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CCBE COMMENTS ON COMMISSION PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

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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 response, from a European-wide perspective, 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). The approach followed by the European Commission in this field has raised serious concerns in several other European and national Institutions.

This paper is divided into four parts. First, there are some preliminary comments with regard to the Commission's exercise and the reform of the legal profession in general. Second, the CCBE recalls its comments in response to the Commission's first report on this subject of February 2004. Third, the CCBE sets out its views with regard to the Commission's progress report. Fourth, the CCBE indicates briefly that it will produce another response in due course to the progress report to show that further deregulation may not in all respects have economic advantages that can match the serious negative impacts on society.

II. Preliminary comments

At the outset, it should be noted that the legal profession has been and will continue to be open to reforms, subject to the protection of core values and the necessities of the judicial systems of the Member States. These reforms are in any case undertaken periodically in the light of comments received from a variety of sources, such as ministries, courts, citizens, clients, national legislators or academics and lawyers themselves. Such reforms are of importance and take place in a constantly evolving society.

At a European level, the lawyers' Directives provide a model of a liberalised market for professional services in the EU². At national level, national regulators, together with the self-regulatory bodies of the profession, carry out revisions of professional rules on a regular basis in order to keep up with changes and developments within society which affect the legal profession³.

The CCBE welcomes the Commission's recognition that reforms are best carried out at a national level and that the relevant national authorities are best placed to take into consideration the national specificities of the national legal system. Member States have to take into account the various public interests at stake and not only the competition interest and economic analysis. They also have a duty

¹ The Commission progress report is available at the following website address: <http://www.europa.eu.int/comm/competition/antitrust/legislation/#liberal>. The link also provides access to the Commission staff working document which is part of the report. The Commission report of February 2004 is available at the same address.

² The free provision of lawyers' services was recognised and has been governed by Directive 77/249 since 1977 (Directive n°77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services). Then, through the application of the 1988 "Diploma" Directive, the integration of the migrant lawyer was organised in the Community (Directive n°89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration). Finally, the right for lawyers to establish in another Member State was recognised by Directive 98/5 in 1998 (Directive n°98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained).

³ In Germany, e.g. the reform of the statute on lawyers' tariff system referred to in the Commission progress report was realised on the basis of discussions between the professional bodies with the government. Furthermore, the so called "Regulations assembly" (*Satzungsversammlung*) continuously concretises and adapts the statutory provisions of lawyers within the powers conferred to it. France has carried out on its own initiative a review of its advertising regulations, amongst other rules of professional conduct. A new decree on the rules of the profession was published on 12 July 2005.

to ensure that access to justice is effectively delivered to their citizens when reviewing the relevant professional rules.

The way in which the Commission has taken forward its own exercise has raised a number of deep concerns amongst national bars and law societies, and other institutions such as national ministries and the European Parliament.

First, the CCBE notes that the scope of this Commission exercise, which aims at reshaping the regulatory framework applicable in each Member State, goes beyond the mere application of EC and national competition rules to professional services. The Commission gives only very limited information on the underlying legal framework for the planned reforms, preferring to promote a general principle of "less regulation, better regulation", regardless of whether this principle or any obligation to promote it exists in the EC Treaty or EC competition rules and, we believe, without sufficient knowledge of how these markets operate. In fact, the promotion of this principle is nowhere stated in the competition rules or elsewhere in the Treaty. It is moreover important that the competition rules, if applicable, are applied in compliance with the case-law of the European Court of Justice. The application of competition rules should be kept separate from regulating a market and the responsibilities for the enacting of regulatory frameworks. Regulatory reviews should always - if found appropriate - be carried out by the relevant competent bodies and authorities. These are in a better position to evaluate the implications and consequences of changes for the national legal order and in particular the administration of (and access to) justice. The CCBE recognises the Commission's expertise in the field of EC competition law, but also believes that, as far as national professional rules are concerned, the authorities of the Member States, notably the legislative bodies, are in the best position to define the rules and regulatory frameworks that apply to the liberal profession. The latter must indeed take into account a variety of factors of a legal and non-legal nature which are of relevance at a national level, such as constitutional principles, rules related to the administration of justice and the application of the rule of law within the different national legal orders. As far as the Commission is concerned, it is a point of concern that DG Competition suggests reforms of laws and regulations within the Member States without participation of other Directorates of the Commission, such as the one responsible for Justice and Home Affairs, which deal with other public interests that have to be taken into account.

As such, the CCBE suggests that a more appropriate approach for the review would have been to make a clear distinction between the various liberal professions concerned. It has applied this kind of logic to other previously tested sectors (electricity, telecoms, etc.), where reforms were undertaken based on comprehensive market studies. This failing is compounded by a failure to take into account the higher values of European societies that the liberal professions promote and protect. This is all the more important from a competition point of view, since the different professions work in different markets and are subject to different national and legal traditions and legal frameworks, which have an impact on the needs and types of regulation and deregulation in these particular markets.

The CCBE would also like to re-state in this context its concerns with regard to the Commission's fact finding exercise. Our member bars have pointed out in the past a number of errors in the facts on which the Commission's first report was based, but there does not appear to have been any attempt to correct those mistakes, nor the assumptions which flowed from the earlier errors. The CCBE asks the Commission to take account and correct any mistakes, since they have serious repercussions on future assumptions, as the follow up report shows. The CCBE also shares the concerns expressed by other professions on the need for a more transparent and real dialogue. Similarly, the CCBE would welcome more concrete information on the activities and conclusions of the European Network of Competition Authorities in this context.

As the CCBE has pointed out repeatedly to the Commission, the legal profession is one which serves the administration of justice and the rule of law. The values in its sector are not only economic ones, and it is incorrect and simplistic, in our view, to base a review of the legal profession solely in economic terms. There appears to be no recognition of this in the review. One example of the Commission's approach in this area will suffice to show the error which underlies the whole. In paragraph 13 of the progress report, the Commission describes 'the main users of professional services' as being businesses and the public sector. This betrays the fact that the Commission, quite wrongly in our case, is looking at lawyers only economically. No lawyer, from whatever sector of the legal profession, would consider businesses and the public sector to be the 'main' users of lawyers. They may account for the most by way of value of business, but every lawyer, and probably every

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19.11.05

citizen, would consider that the rights and liberties of those accused of crime (and its victims), those seeking a 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 overlook their value because its economic value to lawyers is not so much as that 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 the administration of justice. By developing case law, ensuring access to justice at fair prices, enabling the citizen or an economic entity to make full use of available rights, the lawyer is serving a "fourth user", which is the rule of law, which is the cornerstone of every democratic state.

III. CCBE comments on the commission report of 9 February 2004

In June 2004, the CCBE provided the Commission with a detailed commentary on the Report on competition in professional services of 9 February 2004⁴. The CCBE paper, after providing some general comments on the background to the Commission's work on competition in the liberal professions, focused on the Commission's analysis of the Community legal framework.

The CCBE regrets that the Commission did not take into account the remarks and suggestions put forward by the CCBE at the time, and that its approach has remained substantially unchanged. Therefore, the CCBE believes it important to recall the main points of its previous comments, which, in the CCBE's view, are still valid:

- The Commission - rather than describing the current state of the law regarding the scope for the application of EC competition rules to professional regulations - advocates a change in the regulation of certain liberal professions in the EU Member States without providing the required underlying analysis to support that change.
- With regard to the liability of members of the professions under EC competition rules, the Commission's approach does not fully reflect the importance of case-law of the European Court of Justice in the *Wouters* case⁵. Therein, the Court found that the possible anti-competitive effects of professional regulations may be justified by public interest considerations; it acknowledged that the core values of the legal profession do qualify as public interest considerations for such purpose. A distinctive feature of the *Wouters* judgment is the Court's recognition of a margin of discretion of a bar association in deciding what it deems appropriate and necessary to protect the proper practice of the profession, which need not necessarily be the least restrictive means, taking account of the relevant national legal framework and of the prevailing perceptions of the profession in the Member State in question⁶.
- The case law concerning Member States' liability under Articles 3(1)(g), 10(2) and 81(1) of the Treaty does not require State measures to pursue legitimate public interest objectives, and to be proportionate to the achievement of those objectives. There is no basis in EC competition law for the proportionality test for state measures as proposed by the European Commission, and therefore Member States are not under a duty under EC competition law to amend their existing regulations in order to comply with such a test.

⁴ The CCBE comments to the Commission report of February 2004 are available at the following website address: http://www.ccbe.org/doc/En/competition_legal_critique_300604_en.pdf. The CCBE's critique of the IHS study which is referred to in the paper is available at the following website address: http://www.ccbe.org/doc/En/rbb_ihs_critique_en.pdf.

⁵ Case C-309/99, *Wouters, Savelbergh, Price Waterhouse Belastingadviseurs v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.

⁶ *Wouters*, para. 108.

IV. CCBE comments on the commission report of 5 September 2005

A. Lack of traditional competition law analysis

Just as with the initial report of 9 February 2004, the new progress report does not provide any traditional competition law analysis, as mandated by the case law of the ECJ, nor does it state that such an analysis must be conducted. Such an analysis would start by an identification of the relevant market (one or more service markets, one or more geographical markets), followed by an analysis of the competitive conditions prevailing in such relevant market(s), and by analysis of the effect on competition of the rules that the study and the reports identify as potentially problematic from a competition standpoint.

Further, in paragraph 29 of the follow-up report, the Commission states that Member States should initiate analytical work to review existing restrictions. The Commission notes that a *“more substantial structural analysis should begin – for example of regulatory structures - to assess the need and open the way for wider reforms”*.

As stated in our Preliminary Comments above, the CCBE believes that this should be considered as outside of the scope of competition law. Such a proposal to Member States has a direct impact on national structures of public or private law which play a key role in the maintenance and promotion of the rule of law at national level, and which are regulated by national laws. Such a general statement by the Commission, without providing sufficient background of the relevant markets and the legal frameworks, is, in our view, inappropriate, particularly given the possible consequences for the protection of clients.

B. Proposed distinction between categories of users

In section 2 of the report titled “Better defining the public interest”, the Commission states in paragraph 13 (already quoted above) - after referring to some partial analysis in three different segments for legal services - 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.”*

First, and as already stated, the CCBE would like to put into question the declaration that businesses and the public sector are the main users of legal services in all European Member States. Next, the CCBE opposes the Commission “findings” in this respect. The CCBE notes that the distinction, for the purpose of defining the need for regulation, is based solely on how well-equipped the client may be to choose a provider, as if that is a ground for greater or lesser protection of clients. However, regulation of services 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 – in other words, lawyers are regulated in the public interest. In the recent financial scandals which shook the US business world – Enron, Worldcom – the users of professional services have been 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 often suffered devastating financial losses, which ruined their lives. The lawyers in important commercial cases are not regulated just so as to protect the 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 client. The CCBE is disappointed that the Commission’s current approach does not reflect this concern.

The CCBE also notes that the new 8th Company Law Directive on statutory audit which aims at reinforcing and harmonising the statutory audit function throughout the EU clarifies, inter alia, the duties of statutory auditors and introduces a much more rigorous ethical audit process for company

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accounts. It also defines sound and harmonised principles of independence applicable to all statutory auditors through the EU.

As indicated, the CCBE believes that the Commission should have carried out a comprehensive analysis on a separate basis for each profession. It has not provided any information on how users may benefit from less regulation, but merely asserts it, contrary to recent experience.

C. Proposed use of Article 86

The CCBE notes that in paragraph 23 of the progress report the Commission states that *“it is conceivable to use Article 86 in conjunction with Articles 82/81 as a legal base when the conditions, as established by the case law are met.”*

The CCBE would like to point to its comments of June 2004, where it raised with the Commission the issue of the Commission’s attitude towards the relationship between Article 86(2) and the legal profession. The CCBE also notes that the Commission offers no explanation as to which professions are granted special or exclusive rights and their role in society. The CCBE regrets that the Commission does not offer an explanation of these issues, and hopes that the Commission will provide this in the near future in order to ensure that the legal basis of such action is sufficiently understood by all stakeholders.

V. Economic approach

The CCBE is aware of the fact that there are national studies produced by economic experts supporting the views of the CCBE that further deregulation may not in all respects have economic advantages that can match the serious negative impacts on society. The CCBE is in the process of putting together a further document in this respect which will be submitted to the Commission shortly.

VI. Conclusions

The legal profession has been, and always will be, open to any reasonable reform process. However, it would like to emphasise the importance of such reforms being carried out by the competent institutions within the relevant legal framework and with the appropriate tools for analysis having first been carried out. The CCBE disagrees with a call to governments Europe-wide for reforms within the legal profession without further justification. The issues raised in relation to regulation of the legal profession go well beyond competition law into the field of freedom, security and justice, and more broadly into the protection of the rule of law in the European Union. A constructive approach to reform of the legal profession requires recognition of this special context.

Economic analysis demonstrates that less regulation may have significant negative effects on society.

Public interest and economic analysis do not support the suggestion by the Commission that differential regulation of the legal profession and its services is justified depending on the supposed sophistication of the instructing client.

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