

CCBE COMMENTS ON DG GROW STUDIES

Comments on recent studies commissioned by DG GROW and covering the legal services

8/10/2021

Executive summary

These comments were elaborated by the CCBE in response to the recent publications commissioned by the European Commission and covering legal services: “*Study on the impact of regulatory environment on digital automation in professional services*” and the summary report of a study entitled “*Mapping and assessment of legal and administrative barriers in the services sector*”. In addition to expressing its reservation to these studies, the comments aim to highlight their shortcomings in a detailed manner.

In the first part, we address the study regarding digital automation and, by pointing to concrete parts of the study, we argue that: the data used in the study cannot constitute a basis for solid conclusions and the methodology employed raises concerns; the study is based on several incorrect assumptions; some findings are unclear; the study fails to recognise the close relationship between legal services and the administration of justice and does not pay enough attention to the underlying reasons for the regulation. Based on this, we formulate a number of recommendations such as approaching the same problem in a different way, and carrying out more detailed, in-depth studies on the effects of digital automation for specific, individual professional services. We also consider that the development of new technologies cannot be used as an argument in favour of deregulation without duly taking into account the value of regulation for the quality of legal services, the administration of justice and the rights of citizens and consumers. The CCBE has already stressed that any perceived need to increase efficiency through the use of technology should not sacrifice the consistent delivery of justice.

In the second part, the CCBE comments on the “*mapping study*”, where we ask the Commission to be more transparent and make the detailed legal fiches which constituted the basis for the conclusions presented in the summary report publicly available. We also call on the Commission to take into consideration the specificity of the legal profession and the existence of sectoral directives. Moreover, we draw attention to the fact that a number of conclusions seem to be incorrect. Finally, we consider that the study’s approach is oversimplified and does not give a full picture of the situation as it does not take into account when some barriers are justified and necessary.

Our comments close with general recommendations where we reiterate our appeal to the Commission to refrain from drawing any conclusions from these studies for the legal profession and from using these studies as a basis for the upcoming policy actions. Furthermore, we call on the Commission to change the approach followed until now with regards to the regulation of legal services, which is dominated by a market perspective. We consider that this approach is not in line with the acknowledgement of the lawyers’ role by the Commission, for example through the inclusion of the CCBE as a stakeholder in the Rule of Law Report targeted consultation process for 2021. Similarly, this approach goes against the recognition of lawyers’ role in ensuring the rule of law in the 2021 Justice Scoreboard. We are afraid that this lack of coherence stems from the fact that DG GROW looks at the

legal profession through a purely market lens. This approach does not recognise the role of lawyers as universally acknowledged by international bodies, such as Council of Europe in the areas of the access to justice, rule of law and administration of justice.

INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers.

The defence of the rule of law, human rights and democratic values are the most important missions of the CCBE. The ongoing and future challenges regarding the regulation of the legal profession, free movement of lawyers, and quality of legal services have since long been areas of distinct focus for the CCBE.¹

Recently, the Commission published two studies covering the legal profession: “*Study on the impact of regulatory environment on digital automation in professional services*”² and the summary report of a study entitled “*Mapping and assessment of legal and administrative barriers in the services sector*”³.

On 1st June, the CCBE addressed a letter to the Commissioner for Justice and the Commissioner for Internal Market urging them to abstain from using these studies, characterised by several shortcomings, for the upcoming update of reform recommendations for professional services and any other policy actions. Unfortunately, it is Communication published on 9th July, the Commission did refer to the two studies.⁴

In the present document, the CCBE sets out more detailed observations on these two studies as far as legal services are concerned, and reiterates serious concerns regarding them. We hope that these comments will assist in appreciating and understanding those aspects that were not fully addressed or misapprehended in both papers.

I. “STUDY ON THE IMPACT OF REGULATORY ENVIRONMENT ON DIGITAL AUTOMATION IN PROFESSIONAL SERVICES”

The CCBE took note of this study, recognises that it raises pertinent questions and welcomes that the CCBE’s considerations on the legal aspects of artificial intelligence (AI) were referred to. However, we would also like to express our reservations on some of the findings and approach of this study. In our opinion, the study is characterised by several limitations from among which the most serious are listed below.

A. Data used in the study cannot constitute a basis for solid conclusions and the methodology employed raises concerns

- When it comes to field research, only 9 lawyers from Spain and 12 lawyers from France participated in the survey. Taking into account the number of lawyers registered in France and Spain (65.480 and 154.573 respectively)⁵, it becomes clear that no conclusions can be built on the

¹ See for instance our work on free movement of lawyers, available [here](#).

² Available [here](#).

³ Available [here](#).

⁴ See page 2 and page 4 of the Communication on the update of reform recommendations, available [here](#). In addition, several assumptions are based on the findings of these studies. For instance, on page 18, in the part devoted to lawyers, the Communication says that “*The rules on access to and the pursuit of the legal profession are among the most stringent in the business services sector*”, thus alluding to the findings of the mapping study, where legal services were presented as having the highest level of barriers.

⁵ See the CCBE 2017 statistics on the number of lawyers, available [here](#).

data used in the study. This methodological shortcoming makes the study non representative. In addition, the difference between lawyers interviewed by country (9 from Spain and 12 from France compared to 535 lawyers from Italy) points to the lack of balance. Therefore, drawing conclusions for European legal professionals based on this data is impossible.

- In another part of the study, devoted to the consumer's point of view, the authors recognise themselves that the small number of answers to the questionnaire from consumers (51) did not allow them to carry out a quantitative analysis. This set of data was instead used as a set of additional interviews which gives rise to methodological concerns given that the use of the quantitative questionnaire was not designed to conduct a qualitative analysis.
- The study also seems to draw important conclusions from singular interviews. For instance, it says that "*significant findings*" emerged on "*no win, no fee*" models, based on the contribution of just one respondent. Qualifying something as "*significant finding*" when this is based on one interview alone raises red flags regarding the overall quality of the contractor that was chosen by the European Commission and is simply wrong from a scientific point of view.
- As providers of e-services for lawyers for two decades, some European Union (EU) Bars may be surprised not to have been mentioned nor even consulted in this study. Bars and lawyers play the role of the modernisers of the administration of justice and have developed good practices. There are many good examples at European level, such as the contribution of the CCBE to the e-CODEX, the e-Justice portal and the EU IT driven projects⁶. At national level, European and national initiatives were awarded to General Councils and local Bars in this field.⁷
- Generally, the report builds an argumentation that undermines several principles of the European Commission's better law-making initiative. In particular, this argumentation suffers from the lack of adaptation to macro trends in the world (e.g. challenges to the rule of law and the independence of the legal professions), of compliance with the Sustainable Development Goals (e.g. SDG 16 on peace, justice and strong institutions) and, in terms of methodology, from a lack of adequate data-based assessment.

B. Several assumptions are incorrect

- The assumption that higher productivity implies higher benefits for consumers is perhaps true for most economic sectors, but legal services is not such a sector. Higher productivity should not mean increased output in legal services: increased output by lawyers does not benefit consumers in any way. As long as a client wishes to express his or her problem to a lawyer, the lawyer should listen to that client, and not reduce that amount of time, regardless of this having a negative effect on productivity.

Simply put, just because new technologies are capable of providing higher productivity/more output, that should not mean that increased output by lawyers or legal services in general is beneficial and not harmful for consumers. The study completely ignores this danger and uses the same false approach for professional services as for the production of commodity goods or services - the more, the merrier, the higher the output, the more benefits for the consumers.

Nobody thinks that increased manufacturing capabilities for medicines is a replacement for medical services provided by family doctors. Of course, the practice of family doctors will be

⁶ CCBE Position paper on e-CODEX, available [here](#).

See also CCBE's involvement in projects such as Find-A-Lawyer 3 project (FAL 3), e-CODEX, and AI4Lawyers, available [here](#).

⁷ See for instance, the Council of Europe Crystal Balance of Justice Award awarded to *Consejo General de la Abogacía Española* for the Electronic File of Legal Aid, available [here](#). See also The Financial Times award for Legal Innovation awarded to *Abogacía Española*, available [here](#).

affected by new medicines, but their "effectivity" should never be measured by regulators on how many pills they give to patients.

Similarly, mass producing capabilities in text will not transform the provision of most legal services provided. Certainly, there are some aspects of the legal services that are affected by more intelligent text creation and better analysis of huge amounts of texts, but that is not to say that regulation should be based on enabling such technologies or to incentivise providers of such technologies to the detriment of existing providers of services.

- Moreover, regarding instances of other incorrect assumptions, we would like to highlight that the tools of innovation and digital automation mentioned in the study are not accurate and therefore, are less suitable for any strategic guidance at least in the legal services field.

Section 1.2.4. entitled "*Digital automation in legal services*" does not show a representative overview of the paths of innovations in the legal services, and it also shows a certain lack of acquaintance with how the market of legal services is structured. Legal services are strongly dominated by the smallest of practices, both in terms of employment, output and the number of enterprises. The main reason for that lies not in the lack of "*market efficiencies*", but in the personal nature of the services provided, being mostly based on human-to-human interactions. If the regulation of a market does not take into account these special conditions, access to justice will inevitably suffer, because people (consumers and small companies) will not have access to the professional advice they need which is customised and not mass produced.

For these purposes, we suggest the Commission to review the "*Overview on the "Average State of the Art" IT capabilities in law firms*"⁸, which gives a short overview of some of the market specifics of legal services.

- The assumption that the costs of liability insurance and contributions to Bar associations could constitute an obstacle to investment cannot be accepted and does not reflect the situation of some countries covered. For example, Bar fees in Germany are consistently around 300 to 400 euros - and not monthly, but annually. This amount cannot be considered as being a factor potentially significantly increasing digitisation. More generally, across EU countries, the cost of professional indemnity insurance is reasonable.⁹ Above all, insurance premiums are not only very manageable, but also absolutely necessary in the interest of protecting clients from erroneous advice or representation.
- We find incomprehensible the categorisation of legal services into "*strategic legal advice*" which "*consists of activities with higher added value, which are less standardised and more personalised, therefore less automated, and yet very dependent on human factors*", and "*traditional legal advice*" consisting of "*activities such as privacy or anti-money laundering compliance, which are highly automated because they are much more standardised, and generally have a more uniform regulation at an international level*". As practitioners, we find this distinction out of touch with reality. How should we classify the activity of a lawyer who advises and represents a client in criminal proceedings, in a legal dispute about an accident, a divorce or in the drafting company statutes? All of this is just as much a strategic as a traditional legal service.
- The study leaves unmentioned the fact that adaptation of professional practice to digitisation requires prior assessment of the legality of contractual clauses and the compatibility of terms of use with existing European and national professional (not user) standards and regulations, including EU data protection rules. In addition, the study recognises that the market is led by UK

⁸ AI4Lawyers – Artificial intelligence for lawyers: Guide on the use of AI and other novel IT technologies by European lawyers and law firms, available [here](#).

⁹ See CCBE's comparative table on professional indemnity insurance, available [here](#).

and US companies.¹⁰ This raises other issues such as: the fact that standards are set by non-legal and non-European professionals (such as US engineers and IT experts); surveillance by third countries and their law enforcement agencies; the concern that the price of the IT service/software might not be justified if the product does not respond to the needs of the European jurisdiction/EU lawyers practice. Besides, European professional standards are different but not stricter by default than the US ones.

C. Some findings are unclear

- The study found that advertising restrictions constitute a major obstacle to digital automation. This general conclusion does not reflect the specific situation in every EU Member State and even the twelve Member States covered by the study. For instance, in Germany, lawyer-specific advertising restrictions do not exist in fact. Professional regulations only provide that the lawyer must not behave in an unobjective manner (§ 43b BRAO, § 6 BORA).¹¹ Furthermore, he may not advertise in a misleading manner and may only disclose client relationships with the client's consent. The latter results from the lawyer's duty of confidentiality. Everything else is consistently interpreted by case law no differently than the advertising restrictions that apply anyway under the general provisions on unfair competition. It is completely incomprehensible that the advertising restrictions, which serve fair competition and affect every entrepreneur, could stand in the way of the digitisation of legal services.
- The study approaches digital innovation from a simplistic view, merely repeating that using "*innovations*" that have recently become commonplace in many sectors, would revolutionise professional services as well. We are confused why well-established technologies such as optical character recognition (OCR)¹² are called "*latest technology*" and why would they considerably change the way legal services are provided, and why are they mentioned as innovative technology at all in the executive summary of the study. OCR has been used quite plainly and in the same way since early 1980s in the legal services, and obviously currently most legal material is not produced first on paper but digitally, since at least the early years of the 1990s.

Also, the simplistic approach to "*NLP and AI*" as used in the study does not provide any guidance and shows a basic lack of understanding of the legal services industry, and the lack of time spent with studying the professional services affected (at least the legal one). "*Processing large quantities of documents*" and "*creating full-fledged reports*" is neither a bottleneck nor a purpose in the legal market. Of course, there are certain services that benefit from conducting these activities quicker but calling that a game changer for the legal services is a very superficial and false view.

As used in the study, these seems to be empty slogans, which are foremost used by people with specific business interests to convince the public that their existing tools used in one industry should be encouraged to be used in other markets, just because that, in itself, will achieve public benefit for everyone.

¹⁰ See for example page 48 and 49, where most software cited are American and IBM's Watson system is described as a case study.

¹¹ The Federal Lawyers' Act (*Bundesrechtsanwaltsordnung* - BRAO), available [here](#), and Rules of Professional Practice (*Berufsordnung für Rechtsanwälte* - BORA) available [here](#).

¹² The OCR technology, as understood in the study, "*enables the mechanical or electronic conversion of different types of documents – scanned paper documents, PDF files, or digital images – into editable and searchable files*".

D. The study fails to recognise the close relationship between legal services and the administration of justice and does not pay enough attention to the underlying reasons for the regulation

- Asymmetry of information, externalities and monopoly power are mentioned as sources of market failures which constitute the main rationale for regulation. However, they are quickly passed over and no further reasons are presented.
- Yet, particularly in the area of legal services, regulation is justified by many other considerations. Regulation serves to protect consumers and other market participants by ensuring access to justice and the right to a fair trial by a lawyer who is independent of governmental and other third-party influences and interests.¹³ As such, regulation of legal services is inextricably linked with the proper administration of justice and the promotion and protection of human rights.¹⁴ Furthermore, professional secrecy and legal professional privilege, the lawyer's duty of independence, the prohibition of representation of conflicting interests – all belong to internationally accepted standards and constitute core duties. It should be emphasised that only this high degree of compliance with internationally accepted standards throughout the EU made it possible to enact two directives which allow for cross-border services of legal services and cross-border establishment of lawyers in the EU¹⁵. Without the corresponding EU "*lawyers' directives*", there would be no functioning internal market for legal services today.
- Lawyers, compared with other professional services, are special in the sense that they "*comprise part of the broader social-political-moral landscape that comprises a society's legal system, or "The Law"*".¹⁶
- In addition to the key role of lawyers in the justice and institutional systems, and the rule of law, there are also economic reasons for regulation.¹⁷ For instance, "*failures in the structure of the legal system, or in the general conduct of lawyers (...), tend to reduce confidence in markets and make economic exchange riskier/costlier, with potentially negative effects on market activity.*"¹⁸

Moreover, "*the most compelling economic rationale for the regulation of legal services is related directly to the issue of quality*" and "*given the nature of legal services, the impact of having higher quality legal advice can have both direct effects on consumers of legal services (in terms of better advice, and potentially more just outcomes) and indirect outcomes in terms of facilitating economic expansion in the economy more generally*".

- Undoubtedly, the legal services constitute a regulated industry. Nevertheless, there are always good reasons for these regulatory measures, which cannot be taken into account, if the legal services are *de facto* compared with four other, very different services. Just because legal services are part of a wider statistical structure of professional services, that does not mean that the reasons behind the regulation are the same. Moreover, a generalised approach to legal services as a normal economic sector with some peculiarities will inevitably result in the view that these particularities should be decreased or eliminated to be better aligned with the principles of a commodity-based market.

¹³ The role of legal representation in serving the proper administration of justice has been recognised by the CJEU, see for example Joined Cases C-515/17 P and C-561/17 P, par.103-105, available [here](#).

¹⁴ Such regulation serves a legitimate interest – both protection of clients and proper administration of justice have been recognised by the CJEU as overriding requirements of public interest which regulation may pursue. In this regard, see for example, CJEU, Case C-739/19, par. 22, available [here](#).

¹⁵ Lawyers' Establishment Directive (Directive 98/5/EC), available [here](#) and Lawyers' Services Directive (Directive 77/249/EEC), available [here](#).

¹⁶ George Yarrow & Christopher Decker, Regulatory Policy Institute, Assessing the economic significance of the professional legal services sector in the European Union, 2012, available [here](#).

¹⁷ Ibid.

¹⁸ Ibid.

- Competition in the legal services market is strong based on the number of competitors, and it's not a market currently subject to oligopolistic practices at the worldwide level (unlike some other professional services investigated). This is partly thanks to the fact that legal services are by nature fragmented along the borders of jurisdictions. This is a consequence of the existing differences in the national laws of Member States. There is currently no political wish in the EU as a political entity to change these legal differences.

Any EU-wide intervention in the area of professional regulations could have very serious secondary effects that would go well beyond how automation could help consumers with regard to certain professional services. At the same time, it is unclear whether such intervention would bring expected results in terms of competition, innovation and consumer's interest. In this regard, one could look at the results of liberalisation in legal services achieved in England since the Legal Services Act of 2007, including liberalisation in the ownership and financing, the scope of reserved activities, and even the way lawyers can become qualified. There are doubts as for the impact the reform has had and it can be questioned whether it brought expected results in several fields, for example regarding the improvement of the access to justice, innovation and consumers' interest.¹⁹

- It is particularly worrying that the study questions the compulsory membership of professional bodies, thus jeopardising the guarantee of both institutional and professional independence of lawyers and directly attacking one of the cornerstones of the rule of law²⁰ as recognised by the EU itself.²¹ This criterion also goes against many national laws and Constitutions.²²

Our recommendations

- The CCBE suggests that the European Commission approach the same problem in a different way, and carry out more detailed, in-depth studies on the effects of digital automation for specific, individual professional services. In these studies, for the effects of how society is transformed by technology, we also strongly suggest relying on research carried out within the academics, and not on US industry consulting and research companies. We also suggest to extensively consult the main stakeholders concerned as they have the in-depth knowledge specific to their sector.
- According to the CCBE, the development of new technologies cannot be used as an argument in favour of deregulation without duly taking into account the value of regulation for the quality of legal services, the administration of justice and the rights of citizens and consumers. This has also been recognised by for example the European Economic and Social Committee in its recent opinion on Liberal Professions 4.0²³: *"The stringent quality and safety requirements for the provision of professional services are regulated by law in many countries. They must be guaranteed whether these services are provided digitally or not. National professional law has been a bone of contention in the EU for many years. While the European Commission hopes that the reduction of national professional regulations will boost economic growth and competition, there is no mention of the consequential costs in the area of professional services of mistakes due to a lack of quality assurance in deregulated markets."* In this regard, the CCBE is aware of the 2018 study²⁴ on the

¹⁹ See for instance Competition & Markets Authority, Legal services market study, 2016, available [here](#). See also Legal Services Board, Access to Justice: Learning from long term experiences in the personal injury legal services market, 2014, available [here](#).

²⁰ The importance of independence is clearly acknowledged in many international documents such as Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress, 1990, available [here](#); Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer adopted by the Committee of Ministers of the Council of Europe, available [here](#); as well as in several policy documents adopted by the CCBE, in particular, the Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers (Principle a) of the Charter), available [here](#).

²¹ See for example European Commission, The 2021 Justice Scoreboard, page 51, available [here](#).

²² See for example Article 1 par.3. of the French Law 71-1130 1971-12-31, available [here](#).

²³ European Economic and Social Committee, Opinion on Liberal Professions 4.0, available [here](#).

²⁴ European Commission, Effects of regulation on service quality, November 2018, available [here](#).

effects of regulation on service quality which in our opinion suffered of several shortcomings. The CCBE addressed a letter to the European Commission on 25th June 2019, in which numerous methodological shortcomings were highlighted and the CCBE expressed serious doubts about the robustness of the published findings. Thus, we consider that potential effects of reforms for legal services envisaged by the Commission were not properly assessed.

- The historical approach of DG GROW has always emphasised the "*negative freedom*" from the perspective of regulatory barriers whereas, for the legal profession, the right approach is based on the "*positive freedom*": what can liberal professionals do to defend citizens' rights within the appropriate legal and procedural frameworks. In this sense, most of the identified regulatory barriers are unrelated to digitalisation. In the daily practice of the profession, Bars and legal professionals are enablers of the digital performance of the e-administration of justice and, as liberal professionals, they are the only users without right to balance professional and private life or right to digital disconnection.
- The CCBE has already stressed²⁵ that any perceived need to increase efficiency through the use of technology should not sacrifice the consistent delivery of justice. Hence, safeguards must be adopted to guarantee that digitalisation of justice and legal services do not jeopardise the right to a fair trial and access to justice. Moreover, the implementation of digital tools needs to consider lawyers' deontological and statutory duties which serve the interests of their clients and the rule of law in general.
- It seems particularly relevant that the Commission's intention, as Commissioner Didier Reynders has expressed on several occasions²⁶, is to maintain human driven justice systems based on human decision making. We support this need and take it into consideration in all the field of Commission's actions. Indeed, the impact of digitalisation and artificial intelligence is a challenge for all regulators and co-regulators.
- In this regard, one legitimate question would be why, if the Commission supports the use of artificial intelligence in the application of law, this is not taken into consideration in EU law-making. The quality and complexity of EU law are amongst the main sources of unfairness faced by clients of law firms in Europe and directly influence the costs of legal services provided.

II. "MAPPING AND ASSESSMENT OF LEGAL AND ADMINISTRATIVE BARRIERS IN THE SERVICES SECTOR"

When it comes to the summary of the study entitled "*Mapping and assessment of legal and administrative barriers in the services sector*", we appreciate that the contractor VVA contacted the CCBE in December 2019 in the data verification phase of this mapping study. At that time, some of the CCBE delegations, in spite of a short deadline, provided comments on the national tables (country reports in Excel). In many instances, our national delegations found the information to be incomplete, or even incorrect and some commented on the poor quality of the collected national data. We also found it necessary to make more evident the interplay between the application of the Lawyers' directives (i.e. Lawyers' Establishment directive 98/5/EC and Lawyers' Services directive 77/249/EC) and Directive 2006/123/EC.²⁷

²⁵ See for example the CCBE's position paper on e-CODEX, available [here](#).

²⁶ See for example Speech of Commissioner Reynders on digitalisation and access to justice at the CCBE online roundtable on the Digitalisation of Justice, 27th October 2020, available [here](#).

²⁷ The CCBE was contacted on 27th November 2019 by VVA with a request to verify the data included in the Excel country tables. The deadline was set on 5th December but the contractor agreed to extend it to 12th December. On 12th December, the CCBE transferred the comments from its members to VVA.

We regret that the Commission did not publish the final version of the country fiches to enable the stakeholders directly concerned by this study such as the CCBE to confront the full content of the final research results which constitute the basis for the summary report published in April 2021.

From the summary report published, we observe that the study does not take into account the sectoral directives for lawyers²⁸, which allow cross-border establishment and provision of services. Therefore, we cannot consider the findings of the study correct.

- The aim of the mapping study was “(...) to take a broad view of the developments in the regulation of services markets and to obtain an overview of the remaining barriers as well as to understand how these barriers have evolved over time.”
- The results in the mapping study do not take into account the Lawyers Services Directive which allows for cross-border services (not to mention the complementary Lawyers Establishment Directive or the Professional Qualifications Directive). The “identified” barriers are therefore incorrect or at least highly exaggerated, and the findings regarding the legal profession cannot be compared with the other professions mentioned which do not have such sectorial directives.
- In this regard, the following conclusion of the study seems to be incorrect as well: “*The overall evolution of services barriers in 2006-2017 can be characterised as a small decrease of the absolute level of barriers, seen almost in all sectors. The overall speed of barrier reduction must, however, be characterised as slow. More reform efforts are needed in order to achieve the overall objective of the Services Directive to remove regulatory and administrative barriers faced by service providers when operating in the Single Market. (...) While most of the authorisation schemes have remained in place, progress can be observed in the removal of some of the key restrictions accompanying and underlying the authorisation schemes. (...)*”
- These conclusions seem to be based on the assumption of complex and hindering “key restrictions” and „authorisation schemes” which at least in the case of lawyers do not exist.

Moreover, the authors of the report recognise that they did not consider whether the identified barriers are justified and proportionate. Yet, it has been a well-established case law of the CJEU that some barriers are both justified and necessary. Freedom to provide services can be limited if the measure amounting to a restriction pursues legitimate interest and is justified and proportionate.²⁹ Thus, assessing the objective and proportionality of the measures is necessary to properly assess the existing barriers. Therefore, we consider that the study presents a distorted overview of the regulations related to the legal profession. In addition, an unclear methodology seems to have led the authors to assess the level of barriers (by assigning them a score from 0 to 1).

Finally, we would also like to recall the CJEU’s jurisprudence according to which “*the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law*”.³⁰ Indeed, the rules governing lawyers may be different in different Member States. They are part of a specific system in a given country. Therefore, concluding that a measure constitutes an unnecessary barrier because this measure does not exist in another Member States is not correct.

Our recommendations

- The CCBE invites the Commission to be more transparent and make the detailed legal fiches which constituted the basis for the conclusions presented in the summary report publicly available.

²⁸ Lawyers Establishment Directive (Directive 98/5/EC) and Lawyers’ Services Directive (Council Directive 77/249/EEC)

²⁹ See for instance CJEU, Case 309/99, par.122-123, available [here](#).

³⁰ See for instance CJEU, Case 309/99, par.108, available [here](#).

- The CCBE also calls on the Commission to take into consideration the specificity of the legal profession and the existence of sectoral directives.
- The CCBE draws attention to the fact that a number of conclusions seem to be incorrect.
- The CCBE considers that the study's approach is oversimplified and does not give a full picture of the situation as it does not take into account when barriers are justified and necessary.

FINAL RECOMMENDATIONS

For the above-mentioned reasons:

- We reiterate our appeal to the Commission to refrain from drawing any conclusions from these studies for the legal profession and from using these studies as a basis for the upcoming policy actions.
- The CCBE calls on the Commission to change the approach followed until now with regards to the regulation of legal services, which is dominated by a market perspective, and to involve DG JUST. To our knowledge, DG JUST does not participate in the Commission's work related to regulation of legal services. Lawyers are considered by DG GROW as market players comparable to any other service providers and their role as key actors in justice systems, ensuring access to justice and the right to a fair trial for citizens, enforcement of their fundamental rights and the proper functioning of the rule of law, seems to be ignored. We consider that this approach is not in line with the acknowledgement of the lawyers' role by the Commission, for example through the inclusion of the CCBE as a stakeholder in the Rule of Law Report targeted consultation process for 2021. Similarly, this approach goes against the recognition of lawyers' role in ensuring the rule of law in the 2021 Justice Scoreboard.³¹ We are afraid that this lack of coherence stems from the fact that DG GROW looks at the legal profession through a purely market lens. This approach does not recognise the role of lawyers as universally acknowledged by international bodies, such as Council of Europe in the areas of the access to justice, rule of law and administration of justice.³²
- We recall that regulation of the legal profession is within the competence of the respective Member States.
- The CCBE calls on the Commission to pay attention to the fact that calling into question Members States regulation of the legal services may be hazardous and have severe consequences in these areas.
- The CCBE also asks the Commission to note that existing regulations serve public interest. As stated by the European Parliament in its recent resolution, "*national provisions, practices and regulations on access to and the exercise of specific professions, and the access to and the provision of services for the protection of the public interest and the protection of workers and/or consumers, are not an obstacle to the deepening of the single market*".³³

The CCBE stands ready and available to discuss these matters in greater detail with the Commission services.

³¹ European Commission, The 2021 EU Justice Scoreboard, page 51, available [here](#).

³² For example, for the Council of Europe "The legal profession plays a central role in the administration of justice, the defence of human rights, democracy and the rule of law.", available [here](#). See also PACE Recommendation 2121 (2018) stating that "the specific role of lawyers gives them a central position in the administration of justice, as protagonists and intermediaries between the public and the courts. They play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence.", available [here](#).

³³ European Parliament, Resolution on Impacts of EU rules on the free movements of workers and services, available [here](#). See also older resolutions, such as Resolution on the legal professions and the general interest in the functioning of legal systems par. 10-13, available [here](#).