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Challenges to the Legal Profession in Europe

Hans-Jürgen Hellwig*

Abstract

This article analyzes two recent European Union (EU) initiatives that have the potential to significantly affect regulation of lawyers in the EU. The article first addresses the interest in the legal profession that has been shown by competition (antitrust) authorities in various European Union countries and by the European Union Commission. The article explains the events and developments that led to the February 2004 EU Commission Report on Competition in Professional Services. This EU Commission Report called for the abolition of unjustified restrictions on competition in professional services and identified several legal services regulations that should be examined and revised by EU Member States. As the article notes, competition authorities in Denmark, Finland, Ireland, the Netherlands, Spain and Norway also have criticized many provisions of professional regulation, including the bans on contingency fees. The second part of this article contrasts the efforts underway in the EU Commission, DG Competition, with the developments that have occurred in the EU Commission, DG Internal Market. The article explains the importance of the proposed Directive on Services in the Internal Market, which was prepared by the EU Commission, DG Internal Market. The article highlights the Proposed Directive's provisions that will affect the legal profession, including the requirement that EU countries develop a more harmonized code of ethics. The article also identifies those areas in the proposed Directive from which the legal profession has been exempted and calls upon the European legal profession to carefully consider whether they want an exemption. The article highlights the efforts undertaken by the CCBE (which represents the legal professions in the European Union) that are

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relevant to this Directive. The final section of this article compares the different ways in which these two initiatives have taken into account the European Court of Justice case Wouters v. NOVA.

The last twelve months have confronted the liberal professions in Europe, including in particular the legal profession, with the most significant challenges for decades. These challenges are coming mainly from two aspects, namely the aspect of competition law and the aspect of the European Internal Market.¹

I.

For several years, the national competition authorities of the Member States have shown significant interest in the regulation of various liberal professions, including lawyers. In Denmark, Finland, Ireland, The Netherlands, Spain and Norway the authorities have criticized many provisions of professional regulation, in particular the prohibition of success fees and of quota litis.² The detailed report of the UK Office of Fair Trading of March 2001 has put a number of regulations of the legal profession to the test of competition law, in particular the MDP prohibition, restrictions on advertising, and fee recommendations.³ Also challenged was the prohibition that solicitors are not entitled to plead before most of the courts. The traditional honorary title of Queen's Counsel awarded to barristers was seen to present an undue competitive advantage.⁴ The Office of Fair Trading

1. Reference is made to the activities of the Directorate General Internal Market (in particular the proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 final/3, of 13.1.2004) and the Directorate General Competition of the European Commission (in particular the Communication from the Commission—Report on Competition in Professional Services, COM (2004) 83 final, of 9.2.2004) (hereinafter Commission Proposal).

2. For Denmark: A letter of the Danish Competition Authority of 1.5.2001 in Case 3.1120-0289-1, and information in the possession of the author; Finland: Information from the Finnish Bar in the possession of the author; Ireland: Information from the Irish Law Society and Bar in the possession of the author, and Indecon Report on Professions of March 2002 commissioned by the Irish Competition Authority; Netherlands: Decision of the Director General of the Netherlands's Competition Authority, Number 560/80, concerning Case 560 Engelgeer vs. Netherlands Bar Association of 21.2.2002; Spain: Decision of the Court for the defence of competition of 4.10.2002, n.2821—IN; Norway: Public Report on Competition in Legal Services presented by the Governmental Committee (Advokatkonkurransutvalget) of October 2003.

3. Report by the Director General of Fair Trading on "Competition in professions" of March 2001, OFT 328, at 13-14; available at <http://www.oft.gov.uk/NR/rdonlyres/B08439C8-C5F6-4946-8AFF-71C050D34F46/0/oft328.pdf> (last visited 4/11/04) (hereinafter OPT Report).

4. OFT report, *supra* note 3, at 11, ¶¶ 45-47.

pondered whether the legal privilege that protects the communication between lawyer and client represents an undue advantage for solicitors when competing with other consulting professions, e.g. investment banks.⁵ In Germany the Monopolies Commission has also urged a liberalization of the regulatory framework of all liberal professions.⁶

Quite a few observers had thought that this movement would calm down after the decisions of the European Court of Justice of February 19, 2002 in the *Wouters* and *Arduino* cases. In *Wouters*,⁷ the Court held that regulations adopted by bars and law societies, in spite of their anti-competitive effects, are permissible if they serve to protect independence, professional secrecy, and conflict of interest prohibition of the legal profession.⁸ The regulation adopted by the Nederlandse Orde van Advocaten, that Dutch lawyers must not associate with accountants because the latter are not subject to a comparable professional secrecy obligation, was upheld by the Court.⁹ In *Arduino*,¹⁰ the Court qualified the Italian fee scale for lawyers, not as bar regulation, but rather as a governmental regulation. The Court reasoned that the fee scale had not been adopted but had only been worked out by the Italian Bar, and had ultimately been approved by the Italian government, after some changes requested by the government had been made. Such a fee scale was not found to be in violation of the competition articles 81 and 82 of the EC Treaty.¹¹

Shortly after these two decisions, the EU Competition Commissioner, Monti, retained the Institute of Advanced Studies (IHS) of Vienna/Austria to conduct a field study on the economic effects of professional regulation in the Member States.¹² Mr. Monti presented the results of this study in a speech before the German Federal Bar in Berlin in March 2003.¹³ Looking back at the evolution of history, Mr. Monti

5. *Id.* at 11, ¶ 47.

6. Information in the possession of the author.

7. Judgment of the European Court of Justice of 19 February 2002, Case C-309/99 *Wouters* and others, Rec. 2002, p. I 1577 (hereinafter *Wouters*).

8. *Wouters*, *supra* note 7, ¶ 110.

9. *Id.*, ¶ 105.

10. Judgment of the European Court of Justice 19 February 2002, Case C-35/99 *Arduino*, Rec. 2002, p. I-1529.

11. *Arduino*, *supra* note 10, ¶ 41-44.

12. I. Paterson, M. Fink, A. Ogus *et al*, *Economic impact of regulation in the field of liberal professions in different Member States*, Institute for Advanced Studies (IHS), study for the European Commission, Vienna, January 2003, available at http://www.europa.eu.int/comm/competition/liberalization/conference/prof_services_ihs_part_1.pdf (last visited 4/11/04) (hereinafter IHS Study).

13. Competition in Professional Services, New Light and New Challenges, Speech by Mario Monti, Commissioner for Competition, Berlin, 21 March 2003, available at: http://www.europa.eu.int/comm/competition/liberalization/conference/speeches/mmonti_berlin_032003_en.pdf (last visited 4/11/04).

claimed that the existing intensity of professional regulation goes back to the guilds of the middle ages. Consultants for electronic data processing, he said, do not need professional regulation nor professional organizations; so why do the liberal professions need them? Quality of service is important, however, adequate quality is sufficient, he stated, and not every client wishes to have top quality at top prices, and not all professionals can in fact deliver top quality.¹⁴ There is a need for more flexibility through deregulation. The EU Commission acknowledges the specificities and the aspects of public interest to be found with the liberal professions, and in particular, the ECJ judgments in *Wouters* and *Arduino*, although beyond the Commission, intends to fully apply the competition articles of the EC Treaty so that the consumer obtains a wider choice and more value for his money.¹⁵ The national legislator is permitted to adopt regulation to protect the public interest, provided such regulation does not lead to unreasonable and incommensurate restrictions of competition.¹⁶

After this introduction, Mr. Monti presented the results of the IHS Study. The Study developed a complex system of "Regulation Indices" to compare the situation in the Member States, as regards regulation of market entry and regulation of conduct, to an overall regulation index. The overall index ranges from 0 in case of no regulation (for architects and engineers in five countries) to twelve (12) in case of maximum regulation such as for pharmacists in Sweden where there is a legal monopoly.¹⁷ In the legal profession, the index ranges from nine and one half (9.5) in Greece to three tenths (0.3) in Finland, with many countries clustering around six (6), including Germany. By contrast, six (6) is the maximum index for architects (in Italy) and the average index across the EU is less than three (3). Southern Europe has a higher overall

14. *See id.* at 3-4: "By adequate quality I don't necessarily mean top quality. It is enough that the service corresponds to what the consumer wants. My point is that we should aim at an outcome that brings more choice for both the consumer and the provider. Not all consumers want, or need, top quality and top prices for all kinds of services all of the time; not all professionals can or want to provide top quality expensive services all of the time."

15. *See id.* at 6: "Obviously the Commission's policy of establishing a level playing field in the internal market applies also to liberal professions. The Commission's established policy is to fully apply competition rules to these services, whilst recognising their specificities and the role they may play in the protection of public interest. The overall goal must be to improve welfare for all users of professional services: better choice and better value for money."

16. *Id.* Of course, national regulators should act in defence of the public interest in their territory. However, they should refrain from establishing undue and disproportionate restrictions of competition. Regulators should also avoid unjustified restrictions to the freedom of establishment and to the freedom to provide services for practitioners from other Member States.

17. IHS study, *supra* note 12, at 72.

regulation index than Northern Europe. The IHS Study also claims that the average turnover per professional, in low overall regulation index countries, is lower than in countries with a high index. On the other hand, countries with a low index have a higher number of professionals who generate a higher aggregate turnover than their fewer colleagues in countries with a higher regulation index.¹⁸ This has led Mr. Monti to the conclusion that a high level of regulation discourages efficiencies and reduces wealth. According to the IHS Study, less regulated Member States have not shown any signs of market failure, and therefore the more liberal regulatory rules of such Member States should be introduced for the benefit of consumers in the other Member States.¹⁹ Mr. Monti very pointedly wondered whether the regulation of liberal professions serves the consumer or the professionals, and called on the professions and the national legislators to review all existing regulations.²⁰

In the discussion that followed the speech, Mr. Monti said the self-regulatory organizations of the liberal professions should be careful not to develop into cartels; as every lawyer knows, a cartel is illegal and to be dissolved!

Those present in Berlin had the feeling that Mr. Monti was not very familiar with the legal profession in Europe. Based on the Service Directive of 1977 and the Establishment Directive of 1998, any European lawyer, for all practical purposes, can work temporarily or permanently in another Member State, as if he were a local lawyer; such cross-border activity is regulated by the CCBE Code of Conduct and has been adopted in all Member States. All these liberalization measures have been initiated or supported by the legal profession, and there is no other liberal profession in Europe with comparable liberalization achievements.

Mr. Monti prepared his initiative quite systematically. The 2002 Competition Report of the Commission mentions that in 2002 there had been an intensive discussion between the Commission, the national competition authorities, and national experts, on the topics of professional regulation, and the reach of the *Wouters* and *Arduino* judgments; such exchange of information is to be continued in the future.²¹

There have been many comments in Europe on the IHS Study of

18. *Id.* at 111.

19. *Id.*, Executive Summary, at 7.

20. See speech by Commissioner Monti, *supra* note 13, at 11 - 12.

21. European Commission's "XXXIIInd Report on Competition Policy 2002," SEC (2003) 467 final, page 62, available at http://www.europa.eu.int/comm/competition/annual_reports/2002/en.pdf (last visited 4/11/04).

which the theoretical economic basis is rather questionable and which in part is simply wrong, e.g. regulatory provisions, are reported that have long been superseded.²² The Study also neglects the fact that the uniform European consumer does not exist and that the differences in intensity of regulation to be found in the various European countries have deep historic and social roots. The Scandinavian countries have at all times and in all respects been more liberal than the Southern countries which reflects the differences between Protestantism and Catholicism.

Shortly after Mr. Monti's speech, his Directorate General Competition published a long questionnaire on many details of regulation to which the European and national organizations of the liberal professions sent in some 250 responses.²³ A preliminary result of analysis was presented by DG Competition at a hearing in Brussels on October 28, 2003, which received much publicity not only among the liberal professions but also in daily newspapers.²⁴ The preliminary analysis of the 33 responses on the regulation of the legal professions says that there was agreement that a certain level of regulation is needed to ensure appropriate training and compliance with the core professional values such as integrity, professional secrecy and avoidance of conflicts of interest; however, there was considerable disagreement on the level of regulation that is needed to protect the profession's values and on the extent to which lawyers should be subject to competition.²⁵ DG Competition in this regard lists in particular market entry and exclusive rights, price regulation, contingency fees, advertising restrictions, business structure and inter-professional cooperation, with price regulation, advertising regulation and restrictions on multi-disciplinary cooperation being the most critical restrictions from the viewpoint of competition law.²⁶

Mr. Monti, in his concluding speech, announced that the results of

22. E.g., RBB Economics (for CCBE), "A Critique of the IHS report," 9.9.2003; M. Henssler, M. Kilian, "A Position Paper on the IHS study," September 2003; and information from national Law Societies and Bars in the possession of the author.

23. See European Commission, DG Competition, "Commission Services Working Document—Regulation in Liberal Professions and its Effects—Invitation to comment," 27.3.2003, available at http://www.europa.eu.int/comm/competition/general_info/invitation/en.pdf (last visited 4/11/04).

24. See European Commission, DG Competition "Invitation to Comment—Regulation in Liberal Professions and its Effects—Summary of Responses," October 2003, available at http://www.europa.eu.int/comm/competition/liberalization/conference/summary_of_consultation_responses.pdf (last visited 4/11/04).

25. "Comments and concluding remarks of Commissioner Monti at the Conference on Professional Regulation," Brussels, 28 October 2003, available at http://www.europa.eu.int/comm/competition/liberalization/conference/speeches/mario_monti.pdf (last visited 4/11/04).

26. See *Id.* at 9-13.

analysis of the 246 responses would be published in early 2004 and that he would prior thereto start taking measures against the most serious restrictions of competition by professional regulation.²⁷ In fact, DG Competition has taken steps against the fee scale of Belgian architects.²⁸ In addition, Mr. Monti once again requested that the regulatory framework of all liberal professions should be carefully reviewed, and that all provisions inconsistent with European competition law should be eliminated.²⁹

Mr. Monti issued this request to the liberal professions themselves insofar as they have self-regulatory power, as well as to the national legislators as regards professional regulation by national legislation, reminding the legislators that under the ECJ case law the Commission has the powers to bring action against the Member State where it finds that an unjustified restraint of competition is put in place with government blessing or is even imposed by law.³⁰ Mr. Monti, in this context, specifically invoked the ECJ decision of September 9, 2003, in the CIF case, where the Court declared that any national competition authority has the right, and even the duty, to assist the Commission in guaranteeing the respect of Article 10 (Member State Loyalty Obligation) and Article 81 (competition law article) of the EC Treaty by the Member States.³¹ As of May 1, 2004, the enforcement of the competition articles of the EC Treaty will largely lie in the hands of the national competition authorities, and therefore the CIF case is of significant importance. Mr. Monti has made it quite clear that in his view, all competition authorities should exercise their powers under the Treaty in order to have undue anti-competitive regulations removed.³²

On February 9, 2004, earlier than expected, Mr. Monti, in the form of an Official Communication from the Commission entitled "Report on Competition in Professional Services," published the final results of his analysis.³³ The call for abolition of unjustified restrictions of competition in professional services is repeated once more, arguing,

27. *See Id.* at 9, point 52.

28. *See* European Commission press release of 5 November 2003, available at <http://europa.eu.int/rapid/start/cgi/guesten.ksh> (last visited 4/11/04).

29. Speech by Commissioner Monti, *supra* note 13, at 14.

30. *Id.* at 11.

31. Judgment of the European Court of Justice of 9 September 2003, Case C-198/01, CIF, Rec. 2003, 00000, ¶¶ 45-49.

32. *See* speech by Commissioner Monti, *supra* note 13, at 11. "From the more traditional competition enforcement perspective, I should add that using antitrust instruments is always possible where necessary and that from May 2004 onwards the national competition authorities and national courts share this competence with the Commission." *Id.*

33. European Commission Communication—Report on Competition in Professional Services, COM (2004) 83 final, of 9.2.2004 (hereinafter Report).

“The services sector is the main motor of growth in the European Union and professional services are an important part of it. Less and lighter regulation would provide more competitive services for businesses and consumers therefore contributing to increasing Europe’s competitiveness.”³⁴ As regards the legal profession, the report specifically calls for the review and eventual abolition of fee scales, advertising restrictions and regulations on business structure; in particular, MDP.³⁵ Somewhat as a surprise is the fact that specifically mentioned are entry restrictions and reserved tasks where it is stated that the experience in the USA and in Australia on excessive licensing regulation may also be relevant in Europe.³⁶ This may apply to overall lengthy minimum education and training periods before licensing; it is difficult to see how this could be relevant in the context of quality as licensing requirement, although the Report says it could. The Commission further states that most restrictions are best dealt with at national level, as they are mostly national in scope, which would be in line with the decentralized enforcement of the EU Competition Rules as from May 1, 2004.³⁷

The Report specifically recognizes the *Wouters* decision of the ECJ, and states that some regulation of professional services is justified and that in some cases more pro competitive mechanisms can and should be used instead of traditional restrictive rules.³⁸ From these remarks in particular and from the overall tone of the Report, which appears less aggressive than previous statements from DG Competition, it seems that Mr. Monti has, speaking in military terms, adjusted front lines. The major reason to do so lies not so much in the some 250 responses to the questionnaire of DG Competition, but rather in the development that has taken place in the Internal Market area for which Commissioner Bolkestein and his DG Internal Market have responsibility.

II.

On January 13, 2004, the Commission published its long awaited proposal for a “Directive on Services in the Internal Market.”³⁹ This proposal had been preceded by a Communication of December 2000 entitled “An Internal Market Strategy for Services”⁴⁰ and by the Report

34. *Id.* at 8-9.

35. *Id.* at 5, 10-12.

36. *Id.* at 16-17.

37. *Id.* at 21-24.

38. *Id.* at 19.

39. Commission proposal, *supra* note 1.

40. Communication from the Commission to the Council and to the European Parliament “An Internal Market Strategy for Services,” COM (2000) 888 final, of

of July 2002 on “The State of the Internal Market for Services.”⁴¹ DG Internal Market prepared all these documents. There are many parallels between the activities of Mr. Bolkestein and Mr. Monti; however, there are also a few noticeable differences.

The purpose of the new Directive is to cover not only a single sector but also all economic services in the Internal Market, which makes it a so-called horizontal directive. It will introduce a general frame, which will be filled out by the Member States, and the professional organizations. In regard to the legal profession, the new directive, if adopted by the European Parliament and the Council, will be comparable in importance with the Service Directive and the Establishment Directive for lawyers.⁴²

Chapter I of the new Directive contains general provisions on objective, scope and definitions.⁴³ Chapter II entitled, “Freedom of Establishment for Service Providers,” aims at administration simplification for cross-border services by simplifying procedures; this includes introducing single points of contact to handle formalities, introducing rights to information for service providers and recipients relating to the cross-border services (e.g. contact details of the competent authorities and means of redress available in the event of dispute), and introducing electronic means for the completion of all procedures. Article 15 obliges the Member States to justify, within two years from the adoption of the Directive (scheduled for the end of 2005), a number of restrictions that may presently be in effect, including in particular minimum and maximum fees in fee scales.⁴⁴

29.12.2000.

41. Report from the Commission to the Council and the European Parliament on the stage of the Internal Market Strategy for Services, COM (2002) 0441, of 30.07.2002.

42. Reference is made to Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, and Directive 98/5/EC of the European Parliament and of the Council 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.

43. Commission proposal *supra* note 1, Chapter I “General Provisions,” Articles 1 to 4, pp. 44 - 46.

44. *Id.*, Article 15 ¶ 6.

Member States shall notify to the Commission any new laws, regulations or administrative provisions which set requirements as referred to in paragraph 5, together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent the adoption by Member States of the provisions in question. Within a period of 3 months from the date of notification, the Commission shall examine the compatibility of any new requirements with Community law and, as the case may be, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them.

Id.

Chapter III is on “Free movement of Services,” which means temporary cross-border services, to be distinguished from services rendered out of the establishment of the service provider in another state.⁴⁵ In both these cases – i.e. as regards the legal profession both in the context of the Service Directive and the Establishment Directive presently in effect – lawyers are subject to professional regulation both in their home country (country of origin) and host country (foreign country in which they render the service). This phenomenon is usually referred to as “double deontology.”⁴⁶ Since professional regulation of the legal profession has not been harmonized, there exists, between the various European countries, minor or major differences and even some contradictions so that the double deontology phenomenon has turned out to be an obstacle to cross-border services. The term “double deontology” in this context includes not only regulations adopted by the bars and law societies themselves but also regulation by national statute. The differences exist primarily in the area of professional secrecy, confidentiality, legal privilege and of prohibition of conflicts of interest.⁴⁷

It is before this background that Article 16 of the new Directive introduces the country of origin principle for the temporary cross-border service, i.e. the double deontology problem is removed by a clear conflict rule⁴⁸. The introduction of the country of origin rule, which is helpful for the service provider, is accompanied by the far reaching information rights of the service recipient regarding the service provider, his professional rules, the means of redress, the disciplinary authorities as briefly mentioned above and to be found in many other places in the Directive as well. However, the country of origin principle of Article 16, according to Article 17, shall not be applicable to the legal profession because the existing Service Directive *expressis verbis* says that lawyers are subject to the professional rules of both the home country and the host country.⁴⁹ The E-Commerce Directive has deviated from this concept by introducing the country of origin principle for legal services

45. *Id.*, Chapter III “Free movement of services,” Articles 16 to 25, at 55 - 63.

46. *See* in this context the Establishment Directive 98/5/EC, *supra* note 41, Article 6; Services Directive 77/249/EC *supra* note 41, Article 4 ¶4.

47. *See* CCBE Report “Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions”—John FISH (February 2004), *available at* http://www.ccbe.org/doc/En/fish_report_en.pdf. (last visited 4/11/04).

48. Commission proposal *supra* note 1, Article 16. “Country of origin principle. ‘(1) Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.’” *Id.*

49. *Id.*, Article 17 (7) “General derogations from the country of origin principle” “Article 16 shall not apply to the following: (7) matters covered by Council Directive 77/249/EEC, *supra* note 41.”

rendered by modern means of communication. However, as the new Directive says, the legal profession in Europe has not yet formed a position on this question, and therefore it is excluded by Article 17 from the country of origin principle in Article 16. This means that the legal profession is discriminated as compared to other cross-border service providers. It is now up to the legal profession in Europe to determine quickly whether they are happy with this discrimination or whether they would prefer to be included in the country of origin principle, which would require an amendment to the Directive in the legislative process.

Especially important is Chapter IV, "Quality of Services," which is applicable to cross-border services in both the form of temporary and establishment activity.⁵⁰ According to article 26, service providers must make available to the recipient information on certain aspects of their activity, e.g., as regards lawyers the particulars on the professional body with which the lawyer is registered, and his professional title.⁵¹ Upon request, the lawyer must make available additional information on the main features of his service, the price of his service or, if an exact price cannot be given, the methods for calculating the price, so that the client can check it, or a sufficiently detailed estimate, the status and legal form of the law firm and a reference to the professional rules applicable to the lawyer in the Member State of origin and how to access these.

Article 27, requires the Member States to ensure that the risk of professional liability is covered by appropriate indemnity insurance or other comparable form of protection (already in effect, as regards lawyers, in almost all EU Member States), and that the client upon request is to be furnished with information on the particulars of the professional indemnity insurance.⁵² If a lawyer establishes an office in another country, such country may require local professional indemnity

50. *Id.*, Chapter IV, Quality of services, Articles 26 to 33, at 63 - 68.

51. *Id.*, Article 26 "Information on providers and their services."

1. Member States shall ensure that providers make the following information available to the recipient: (e) in the case of the regulated professions, any professional body or similar institution with which the provider is registered, the professional title and the Member State in which that title has been granted.

Id.

52. *Id.*, Article 27 "Professional insurance and guarantees."

1. Member States shall ensure that providers (. . .) are covered by professional indemnity insurance appropriate to the nature and extent of the risk, or by any other guarantee or compensatory provision which is equivalent or essentially comparable as regards its purpose. 2. Member States shall ensure that providers supply a recipient, at his request, with information on the insurance or guarantees referred to in paragraph 1, and in particular the contact details of the insurer or guarantor and the territorial coverage."

Id.

insurance only on a basis supplementary to the home country insurance in order to cover aspects of risk that must be covered in the host country and that are not covered by the home country insurance. In fact, the CCBE for more than a year has been working on the problems of professional liability insurance in cross-border legal services by establishing working groups with members from the legal profession and insurance industry to identify existing parallels and differences between the various national coverage systems and how they can be bridged.⁵³ Related thereto, the CCBE is also working on the issue of social insurance for lawyers engaged in cross-border legal work by means of foreign establishment.⁵⁴

According to Article 29, all total prohibitions on commercial communications (i.e. advertising) are to be removed.⁵⁵ Leaving aside total prohibitions, commercial communications may be regulated by professional rules relating to the independence, dignity and integrity of the profession in question as well as professional secrecy.⁵⁶

Article 30 permits multi-disciplinary activities, with the proviso that regulated professions may be subjected to restrictions as is justified in order to guarantee compliance with different rules of professional ethics and conduct which apply according to the specific nature of each profession; this is the case in some countries with lawyers and auditors.⁵⁷ Where multi-disciplinary activities are authorized, Member States shall ensure that conflicts of interest and incompatibilities between the activities are prevented, that the independence and impartiality, which

53. Further information is available at the CCBE website at http://www.ccbe.org/en/comites/assurance_en.htm (last visited 4/11/04).

54. *Id.*

55. Commission proposal *supra* note 1, Article 29 ¶1: "Commercial communications by the regulated professions." "1. Member States shall remove all total prohibitions on commercial communications by the regulated professions." *Id.*

56. *Id.*, Article 29 ¶2.

Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consonant with the specific nature of each profession."

Id.

57. *Id.*, Article 30 ¶1 "Multidisciplinary activities."

1. Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities. However, the following providers may be made subject to such requirements: (a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession.

Id.

certain activities require, are safeguarded, and that the rules of professional ethics and conduct for different activities are compatible with one another, especially regarding matters of professional secrecy.⁵⁸ This recognizes the principles of the Wouters decision of the ECJ. What, in Wouters, had been done by the Nederlandse Orde van Advocaten on a voluntary basis, to protect the professional secrecy obligation of lawyers by issuing a prohibition to form a MDP with accountants, who are not subject to a comparable secrecy obligation, now becomes compulsory, and this is so not only for lawyers but also for the other liberal professions. The principle is clear; the professional rules and regulations of the one profession shall not be eroded by incompatible and less stringent rules and regulations of the other profession in particular as regards independence, impartiality, professional secrecy and conflicts of interest.

According to Article 31, the Member States in collaboration with the Commission shall take accompanying measures to encourage service providers to take voluntary action at ensuring the quality of service provision: in particular by certification, evaluation and the introduction of quality control systems and quality labels drawn up by the professional bodies at community level.⁵⁹

Article 32 deals with procedural questions in the case of legal disputes.⁶⁰ Article 33 provides for the information exchange between Member States on administrative and disciplinary measures.⁶¹

58. *Id.*, Article 30 ¶2.

Where multidisciplinary activities are authorised, Member States shall ensure the following: (a) that conflicts of interest and incompatibilities between certain activities are prevented; (b) that the independence and impartiality required for certain activities is secured; (c) that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy.

Id.

59. Commission proposal *supra* note 1, Article 31 ¶1 "Policy on quality of services."

1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage providers to take action on a voluntary basis in order to ensure the quality of service provision.

Id.

60. Commission proposal *supra* note 1, Article 32 "Settlement of disputes."

1. Member States shall take the general measures necessary to ensure that (...) all recipients, including those resident in another Member State, can send a complaint or a request for information on the service provided.

Id.

61. *Id.*, Article 33 ¶1 "Information on the good repute of providers."

1. Member States shall, at the request of a competent authority in another Member State, supply information on criminal convictions, penalties, administrative or disciplinary measures (...) in respect of the provider, which are liable to bring into question either his ability to conduct his business or his professional reliability.

Chapter V, "Supervision," establishes the important principle that Member States are obliged to exercise their domestic powers of surveillance and supervision in cases where the service has been rendered in another Member State. Member States must mutually assist one another in the supervision of service providers and their cross-border services.⁶²

Almost sensational is Chapter VI, "Convergency Program."⁶³ Article 39 encourages the creation of codes of conduct at the community level in the area of commercial communications (i.e. advertising) and professional ethics and conduct.⁶⁴ The article aims to ensure, according to the specific nature of each profession, the independence, impartiality and professional secrecy.⁶⁵ The code of conduct drawn up at community level and is thereafter to be applied at the national level. The model for this has been the CCBE Code of Conduct, which, as stated above, deals with cross-border activities of a lawyer only and will be broadened to cover also purely domestic work.⁶⁶

The Directive intentionally uses the term "convergence," to mean less than full harmonization. It implies that at least initially the European level code of conduct may be limited to general statements and principles, leaving sufficient "room to breathe" for detailed implementation at the national level. This, in fact, is the approach on which the CCBE Code of Conduct has been based, and therefore it should be possible, without too many difficulties, to broaden the scope of the existing Code to cover domestic work. After all, the conduct rules cannot really be different between cross-border work and domestic work. The CCBE has already started to work on this issue in close cooperation with its national member organizations. It is important for all liberal professions that there is a strong bottom-up element in the drafting of the

Id.

62. *Id.*, Chapter V Supervision, Articles 34 - 38, at 68 - 71.

63. *Id.*, Chapter VI "Convergency Program," Articles 39 - 44, at 71 - 73.

64. *Id.*, Article 39 "Codes of conduct at Community level."

1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up of codes of conduct at Community level, in conformity with Community law, in particular in the following areas: (b) the rules of professional ethics and conduct of the regulated professions which aim in particular at ensuring, as appropriate to the specific nature of each profession, independence, impartiality and professional secrecy.

Id.

65. Commission proposal *supra* note 1, Article 39, ¶1 (b).

66. The CCBE Code of Conduct for lawyers in the European Union is available at http://www.ccbe.org/doc/En/code2002_En.pdf (last visited 4/11/04). The CCBE is currently working to see how the CCBE Code of Conduct can be made work as a prototype at a national level.

European level code of conduct before such code is implemented top down at the national level.

The professional organizations do not have much time to deal with this issue. According to Article 40, the Commission will assess the need to take initiatives of its own on matters covered by Article 39, for which it has not been possible to finalize codes of conduct before the date by which the directive must be transposed into national law (envisaged to be one year after adoption of the directive) or for which such codes are insufficient to ensure the proper functioning of the Internal Market.⁶⁷ This means if the professional organizations at the European level do not do the job, the Commission will issue a draft directive to harmonize the national rules of conduct.

The CCBE, at first reaction, welcomed the proposed Directive as a major step to further liberalization. In effect, there are some aspects in the Directive where the CCBE has already been working actively in the direction now envisaged by the Directive or where the work of the CCBE has been the prototype model for the Directive such as the CCBE Code of Conduct.⁶⁸ The CCBE is now studying the details of the proposed Directive; however, I am confident that this work will not affect the positive reaction, as a matter of principle, to the new Directive.

It is expected that the European Parliament will commence deliberations this fall, after the election has taken place. Whether the

67. Commission proposal supra note 1, Article 40 "Additional harmonisation."

1. The Commission shall assess, by [one year after the entry into force of this Directive] at the latest, the possibility of presenting proposals for harmonisation instruments (...) 2. In order to ensure the proper functioning of the internal market for services, the Commission shall assess the need to take additional initiatives or to present proposals for legislative instruments.

Id.

68. CCBE Press Release of 14.01.2004, available at http://www.ccbe.org/doc/Archives/pr_0104_en.pdf (last visited 4/11/04).

For instance, in addition to the Directives 77/249 of 22nd of March 1977 on services and 98/5 of 15th February 1998 on establishment (both applicable only to the legal profession), the CCBE has been working in the following areas: (a) The CCBE Code of Conduct (...) is a leader in the field of Europe-wide codes of professional conduct. The prohibition on general restrictions regarding commercial communications required by the draft Framework Services Directive has already been addressed in the CCBE Code. (b) As far as professional indemnity insurance is concerned, the CCBE has, since 2002, undertaken important work to facilitate the free movement of legal services. This work includes, notably, a draft common questionnaire in order to harmonise the establishment request by a lawyer, proposed minimum standards, and an additional policy to make up for the shortfall in insurance taken out in the Home Member State. (c) The CCBE is also working on solutions to the difficulties encountered with the various regimes of social security in the Member States.

Id.

envisaged adoption date for the Directive (end 2005) can be achieved is too early to predict.

III.

When comparing the challenges for the legal profession from DG Competition on the one hand and DG Internal Market on the other hand, as summarized above, there is one noticeable difference. Mr. Monti has started-off by questioning the regulation of the liberal professions in a rather summary way, without differentiation in detail, and has even appeared to challenge the self-regulatory power of the professional organizations. The proposed directive of Mr. Bolkestein is based on the rationale of the *Wouters* and *Arduino* decisions of the ECJ. The ECJ has said the core values of the legal profession (independence, professional secrecy/confidentiality and conflict of interest prohibition) are reflected in the directive, not only in the sense that regulation to protect such core values are justified in spite of the anti-competitive effects thereof, but also in the sense that such regulation is obligatory. In addition, the directive recognizes that the professional organizations have an important role to play in this context when entrusting them with the task to set up European codes of conduct. Mr. Monti, to some extent, seems to have fallen in line with Mr. Bolkestein.