# Professional rules and business development

The Council of Bars and Law Societies of the European Union – or CCBE – of which I am President is the officially recognised body representing lawyers to the European institutions. Through our member bars, we represent over 500,000 lawyers, within the EU itself, in the accession states and in other European countries. The subject of my speech is professional rules and business development. Before going into that in detail, I would like to make a few general remarks about competition and the legal profession, which otherwise would go unsaid at today's conference.

At the European level, we lawyers are recognised as having the most radically liberal regime for the provision of services and for the establishment of commercial offices. The Services Directive allows a lawyer from one Member State to provide temporary services freely in another Member State. As part of the Mutual Recognition of Diplomas Directive, a lawyer can acquire the title of lawyer in another Member State through either an aptitude test or a period of adaptation. The Establishment Directive of 1998 entitles a lawyer to go from one Member State to another and practise there under home title without any obstacle other than to register with the local bar and be subject to its regulation. After three years of practising local law, the migrant lawyer is given more or less automatic access to the local host title. The legal profession actively promoted the two sectoral Directives which apply to it. We have also established the CCBE Code of Conduct which covers all cross-border work of lawyers in Europe. Is there any other regulated profession that has achieved the same level of liberalisation?

At the national level, lawyers compete fiercely with each other. For individual client work, there is in every Member State plenty of consumer choice in relation to access to a lawyer. And corporate clients do not suffer from the over-concentration of work in just a handful of immensely powerful global players, as happens in some other professional sectors. In every major capital city of Europe, there are foreign law firms, sometimes European, sometimes American, competing with local firms to provide commercial services. Price competition among these firms is intense, and the users of legal services have significant purchasing power. Overall, there is no evidence of anti-competitive conditions in any sector of the market – in fact, the opposite is true.

As a result, we have been disappointed by the approach of the European Commission to our sector. On the basis of wanting a snapshot of the position of the professions, they commissioned the study undertaken by the Institute for Advanced Studies which was described earlier. This study is not, in our view, a piece of work on which to base serious conclusions. We have sent to the Commission recently an examination of the Austrian Institute study undertaken not by lawyers but by economists. This counter-view is available on our website at www.ccbe.org. I will read you some of its conclusions:

'As an economic analysis of the effects of regulation, on which policy decisions could potentially be based, the study has major weaknesses, which make it inappropriate as a foundation for policy measures:

- First, the paper lacks any real theoretical framework … The theoretical discussion is also biased in that it presupposes that there will always be too much regulation – the question of why there might be too little regulation is not addressed.

- Secondly, the analysis … has major methodological flaws. In particular, by using only simple correlation techniques, and separately examining a number of related variables, the authors are highly likely to have produced "spurious" correlations.

- Thirdly, the report presents only a selection of the results, leaving it open to the accusation of "publication bias". ...

- Finally, the interpretation the authors put on the results is highly questionable, and is particularly ambiguous given the lack of any clear theoretical framework.'

We think the European taxpayer would expect the Commission to have a more accurate basis for its work.

Coming now to the central theme of this panel session on 'Professional rules and business development', it is clear that the Commission has proceeded in this case as if economic criteria are the only ones to be applied to the professions. This is simply not true of the justice sector. We, as lawyers, are grateful for the European Court of Justice, which has seen it as its responsibility to speak out for the values of the administration of justice and the rule of law. There was a case involving just these issues before the Court last year, in the case of *Wouters* (C-309/99). The Dutch Bar had banned multi-disciplinary partnerships with accountants. The ECJ made plain in its decision that bars and law societies were subject to competition law in the creation and implementation of their rules. But it also endorsed the view, which is significantly missing at the European Commission institutional level, that there are values relating to the administration of justice and the defence of the rule of law which are beyond competition. In essence, the Court said that when the Dutch Bar was regulating to protect the core values of lawyers – described as independence, confidentiality and the avoidance of conflict of interest – they would not be subject to competition law.

A consequence of the *Wouters* judgement is that it is possible that different bars will come to different decisions about the same issues, all while protecting the core values of the profession. For instance, in Germany, partnerships between lawyers and accountants are allowed, in the Netherlands they are banned. How can that be in a single market? This raises a very important point about the legal profession. Whatever may be the case regarding other professions and the subject-matter of their work, the laws, with which we deal are not the same in the various Member States. Laws and legal systems are part of the cultural heritage of each country. Like art and language, they are only to be tampered with, and harmonised, with extreme care. The fact that multi-disciplinary partnerships may be allowed in one Member State but not in another may not fit into a neat Europe-wide plan, but they are consequences of deep differences of approach towards the professions, of which the Commission would be advised to take account. I am aware, by the way, that there was a decision of the Belgian supreme court recently which struck down an anti-MDP regulation as anti-competitive. But it was struck down because it was too general and undiscriminating in its ban on MDPs, and the case does not undermine the principles laid down by the European Court of Justice in its own decision.

Independence, secrecy/confidentiality and prohibition of conflicts - after the Enron and Andersen failures, which occurred in large part as a result of a lack of regulation, no one should question the importance of these core values of the legal profession. These are not rights but obligations on lawyers, existing for the sake of clients, of the administration of justice, and of society at large.

MDPs seems to be in the forefront of the mind of DG Competition. This is surprising. With good reason, the Sarbanes-Oxley Act in the United States has imposed a far reaching ban on non-audit services of accounting firms. The European Commission has also raised concerns about independence in its own work on non-audit services provided by a statutory auditor. Wherever in the world there have been captive law firms of accountancy firms, such law firms are now separating.

The title of this session encompasses not just inter-professional co-operation but also rules on new entry and business structure. Clearly, in the few minutes available to me, it is not possible to dwell on the details of the variety of matters which might be included in such subjects. But, it is not necessary to deal with each aspect, because the principles of the approach of the CCBE is that the ruling criteria for decisions on business development should be the protection of the core values of the legal profession as outlined in the *Wouters* judgement, namely independence, confidentiality and the avoidance of conflicts of interest. Subject to the protection of those values, the CCBE would be pleased to see the widest possible array of business structures.

I should like to end on the note that I began. Lawyers embrace competition in everyday practice of the widest kind. We have already at the European level the most radically liberal regime of cross-border practice. Subject to the protection of the core values, as I have said, we remain flexible and open.

Thank you.