Comments and concluding remarks of Commissioner Monti at the Conference on Professional Regulation

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Ladies and Gentlemen,

I hear that the day has been most interesting. I am pleased to have arrived in time to listen to the last panel. In fact I just came back from Washington where I discussed the topic of the Regulation of Professional Services with my colleagues at the US antitrust agencies (the Antitrust Division of the Department of Justice and the Federal Trade Commission).

I wish to thank the speakers and each participant for their contribution to this conference and I welcome this opportunity to share with you my perspective on the regulation of professional services.

In a speech I gave in March, on competition and professional regulation, I put the emphasis on the Lisbon goal, agreed by the heads of EU States and governments in 2000, aiming at making Europe the most competitive and dynamic knowledge-based economy in the world. I hope you will agree that there is an obvious link between the improvement of the conditions of competition in professional services and the Lisbon agenda. Europe has to be at least as modern in this area as our main

competitions to attain the agreed Lisbon objective by 2010. This is a political goal and also a competition policy goal, and all EU countries share an interest in making use of the potential to generate more growth and employment in the economy by modernising the services sector where needed.

In this context I would also like to say a few words on the American state of play. The US markets have been freed of price regulations, including the abolition of minimum, maximum or suggested fee scales and also the markets involving law and real estate have been opened up to competition by qualified real estate and banking professionals. In the US they are still aiming at striking a careful balance between professional advertising and public protection and evaluating whether business structures should allow multi-disciplinary practices. I find this American overview helpful to point out that every profession in every country faces some regulation and that some restrictions are easier to remove, or to replace by less stringent ones, than others. In the US, the professions or authorities have indeed done away with some of the most serious restraints on competition and are considering some further relaxation of the existing rules. Nevertheless, even today members of a profession cannot necessarily practice in another

State. To me this means that in some ways the EU could, if it so wished, be more progressive than the US in this important sector of the economy.

So why do I think modernisation is needed in Europe?

Let me just give you two simple examples which illustrate our concerns and which give you an idea of possible benefits of revisiting the existing regulations:

Firstly one figure to give you an idea of the costs of not doing anything: in one of the most heavily regulated EU country, Italy, my distinguished colleague Giuseppe Tesauro has noted that professional services account for up to 9 % (on average 6 %) of companies costs. The spillover effects to other sectors seem crystal clear, and if the costs of the professional services to the business could be contained, the prices of their products and services could also be lower.

Secondly, we can also ask ourselves what is the likelihood, in Europe, of inter-State spillover effects. In the US the Federal Trade Commission has highlighted that citizens of one State are often forced to absorb the costs imposed by another State' anti-

competitive regulations. I fear similar effects also on our continent: any unjustified national restriction in fact equals a lost opportunity for the whole European economy. More concretely, if advertising is banned, the established professionals have a clear competitive advantage and the newcomers, notably from other States, are disadvantaged. This also limits consumers' choice and may have adverse effects on employment.

Let me now spend a moment on putting the macroeconomic findings and concerns in a microeconomic perspective. And in whatever quality you are here today, I suggest that for a few minutes you put on the hat of a person who needs to buy a house, to live in it or to run business in it.

You will encounter a number of professionals on your way to a satisfactory transaction. A real estate agent or another professional of this first link in conveyancing will help you to find a suitable property. An architect will estimate its value, draw up transformation plans for you and supervise the works, in collaboration with an engineer or another construction professional as the case may be. An accountant, tax consultant or other professional of numbers will help you with the technicalities of the

investment. A notary will draft the transaction documents and authenticate the deed. Even the intervention of a lawyer may be needed. And in the unfortunate event that the transaction causes you some headache, you go to a pharmacy to procure some over-the-counter painkiller.

This is something of a caricature, but it is quite likely that many of you go through part of this once or even repeatedly. My view is that the consumer's or businessperson's possibility to engage, in each of these phases, a professional whose profile and offer best match his needs depends much on three variables: the availability of (i) appropriate advertising, (ii) appropriate pricing and (iii) appropriate selection of services and service-providers. It seems difficult to get best possible satisfaction or value for money if advertising is restricted or banned, if prices are not negotiable, if business development is subject to strict rules and/or if some specific services are imposed rather than demanded.

My role is to ask you as potential users of services whether you are satisfied under the current regime. My role is also to challenge the competent regulators to assess where they see some scope for change.

The change could begin by some small steps forward. Why not for instance reconsider whether rules designed for consumer protection really should apply in the same way to business consumers and to individual one-off consumers?

In this context I would also like to remind you that, as you have may learnt earlier and also heard today in the presentation of activities led by DG Internal market, the Commission is taking steps to make the internal market in services function better. This is an important component of the process of economic reform launched by the Lisbon Council. The increase in cross-border services provision and the resulting competitive pressure will help identify cases where the current regulatory framework hinders innovation and modernisation of professional services. This should contribute to a process of modernisation of the regulatory framework at national level which has already been launched by a number of Member States.

I will now turn to the rules and regulations on which you have been asked to comment. Our stocktaking exercise has made it clear that there is a striking lack of consensus among the professions – and the professionals – on the need for specific regulations such as

price fixing, recommended prices, advertising prohibitions and restrictions on inter-professional co-operation. In many cases, a minority of respondents only were in favour of the most restrictive rules.

I also have some feedback that since I raised the issue and invited the professional bodies, the professionals and their customers to a critical assessment, overall understanding has increased. I am pleased to note that some have already started their reflections. As an example, I have been told that the International League of Competition Law (LIDC), just this month, adopted unanimously a resolution which calls for the codes of conduct to specify the objective that a rule is designed to pursue, something which clearly helps to assess its justification. The same resolution emphasises the importance of proportionality of self-regulation and of State regulation, and it points out that careful scrutiny is required, in particular, where the rule has the effect of specifying fees or fee scales that may be charged.

Against this background, I personally tend to think that some rethinking would be useful in particular in the areas of pricing restrictions and advertising bans. As to prices, I share the

viewpoint of Advocate General Léger of the European Court of Justice, expressed in his Opinion in the famous Arduino case: [I quote] "*there is no causal effect between the level of fees charged and the quality of services supplied. I fail to see how a system of mandatory prices would prevent members of the profession from offering inadequate services if, in any event, they lacked qualifications, competence or moral conscience. Second, the quality of services is – or ought to be – guaranteed by measures of a different type, such as those governing the conditions of entry to the profession and lawyers' professional liability*" [end of quote].

Today, there have been some arguments in favour of fixed prices. Fixed prices automatically entail cross subsidisation. If the regulator finds this justified, it should at least make it transparent.

As to advertising, while I see that some advertising may be problematic from a consumer protection viewpoint, I strongly believe that the absence of real informative advertising makes it difficult to shop around for a good price and service. Such restraint therefore enhances the ability of profession members to sustain collusive prices or, at least, for some profession members to charge significantly above cost. I would like to remind you that the

Court of First Instance confirmed in the European Patent Institute case that a simple prohibition of comparative advertising restricts the ability of more efficient professional representatives to develop their services.

As regards rules on business structure and multi-disciplinary practices ('MDPs'), I should first remind you that in the famous Wouters case, also debated today, the Court clearly noted that prohibitions of one-stop shops are liable to restrict competition and must be justified for overriding reasons in order to be acceptable. Indeed, the only restrictions permitted are those which can reasonably be considered as necessary for protecting the public interest. In the Wouters case a prohibition was considered justified to prevent conflicts of interests. I would like to mention here that the Belgian Supreme Court has very recently [on 25 September 2003] annulled the rules prohibiting any kind of collaboration between the members of the Flemish Bar and other professions. It found that rules which were founded on an open-ended list of presumptions of infringement, which did not specify with which professions collaboration was prohibited, which did not contain any nuances or possibilities of derogation, impeded lawyers' freedom to provide services in a disproportionate manner. Such an extreme

rule was not justified by the need to prevent conflicts of interests. My feeling is that the issue of whether MDPs are a good or a bad thing must be further explored and probably decided on a case by case basis.

I would now like to raise the question of who is best placed to consider if the traditional rules are outdated and make the change happen where necessary.

First of all, in line with what some speakers have said earlier today, I wish liberal professions would stop defending a blanket exception to all theirs rules and would seize the opportunity to look at each rule separately and justify it explicity.

Self-regulatory reform would be most welcome. I would encourage that professional associations revisit their rules on their own initiative, in the interest of their own professions. They should modernise the rules they are alone responsible for. In parallel they should propose changes to the legislator for regulations that are incorporated in legislative instruments. This ought to be done not only when it is a legal obligation, but it should be seen as a political and economic opportunity.

From the more traditional competition enforcement perspective, I should add that using antitrust instruments is always possible where necessary and that from May 2004 onwards the national competition authorities and national courts share this competence with the Commission.

To complement the self-regulatory changes, State regulation reform would be needed where it is fundamentally the national or regional law that entails unjustified restrictions of competition.

As you are well aware, the Commission has the powers to bring an action against a Member State to the European Court of Justice where it finds that an unjustified restraint of competition is put in place with government blessing or even imposed by law. In the field of liberal professions, we have not yet made much use of this power, but the power to act is there and – thanks to the interpretations of the combined effects of Articles 10 and 81 given by the Court in a number of preliminary ruling cases – we know what kind of challenges seem legally justified. We also know where there is still need for further clarifications. One of the points where we still would like to see some further Court guidance, after the Arduino judgment, is the extent to which a government needs to

give guidance and effectively control the use of the delegated powers by the professional association – to what extent the restriction is truly a State action.

September 9th this year was an important day for European competition policy. On that day came the ruling of the European Court of Justice in the Consorzio Industrie Fiammiferi or 'CIF' case. The Court declared, in essence, that any national competition authority has the right, and even the duty, to assist the Commission in guaranteeing the respect of Articles 10 and 81 by the Member States. The national competition authority has the right and duty to "disapply" national law and give effect to EU law prohibiting anti-competitive agreements, decisions and practices. My services will discuss the exact implications of this judgment with the Member States' competition experts in a meeting in November. It seems to me, at first sight, that it opens to the national competition authorities some enforcement possibilities. This could be the case where the adoption of common fee scales is based on statutory empowerment or where advertising restrictions interpreted and enforced by professional associations are based on such empowerment, provided that the role of the professional association is not merely advisory. This new doctrine

indeed seems to limit the scope of the so-called State action defence in the EU, although the exact use of these powers is still to be determined.

Now, you probably expect to hear what my next steps are going to be.

I can tell you today that I have instructed my services to start preparing a Report on competition in the professions. I would like this Report to begin by outlining the economic rationale to reform some of the rules and regulations affecting competition in professional services. I would also like to outline the requirements of EC competition rules with respect to State and self-regulation of professional services, having regard in particular to the Arduino and Wouters judgments of the European Court. There may be room to suggest possible course of action for the Member States and for the professions, with reference to specific rules and regulations as the case may be. It might also be useful to explore the possibility of defining a timetable and a monitoring mechanism of progress.

We are just about to round up the stocktaking. We now have to reflect on what has been said in the written submissions and here

today orally. My plan is that the Commission's Report will be released in the beginning of next year.

I have already encouraged the professions to revisit their rules. I would be pleased if also the competent regulators used the next few months to reflect how to make a contribution to improving the conditions of competition to the benefit of consumers and professionals alike.

I have one more remark to make. As I have already made clear to the European Parliament, my intention is not that the current regulatory framework should be changed overnight in a lump exercise. I am in favour of competition between legal systems, as suggested by Professor Van Den Bergh. I am not aiming at harmonisation of all regulations, nor at generalised deregulation. My intention is to encourage and help the competent regulators to improve the conditions of competition, while duly safeguarding the interests of consumers. Let's think together who are the best placed to draw up codes of conduct for the various professions. I tend to believe it is for the governmental experts of professional regulation and the professional organisations together to revisit the rules in place and to abolish any rules that produce anti-

competitive effects without being objectively necessary and the least restrictive means to guarantee the proper practice of the profession in question. I would say, at this stage, that the governments have a burden of proof to reassess the regulations, since they have agreed the Lisbon agenda. I think the lack of consensus to support the existing rules is sufficient for US to ask those who defend the status quo to justify their position in today's context.

The Commission's Report on competition in professions would be there to help the governments and the professions by providing some common criteria for their assessment.

Let me stress it once again: it is my firm belief that some modernisation of rules affecting competition in professional services is of crucial importance for the EU to meet the Lisbon goal of making the EU the most competitive and dynamic economy in the world by 2010.

Thank you for your attention throughout the day and for your precious input to this stocktaking exercise. I hope and trust that I can count on your participation also in the next steps.