Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the
OECD Competition Committee
Working Party No. 2 on Competition and Regulation

“Competitive Restrictions in Legal Professions”

June 4, 2007

1. BIAC understands and appreciates the potential benefits of promoting competition within self-regulated industries, including lower prices, greater choice, innovation and efficiency.

2. Specifically, with respect to the legal profession and with reference to the OECD Secretarial Note on Competition in Professional Services, BIAC agrees with the following general principles:

   a. Entrance requirements into the legal profession should not be disproportionate to what is required to perform the service competently.

   b. Regulatory objectives should take into account the specific needs of small consumers. BIAC notes that sophisticated commercial purchasers of legal services are in a position to better obtain services on a basis suited to their specific needs.

   c. Restrictions on competition between members of a profession should be eliminated subject to necessary public interest safeguards. These include agreements to restrict price, to divide markets, to raise entrance requirements or to limit advertising. For example, it would be reasonable and in the public interest to prohibit unfair or misleading advertising practices, or advertising which would bring the administration of justice into disrepute.

3. BIAC believes that statutes prohibiting the unauthorized practice of law are necessary and appropriate to ensure that consumers are provided with legal services from qualified providers meeting minimum standards of practice. However, prohibitions on the unauthorized practice of law should not be used as a cloak to shield lawyers from competition by non-lawyers having appropriate qualifications to undertake specific legal functions.

4. BIAC also agrees that recognition of qualifications of professionals from other countries should be promoted, but having regard to the specific professional qualifications necessary to practice law in a given jurisdiction and the need to ensure that there are available remedies to consumers of their services. BIAC notes that some reduction in these barriers to legal practice within the EU would be consistent with the freedom of establishment principles underlying the EU Treaty and would also help to facilitate the single market objective of the European Union.
5. BIAC agrees that regulations relating to the legal profession should be reviewed against principles of good regulation, including that the regulation be targeted and not restrict competition more than is necessary.

6. However, as with any market in which the minimum performance standards are an essential requirement, BIAC is against basing reform of the regulation of the legal professions solely on competition principles. A proper balance must be struck between the objectives of free competition and the objectives underlying the regulation of the legal profession. These latter objectives may vary from country to country.

7. In all cases, BIAC recommends that competition regulators proceed with an appreciation of the other public interest implications of any intervention in the regulatory framework of the legal professions.

8. The considerations informing the regulation of the legal profession, it should be noted, can be different from those relevant to the regulation of other professions. For example, in Canada, the courts have recognized the fundamental importance of having an independently governed legal profession to its constitutional framework. This independence is fundamental to Canada’s rule of law, which is the underpinning of its constitution. Such principles are of general application in all OECD Member States.

9. BIAC notes the division in certain jurisdictions between the governance and the professional or trade association-like functions of the legal profession. This is the case, for example, in the United States and Canada, where the bodies that regulate standards of conduct and other matters relating to the practice of law, are separate from the bodies that provide continuing education and other services to the members of the profession. In these countries, the regulators of the legal profession have a statutory obligation to regulate in accordance with specific objectives determined by the legislature, which puts them on a similar platform as the competition authority. Where the regulators do not have the power to regulate certain types of conduct or have chosen to forbear, market forces prevail and the competition law would apply to prevent any anti-competitive conduct in that regard by the regulatees. Accordingly, it follows that in such jurisdictions general regulators applying an umbrella or framework law (such as competition law) must defer to the sector specific regulators in determining the appropriate balance of potentially competing public interest objectives. Such a division of responsibilities and functions is one model for consideration in seeking better regulation of the legal profession.

10. In this context, BIAC suggests that competition regulators proceed with appropriate restraint in judging the regulation of the legal profession. We submit that the promotion of competition ought not to be the sole goal in the governance of the legal profession, and must be carefully balanced against the primary public interest objectives that regulators of the legal professions are charged with protecting.

11. The right balance between economic and non-economic factors must be found in order to properly regulate the legal profession. For example, ensuring the competency of lawyers necessitates a certain level of restriction on entry and mobility. Similarly, the requirements to ensure the avoidance of conflicts of interest or the maintenance of solicitor/client privilege, for instance, may require regulations that limit the forms of association between lawyers or between lawyers and other professionals.
12. In certain jurisdictions there is a perceived need to improve access to justice for consumers with the aim of enhancing the ability of consumers to utilise the laws introduced for their benefit including competition law. Whether such ideas as creating legal advice centres in supermarkets are viable and realistic or not may be open to question but in any event such considerations should not override and are not a substitute for the need to maintain the essential skills, integrity and competence of the legal profession which is a fundamental safeguard for all consumers, business and anyone else that may require the advice and assistance of the legal profession from time to time.