Competition and the European legal professions

Beleid ten aanzien van advocaten wordt niet alleen gemaakt in Den Haag, maar natuurlijk ook in Brussel. Recent werden twee rapporten gepubliceerd over vrijeberoepsbeoefenaren, waaronder advocaten: het rapport van mededingscommissaris Monti en het rapport van commissaris Bolkestein (Interne Markt). Secretaris-generaal Goldsmith van de koepelorganisatie van Europese balies, de CCBE, gaat in op de Commissie-rapporten en geeft aan wat de positie is van de CCBE.

J. Goldsmith
Secretary General of the Council of the Bars and Law Societies of the European Union (CCBE)

The Council of Bars and Law Societies of the European Union (CCBE) represents, through its member bars, over 700,000 European lawyers to the European institutions and internationally. From the discussions which take place within the CCBE, particularly on the topic of competition (which has moved near the top of the agenda recently), it is possible to have a grand overview of the European legal profession. The discussions within the CCBE have centred recently on a variety of related topics. Principally, there have been two initiatives from the European Commission concerning the profession.

The first has been from DG Competition, which is currently examining the state of competition in all of the liberal professions in the European Union. The background is that professional services are particularly important to the functioning of the European economy because they are very fast growing. The starting point of the European Commission is the single market. Europe is based on the notion of a single market of goods and services. Lawyers are part of that single market, and are subject to the drive to bring down barriers so as to achieve it. That is what lay behind the already extremely liberal regime for the provision of legal services in the EU, through the relevant directives, and in particular the Services Directive of 1977 and the Establishment Directive of 1998.

Now, despite the level of liberalisation which has been achieved in respect of legal services, the Commission is asking why it is still necessary for a European businessman to have to consult lawyers from all 25 member states in order to do business throughout the EU. Why are the rules governing lawyers' conduct so different across Europe? At least in part, therefore, the European Commission is addressing this question as an issue relevant to the functioning of the internal market.

On the other hand, Mario Monti, the European Competition Commissioner is also looking at the regulation of lawyers. He has also asked the question – why are the rules governing lawyers so different? – but from a competition standpoint. The European Competition services began their work by conducting some research, which in the view of the CCBE is highly flawed: there was no theoretical framework, only a selection of the results was published, the interpretations were questionable, and, worst of all, the research was conducted in a vacuum without ever considering the context in which regulation of the legal profession takes place.

The research covered all the liberal professions, not just lawyers. It revealed that there was a very different level of regulation of the professions in Europe. Countries in the north tended to be lightly regulated and countries in the south were heavily regulated. This included lawyers. Commissioner Monti asked if lighter regulation had produced market failure. As he believed that it had not, his services concluded that there would be no danger in the professions in the south of Europe being more lightly regulated.

The resulting European Commission report on competition in the liberal professions picked out five main areas of regulation that Commissioner Monti claimed might be anti-competitive. The report condemned three types of regulation outright: fixed and recommended prices, and total barriers to advertising. Two further types of regulation, entry restrictions and reserved tasks, were also questioned, as the report asked whether these could act as

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barriers to competition. Might there be scope to lower entry requirements without undermining the level of service available? Might there be a possibility to narrow the scope of reserved tasks or remove reserved rights if a less restrictive way of dealing with the issue could be found? The report also touched on MDPs, and declared that the starting assumption should be that they should not be prohibited.

Different positions

The Monti report was one of two exercises by different European Commissioners currently underway in Europe to examine the regulation of the legal profession. The powers available to these Commissioners and the positions they had taken were very different. The Internal Market Commissioner, Frits Bolkestein, who is responsible for the single market, has published a draft law, or directive, which deals with a number of the issues of concern identified by Commissioner Monti. His draft law would have a much more immediate impact once agreed, and would prohibit, for instance, total bans on lawyers' advertising and require an evaluation to take place at Member State level of fixed prices for legal services. Whereas Commissioner Monti and the competition services can only investigate and take action against particular rules which they feel to be contrary to competition law, Commissioner Bolkestein and his directive will establish a horizontal law applying to the legal professions (and others) in all 25 Member States, which will therefore have a more radical impact. The Bolkestein draft directive also permits MDPs, but recognises that various protections for profes-

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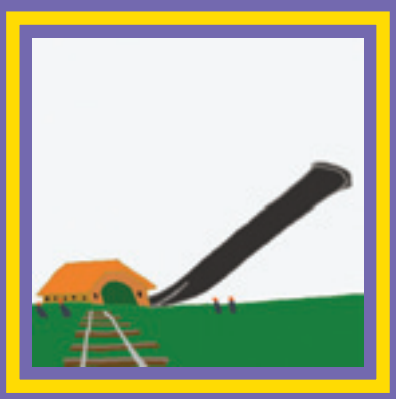
15 SPECIALISATIE-VERENIGINGEN



Aantal leden: 69.
Toelatingseisen: Er zijn voor adspirant-leden geen toelatingseisen, behalve dat zij een voltooide stage moeten hebbben. Gewone leden moeten aan het bestuur aantonen dat een substantieel gedeelte van hun praktijk bovengenoemd rechtsgebied bestrijkt.
Cursussen: Voor adspirant-leden wordt van tijd tot tijd een opleidingscursus in het onteigeningsrecht gegeven.
Andere activiteiten: Tweemaal per jaar vinden vergaderingen plaats die een kort huishoudelijk gedeelte en vervolgens een wetenschappelijk gedeelte omvatten. De vereniging intervenieert verder wanneer daartoe aanleiding is bij regering en parlement wanneer wetsontwerpen aanhangig zijn op haar rechtsgebied.
Publiciteit: Het voeren van een beeldmerk is nog niet aan de orde geweest binnen de vereniging. De vereniging communiceert naar buiten vooral via de eigen website, die regelmatig door rechtzoekenden wordt bezocht.

"De Vereniging van Onteigeningsadvocaten bestrijkt een echte niche-markt. Wij rekenen het administratieve schadevergoedingsrecht als geheel tot ons vakgebied, dus naast onteigeningen ook planschades en nadeelcompensaties."

sional core values will need to be put in place if they are to be operational.

The difference of emphasis between the communications on the legal profession published by the two Commissioners makes for an interesting comparison. Commissioner Monti has only reluctantly accepted the need for some professional regulation. Commissioner Bolkestein is, on the other hand, more accommodating, and seems to recognise more readily the role that regulation – and, therefore, the bars – play.

There is another interesting aspect of the Bolkestein draft directive. This is the recognition that there is a tendency towards the harmonisation of professional rules. The European Commission's activities, whether undertaken for competition purposes or to improve the functioning of the internal market in Europe, will both tend in that direction. In particular, in the Bolkestein directive, there is a provision which means that the CCBE is encouraged to draw up a common code for all EU bars to adopt. This is currently being discussed internally by the CCBE.

At the same time as these Europe-wide initiatives, there are similar initiatives in the Member States. Both Ireland and Denmark, for instance, have instituted competition-led inquiries into their legal professions. In the United Kingdom, there is the Clementi review of legal services, which is looking at whether the professional bodies should retain their right to regulate and discipline their members. Other bars report similar activities.

Anglo-saxon vs civil law

It is true that there are still great differences between the legal professions in Europe? The approach to what a lawyer can do varies between anglo-saxon countries where a lawyer has for a long time provided business services to clients, and where the notion of a notary does not properly exist, to civil law countries where lawyers in the past were more court-oriented in their services and where a notary carried out at least some of the more business-related transactions. These distinctions have been blurring for years now, and, although the practices of lawyers in all European countries are converging, there are still differences in approach.

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There are also differences in rules. Some bars still ban advertising outright, whereas most permit advertising under certain conditions. Others have fixed or recommended fees, whereas others have a system of free negotiation between lawyer and client. Some permit MDPs, others do not. These rules will fall under the scope of the two initiatives mentioned above, namely the Monti competition initiative and the Bolkestein services directive.

But the fact that there are differences between the legal professions in Europe does not mean that European lawyers as a whole are unable to speak with a common voice through the CCBE. We have been united in our positions on the two Commission initiatives outlined.

In relation to competition, the CCBE has released two reports. One was commissioned from a firm of independent economists, and was a critique of the basic research undertaken by DG Competition before it embarked on its first conclusions. The other is a legal analysis of the DG Competition report, pointing out various legal mistakes in the Commission's approach to the regulation of lawyers. Both reports are available on the CCBE's website – www.ccbe.org. In general, the CCBE has pointed out to the Commission that legal services should not be judged by economic criteria alone, and that they are part of the underpinning of the justice system which is vital for democracy and the rule of law. As a result, the core values of the legal profession are not economic values, an approach which we feel has been sanctioned and approved by the European Court of Justice in the *Wouters*[1] case.

As regards the current Services Directive, we are in the process of forming our views. Overall, we are pleased that the role that the bars play in regulation has been recognised, but we are going through the detail to be sure that our members can live with the various provisions.

In both cases, the bars have united, despite the difference in detail of their regulatory regimes, to present a common approach, and we believe that this common approach will continue during the passage of the Bolkestein draft directive on services through the European institutions.

The report condemned three types of regulation outright: fixed and recommended prices, and total barriers to advertising

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