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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL,  
THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND  
SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Professional Services - Scope for more reform**

**Follow-up to the Report on Competition in Professional Services, COM(2004) 83  
of 9 February 2004**

(SEC(2005) 1064)

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ANNEX: Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services, SEC(2005) 1064

## 1. BACKGROUND

1. Professional services are a key sector of the European economy and are entrusted with the delivery of services of considerable public importance. Figures for 2001 show that ‘business services’<sup>1</sup> generated turnover in excess of 1 281 billion Euros, or approximately 8% of total turnover of the EU<sup>2</sup>. This generated more than 660 billion Euros of value added in 2001. Approximately one third of this can be attributed to ‘professional services’. The Irish antitrust authority for example has estimated that in Ireland expenditure on legal services alone in 2001 had reached 1 140 million Euros, or nearly 1% of total GDP. In employment terms, ‘other business services’ employed almost 12 million people in 2004<sup>3</sup>, or 6.4% of total employment, up from 5.7% in 2002.<sup>4</sup>
2. The sector is characterised by high levels of regulation. This is often a mix of State regulation, self-regulation and custom and practice, which has evolved over a number of years.
3. The importance of freeing up all markets and removing unnecessary regulation to promote greater competition was underlined by the Kok Report in November 2004. This urges a systematic review of regulation to ensure that it does not unnecessarily impede economic activity<sup>5</sup>. To further this aim, the Commission Communication to the 2005 Spring European Council, and the reinvigorated Lisbon strategy, feature improving regulation to promote competitive markets as a key strand of work for the future. Moreover, the European Council in its March 2005 Conclusions underlined the importance of this task by calling on Member States to screen domestic legislation for compatibility with EU rules in order to remove market barriers and open up competition in the internal market<sup>6</sup>.
4. The Commission’s work in the area of the professional services should be seen within this context. It has been targeted at examining whether the current regulatory mix is the most efficient and least restrictive of competition, or whether better regulation, more adapted to the modern world could help spur economic growth, and deliver better services and value for consumers.

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<sup>1</sup> Category 72 ‘Computer Services and 74 ‘Other Business Services’ of the NACE classification. Category 74 of the NACE classification includes legal, accounting and auditing activities; consultancy; market research; business and management consultancy; management activities of holding companies; architectural and engineering activities and related technical consultancy; technical testing and analysis; advertising; labour recruitment and provision of personnel; investigation and security activities; industrial cleaning and miscellaneous others.

<sup>2</sup> Source: Eurostat, ‘Developments for turnover and employment indices for services during the third quarter of 2004’, Statistics in focus 11/2005. Data refers to the following 14 countries: BE, DK, DE, ES, FR, IE, IT, LU, NL, AT, PT, FI, SE and UK.

<sup>3</sup> Source: Eurostat, Labour Force Survey, 2004.

<sup>4</sup> It is planned that the collection of statistics on business services will become part of the regular annual surveys covering all 25 Member States from the reference year 2006 or 2007 onwards.

<sup>5</sup> See page 25 of the Report from the High Level Group chaired by Wim Kok, November 2004. The Report is available at: <http://www.europa.eu.int/growthandjobs/pdf/2004-1866-EN-complet.pdf>

<sup>6</sup> European Council Presidency Conclusions, Brussels, 22-23 March, 2005. These are available at: [http://www.europa.eu.int/european\\_council/conclusions/index\\_en.htm](http://www.europa.eu.int/european_council/conclusions/index_en.htm)

5. Following a stocktaking exercise in 2002-03 to gain insight into current regulatory practices, the Commission published a Report on Competition in Professional Services<sup>7</sup> in February 2004 (hereafter referred to as the ‘2004 Report’). This Report was supplemented by the Stocktaking Exercise on Regulation of Professional Services in the new EU Member States, published in November 2004<sup>8</sup>.
6. The Commission has focused on six professions - lawyers, notaries, engineers, architects, pharmacists and accountancy (including the neighbouring profession of tax advisers), and analysed in detail five key restrictions on competition (i) fixed prices, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi-disciplinary practices.
7. In many instances traditional restrictive rules in these areas are serving to restrict competition. Such regulations may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-efficiently, lower prices, increase quality or to offer innovative services. This is bad for consumers, the economy and society generally. The availability of better and more varied professional services could also increase demand, which in turn could have a positive impact on job creation in this important sector where jobs are high-skill and high-paying.<sup>9</sup>
8. In the 2004 Report, the Commission suggested that a proportionality test should be used to assess to what extent anti-competitive professional regulations and rules truly serve the public interest and can be objectively justified. The 2004 Report suggested that for this purpose it would be useful that each rule had an explicitly stated objective and an explanation how the chosen regulatory measure was the least restrictive mechanism of competition to effectively attain the stated objective. The Commission invited all to work in partnership –regulatory authorities in the Member States and professional bodies<sup>10</sup> - to review existing rules taking into consideration whether those rules are necessary for the public interest, whether they are proportionate and whether they are justified. For the purpose of this Communication, those restrictions that do not meet the proportionality test as suggested in the 2004 Report are called ‘unjustified’ or ‘disproportionate’.

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<sup>7</sup> The Report is available at:

[http://www.europa.eu.int/comm/competition/liberal\\_professions/final\\_communication\\_en.pdf](http://www.europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf)

<sup>8</sup> Stocktaking Exercise on Regulation of Professional Services - Overview of Regulation in the New EU Member States dated November 2004, can be found at:

[http://www.europa.eu.int/comm/competition/liberalization/conference/overview\\_of\\_regulation\\_in\\_the\\_eu\\_professions.pdf](http://www.europa.eu.int/comm/competition/liberalization/conference/overview_of_regulation_in_the_eu_professions.pdf)

<sup>9</sup> See Commission publication “Employment in Europe 2004”, Chapter 3, which concludes that compared to the US there is significant untapped job creation potential in the European services sector, including in business/professional services. This can be found at:

[http://www.europa.eu.int/comm/employment\\_social/publications/2004/keah04001\\_en.pdf](http://www.europa.eu.int/comm/employment_social/publications/2004/keah04001_en.pdf)

<sup>10</sup> In this context the term ‘professional bodies’ refers to non-governmental self-regulating bodies, while the term ‘national regulatory authorities’ applies to governmental bodies/departments with responsibility for regulatory oversight of the professions.

9. This Communication reports on progress in the review and removal of such unjustified restrictions<sup>11</sup> by Member States using the detailed analysis contained in the Commission staff working document annexed to this Communication<sup>12</sup>.

## 2. BETTER DEFINING THE PUBLIC INTEREST

10. There are reasons why some carefully targeted regulation of professional services can be necessary:

- firstly, because there is an “asymmetry of information” between customers and service providers of professional services in that they require practitioners to display a high level of technical knowledge. Consumers may not have this knowledge and therefore find it difficult to judge the quality of the services they purchase;
- secondly, the concept of “externalities”, whereby the provision of a service may have an impact on third parties as well as the purchaser of the service. A prime example is an inaccurate audit which may mislead creditors and investors; and
- thirdly, certain professional services are deemed to produce ‘public goods’ that are of value for society in general – for example the correct administration of justice. It is possible that without regulation there might be an inadequate or undersupply of these services.

11. These factors do, however, not affect all users of professional services in the same way. In view of this and following discussion with the professions, users and Member States (competition and regulatory authorities), the Commission has come to the conclusion that it would be useful to refine and deepen its economic analysis of the professional services market, and, in particular, give more consideration to what is meant by the public interest in different markets. This would facilitate a better understanding of the interplay between supply and demand for each professional service under consideration, and help set the framework for the review of existing regulation.

12. The Commission has undertaken some analysis of the different markets involved. This can be found in the annexed Commission staff working document. It identifies in general terms who is buying or using different services - whether small or big business, consumers or the public sector - and then identifies more precisely how existing regulatory practice impacts on these users.

13. The key finding is that one-off users, who are generally individual customers and households, may need some carefully targeted protection. On the other hand, the main users of professional services - businesses and the public sector – may not need, or have only very limited need of, regulatory protection given they are better equipped to choose providers that best suit their needs. The picture is not entirely clear with respect to small business and further analysis is needed to assess more

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<sup>11</sup> As defined in paragraph 8 above.

<sup>12</sup> ‘Progress by Member States in reviewing and eliminating restrictions to competition in the area of professional services’, Commission staff working document, SEC(2005)1064.

fully their needs for regulatory protection. Moreover, there is little margin for new, innovative and demand-driven services to emerge in the current regulatory set-up. This in turn can create costs for business. The differing interests of these groups should therefore be paramount in reviewing existing regulation and rules.

### **3. ACTIVITIES BY THE COMMISSION AND NATIONAL COMPETITION AUTHORITIES**

14. During 2004 the Commission established a structured dialogue with the European professional bodies of lawyers, notaries, engineers, architects, accountants, tax advisers, and pharmacists, and with national regulatory authorities to discuss the justification of existing professional rules and explore what can be done to make them more pro-competitive. The level of receptiveness to reform varied depending on how open and deregulated the particular profession under discussion already was.
15. National competition authorities have been active and a step change has been seen in their activity with the majority reporting being engaged in work in this field during 2004/05. Work undertaken has included:
  - bilateral discussions with national regulatory authorities and professional bodies;
  - participation in seminars/conferences on competition in the liberal professions;
  - the issuing of opinions on draft legislation, which contain provisions likely to be restrictive of competition, and
  - stocktaking exercises and sector studies.
16. This work has resulted in the removal of some restrictions which were unjustified within the meaning of paragraph 8 above, and been a key factor in the setting up of government sponsored committees to consider in detail recommendations made and bring forward proposals for more radical change. During 2004 the EFTA Surveillance Authority has also undertaken an analysis of the regulatory situation existing in the professional services area in the three EFTA countries (Iceland, Liechtenstein and Norway).<sup>13</sup>

### **4. PROGRESS BY MEMBER STATES**

17. Table 1 below shows the level of progress made by each Member State during 2004/05 in reviewing and eliminating disproportionate restrictions in legislation and the rules and regulations of professional bodies.<sup>14</sup> Individual ratings have been arrived at using information provided by Member States. The level of progress made must be seen in the context of the level of existing regulation in these countries. Some countries have low levels of existing regulation and have less to do in terms of reform (see Figures 1 and 2).

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<sup>13</sup> Further detail on all of this activity can be found in Section 3 of the Commission staff working document - see footnote 12.

<sup>14</sup> Detailed information on activity undertaken can be found in Section 4 of the Commission staff working document - see footnote 12.

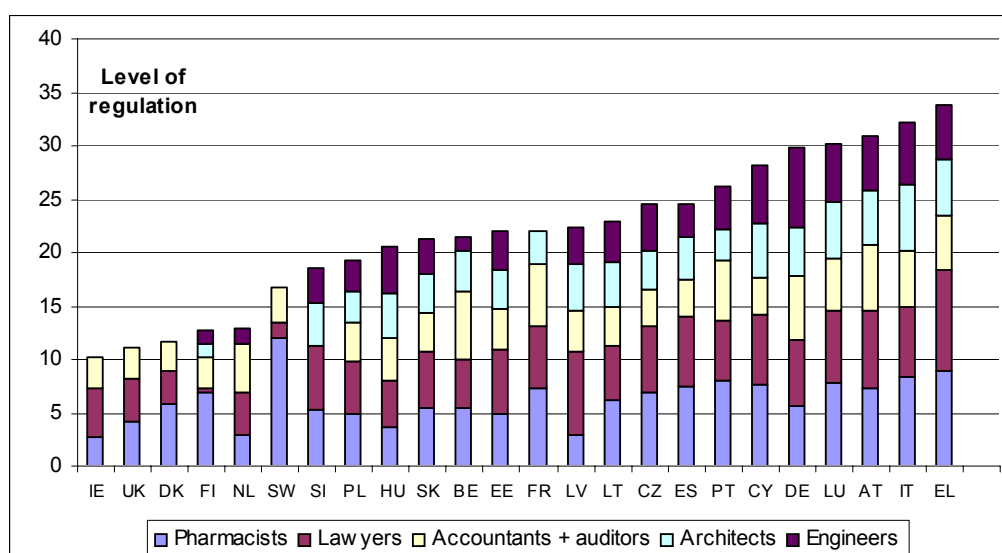
18. The table shows that most progress is being made in those countries where there is a structured programme of pro-competitive or regulatory reform in place – Denmark, Netherlands and the UK. These countries also have some of the lowest levels of existing regulation. Furthermore, it is notable that in these countries there is a close partnership between government and national competition authorities, and that often substantive reform in a given sector is preceded by an in-depth analysis of existing restrictions by the competition authority. Experience also shows that in these countries fixed pricing and advertising restrictions have been tackled first, to be followed subsequently by more far reaching structural reforms.
19. In view of the above, it is encouraging that over a third (9 in total) of Member States report that analytical work is underway, which it is hoped will lead to substantive reform in the near future. Six other countries report that minor reforms have been made e.g. a slight easing of qualitative entry qualifications. In the other seven countries the reform process has been slow to get off the ground and no activity is reported as yet.

**Table 1: Level of Member State activity during 2004/5 to reform legislation and professional rules and regulations in the professional services sector**

Level of activity	Member States
No activity	Czech Republic, Cyprus, Finland, Greece, Malta, Spain, Sweden
Minor reforms	Austria, Estonia, Hungary, Latvia, Slovenia, Portugal
Analytical work in progress	Belgium, Italy, Luxembourg, Poland
Both minor reforms and analytical work	France, Germany, Ireland, Lithuania, Slovakia
Substantial structural reform	Denmark, Netherlands, UK

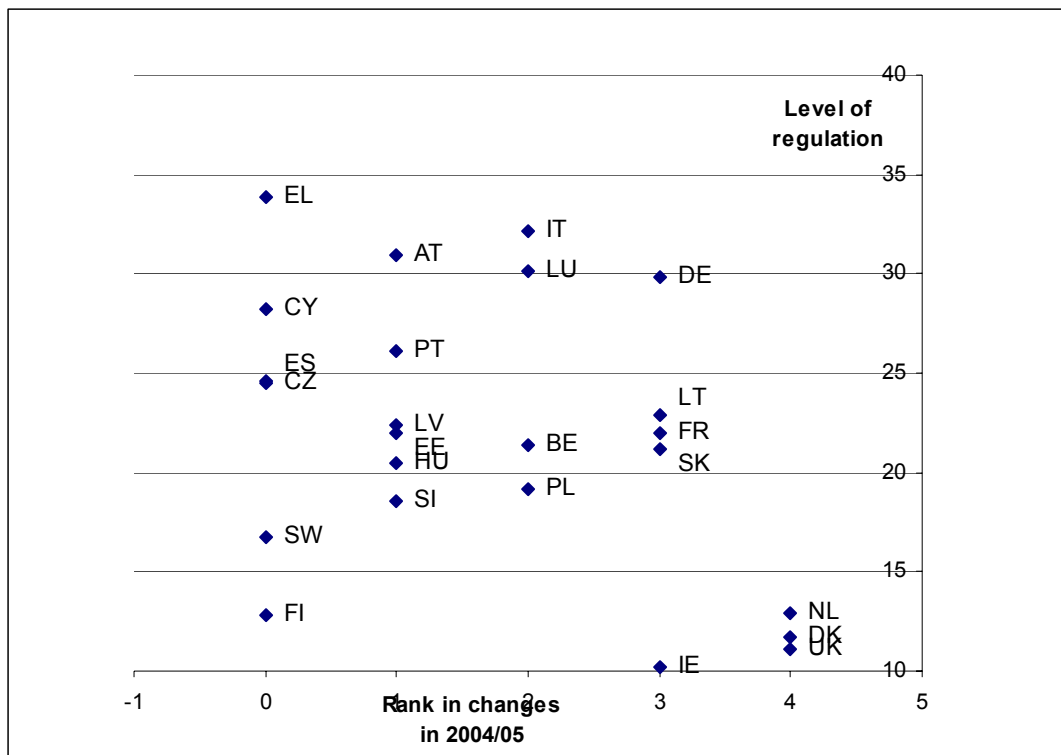
Note: This does not take account of activity in this sector by national competition authorities

**Figure 1: Index of level of regulation in Member States**



Source: IHS Study<sup>15</sup> updated to include new Member States and reflect reforms reported

**Figure 2: Comparison of Member States' reform activity (Table 1) against level of existing regulation (Figure 1)**



Note: Malta is not included due to missing information

## 5. APPLICATION OF THE EC COMPETITION RULES

20. As a result of modernisation of antitrust enforcement, national competition authorities and national courts can apply Article 81 of the EC Treaty in its entirety i.e. decide upon the existence of a restriction under Article 81, paragraph 1, and whether the conditions laid down in Article 81, paragraph 3 are satisfied, so that the prohibition does not apply. Moreover, national competition authorities and national courts can directly apply Article 82 of the EC Treaty. Since the vast majority of competition restrictions in the professional services area have their origin and effect in a single Member State, administrative enforcement falls mainly to national competition authorities and private enforcement of these rules can be achieved in the national courts.
21. Furthermore, in the *CIF*<sup>16</sup> judgment the European Court of Justice (ECJ) decided that where undertakings engage in conduct contrary to Article 81(1) and where that conduct is required or facilitated by State measures, a national competition authority has a duty to disapply those State measures and give effect to Article 81/82. Details

<sup>15</sup> “Economic Impact of regulation in the field of liberal professions in different EU Member States”, Ian Paterson, Marcel Fink, Anthony Ogus, Institute for Advanced Studies, Vienna, January 2003, available at: <http://www.europa.eu.int/comm/competition/liberalization/conference/libprofconference.html>

<sup>16</sup> Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* [2003] ECR I-08055.



of enforcement activities by the Commission, national competition authorities and courts during 2004/05 in the professional services sector are given in the Commission staff working document. Ten cases were opened by national competition authorities under the EC competition rules in the six professions under study by the Commission. These covered a variety of restriction type and profession. Member States are also pursuing further regionally confined cases under their national competition rules. The Commission also issued a decision condemning the recommended minimum fee scale operated by the Belgian Architects' Association<sup>17</sup> in June 2004. Moreover, on 17 February 2005, the ECJ gave a preliminary ruling on *Mauri*<sup>18</sup> - an Italian case concerning the State examination for access to the Italian Bar. The ECJ's order assessed the facts on the basis of the criteria mentioned in Case C-35/99 *Arduino*.

22. Private enforcement in national courts does not only cover Articles 81/82 as they apply to undertakings and associations of undertakings, but is also possible against Member States under Articles 86(1) in conjunction with Articles 82/81 or against them under Articles 3(1)(g), 10(2) in conjunction with 81/82.
23. Apart from enforcing Articles 81/82 against undertakings and associations of undertakings, the Commission can also act against restrictive behaviour by a Member State. To date, the legal base in the professional services sector has been Articles 3(1)(g) and 10(2) read in conjunction with Article 81. However, it is conceivable to use Article 86 in conjunction with Articles 82/81 as a legal base when the conditions, as established by the case-law<sup>19</sup> are met. Article 86(1) obliges Member States in the case of public undertakings and undertakings to which they grant special or exclusive rights, neither to enact nor maintain in force any measure contrary to the EC Treaty rules. It is designed for the specific situation where a Member State has special influence over public undertakings due to the fact that it controls them, or over privileged undertakings, due to the fact that it grants them special or exclusive rights. Article 86(3) gives the Commission special power to ensure the implementation of Article 86 and where necessary to address appropriate decisions or directives to Member States directly. It is therefore arguable that the Commission should in appropriate cases make use of Article 86(3). For example, it could be used in cases where restrictions on the number of professionals allowed to practise amount to special or exclusive rights. An assessment of the possibility to use Article 86 will be made on a case-by-case basis.

## 6. CONCLUSIONS

24. The key conclusion is that more urgency by the majority of Member States to bring about systematic pro-competitive reform in this sector would bring about significant economic and consumer benefits. In practical terms, this means Member States taking 'political ownership' of this work at national level to drive forward the reform process. This has been recognised more generally in the Lisbon agenda mid-term review, and in the European Council Conclusions mentioned above, which re-

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<sup>17</sup> Decision of 26.06.2004, COMP/38.549 - PO / L'Ordre des Architectes belges, [http://www.europa.eu.int/comm/competition/antitrust/cases/index/by\\_nr\\_77.html#i38\\_549](http://www.europa.eu.int/comm/competition/antitrust/cases/index/by_nr_77.html#i38_549)

<sup>18</sup> Case C-250/03 *Mauri* [2005] ECR I-0000.

<sup>19</sup> See Case C-475/99 *Ambulanz Glockner*, [2001] ECR I-8089.

launched the Lisbon agenda refocusing on growth and employment, and agreed that Member States should present national reform programmes for supporting growth and employment at national level, and appoint a Lisbon national co-ordinator.

25. The weight of tradition should not be underestimated as affecting the pace of change, and in many countries regulators fail to see how things can be done differently. Moreover, the professions themselves have in general not been actively promoting it. The current picture could also indicate that some countries have relatively weak regulatory oversight of the professions. This could be caused by the economic phenomenon of regulatory capture which is not uncommon especially in areas subject to self-regulation.
26. The Commission recognises that it is the Member States' prerogative to determine to what extent they want to regulate the professions directly by State regulation, or to leave the matter to self-regulation by professional bodies. However, good governance would require that Member States oversee the impact of national self-regulation to guard against it becoming overly restrictive and detrimental to customers' interests.

## **7. WAY FORWARD**

27. The Commission remains fully committed to bringing about wide scale reform to this sector and encourages Member States to take the initiative to drive forward reform at national level. There continues to be room for improvement in all Member States.
28. Since restrictive regulation in this sector is developed and impacts at the national level, it is up to national regulatory authorities and professional bodies to bring about change having due regard to the specificities of the relevant profession in each country. Experience shows that such a process will not start without strong political backing. Given the importance of this sector to the EU economy, the Commission calls on Member States to address the issue of modernising the rules affecting the professions in their national reform programmes for implementing the Lisbon agenda, which are due to be presented in autumn 2005. Further reporting will therefore be made in the context of the overall Lisbon process.
29. As a start Member States should initiate – where they have not already done so - analytical work to review existing restrictions. A first stage of this could be to identify those restrictions on competition which can be removed quickly without further analysis being necessary e.g. certain fixed and recommended prices, and certain advertising restrictions. At the same time, more substantial structural analysis should begin – for example of regulatory structures - to assess the need and open the way for wider reforms. This would enable Member States to make good progress by 2010.
30. The Commission's further refinement of its economic analysis of the different markets for professional services, leads the Commission to the conclusion that consumers and one-off users may have a greater need of some carefully targeted regulatory protection. However, the main users of professional services – business and the public sector – may have no, or only very limited, need of regulatory protection. The position with respect to small business users is not entirely clear and

further work is required to assess their specific needs. The current regulatory set-up is unsatisfactory for these two latter groups given its lack of flexibility and hinders the development of innovative and demand-driven services.

31. The Commission will continue to act as a facilitator in this exercise, helping to spread best practice. It will increase partnership working with national competition authorities, who have already started some promising work, so that they take even greater ownership to progress this at national level. It will also continue and improve its relations with national regulatory authorities by organising a more structured debate and raising the profile of this work with them. This will pave the way for greater co-operation between national competition authorities and regulatory authorities.
32. As a start, over the coming months the Commission will publicise fully the findings of this Communication to ensure that the main messages on the need to modernise the professions in Europe are understood by all key players - in particular national parliaments and policy makers.
33. The Commission will consider taking further appropriate enforcement action using the EC competition rules, including the option of intervening under Article 86 if possible and necessary.