A few months before his death, John Mitchell wrote the Foreword to the English-language edition of "The Community Legal Order" by Professor Jean-Victor Louis. This Foreword, though written to commend the work of another scholar and friend, deserves to be read as John's testament to those generations who will never know the freshness and excitement of the "Game Without Frontiers" in which he played when the Community was young. For him, the statement that the Treaty reaches past governments and speaks to individuals was more than an elegant maxim. It was a profession of faith in a new legal order in which law can once again be creative and provide a sound structural basis for rational and fair government. To one former pupil at least, together with many quiet acts of kindness, he passed on the gift of that faith which survives, as it survived for him, dented but not destroyed by experience.

If the Treaty speaks to individuals, it speaks to them chiefly as economic animals, buying and selling their goods and services with the widest scope for personal choice and freedom of action in an open market cleared of national barriers. For the legal profession which, as John sought to persuade us, has a special part to play in the creation of a new legal order, these aims of the Treaty involve an element of contradiction. This is so for two reasons.

First, the essence of the liberal professions is that their individual members are not free to act purely as economic animals. Apart from the restraints of law and ordinary morality, their activities are subject to professional codes of ethics and discipline whose very purpose and effect is to restrain the pursuit of their own or their clients' individual economic interest in order to protect a wider public interest.

Secondly, and above all in the case of lawyers, the structure of their training, organisation and professional existence is essentially national in character. Except for a tiny minority of lawyers, the subject matter of their practice is national law, enacted by national parliaments and administered by national courts and public authorities. 90 per cent. of the lawyers practising in Europe today are likely to spend the rest of their lives dealing with the
application of national law to their clients’ problems. 90 per cent.
of their clients will be local people with local problems. It is these
clients most of all who must be protected by professional rules and
professional discipline against incompetence, inefficiency and
dishonesty.

To be effective, professional rules and discipline must be suited
to the national and local conditions in which they are designed to
operate. Moreover, rules and discipline by themselves are not
enough. Professional loyalty (in the best sense of the word) is, in
the case of most lawyers, a better protection for the client than
books of rules and the sanctions of discipline tribunals. A sense of
loyalty depends on tradition, and traditions are usually local or, at
most, national. They grow; they are not created.

The aims and imperatives of the Treaty—freedom of move­
ment, freedom of choice and freedom of competition in a single
harmonised market—offer the legal profession the opportunity to
make a fresh start and develop in new ways. The danger is that
excessive concentration on economic freedom, and harmonisation
in a way that takes no account of local or national tradition, may
deprive the average client of more than it gives him.

The Court of Justice has recognised the potential conflict
between the economic aims of the Treaty and the protection of the
individual. Explaining the purpose of Directives on freedom of
establishment, the Court has said that Article 57 of the Treaty “is
directed towards reconciling freedom of establishment with the
application of national professional rules justified by the general
good.”1 Elsewhere, the Court has said that “rules justified by the
general good” are to be identified according to objective criteria.2
But it is one thing to say that conflicting interests must be
reconciled according to objective criteria; it is quite another thing
to find the right criteria and apply them. The Treaty does not tell
us how, or by whom, this is to be done. The Court may have found
the theoretical solution, but it has left the profession with the
practical problem.

Nevertheless, as Monnet repeatedly said, it is problems and the
collective need to solve them that produce results. The influence of
the Community on the legal profession has been very small if it is
measured in terms of a single Directive “to facilitate the effective
exercise of freedom to provide services by lawyers.”3 The true
measure of the Community’s influence on the legal profession lies
in what it has forced the profession to do for itself.

The first step was the creation, as a focus of co-operation and (in
the best Monnet traditions) common action, of La Commission
At a very early stage, the leaders of the profession in continental Europe realised that the Treaty would affect the private practitioner in a way that conventional international treaties do not. Perhaps anticipating Van Gend en Loos, they foresaw that Community law would have a direct effect on the private problems of the private client. What is more, they foresaw that the development of the Community and of Community law would affect the whole of Europe, not just the original Six Member States.

It is appropriate that the prime mover in meeting the challenge of the Community was a Swiss lawyer—Hans Peter Schmidt, then as now a leading member of the UIA (Union Internationale des Avocats). In the course of a meeting of the UIA in Switzerland, the delegates went for a sail on Lake Constance and Schmidt suggested that the time had come to set up a committee to study problems of common interest arising from the Treaty. This led to the creation, as a sub-committee of the UIA, of the chrysalis from which the CCBE later emerged.

The CCBE is now an independent body recognised by the Community institutions as the representative organ of the Bars and Law Societies of the Community and, through them, of the individual members of the legal profession. But the fact that it grew as a child of the UIA has had important consequences for its later development.

For one thing, the CCBE was never a purely technical committee dealing with the minutiae of Community law. From the first, it attracted the energy and enthusiasm of leaders of the profession who were already committed to a more creative vision of its role and its future. The speeches of its first President, Ercole Graziadei, emphasised the effect that modern technology and the needs of the modern commercial client would have on the practice and structure of the profession; and he urged the Bars to see the rapid growth of American law firms, not as a threat to be resisted by protectionism, but as an invigorating challenge to traditional European methods and values. His immediate successors, Achille de Gryse, Pieter de Brauw and Albert Brunois, had all played a part in the reform of the profession in their own countries and were able to bring that experience to bear on the new problems of the profession in the Community. Their belief in the Community as a solution to the enmities from which they themselves had suffered, and their kindness and tolerance towards their successors of a new and less experienced generation, was characteristic of a
generosity of spirit which other institutions—even the Bars themselves—do not always show.

Another consequence of the CCBE's origins in the UIA has been the presence at its meetings of observer delegations from non-Community countries. The Community has often been accused—and sometimes with justice—of having an introverted and selfish view of "Europe." The CCBE has never been allowed to make the mistake of thinking that Europe stops at the frontiers of the Six, the Nine or even the Ten. Within a body that includes delegates from Sweden and Norway, Denmark is not seen as an appendage of continental Europe, but as a valuable point of contact with the living Scandinavian tradition of pragmatic idealism on which the Community can draw as a source of freshness and vigour. Switzerland by herself is a microcosm of the Community and has already had to face, and find ways of solving, many of the same problems. Austria helps Germany to open a window on the culture and experience of Middle Europe. Spain and Portugal already help Italy and Greece to extend the horizon in the Mediterranean and Yugoslavia reminds us of the survival of the lost Europe of the East.

Thus, the institutional structure of the CCBE has emphasised the diversity of Europe and its underlying unity. The official institutions created by the Treaty tend to think only in terms of the Community as such and they are often impatient of national and regional differences. The CCBE, which came into existence because of the Treaty but was not created by it, can afford to be tolerant of those differences and to learn from them.

Apparently irreconcilable differences first emerged in discussion of the Directive on Lawyers' Services and were accentuated by the accession of Denmark, Ireland and, in particular, the United Kingdom. On one level the problems were partly linguistic and partly juridical. On another and deeper level, they raised the question whether, and if so in what sense, there is such a thing as the legal profession in Europe at all.

The Directive was drafted in French and dealt with the profession of avocat. It assumed that such a profession existed in all the Member States. To a certain extent, this was a reasonable assumption. The same professional title is used in five states of the original Six, in Scotland where the profession sprang from the same roots, and in Denmark. English and Irish barristers can be fitted into the same mould as the avocat in spite of the rule preventing direct access to the client, which seems in any event to have existed in pre-Revolutionary France. The odd men out.
apparently for different reasons, appeared to be the German *Rechtsanwalt* and the British and Irish solicitor.

Ostensibly, the main problem for Germany was Article 55 of the Treaty which excludes from application of the Chapters dealing with freedom of establishment and services “activities . . . connected, even occasionally, with the exercise of official authority.” The training, structure and functions of the profession of *Rechtsanwalt* within a system organised by the state were felt to bring that profession as a whole within the terms of Article 55.

The problem in this form was soon disposed of by the Court of Justice in the *Reyners* decision. In that decision, the Court rightly focussed attention on “activities” rather than “professions.” But this did not resolve the underlying question, “what are ‘the activities of the avocat’, and what are the essential characteristics of his profession?”

The traditional structure of the legal profession in Europe, inherited from the civil and canon law, rested on a distinction between the functions of the advocate and the procurator (attorney). The advocate was independent of his client and had no binding legal relationship with him. His function was to “assist” the client in civil or criminal proceedings, and he was responsible for the written and oral pleading. The procurator, on the other hand, had a binding legal relationship with the client. His function was to “represent” the client, primarily in civil proceedings, and his acts were in law the acts of the client. The advocates were organised in autonomous Bars or “Orders,” usually attached to a particular court, but they could plead anywhere. The procurators were usually organised in “Chambers” (*Kammern*); they were subject to a measure of state regulation, particularly in relation to their fees; and there was a territorial restriction (reflecting the need for certainty of communication) on the area within which they could practise.

This division of function, and therefore of profession, existed at one time or another in all the original Six, in Scotland and in Denmark. In England and Ireland, it underlies the distinction between barrister and solicitor.

In the continental Member States, the two professions have become fused in a variety of ways. In Germany, the profession of *Advokat* was suppressed in the nineteenth century, leaving a single profession of *Anwalt* (usually translated “attorney”). In Belgium, the profession of *avoué* (procurator) was suppressed in the judicial reforms of 1967, leaving a single profession of *avocat*/*advocaat*. In France, both professions were abolished in 1972 and “the new profession of *avocat*” took their place, although the *avoué près la
Cour d'Appel survives. In Italy, Luxembourg and the Netherlands, the professions were combined without abolishing either of them, although the emphasis in each country is different. In Italy, the lawyer becomes a procuratore first and may later become an avvocato. In Luxembourg, he becomes an avocat first and becomes avocat-avoué on completion of his stage. In the Netherlands, he becomes advocaat en procureur at the same time. The Danish advokat combines both functions under the same title.

But traces of the old distinction remain, particularly in Germany. The territorial and hierarchical restrictions on the activity of the Rechtsanwalt, the title and structure of the Rechtsanwaltskammern and the detailed regulation of professional fees all reflect the origins of the German profession as a profession of procurators who are now also advocates. This is why the parallel between the Rechtsanwalt and the avocat appears to break down in unexpected ways when attempts are made to harmonise points of detail.

In Britain and Ireland, the importance of the old distinction between the professions now lies in defining what a barrister (or Scottish advocate) does not do, rather than in defining what a barrister or a solicitor does. This is particularly true in the Republic of Ireland where solicitors now have right of audience in all courts.

Two features of the profession in Britain and Ireland have proved to be of more fundamental significance and have given rise to much misunderstanding. One is that “the legal profession” is assumed to include all those who (i) are barristers or solicitors, and (ii) earn their living in the practice of the law. The other is that the British and Irish solicitor undertakes, and is expected by the client to undertake, a range of activities which the avocat does not undertake and, in some cases, is expressly forbidden to undertake.

In Britain and Ireland, judges are chosen from barristers and solicitors. They remain barristers or solicitors after their appointment and, both in spirit and in fact, they remain members of “the legal profession.” So, equally, do lawyers in the service of national and local government and the salaried legal advisers of industrial and commercial undertakings. Admission to the profession of barrister or solicitor, rather than a university law degree, is the basic and continuing qualification of the practising lawyer, whatever his field of practice. To say of someone “He is a barrister” or “He is a solicitor” does not necessarily tell you what are his activities or whether he is self-employed or salaried.

By contrast, to say of a French lawyer “he is an avocat” defines the scope of his activities within fairly precise limits. It tells you
that he is self-employed and not salaried: he cannot therefore be a lawyer in government service, or a salaried legal adviser in industry or commerce. He is not a magistrat and he is not a notaire (a profession created, or recreated, by Napoleon). He is essentially an independent practitioner in private practice.

It follows that, for purposes of definition, the phrase "les activités de l’avocat" is capable of being used with a reasonable degree of precision. The equivalent English phrase "the activities of the lawyer/barrister/solicitor" is not. The Lawyers’ Services Directive (77/249/EEC), which assumes that the phrases have the same meaning and are capable of being used with the same degree of precision, is a conceptual dog’s breakfast9 since it is based on the false premise that equivalence of title implies equivalence of status, function and activity.

The British and Irish solicitor is not an unregenerate and unfused avoué who undertakes the forbidden activities of the agent d’affaires, although he may appear to be so to French eyes. He is an avocat when he pleads in the courts where he has right of audience. In matters of procedure, particularly when the client is "assisted" by a barrister, he is an avoué. In relation to conveyancing, contracts, company formation, wills and probate, he performs many of the functions of the notaire. He is also, unlike the avoué, entitled to act as the attorney or agent of his client in the whole field of commercial and business matters as well as in litigation.

For many centuries until other professions (such as accountants) appeared on the scene, the tradition in northern Europe was that the local lawyer (the solicitor) performed all the functions for which the local community required a literate “man of business.” This tradition is reflected in the wide range of activity of the Scandinavian advokat and spills over into northern Germany. For the same sociological and geographical reasons, it is found in the mountain cantons of Switzerland, and it was taken by the early colonists to America and other parts of the British Empire.

The range of the solicitor’s activity and his involvement in commercial activity are not aberrant peculiarities of the profession in two Member States. They are as valid in terms of tradition as the more severely limited range of activity of the professions inherited from the civil and canon law. The problem lies in finding a basis for harmonising the structure and rules of professions which spring from different traditions and have a different view of their nature and function.

At present and for the immediate future, the northern tradition is better adapted to meet the demands of the modern commercial
client, the economic pressures that go with them, and a general shift of emphasis in the activities of the profession.

The growth of the giant American law firm with branch offices in Europe was, as Graziadei saw, the necessary response of the American profession to the demands of the giant corporation with a turnover exceeding the GDP of the smaller Community Member States. The multinational corporation needs more than the services of an individual lawyer, however talented and industrious. It needs a team of lawyers with a close understanding of the problems and methods of modern commercial life, backed by the resources of capital and revenue which only a large partnership can hope to offer. Where the Americans led, the English followed and later the Dutch; and the same trend is apparent throughout western Europe, whether or not it is overtly recognised or welcomed.

In the traditional fields of activity, civil litigation is becoming, or has already become, too cumbersome and expensive as a method of resolving disputes. Arbitration has eaten into the work of the courts. Taxation has deprived the private individual of the means to finance, and the subject matter of, litigation about property rights. Divorce is becoming a paper transaction, and informal tribunals are being created to resolve family problems and disputes between employer and employed. Consequently, the traditional activity of the avocat plaidant has been curtailed, while that of the avocat consultant has enlarged. This is true at every level of society as the demand for neighbourhood legal advice centres shows.

The growth of the power of the state (including that of the Community institutions) has created a mass of "regulatory law," largely devoid of principle and frequently unintelligible, but reinforced by quasi-penal sanctions. The client more than ever needs the lawyer as a guide through the wilderness of modern government and the lawyer can no longer rely on a grasp of principles learnt at university. He needs the resources of up-to-date specialisation, documentation and research which the larger office is particularly suited to provide.

But the question now is whether, and how far, this trend will continue and whether the traditions of the continental profession may not have something to contribute in return.

The speed of modern communication—by telephone, telex, teletypewriter and linked word-processors—make it unnecessary for every individual in a team to work in the same office or even in the same continent. High-speed data retrieval with full text storage diminishes the need for physical access to a library or filing system. If present trends continue, the cost of using the resources of
computer technology will decrease almost in proportion to the speed of advance. It has been predicted that, by the end of the century, there will only be six major law firms in the United States—partly because of amalgamation, but also because the large firm will no longer be the most efficient vehicle for delivering the service the client requires.

What the client will continue to need and will increasingly demand is the personal skill of the individual lawyer whom he knows and trusts. An Italian lawyer remarked that the practice of law is 10 per cent. knowledge and 90 per cent. "nose." Whatever other skills the computer may master, it is unlikely to develop the flair of the human individual for scenting out the one essential fact in a mountain of irrelevancies or the route by which an uncharted course can lead to a predictable end.

In the future, many of the functions now performed by trained lawyers will be performed by machines or by relatively untrained staff capable of operating them. The skilled lawyer, if he is wise, will be prepared to let them do that work and concentrate on the work they cannot do.

Thus, the very qualities of personal independence which the traditions of the continental profession are designed to safeguard and promote may become the essential features of the profession of the future.

The merit of the CCBE as a forum for discussion is that the collective experience and foresight of those who appear to belong to irreconcilable traditions is brought together in a more practical context than that of the conventional international congress. The members of the CCBE have worked together on many subjects of common interest over a long period and have learned to trust each other. The suspicions and protectionist instincts generated by the unknown and unfamiliar become less important than the joint search for an acceptable common solution.

This is, of course, the pure gospel of Monnet. But there is a difference. Monnet's doctrine required the adoption, with the minimum of delay, of common rules and common institutions, if necessary by the obliteration of what existed before. In purely economic and commercial terms, that may be right. But in the fields of activity where tradition contributes to vitality, the ruthless destruction of tradition can be counter-productive. It is more likely to generate resentment and resistance than progress.

The experience of the CCBE has been that a more fruitful source of inspiration for the future is the search for common principles. Initially, common principles are difficult to find and it is sometimes necessary to scrape away the encrusted debris
of centuries of development in order to find them. But if, as the Community ideal assumes, the peoples of Europe ultimately share the same instincts and the same values, there is no logical reason why they should not be able to agree on a common body of principles, of which their national rules and institutions are merely the expression.

This is surely what the makers of the Treaty had in mind when they distinguished between the form and effect of a Regulation and a Directive. A Directive, although binding as to the result to be achieved, leaves the choice of form and methods to the Member States. The current obsession with points of detail in Directives is counter-productive in terms of the speed of legislation and of its acceptability.

In the CCBE, the search for a shared basis of principle began with the doctrine of "the professional secret" which is common to the law of the original Six and also, with variants, to Denmark. In these states it is a criminal offence for a professional man to disclose confidential information entrusted to him in his professional capacity.

There is, on the face of it, no immediate parallel in the common law of Britain and Ireland. The doctrine of "legal professional privilege" which protects communications between lawyer and client is, at least according to the textbooks, an aspect of the law of evidence. There is no penal sanction and the doctrine does not apply at all to other professions.

Nevertheless, there is, underneath, a shared basis of principle in relation to the reason for the rule that communications between lawyer and client are protected from disclosure. The reason is that the lawyer cannot perform his function properly unless his client tells him all the relevant facts. There is a public interest in maintaining the confidential character of the relationship between lawyer and client which overrides any immediate, short-term interest.

Detailed comparison between the laws of nine Member States showed, once again, that the conformity to pattern of the Six on the one hand, and the common law countries on the other is more apparent than real. There are significant divergences, for example, between the law of Germany and the other five and, even where the words of the legislative texts are almost identical (in Belgium, France and Luxembourg), their application has been different. Similarly, there have been marked differences in the development of the law in England, Scotland and Ireland.

It remains to be seen what will be made of these differences by the Court of Justice in the A.M. & S. case, where the CCBE was
allowed to intervene on behalf of the Bars and Law Societies of the Community. It is to be hoped that the Court will be prepared to put some clothes on the increasingly skeletal devotion of the Community institutions to fundamental rights. But whatever the result, the process of search for common principles produced its own rewards for the CCBE in two respects. It drew attention to the hidden differences within two apparently monolithic and incompatible bodies of law and thereby reduced the friction which incompatibility tends to generate. And it demonstrated that each Member State has something to contribute, in terms of method or approach, to a common Community solution.

In the field of professional ethics, the CCBE again found a shared basis of common principle. Admittedly, the rules of the European Bars differ widely—very often because they reflect a different view of the nature of the profession. Nevertheless, their ultimate purpose is to create and foster a relationship of trust between lawyer and client, between the lawyer and his colleagues in the profession, and between the lawyer and the courts and public authorities with whom he has to deal on behalf of his client. This may, in a sense, seem fairly obvious. But it is not always easy to find the reason for rules which, in many cases, have existed for centuries and appear no longer to have any "objective justification."

The idea that trust lies at the root of professional rules is helpful as a criterion by which to judge whether a particular rule is purely protectionist or whether, perhaps, it could be restated in a form more suited to modern conditions without losing its essential character and purpose. This idea was developed in the CCBE's "Declaration of Perugia on the principles of professional conduct of the Bars and Law Societies of the European Community," and it is encouraging to find that this brief statement of principle has now been adopted as part of their professional code by many of the Bars in the Community.

No doubt, particularly in giving practical content to the right of establishment, it will be necessary to develop a more detailed code of common rules. But it is certain that, if the CCBE had attempted to produce such a thing without first considering the underlying principles, the code would not have seen the light of day for many years. In the meanwhile, there would have been nothing to demonstrate that the Bars of the Community have more in common to unite them than there are differences to divide them.

The problems of the legal profession in the Community are reflected in other parts of the world: the United States, India and
The profession there is genuinely interested in what Europe is doing. Precisely because the Community brings together so many differences of thought, tradition and method, forcing us to find a basis for common action, it can have influence on what happens elsewhere. The question is whether those of us to whom John Mitchell gave so much inspiration and encouragement are still prepared to make the effort.

Notes

4 The acronym CCBE was invented by Bâtonnier Louis Pettiti, now a judge of the European Court of Human Rights, and always a powerful advocate of inter-Bar co-operation and friendship in Europe. The official English title of the CCBE is “Consultative Committee of the Bars and Law Societies of the European Community.”
6 Assist = ad-sistere = to stand beside.
7 Represent = repraesentare = to stand in the place of.
8 See Brett, M.R., in R. v. Greenwich County Court Registrar (1885) 15 Q.B.D. 54, 58; compare, for Scotland, Lord President Inglis in Batchelor v. Pattison & Mackersy (1876) 3 R. 914, 918.
9 The present writer used this description in an early article on the Directive ((1977) 22 Journal of the Law Society of Scotland, 188) and does not recant.
10 Case 155/79 A.M. & S. Europe Ltd. v. Commission [1982] 2 C.M.L.R. 264. This article was written before the final decision of the case on May 18, 1982. The Court's judgment is encouraging in so far as it recognises the existence of a principle common to the Member States and holds that Regulation 17 must be construed in light of that principle. In other respects (its treatment of the salaried lawyer and of lawyers from third countries), the judgment gives cause for regret.