators and public opinion to take the inaccurate view that OECD deems professional regulations to be unduly restrictive.

While the background paper can be commended for its balanced and analytical approach, the language of the Executive Summary seems to advocate strong conclusions against professional regulation which do not find any support in the analysis carried out in the rest of the Report. The authors should have considered that, besides compromising the validity of the Report, the current drafting of the Executive Summary may induce the public (including public authorities) to overlook the extensive analytical work carried out in the Background paper and the method on which it is based and to misunderstand the function of professional regulations.

CCBE submission to the OECD report

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The comments in this paper are a submission to the OECD Report on “Competitive Restrictions in Legal Professions” (the Report).¹ The comments are not exhaustive and are not intended to discuss in detail the analysis carried out in the Report, but rather to clarify the CCBE position as regards the approach, the method and the language used in the Background Paper and the Executive Summary and to express the position of the legal profession on the policy proposals put forward by the OECD. Observations from CCBE National Delegations on certain National Contributions forming part of the Report are available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comments_national_de1_1232620813.pdf.

Introductory remarks

The CCBE would like to clarify at the outset that the legal profession has been, and will continue to be open to reforms. In the past few years, European and national regulatory bodies have undertaken several initiatives aimed at reviewing and reforming regulations applicable to the profession of lawyer. The CCBE and its member bars favour those initiatives, insofar as they can effectively improve access to justice and ensure the full exercise of the right of defence, respecting the fundamental principles of the profession. It is recognised that they are of importance and take place in a constantly evolving society. Further, the legal profession throughout Europe is a dynamic sector of the economy, open to intense and ever-increasing competition.

However, through its European and national organisations, the legal profession has constantly expressed the concern that, whilst intending to achieve increased competitiveness of legal services

¹ The Report is available at <http://www.oecd.org/dataoecd/12/38/40080343.pdf>.

markets, attempts to overhaul the regulatory framework applicable to lawyers do not take the peculiar role of the legal profession, its principles, its functioning and the repercussion of “*liberalising*” measures on the markets for legal services access to justice and the public interest, sufficiently into account.

The CCBE, and its Member Bars and Law Societies, firmly believe that regulatory reviews should be based on the following principles:

- **The legal profession mainly serves non-economic values.** The legal profession serves the administration of justice and the rule of law. Its role and function has constitutional relevance in all EU Member States.² In the same vein, the EU legal order, through the case-law of the ECJ, provides for express recognition of the importance of lawyers in European society.³ The regulatory framework applicable to lawyers is conceived with a view to promoting and protecting fundamental values, rather than being merely aimed at ensuring economic efficiency and competitiveness. In this respect, professional regulations differ from frameworks applicable to other activities (such as postal, transport, electronic communications and financial services) whose nature is primarily an economic one. National and supra-national legislators and regulators (chiefly anti-trust agencies) should always take this aspect in due consideration;
- **Lawyers’ regulations are aimed at preventing market failures.** Besides guaranteeing constitutional values, professional regulations aim at ensuring the smooth functioning of the sector and at avoiding market failures and negative externalities. These may occur primarily as a consequence of information asymmetries. The consequences of removing *ex ante* regulation (and self-regulation) should be carefully assessed by national and supra-national authorities: fostering competition through de-regulation is not necessarily the best option if the quality and reliability of legal services has to be ensured uniformly for all users. Economic analysis (which presupposes the gathering of sound empirical evidence and the use of generally accepted scientific methods) should be constantly applied in order to assess the consequences of policy and regulatory choices for the welfare of citizens.⁴ Regulators should be warned against the use of arbitrary indexes such as those created by the IHS and whose validity is questioned also by the OECD Report.
- **The market for legal services is a competitive one and its regulations do not prevent competition.** Only after having assessed the importance of professional regulations for the protection of constitutional values and the general interest, may regulators consider the impact of those regulations on the competitive conditions in the market. This assessment should be carried out through impartial and extensive empirical studies, taking into account well established principles of economic analysis. The CCBE points out that the lawyers’ profession is a highly competitive and dynamic one. The markets for legal services in the EU and beyond are fully exposed to competition; quantitative restrictions to entry do not exist and the number of operators is extremely high and growing. Regulations often have a pro-competitive effect, fostering competition on the quality of services. Hard-core restrictions of competition, such as cartels and abuses of dominant positions, have never been detected in the market for legal

² The Belgian Constitutional Court (Cour d’Arbitrage) and the French Conseil d’Etat, in their rulings of 23 January and of 10 April 2008 have reaffirmed the role of lawyers in ensuring right of defence and access to the law, clarifying that national legislators must respect the fundamental principles of the profession when enacting provisions aiming at protecting other public interests.

³ See, for instance, Judgment of the Court of 5 December 2006, joined cases C-94/04 and C-202/04, *Federico Cipolla v Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v Roberto Meloni* in ECR [2006] Page I-11421. See also, Judgment of the Court of 26 June 2007, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, ECR [2007] Page I-5305.

⁴ In this respect, the CCBE appreciates that the OECD took into account the findings of the study prepared by Copenhagen Economics in 2006. See Report, pages 53 and 55.

services⁵. The restrictive nature of regulations cannot simply be assumed; it must be checked against the concrete functioning of the markets. In this respect, it is paramount to recognise that the various legal professions do not constitute a single service market (lawyers should not be confused with notaries, which enjoy a number of public privileges) and that, having regard to the geographic dimension, each national market is distinct and should be subject to a separate analysis.

In light of the foregoing, the CCBE believes that any reform of the lawyers' regulations should be undertaken only once it has been established: 1) that it would not affect the constitutional values, which the profession is required to promote, 2) that the general interest and the welfare of consumers are adequately protected and 3) that reforms are likely to provide, on the basis of a sound economic analysis, for a tangible and significant improvement of the competitive conditions in the relevant market(s).

CCBE's Comments on the Report

In light of the principles set out in the previous paragraph, the CCBE would like to submit certain general comments on the Report.

The CCBE acknowledges the effort that the OECD has made to deal with the issue of regulation of legal services using a generally balanced and objective approach, notwithstanding the starting point and the objectives of the Report, which are clearly focused on challenging those regulations.

The CCBE deems it very important that, in its second section, the Report carried out an extensive analysis of the issue of information asymmetries and negative externalities which make regulation necessary and justified for legal services. The CCBE appreciates that the Report also takes into account a third form of market failure, namely the "*under-provision of public goods*".⁶ Indeed, regulation may be considered to be necessary if certain public goods are to be made widely available to society.

In this respect, the CCBE notes that the Report states clearly that:

"Legal professionals generate important positive externalities that are of great value for society in general. Lawyers play a crucial role in the proper administration of justice and notaries contribute to legal certainty by allowing a transfer of real estate property to have full effect vis-à-vis third parties.

*An important positive external effect of exclusive rights is a lowering of the cost of judicial administration. Pleading of cases in court by non-lawyers may place a high burden on judges (particularly in complex cases), whereas qualified professionals may produce better argued cases and more valuable precedent (Bishop 1989)."*⁷

The CCBE also notes that account is given to the fact that governments may pursue non-economic goals (e.g. the protection of constitutionally safeguarded rights or legal certainty) when they enact regulation for legal services.⁸ It is undoubtedly important for the legal profession that all the relevant factors are taken into account when regulatory frameworks are discussed.

⁵ On the contrary, the Court of Justice has found that regulations applying to the legal profession either do not restrict competition or are justified in the public interest. See, Order of the Court of 17 February 2005, Case C-250/03, *Mauri*, ECR [2005], Page I-1267 and Judgment of the Court of 19 February 2002, Case C-309/99, *Wouters*, ECR [2002] Page I-1577.

⁶ Report, Page 24.

⁷ Report, Page 24.

⁸ *Ibidem*.

Regarding the analysis of the “*private interest theories of regulation, in particular self-regulation*”, the CCBE is satisfied that the Report acknowledges that, despite the work undertaken by economists, there is no sufficient evidence to support the idea that regulation may be enacted for private rather than public interest.⁹

Concerning the analysis of the specific professional regulations (exclusive rights and other entry restrictions, restrictions on fees and advertising and restrictions on business organization and multi-disciplinary practices) the CCBE observes that – unlike the European Commission’s report on competition in the liberal professions - the Report strives to carry out a balanced review of the economic theories in support of or against the regulation itself and it makes the necessary effort of ascertaining whether any empirical evidence exists in order to support either theory.

It should be pointed out that, as a result of the adoption of a more balanced approach, the Report reaches important conclusions in favour of regulation of legal services, which offset or strike a balance with conclusions tending to the opposite direction:

1. On exclusive rights and other entry restrictions, for instance, the Report states that “*there is little empirical evidence to support the view that qualitative entry restrictions will lead to a lower number of active professionals*” and that little support has been found for the view that entry restrictions affect the price of legal services in the U.S.;¹⁰
2. On the restrictions on fees, the Report states that there is no sufficient evidence to link recommended fees with the actual fees charged by lawyers and that “*competition authorities may assimilate recommended fees with price cartel too easily*”;¹¹
3. On advertising, the Report takes into account the results of two studies, leading to opposite conclusions on the impact of advertising on quality and the price of services. Correctly, the Report does not reach any strong policy conclusion on this subject;¹²
4. In the same fashion, the Report points out that there is very little empirical evidence confirming arguments in favour or against restrictions on partnerships and business organization.¹³

With regard to the policy recommendations, the CCBE can certainly agree with the view that policy makers should always consider whether, through a revision of professional regulations, they are opening the doors to undesirable negative externalities. Lawyers fully support the view that “*in some cases there may be too little regulation rather than too much regulation*”.¹⁴

As stated at the beginning of this commentary, the CCBE supports the idea expressed by the fourth policy recommendation, that a public interest assessment of regulatory and self-regulatory rules should include non-economic objectives reflecting different policy choices used across jurisdictions.¹⁵ Non-economic objectives are at the basis of lawyers’ regulation. They should be taken into account not only as an additional factor in the evaluation of the regulatory framework, but as one of its main parameters.

⁹ Report, Page 26.

¹⁰ *Ibidem*, Page 37.

¹¹ Page 44.

¹² Page 48.

¹³ The main sources of empirical evidence refer to architects and dentists. Only one study dealt with law firms in the U.S. The increased average size of law firms in countries where LLPs were allowed was considered only as “*a possible indication of efficiency gains*”.

¹⁴ Page 52.

¹⁵ *Ibidem*.

Finally, the CCBE deems it obviously necessary that policy makers conduct a cost-benefit analysis in order to establish whether restrictions of competition are disproportionate; too often professional regulations have been considered to be unduly restrictive without adequate consideration of the negative externalities that those regulations are aimed at preventing.

Critical remarks

Against this background, the CCBE considers that it is necessary to address certain critical remarks to the authors of the Report.

First and foremost, in relation to the overall approach adopted by the authors, the CCBE regrets that the Report does not satisfy the same standards of impartiality and accuracy throughout the whole document.

The CCBE also regrets that the OECD did not check the quality and accuracy of national contributions. Several CCBE delegations have pointed out the existence of serious flaws, factual mistakes and biased views in the contributions referring to their national regulatory framework.

Detailed examples are attached to these comments http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comments_national_de1_1232620813.pdf. Given the relevance of the issues at stake, the CCBE would have expected national contributions to satisfy the same standards as the background paper. The lack of uniformity affects the validity of the whole exercise.

In relation to more specific aspects, the CCBE believes that it would have been preferable, from an analytical point of view, if the Report dealt with each legal profession separately. If the purpose of the Report was to assess competitive restrictions in the markets for legal services, the definition of those markets should have been an unavoidable first step. The application of the elementary “supply-side substitutability” criterion should have led to the conclusion that, for instance, lawyers and notaries operate in markets which are only partially overlapping. Therefore, the analysis of the impact of regulations in those markets should have been separated. However, the CCBE acknowledges that the Report marks a significant progress in comparison with the European Commission’s reports, which had the unrealistic ambition to deal simultaneously with the whole range of professional services, putting lawyers and pharmacists in the same ‘basket’.

The observations above lead to another important issue: the Report suggests, in its second policy guideline, that regulation should be addressed to markets rather than to professions (which may explain why all legal services are dealt with simultaneously). This idea was already put forward by the Commission in its progress report on competition in professional services, which proposed a distinction between categories of users in order to justify different levels of regulation. The CCBE already rejected this idea, which seems to take into account only the problem of information asymmetry. The European Bars and Law Societies have pointed out that regulation exists not only because of the supposed sophistication of the people using the services, but to protect the general public and to guarantee the right of defence and access to justice (to which also “sophisticated” users are entitled). In other words, according to the CCBE, lawyers (and not just legal services) are regulated in the public interest.¹⁶

A final issue of particular concern to the CCBE is the proposal of an independent Regulatory Authority for the Legal Service Markets. This proposal appears to be based on the assumption, which finds no demonstration throughout the paper, that “*self-regulation lacks legitimacy due to the absence of*

¹⁶ CCBE Comments on Commission progress report on Competition in professional services, page 5.

representation of consumers and stakeholders in the self-regulatory bodies of the legal profession” and that “self-regulation enables the legal profession to restrict competition and harm the consumer interest”. The Report points out to the recent reforms adopted in England and to the recommendations in the report of the Irish Competition Authority of 2006 as possible solutions to overcome the problems relating to legitimacy and supra-competitive prices, preserving most of the benefits of self-regulation.¹⁷

In the CCBE’s view, the proposal should have been supported by a more structured and in-depth analysis of the concept of “self-regulation” in the various jurisdictions and – at the very least – by a credible economic exercise aimed at establishing a certain link between “self-regulation” and harm to consumers and supra-competitive prices. The CCBE does not oppose any regulatory model, provided that the necessary independence of the legal profession is guaranteed. However, it firmly believes that regulatory structures should be chosen by national legislators taking into account a plurality of factors, as it happens with professional regulations. Furthermore, the proposal is difficult, when not impossible, to discuss, insofar as it does not define the concept of self-regulation and does not provide any indication as to the impact that it should have on the market. The CCBE notes that pure self-regulation of lawyers does not exist anywhere in Europe, since rules enacted by the bars (such as ethical codes) are always combined with statutory provisions and are in any event subject to the rule of law and judicial review.

Conclusions

The CCBE finds the OECD background papers for the roundtable to be interesting and informative documents, insofar as they propose an acceptable framework for analysis of regulation of legal services. The CCBE appreciates that the authors of the report made a visible effort to assess impartially legal professional regulations, taking into account not only the interest of increasing competition but also non-economic values linked to the provision of legal services.

The CCBE deems that the method which the OECD has endeavoured to follow is substantially acceptable. The CCBE therefore believes that the Report may be, to this extent, considered as a reasonable base for discussion. However, as regards the concrete assessment of the impact of professional regulations on the functioning of the market, the CCBE considers it necessary to carry out a proper factual analysis. In this respect, no conclusion can be drawn from the Report as such, which is by necessity a theoretical work, containing a review of empirical studies carried out in various jurisdictions for different purposes and without following a uniform approach.

Further, the CCBE and its Member Bars and Law Societies regret that national contributions are, in certain cases, biased and flawed and that not all sections of the Report meet the same standards of accuracy and impartiality. Further comments are provided at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comments_national_de1_1232620813.pdf.

Finally the CCBE questions the appropriateness of certain policy conclusions reached by the Report, particularly those related to the regulation of services (rather than professions) and to the establishment of a Regulatory Authority for the Legal Service markets. The CCBE believes that those conclusions would require a further in-depth analysis of economic and institutional implications which go well beyond the scope of the Report. The CCBE and its Member Bars and Law Societies are willing to contribute to a more in-depth analysis of these issues with the OECD, with a view to serving the public interest and the rule of law in the best way possible.

¹⁷ Report, Page 55.