



Better Regulation of Professional Services

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Introduction

- **The nature of the project**
(COM Reports 2004 + 2005)
 - Gradual and incremental.
 - Dialogue, screening, advocacy, enforcement.
- **The role of the Commission**
 - In the first place: Setting the framework.
- **The role of the national level**
 - Exploring and implementing concrete change.
- **False dichotomies**
 - Economic vs legal ?
 - Economic analysis vs non-commercial features ?



Context

- **Lisbon agenda: growth and employment.**
- **Unlocking the potential of the services sector, including Professional Services.**
 - Necessary due to its economic and social importance.
 - Unduly restrictive regulation can hamper innovation, growth and employment.
- **Better regulation as part of Lisbon agenda:**
 - Efficient inputs for the economy.
 - Good price – quality relationship, more choice, innovative services for users.
 - Observance of all relevant public interests.



Objectives of reform

- **Key objective is better regulation**
not complete de-regulation:
 - Need for some regulation certainly accepted.
 - Need to find the adequate level of regulation.
- **Proportionality test = core methodology**
checking whether a regulation/rule:
 - o has a clearly defined public interest objective, and
 - o is objectively at all suitable to achieve this goal, and
 - o is the method least restrictive of open markets and competition to achieve this objective.



First track: Advocacy for voluntary change

- **NCAAs and EU Commission call upon**
 - national regulators (legislative/ administrative) and professional bodies (self-regulatory)
 - to review existing regulations by applying a **proportionality test** and remove or reshape those regulations that cannot be justified.
- **Achievements: Progress Report 9/2005**
 - Mixed picture of reform activity in the 25 MS.
 - Growing importance in re-invigorated Lisbon Agenda: National reform programmes.



Second track: Enforcement

- **EC competition rules with regard to Professional bodies (Art.81/82)**
 - National competition authorities
 - National courts (incl. references to ECJ, e.g. *Wouters*)
 - EU Commission
- **EC competition rules with regard to MS (Art.3(1)(g), 10, 81, or Art.86+82)**
 - National courts (incl. references to ECJ, e.g. *Arduino, Macrino*)
 - EU Commission
- **EC internal market rules with regard to Member States (Art.43, 49)**
 - National courts (incl. references to ECJ, e.g. *Cipolla*)
 - EU Commission

- **No bias against self-regulation and for State-regulation, or vice-versa.**
 - MS decide about extent of self-regulation.
 - Adequate supervision by MS.
 - Any restrictive regulation has to satisfy the proportionality test.
- **Professional bodies/chambers**
 - Important role for independence, compliance with core values, etc.
 - Avoid conflict of interests: e.g. separation of representative and regulatory functions.



Core values of profession

- **Three principal reasons for regulation**
 - Asymmetry of information.
 - Externalities = impact on third parties
 - Public goods = Value for society in general
- **Specific meaning of these reasons in each profession.**
 - Leads also to core values of the profession.
 - E.g. for lawyers: Independence, specific deontological rules (professional secrecy, avoiding conflicts of interest), contributing to access to justice and correct administration of justice .
- **Restrictions as such are not core values.**
- **In turn, core values can justify restrictions only to the extent the proportionality test is satisfied.**
- **ECJ *Wouters* endorses the proportionality test.**
 - Take account of national regulatory context.
 - But no leeway for not adopting the least restrictive rule.



Fixed prices

- **Severe restriction of**
 - competition (see AG in *Macrino* § 40).
 - freedom to provide services (AG in *Cipolla* §§ 65, 70)
- **Fixed minimum fees for legal services generally not justified by**
 - access to justice (AG in *Cipolla* § 80).
 - proper operation of legal profession (quality, deontology) (AG in *Cipolla* §§ 81-89), or
 - foreseeability of costs to be reimbursed (AG in *Cipolla* §§ 90-91).
- **Possible exception for legal aid cases.**
- **Less restrictive alternatives.**
- **Example of the majority of MS,**



Significance of ECJ rulings

- **C-35/99 *Arduino***
 - Fixed minimum and maximum fees for lawyers' in-court work in Italy.
 - No State liability under Art.3(1)(g), 10, 81 for delegation of State regulatory powers to Italian Bar Council.
- **C-202/04 *Macrino (pending)***
 - Facts dto, but for out-of-court legal services.
 - AG: pre-decided for the Italian system in *Arduino*.
- **C-94/04 *Cipolla (pending)***
 - Prohibition to derogate from the min. and max. fees.
 - AG: Infringement of freedom to provide services.