

LIBERAL PROFESSIONS PRESENTATION

INTERNATIONAL LEAGUE FOR

COMPETITION LAW

- BARCELONA, 3 OCTOBER 2003 -

Do professional organizations in charge of the drafting or controlling the rules concerning the practice of liberal professions have to comply with anti-trust regulations?

If so, are they exempted or should they be exempted?

Slide 1: The Commission's approach to the Professions

I'm delighted to have the opportunity to participate in this plenary session and to comment on the question put in the Report prepared by Luis Ortiz Blanco and Alberto Escudero Puente. Let me start by giving you an overview of how the Commission is looking at this sector at the moment.

Bullet A

Some Member States, and the Commission, are querying whether over-regulation may be stifling healthy competition in the European professions. Speaking in Berlin earlier this year, Commissioner Monti highlighted the importance of professional services within the European economy, and the need to unlock their potential. The overall context is that in Lisbon, the European Council set itself the ambitious goal of becoming the most competitive and dynamic knowledge-based economy in the world by 2010.

Bullet B

The Commission is pursuing a number of initiatives in this direction. In Internal Market terms we are working on a proposal for a Directive on services, and already in negotiation is the draft Directive on the recognition of professional qualifications.

Bullet C

Mr Monti has asked his services to obtain a better overall understanding of the regulation of liberal professions, focusing specifically on rules and regulations restrictive of competition. Across the EU, competition in the professions continues to be limited by regulations such as fee scales, restrictions on advertising and prohibitions of inter-professional co-operation. Our stocktaking exercise has two parts.

First, it is important to try to assess what economic effects regulations to have on output and efficiency, price levels and employment. Second, we need also to understand the extent to which rules and regulations restrictive of competition are necessary. In other words, are they are needed to ensure the “proper functioning” of the profession and the protection of consumers? In more legal terms – what we could describe as the “Wouters test” - are the rules proportionate and objectively justified, in the light of a real and defined public interest aim?

Slide 2: The Independent Study on the Professions (IHS Study)

The Commission made available, earlier this year, an independent study on the regulation of the professions in the EU. The study provides an interesting overview of the economic impact of professional regulation in the Member States.

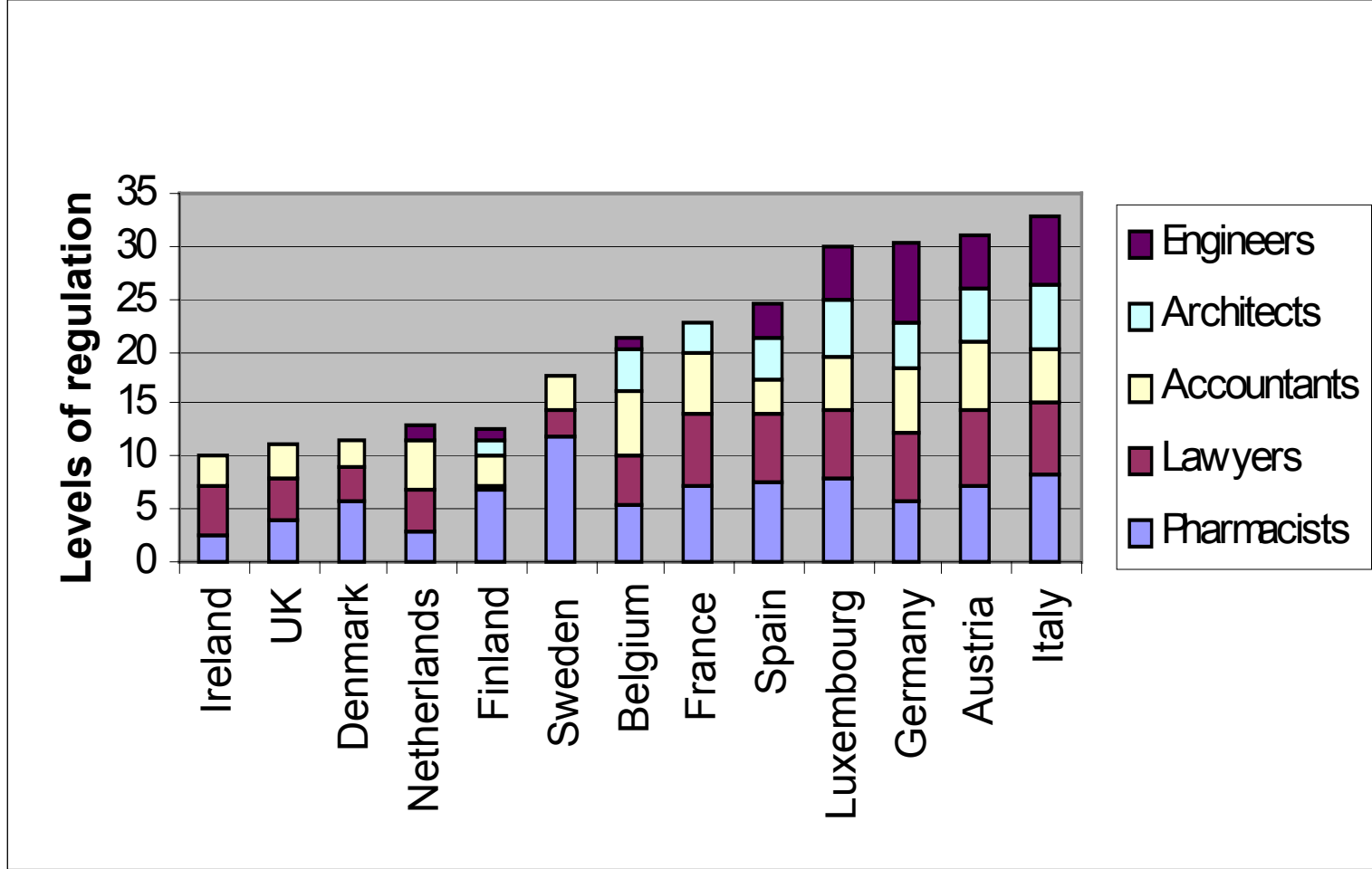
First, as you can see, the study highlights the significant disparities in levels of regulation across the EU, with countries such as Austria, Germany, Italy, and Luxembourg, maintaining very high levels of regulation. Member States such as Denmark, Ireland, the Netherlands, and the UK have, relatively, more liberal regimes.

Even in the relatively less regulated countries, the professions continue to maintain a significant number of restrictive rules. And the least regulated Member States, such as Ireland and the UK, are arguably the most sceptical of the restrictions that remain in their countries.

The study also tries to “rank” groups of professions: Within the professions in the EU taken as a whole, pharmacy appears to be the most regulated sector; the legal and accountancy professions seem to be highly regulated in most countries; while engineers and architects generally have relatively more liberal regimes.

The study points out that there have not been any serious cases of market breakdown in the less regulated countries. The professions in these countries function effectively, making it harder to argue that a regulatory framework more restrictive of competition is genuinely essential for the protection of consumers. The study suggests that there is no reason to believe that the lighter regulatory strategies that work in one Member State could not be made to work in another.

It should be note that the study has not looked at all professions, it doesn't for example analyse rules governing the medical professsions.



Slide 3: Links between regulation and economic efficiency

Secondly the study establishes some links between levels of regulation and economic efficiency.

Bullet A

In the most regulated countries, there appears to be a proportionally smaller number of professionals who receive relatively higher turnover per professional.

Bullet B

In the countries with lower degrees of regulation, there are relatively lower revenues per professional, but a proportionally higher number of practising professionals generating a higher level of overall turnover.

So if high regulation appears to be connected with high profits for a smaller number of professionals, low regulation seems to be connected with higher employment in the professions, and greater overall wealth creation.

Slide 4: The Comments to the IHS Study on the Professions and next steps

The Commission has launched its own exercise aimed at obtaining wider input. We have asked consumers and professional groups to respond to the study's findings and to comment more generally on the effect of regulation on competition and quality of service.

Bullet A

We received around 250 responses, and we are currently in the process of evaluating them. The extent of regulation shown by the study is confirmed.

Bullet B

The Commission is organising a conference on 28 October on "Regulation and professional services in the European Union" where consumers and practitioners will discuss the report's findings and the justification for rules. We will present a summary of the responses submitted so far, and this will also be put on DG Competition's website.

Bullet C

On the basis of the input, we will then especially focus on identifying those restrictions that may not be justified or objectively necessary in the regulation of the liberal professions. We expect that Commissioner Monti will be in a position to close the stocktaking exercise towards the end of this year, and to announce his preliminary conclusions.

Slides 5 to 7: Comment on the LIDC Report/ Applicability of competition law to professional regulation

Let us now turn to the more legal aspects and address the questions put forward by the LIDC Report. The distinction it draws between self-regulation delegated by the state authorities, and autonomous self-regulation, is important.

Slide 5: Professional regulation and competition law (1)

Bullet A

- The Commission is well aware that certain professional rules are necessary for a proper practice. Purely deontological rules do not infringe Community competition rules. Whether a rule is, however, purely deontological in nature has to be assessed on a case to case basis. The professions evolve - and the world evolves - and this justifies revisiting the relevant rules from time to time.

Bullet B

- In principle, self-regulation of professional associations comes within the scope of EC competition rules. There is no general exemption for the sector of professional services.

Bullet C

- As we know, many Member States have adopted laws that regulate the liberal professions. The judgement of the European Court in *Arduino* confirms that, in the absence of harmonising measures on a European level,

Member States are entitled to determine the framework in which the professions operate.

In terms of EC competition law articles 81 and 82 cannot be applied directly to state measures. However state measures may not obstruct the “effet utile” (and enforcement) of these rules.

Slide 6: Professional regulation and competition law (2)

Bullet A

- The European Court has developed guidance as to when a Member State can be found to violate its obligations. So, a Member State would violate Article 10 EC should not require or favour the adoption of cartel agreements contrary to article 81 EC, or reinforce their effects. A Member State equally would infringe articles 10 and 81 EC if it were “to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere”.
- The *Arduino* judgement sets out that a Member State must have means to control the exercise of the delegated powers and must have the last word in the setting of professional rules. We think, for instance, that any ‘rubberstamp approvals’ by the State should be questioned.

The same goes for proposals of professional bodies the content of which the authorities of a Member State cannot influence but only reject or endorse. Any initiatives by professional bodies to set regulations with binding or coordinating effects which are not envisaged or approved by the law or the competent State authorities are open to question.

Slide 7: Professional regulation and competition law (3)

So we can answer the two questions addressed by the LIDC Report:

Bullet A

- 1) Yes, professional regulations and the relevant bodies adopting them have to comply with the requirements of EC competition law.

Bullet B

- 2) No, professional regulations are not generally exempted from the field of application of EC competition law. Therefore, they should not be excluded from the application of national competition law either since any such exemption would be without effect where EC competition law applies.

Slide 8: Perspectives for national regulators and National Competition Authorities

Let us finish with some perspectives.

Member States have the responsibility to determine a reasonable framework in which the professions operate. In the context of Lisbon, this implies that Member States therefore should refrain from setting or maintaining unjustified restrictions, and should assess the scope for modernising their regulations to achieve agreed objectives in the most efficient way. This would be a political imperative, going beyond legal obligation.

Bullet A

- The Commission notes liberalisation tendencies in the Member States. The guiding principle would be that any professional regulations that should be retained should be proportionate and not go beyond what is necessary.

Bullet B

- With the entry into force of the new anti-trust Regulation no. 1/2003 in May 2004, all national competition authorities will be enforcing articles 81 and 82 in this sector as in all others. This will lead to a common application of the anti-trust rules across the EU. The Commission and the national competition authorities will further develop their close collaboration, and this should lead to a coherent approach and coherent application of law in this sector, and indeed, in general.