

**Competition in Professional Services:
New Light and New Challenges**

By

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Ladies and Gentlemen,

Thank you for the invitation to talk in this important conference. The audience here is mainly composed of lawyers, but I will take this opportunity to talk not only about lawyers, but about liberal professions in general. I know you are all keen on finding out about the results of the independent study on liberal professions that we commissioned. Let me tell you that it provides a fascinating picture of the situation in the different Member States and advocates that the public would win from more freedom being brought into the professions altogether. But more about that later.

1. Liberal professions in general

Liberal professions can be generally defined as occupations requiring special training in the liberal arts or sciences, for example lawyers, architects, auditors, doctors, and pharmacists. These are services that citizens regularly use, some more than others. And just as relevant, professional services are also an important input in all areas of business.

One thing all these professions traditionally have in common is a high level of regulation. I would like to stress here the word 'traditionally': your Federal Organisation exists since 1959 and local bar associations since the late 19th century. It is interesting to note that the most regulated professions are also the oldest ones, such as pharmacists and notaries: these are professions that were established at the time of the guilds! By contrast, newer professions, which could, in theory, aspire to a special status, are

not regulated at all. I am thinking for example of computer scientists: the ‘engineers’ of our paperless society, who hold the keys to the systems of many businesses. They are not organised as a profession in most Member States – and I am not suggesting they should be!

Historically liberal professions were either regulated by national governments or self-regulated through professional bodies organised at national or even local level. This is still the case now. This regulation can affect, *inter alia*, the numbers of entrants into the profession; the prices professionals may charge and the permitted charging arrangements; the organisational structure of professional services undertakings; the exclusive rights they enjoy; and their ability to advertise.

The rationale for regulating these professions is varied. One argument is based on what we economists call ‘asymmetric information’. Since the essence of professional services is the high level of knowledge of the professional, the level of information available to the provider and to the consumer of services is different. In other words the professional knows and the consumer does not or very little, and may not be able to gauge the quality of the service paid for. Hence, the need to somehow protect the consumer and ensure that the services are indeed of adequate quality.

By ‘adequate quality’ I don’t necessarily mean top quality. It is enough that the service corresponds to what the consumer wants. My point is that we should aim at an outcome which brings more

choice for both the consumer and the provider. Not all consumers want, or need, top quality and top prices for all kinds of services all of the time; not all professionals can or want to provide top quality expensive services all of the time.

Another line of argument in favour of regulating professions takes into account externalities. By externalities we mean that the service in question affects someone who is not involved in the buying or selling of the service itself. The price paid in the transaction therefore does not reflect all of its advantages or disadvantages. This market problem could be solved by regulation. Of course, it is not true that because markets are not perfect, regulation will necessarily make it work better. In all markets, whenever one encounters a market problem, such as externalities, the best response is to correct the market imperfection and then allow the market to work. The wrong response is to assume that the market cannot work and regulate it in such a way that there is no market at all.

In the last decade, voices have begun to say that the level of regulation for the professionals was out of step with economic developments and technical progress. In some Member States State regulators as well as self-regulators have undertaken a process of easing some of the restrictions. This is the case of Spain, which has undertaken a legislative reform of the law governing professional bodies. There has also been a comprehensive review of the self-regulatory rules in Denmark and the UK. But this is far from being the case of a majority of countries or of all professions.

2. The context

Let me recall that the Lisbon European Council of EU leaders in March 2000 highlighted the role of services in the economy and their potential for growth and employment. The Lisbon European Council also proclaimed the aim of making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. Well, let me say that professional services can play an important role in this process. In Germany, a report on liberal professions by the Ministry for Economics of June 2002 puts the number of liberal professionals at 3 million contributing 8% to German GNP.

A key part of the Lisbon programme is also the “Internal Market Strategy for Services” which aims to create a level playing field for all undertakings. I remind you that services represent 70% of EU GDP but only 20% in terms of cross border trade. In July 2002 the Commission issued a report which attempted to draw up a comprehensive inventory of the internal market barriers that continue to inhibit cross-border services. The impact of the barriers identified in the report is on all sectors of the economy as barriers to one service will trigger knock-on effects for other services and also for the wider industrial economy, given the integration of services into manufacturing. The Commission is currently considering how best to address these barriers.

I also recall briefly that the Commission has proposed a new Directive on recognition of professional qualifications for regulated professions in March 2002.

3. Competition policy and liberal professions

Obviously the Commission's policy of establishing a level playing field in the internal market applies also to liberal professions. The Commission's established policy is to fully apply competition rules to these services, whilst recognising their specificities and the role they may play in the protection of public interest. The overall goal must be to improve welfare for all users of professional services: better choice and better value for money.

Of course, national regulators should act in defence of the public interest in their territory. However, they should refrain from establishing undue and disproportionate restrictions of competition. Regulators should also avoid unjustified restrictions to the freedom of establishment and to the freedom to provide services for practitioners from other Member States.

4. A clearer legal framework

The European Commission took its first formal decision concerning competition in professional services in 1993 on customs' agents' tariffs in Italy, and the European Court of Justice issued its first judgment in 1998 confirming the Commission approach. The Court confirmed that the providers of professional services are undertakings within the meaning of the competition rules. It was

also confirmed that professional bodies are associations of undertakings when taking decisions in the economic sphere.

As you are well aware, two judgments of February 2002 of the European Court of Justice, in the *Arduino* and *Wouters* cases, have further clarified the legal framework. I will not dwell very long on these two recent judgments, as they are the main subject for all the other speakers today.

The *Arduino* judgment clarifies that Member States have the right to regulate a profession. This is no surprise as in the absence of harmonisation at the European level, Member States have the primary responsibility for defining the framework in which professions operate. It went on to say that Member States can associate professional bodies in this task as long as they retain the decision-making powers and establish sufficient control mechanisms. They must not abdicate their powers to professional bodies without clear instruction and control. In practice, this judgment confirmed what we already knew.

Allow me a few more words on the *Wouters* judgment which stated that some types of rules and regulations can be considered as inherent to a particular profession and, therefore, cannot in principle be caught by the prohibition of anti-competitive agreements, decisions and practices. Without such genuine 'deontological' rules the profession would be deprived of its essential character and could not function as such. Of course, it is not our intention to challenge these rules.

However other regulatory rules, ones that are not “inherent” to the profession, could be subject to the application of the competition rules. Any rule that is restrictive of competition and is not reasonably necessary to guarantee the proper practice of the profession could be analysed by the Commission or the Courts. How do you decide which rules should be covered by the competition rules and which shouldn't? Well I'm afraid this has to be decided on a case by case basis or more to the point, rule by rule, profession by profession.

5. A clearer economic picture

Now let me come back to the study. For the Commission to have a more pro-active approach in this field, it has to base itself on facts. For this reason we commissioned a study to compare the regulations affecting lawyers, notaries, accountants, architects, engineers and pharmacists in all Member States. This work was carried out by the Institute for Advanced Studies in Vienna, and was completed just this month. Before I share with you some of its results let me publicly thank all the professional bodies, which helped the Institute gathering the information.

The first clear result is that the extent of regulation varies greatly across the EU, suggesting that the public interest objectives which are considered to require specific laws in some Member States are seen very differently elsewhere.

The study develops a complex system of “regulation indices” to compare the situation in the Member States for such things as

regulation of market entry and regulation of conduct, as well as an overall index. The overall index ranges from 0 in case of no regulation (for architects and engineers in five countries), to 12 in case of maximum regulation such as for pharmacists in Sweden where all pharmacies are owned by one state owned company.

In the legal profession the index ranges from 9.5 in Greece to 0.3 in Finland, with many countries clustering around 6, including Germany. By contrast, 6 is the maximum index for architects (in Italy) and the average across the EU is less than 3.

Countries with most regulations for all professions are Austria, Italy, Luxembourg, Germany, and possibly Greece. Belgium, France, Portugal and Spain appear to be in the medium field, whereas the UK, Sweden, Denmark, the Netherlands, Ireland and Finland show rather liberal regulatory regimes (with the exception of pharmacists in the Nordic countries).

Now why would German consumers be less able to take care of their own interests than the Danish? The study argues that since no major market failure has been reported in any Member State, there is no reason to expect that lower regulation strategies which work in one Member State could not be made to work in another.

Another observation is that in countries with low degrees of regulation, there are relatively lower revenues per professional, but a proportionally higher number of practising professionals generating a relatively higher overall turnover. This would suggest that low regulation is not a hindrance but rather a spur to overall wealth creation.

Going a bit further, a high level of regulation would discourage efficiencies and lower wealth. As an extreme example I would mention Italy or Spain, where there appears to be an enormous number of firms with very few employees; surely efficiencies could be gained if some concentration was allowed – you can see that in some instances even the Competition Commissioner is in favour of concentration!

6. A Stocktaking Exercise

I will stop my comments here. The report has only recently been finalised and will be published on the Competition Directorate General's Internet pages for your comments which will be welcome.

In the light of the outlined market trends, current regulatory trends and case-law developments, I believe the time is right to take stock. My services and myself are increasingly asked for our views on various types of rules and regulations in the sector of professional services. It is the Commission's role as the guardian of the Treaty continuously to monitor markets, to ensure that competition in the internal market is not distorted and to propose action where necessary and justified. In this my colleague in charge of the Internal Market, Mr. Bolkenstein and myself, are working together in parallel.

Our aim will be to better understand and evaluate the present market situation. To evaluate to what degree the consumer is satisfied, whether there are artificial barriers to the optimal use of

resources as well as whether improvements to the existing rules and regulations are possible. To do this, further informed input is needed in the first place from those directly concerned, such as users of services, service providers and those responsible for the regulations.

The present level of rules and regulation of liberal professions owe some debt to historical convention. How many are still needed in the modern world? Do they hinder or favour the development of the sector? Let me be provocative: Do they protect the consumers or the professionals?

I propose to assess whether existing rules and regulations, which, remember, were devised and enacted in a very different economic context to that which exists today, continue to serve the legitimate purposes of the protection of the public interest. I would also like to assess whether they are the most efficient mechanisms available in the current market situation.

It is clear that across the EU there are different regulatory mixes. As the study shows, different regulatory choices produce different outcomes in the market and it is possible that some regulatory mixes have more beneficial market outcomes than others. It should be difficult to argue against those that have the least distorting effect on the workings of the market, while delivering the same, or even higher, turnover.

What is the role of public regulators in this exercise?

Against this background, I believe that regulators could seize the opportunity to re-evaluate and possibly reform a regime put in place and/or supervised by them. I hope this exercise can serve as a stimulus for rethinking public regulation. In this exercise, the results of the study can be useful to learn how things are done in other countries. I encourage you to be imaginative and to keep your mind open to new solutions. Germany, as one of the few countries which still sets fixed fees for many professions, could set the example, and lead in this re-assessment of existing regulation. The Commission certainly shares the goal outlined in the report of your Ministry: to ensure liberal professions the necessary freedom so that they can be creative, efficient and employment oriented.

What is the role of the professional bodies in this exercise?

Professional bodies play an essential role in this exercise, given that they have regulatory powers in their own right. I look forward to receiving your comments. This can be a mutual exchange of information, we can learn from you and you can learn from how things are done in other countries or other professions.

It should not be forgotten that you, as professionals, would also gain from healthy competition. You may be better able to adapt your services and innovate to meet the evolving needs of the users. You may more easily be at the cutting edge in the development of services worldwide. Having a long and honourable historic tradition should not be a barrier to modernising, offering new services, and to become more competitive. Lower regulation

will expand the market: acting as forces for change is in your own interest.

7. Conclusion

In conclusion, I am inviting you to think about the amount of regulation that is necessary. I have asked my services to prepare a short paper inviting comments from the liberal professions industry and from all those with an interest. This will be on the Internet site of Directorate General for Competition next week. I hope that we will receive many comments from all those concerned: users of services, professionals, professional bodies and regulatory bodies.

After establishing the relevant facts the Commission services will evaluate them. I hope that by the end of the year we will be in a position to identify the rules and regulations, if any, that could be seen as disproportionate and not objectively justified. We will then see whether to recommend any action.

I trust that this collective exercise can lead us to reassess the regulatory needs of the professions and the needs of the markets today. This is an important component in making Europe the most dynamic economy by 2010.

Thank you for your attention