The Future of the Legal Profession in the EEC Context
Mr David Edward QC, President of the CCBE (the Consultative Committee of the Bars and Law Societies of the European Community) has recently delivered two important addresses to members of the English profession, first on the future of the legal profession and second on the role of the CCSE as spokesman for advocates, barristers and solicitors in the United Kingdom and their equivalents in the EEC Member States, not only on matters concerning professional practice but also on the wider question of harmonisation of laws. Mr Edward, a Scottish advocate, has been a member of the United Kingdom delegation of the CCBE since October 1972, having taken the place of Lord Mackenzie Stuart, one of the judges at the Court of Justice of the European Communities. He became president of the CCBE for a two-year term in January 1978, and at the unanimous request of the CCBE delegations earlier this year has agreed to serve for a further one-year term to the end of 1980. The following is an abridged version of his address delivered to members of the Commerce & Industry Group and the Solicitors European Group on 25 June. The talk to the Solicitors European Group and Bar European Group, which preceded it in March, will appear in the next issue of the Guardian Gazette.

Let me say at once, that when I use the expression 'salaried lawyer', I mean a lawyer who is remunerated by way of salary, rather than by way of fee, and whose function is wholly, or mainly, to provide legal services to his employer. Nothing I say is in the least intended, and it would be absurd if it were, to imply that the salaried lawyer, vis-à-vis the lawyer in private practice, is some lower form of life or that I regard the salaried lawyer in the United Kingdom as having anything other than a full, equal and honourable status in our profession.

Against that background, I turn to the title of the talk which is, 'The Future of the Legal Profession in the Community Context'. I propose to deal with each element and consider, first, the Community context, starting from the base document, the Treaty of Rome.

**Freedom of movement**

Title III of the Treaty deals with the freedom of movement of persons, services and capital. Within that title, freedom of movement of persons and services is dealt with in three chapters: ch 1—(arts 48 to 51) 'Workers', which means, in the terms of the Treaty, wage and salary earners; ch 2 (arts 52 to 58) 'Freedom of Establishment', which includes, as it is put, the right to take up and pursue activities as self-employed persons and the right to set up and manage undertakings in other Member States; and ch 3 (arts 59 to 66) 'Freedom to Provide Services', defined in art 60 as being services normally provided for remuneration in so far as they are not governed by the provisions relating to free movement of goods, capital and persons. Specifically, it is said that services include activities of 'the professions'. There is an important distinction here between the English text and the text in other languages, because the English text speaks about activities of 'the professions', but the French text talks of activities of 'les professions liberales', and all the other language texts talk about 'the free professions'.

As to exclusions, art 49 excludes from the scope of ch 1, workers employed in the public service, and art 55 (applied to services by art 66) excludes activities connected with the exercise of public authority.

The Treaty deals in various stages with the steps which are to be taken. Arts 53 and 62 prescribe that no Member State shall introduce any new restrictions, and arts 52 and 59 require the abolition of existing restrictions based on nationality. The matter is not put quite so emphatically and distinctly in the chapter relating to workers, but the position is the same. Arts 52 and 60, lay down that the freedom to establish and the freedom to provide services shall be on the same conditions as for nationals of the host country. This has been extended by the court, in Van Binsbergen and other cases, where the court has said that it is not simply discrimination on ground of nationality which is to be removed, but discrimination based on residence or anything which prevents freedom of movement between Member States.

Finally, there is art 57 (applied to services by art 66), which requires the Council of Ministers to pronounce directives of two types: (a), Directives for the mutual recognition of diplomas,
certificates and other evidence of formal qualifications. Again, note the difference of language between the English text and other texts. In the French text, "other evidence of formal qualifications" is "autre titre" (other titles) and that may be important in considering what is the effect of provisions of the first directive on the provision of lawyers' services, and (b) Directives for the co-ordination of the provisions laid down by law, regulation or administrative action are exempt from Capital Transfer Tax, Register Act 1975, bequeathable, is "autre titre" (other titles). The analysis, in other words, may be by function or what a person does; to independence of direction: or to financial or fiscal status, and, in this country, social considerations also come into the question of whether a particular form of activity is in the narrow sense to be described as 'professional'. The legal profession

What is "the legal profession?" Does it mean everyone who makes his living by practice of the law? Is the teacher of law at a university, who is not a member of one of the professional bodies but is from time to time asked to give legal advice, a member of the profession? Are court officials, who do not happen to be solicitors or barristers, members of the profession? Are bailiffs and such officials members of the profession? Does it depend on the context in which you use the words 'legal profession'? In certain contexts, the legal profession includes the judges, and it includes lawyers in the employment of government, national and local. But it may, in other contexts, be used in a much narrower sense to mean only lawyers engaged in private practice. On balance, it probably means all those who have the qualification of solicitor or barrister and who, in some fashion, earn their living in the practice of the law, no matter what

Looking at the matter another way, the emphasis is on (1) the relationship between the beneficiary of non-salaried activities, the purpose is to derive the greatest possible enjoyment from life in the homelike surroundings provided by Stretton. Provided without State aid. Please help us to continue
they actually do, but now let us examine some of the other peculiarities of the profession in this country.

It is a necessary qualification to be a professional judge that one is first a solicitor or barrister, and, having become a judge, one remains a solicitor or barrister, but by necessary definition, the activity of a judge is not the activity of a solicitor or a barrister. However, lay-magistrates are not 'judges' in our terms, and a person can be in practice as a solicitor or barrister in the narrow sense, but can also sit part-time on the bench.

His two activities are distinct. Finally, a judge in the lower court may be either a solicitor or a barrister and it does not matter which for the purpose of being a judge.

De facto I think that, in most cases, those who wish to employ lawyers to do legal work for them on a salaried basis in this country would opt for somebody who has the qualification of solicitor or barrister. It does not matter which in most cases, except where the employer wishes the salaried lawyer to undertake reserved activities. And that, in truth, means the activities reserved to solicitors, because the salaried barrister is specifically excluded from those very activities which are the reserved activities of the barrister which nobody else may perform.

Therefore, to say of somebody or to say of oneself, 'I am a solicitor' or 'I am a barrister' may tell you what I do, but it may simply tell you what my qualifications are. However, whether
one is a solicitor or barrister, whether one is a salaried lawyer in private practice, or a judge, one is a member of some kind of professional brotherhood, with a common outlook, a common sense of purpose and common loyalty.

One continental view of the profession, which is probably the most different from ours is the French, and because it is the one which is most familiar to British lawyers, it is thought to represent the continental outlook, but it is a good one because it really represents the diametrical opposite of ours.

In French the word 'profession' means profession in the wide English sense. Thus you have, in a recent opinion of the Advocate-General at the Court of Justice dealing with the profession of avocat, a reference to the professional qualification of a member of a profession. The narrower English meaning of 'profession' is implied by the words 'profession libre', but that also includes some references which are not always present in the English use of the word, 'profession' in the narrow sense. It implies, in particular, financial independence.

There is a tendency, in the French system, in the common designation of the profession that is by reference to what a person does in particular. There is also the element, particularly in the legal profession, of territoriality: that one is a member of a local Bar, the Bar of London, the Bar of Bristol, the Bar of Leeds, the Bar of Nottingham. Each which has its own system of rules and discipline.

So, 'I am an avocat' tells you much more specific things, than 'I am a solicitor' or 'I am a barrister'. It tells you that I have certain qualifications, that I am subject to the continuing rules and discipline of a local Bar, that I am entitled to do certain things which others may not do, in particular, that I may plead in certain courts. It also tells you, quite specifically, that I do not, and may not, do certain other things. I am not and may not be a notary. I am and may not be a judge. I am not a counsel receiver, nor a 'constable', that is, a salaried lawyer in full-time employment in industry or commerce, and I am not a lawyer in the public service, whether in national or local government. It also tells you that I am a member of a 'profession libre', that is to say, a member of a non-salaried profession, or profession exercising non-salaried activities. All these are implied when you use that phrase. In contradistinction to the situation in this country, the only shared qualification of people who perform legal work in France is their initial university degree, which is a compulsory qualification, unlike the position here. Beyond that, there is no shared membership of a common profession and no shared outlook or legal profession providers that any person may advise any other person about his rights in law, there exists another profession (recently regulated) of 'conseil juridique' or legal adviser. University professors also exercise an important role, in the giving of opinions, not only to clients, but also to lawyers and to the courts.

The sharp edges of definition in the French system and the lack of a common outlook, organisation or discipline, are characteristic of most French institutions. On the other hand, it is a system in which professional control can be tighter and which avoids certain tensions which are present in our system. In the French system, the salaried lawyer is that, even if art 57 is applied, even if the conditions for taking up and pursuing activities of a professional nature, are co-ordinated, the extent of these changes is limited to what is necessary to remove obstacles but no more. In my view, that route is the route to integration. It must be a route which proceeds on a strict analysis of the Treaty, which, in turn implies a strict analysis of the qualifications which one may do, of whether they are wage or salary earners, or self-employed, and all the other distinctions mentioned earlier, including the distinction between whether they are employed in the public service or not.

Further, it leads to innumerable arguments such as to whether a particular state of affairs is 'established' or 'non-establishment', or that is 'non-salaried employment'. All these distinctions come in, aggravated by the fact that six languages and nine different cultures are involved.

The most hopeful way, in my view, is to recognise that the Community is a new legal order, that the Community problems are world problems and world trends.

Specialisation is not a problem just for England, for activity as a judge, as a solicitor or lawyer in private practice, or that is one becomes, at State expense, a deputy judge. The qualification of 'assessor' is the basic qualification. Therefore, one can, in Germany, talk about 'the legal profession' in some sense, because it goes beyond the university degree. On the other hand, once again, there is no shared membership of a common professional body.

**Application of the Treaty of Rome**

As to the application of the EEC Treaty, initially, there were three possibilities. The first argument was that the Treaty does not apply to lawyers at all. That was an argument based on article 55 of the Treaty, but was answered in the negative in Reynier's case. The second approach is that the Treaty is simply concerned with removing obstacles, and leaves national structures and national rules in place, because it ignores the important point about art 57, which calls for directives co-ordinating the provisions for the taking up and pursuit of self-employed activities.

The third thesis which may, or may not, affect the qualified lawyer, is that, even if art 57 is applied, even if the conditions for taking up and pursuing activities of a professional nature, are co-ordinated, the extent of these changes is limited to what is necessary to remove obstacles but no more. In my view, that route is the route to integration. It must be a route which proceeds on a strict analysis of the Treaty, which, in turn implies a strict analysis of the qualifications which one may do, of whether they are wage or salary earners, or self-employed, and all the other distinctions mentioned earlier, including the distinction between whether they are employed in the public service or not.

Does it, for instance, make sense any longer to talk about the establishment of a common outlook, when there were distinct, distinguishing important, where a person has his office and is established, in a situation where he can be giving advice face to face in London in the morning and in Washington in the afternoon, where he can have an office in virtually any part of the world and communicate by telephone, telex or telecopier, with any other part of the world simply by dialling, and where, in truth, a person frankly does not need an office and establishment, to conduct a world-wide practice of law?

We also have to recognise that the new world of the Community is no longer a world of national, but of international, legal systems. The last quarter of the 20th century.

Computers are going to have an enormous effect by the end of the next ten years, if it be the case
that, by plugging into the computer data bank, the lawyer in Halifax is going to have access to precisely the same data as the lawyer with a large office in London and an enormous library. There are attacks on the concept of our profession, on professional standards and on the professional organisations.

We have to ask ourselves, therefore, whether our existing structures are adequate, both for the protection of our clients and for the protection of ourselves. The special merit of the Treaty, and of the fact that we are in the Community, is that, because the Treaty involves a co-ordination across six languages and nine systems, we cannot proceed on any other basis than by facing facts. We have to face what are the realities of what people do and how they actually behave and how they ought to behave, rather than cling to pre-conceived notions.

**Position of the salaried lawyer**

Furthermore, we have to do it in the context of mutual respect for each others' systems and mutual recognition of each others' fears. The fears of loss of status, of recognised points of reference, of standards. Specifically, as regards the position of the salaried lawyer, is it not time that one asked whether it is realistic simply to say that a salaried lawyer is just the same as a lawyer in private practice, except that he has just one client? That may be, and indeed is, true in many cases where the employer respects the independence of those whom he employs as lawyers. Is it true in all cases? Do salaried lawyers, and can salaried lawyers, always behave in the same way as lawyers in private practice? Think of the position of some lawyers in local government recently.

Should we not perhaps ask the question: 'Does the lawyer, the salaried lawyer, need a special set of rules: not to control his conduct but to guide it and most particularly to protect him from improper pressure?'

The bars and law societies of this country have an obligation to recognise and support the status of salaried lawyers. There is a corresponding obligation on salaried lawyers to observe the obligations which go with membership of the profession. No professional body can protect the status of salaried lawyers just by asserting that they are members of a particular professional body. It is essential that we assert the need for salaried lawyers to share in and contribute to the common standards and the common professional outlook of the profession. Therefore, I would say to the salaried lawyers here: your future in the Community is in your hands. There is no prospect of our being able, in the Community context, to assert that legal professional privilege attaches to the communications of the salaried lawyer who does not behave with the independence of mind and conduct which is the justification of legal professional privilege.

To all of you, I simply say this: we have the opportunity to create something new, and we have nothing to lose but our pre-conceived ideas.