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COMMUNICATION FROM THE COMMISSION

Report on competition in professional services

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Report on Competition in Professional Services

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EXECUTIVE SUMMARY

Liberal professions are occupations requiring special training in the liberal arts or sciences. This report concentrates on the professions which have so far been analysed in some detail by the Commission, namely lawyers, notaries, accountants, architects, engineers and pharmacists. The sector is usually characterised by a high level of regulation, in the form of either State regulation or self-regulation by professional bodies. The main purpose of this report is to set out the Commission's thinking from the perspective of competition policy on the scope to reform or modernise specific professional rules.

The Lisbon European Council in March 2000 adopted an economic reform programme with the aim of making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. Professional services have an important role to play to improve the competitiveness of the European economy, as they are inputs for the economy and business, so their quality and competitiveness have important spill over effects. Professional services are also important because of their direct import for consumers.

The five main categories of potentially restrictive regulation in the EU professions are: (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi-disciplinary practices.

On the one hand, a significant body of empirical research shows, the negative effects that excessive or outdated restrictive regulations may have for consumers. Such regulations may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-efficiently, to lower prices, to increase quality or to offer innovative services.

On the other hand, there are essentially three reasons why some regulation of professional services can be necessary: asymmetry of information between customers and service providers, as a defining feature of professional services is that they require practitioners to display a high level of technical knowledge which consumers may not have; externalities, as these services might have an impact on third parties; and certain professional services are deemed to produce 'public goods' that are of value for society in general. Proponents of restrictive regulations argue therefore that such regulations are designed to maintain the quality of professional services and to protect consumers from malpractice.

While the Commission acknowledges that some regulation in this sector is justified, it believes that in some cases more pro competitive mechanisms can and should be used instead of certain traditional restrictive rules.

As a matter of Community competition law it is necessary to distinguish between the potential liability of professional bodies and that of the Member States.

Regulations adopted by professional bodies are decisions of associations of undertakings capable of infringing the prohibition contained in Article 81 EC. Regulations which are objectively necessary to guarantee the proper practice of the profession, as organised in the Member State concerned, fall however outside the scope of the prohibition.

State regulation which imposes or favours anti-competitive conduct or reinforces its effects, infringes Articles 3(1)(g), 10(2) and 81 EC. Where a State delegates its policy-making power to a professional association without sufficient safeguards, that is without clearly indicating the public interest objectives to respect, without retaining the last word and without control of the implementation, the Member State can also be held liable for any resulting infringement.

Ultimately, in the Commission's view, in all scrutiny of professional regulation a proportionality test should be applied. Rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective. Such rules serve the interests of users and of the professionals alike.

The Commission invites all involved to make a joint effort to reform or eliminate those rules which are unjustified. Regulatory authorities in the Member States and professional bodies are invited 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. The Commission also suggests to explore together with all involved the need to put in place pro-competitive and transparency enhancing accompanying mechanisms to strengthen consumer empowerment.

From an enforcement perspective from May 2004 onwards, the national competition authorities and the national courts will have a more prominent role in assessing the legality of rules and regulations in the professions. To the extent that competition restrictions have their centre of gravity in a Member State, administrative enforcement of the EC competition rules in the liberal professions will then be mainly the task of national competition authorities. The Commission will however also continue to carry out casework where appropriate. A coherent application of Articles 81 and 82 will be guaranteed through co-ordination in the European Competition Network.

The Commission will report in 2005 on progress in eliminating restrictive and unjustified rules.

1. INTRODUCTION AND SCOPE

1. Liberal professions are occupations requiring special training in the liberal arts or sciences, for example lawyers, notaries, engineers, architects, accountants and pharmacists. The sector is usually characterised by a high level of regulation, in the form of either State regulation or self-regulation by professional bodies. This regulation can affect, inter alia, the numbers of entrants into the profession; the prices professionals may charge and the permitted charging arrangements (e.g. contingency fees); the organisational structure of professional service undertakings; their ability to advertise; and the tasks which are reserved for the members of the profession.
2. As regards self-regulation by the professions Article 81 (1) of the EC Treaty prohibits ‘all agreements between undertakings, decisions by association of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market’.
3. As regards State regulation Article 10(2) of the EC Treaty prohibits measures of the Member States which could jeopardise the attainment of the objectives of the Treaty. Read in conjunction with Articles 3(1)(g) EC (which refers to the objective of a system of undistorted competition in the internal market) and Article 81 EC, those provisions require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.
4. There is thus potential tension between, on the one hand, the need for a certain level of regulation in these professions and, on the other, the competition rules of the Treaty.
5. The goal of this report is to set out why action in the field of professions is needed from a competition policy perspective (section 2), to report on what the Commission has done so far (section 3), to present the Commission's intermediary findings on key restrictions and their alleged public interest justifications (section 4) and on the Community legal framework within which those restrictions have to be analysed (section 5) and, finally, to propose a future course of action to promote the elimination of unjustified restrictions (section 6).
6. This report concentrates only on the professions which have so far been analysed in some detail, namely lawyers, notaries, accountants, architects, engineers and pharmacists. Similar conclusions could be reached concerning neighbouring professions, where they exist (for example, tax advisers, estate agents). Medical professions are not covered by this report¹. Moreover, the Commission has limited its fact-finding so far to the current EU 15 Member States.
7. Since the Commission finds that important progress can be made using other mechanisms, it does not at this stage explore the potential use of Article 86 EC.

¹ The OECD is carrying out ongoing work on competition in professional services, including some of the professions not covered here.

Neither does the Commission consider it necessary to discuss in this report the potential application of Article 82 EC or of the Merger Regulation².

2. BACKGROUND

2.1. General context

8. The Lisbon European Council in March 2000 adopted an economic reform programme with the aim of making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. In that connection the European Council highlighted the key role of services in the economy and their potential for growth and employment.
9. Services are the main motor of growth in the EU, accounting for 54% of GDP³ and for 67% of those in employment. A key part of the Lisbon programme is therefore the “Internal Market Strategy for Services” which aims to create a fully functioning internal market for all service providers⁴. In that context the Commission has just adopted a Proposal for a Directive on services in the Internal market⁵, including professional services, based upon a mixture of mutual recognition, administrative cooperation, harmonisation where strictly necessary, and the encouragement of self-regulation. As far as regulated professions are concerned, this proposal complements the Proposal for a Directive on recognition of professional qualifications⁶ adopted by the Commission in March 2002 which awaits the completion of its first reading. The proposal consolidates and improves the current regime of mutual recognition of professional qualifications, covering a range of parallel issues, including simplification of cross border provision of services. The European Parliament has also recognised the importance of professional services⁷.
10. The recent Commission Communication on the Competitiveness of business related services and their contribution to the performance of European enterprises⁸ highlights the contribution of business related services, and in particular knowledge – intensive business services, to the Lisbon objectives of employment growth and competitiveness of the European economy. The measures proposed by the Communication include the promotion of continuous learning and updating of skills, the integration of ICT into business processes in order to improve productivity, and the promotion of service quality and voluntary standards for the cross-border supply of services.

² Council Regulation (EEC) 4064/89, OJ L 395, 30.12.1989; substituted from 1 May 2004 with Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29.01.2004.

³ Source: Eurostat (2002) European business: facts and figures. Services include construction but exclude social services and public administration.

⁴ Communication from the Commission to the Council and the European Parliament, An Internal Market Strategy for Services, COM (2000) 888 final, 29.12.2000.

⁵ Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market COM (2004) 002 of 13.1.2004.

⁶ Proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications, COM (2002) 119 final of 7.3.2002.

⁷ European Parliament resolution on market regulations and competition rules for the liberal professions, 16.12.2003.

⁸ The competitiveness of business-related services and their contribution to the performance of European enterprises COM(2003) 747 final, 4.12.2003.

2.2. The importance of professional services for the EU economy

11. Professional services have an important role to play to improve the competitiveness of the European economy. Exact data about the sector is not available, but probably about a third of employment in 'other business services' should be ascribed to professional services⁹. Other business activities employed over ten million people in 2002 in the EU, corresponding to 6.4% of the workforce; however it employed disproportionately more high skilled workers, accounting for 10% of overall high skill employment¹⁰. The sector had a turnover of around 980 billion Euros and created around 500 billion Euros of total valued added for EU15 in 2001. It is also a growing sector: 'Other business services' turnover grew by a record 5% in the first half of 2003, while employment grew by 0.7 %¹¹.
12. Moreover, professional services are important inputs for the economy and business, so their quality and competitiveness have spill over effects across the whole economy. The Italian Antitrust Authority has estimated that in Italy an average of 6% costs of exporting firms are due to professional services. Thus greater variety in prices and quality, as well as greater innovation in professional services could go a long way in improving the competitiveness of European enterprises and fostering GDP growth in the EU.
13. Professional services are also important because of their direct import for consumers. Competition for professional services will continue to take place mainly at the local level for the foreseeable future. Greater choice in the range of services available and their prices empowers users to choose for themselves the combination of price and quality which better suits their needs.
14. In a recent study on the economic impact of regulation in the field of liberal professions in the different Member States commissioned by DG Competition¹², the data seems to indicate that light regulation is not a hindrance but rather a spur to overall wealth creation. In countries with low degrees of regulation, there are proportionally higher numbers of practising professionals generating a relatively higher overall turnover.

3. COMMISSION ACTION IN THE FIELD OF COMPETITION FOR PROFESSIONAL SERVICES

15. In order to obtain a better understanding of the regulation of liberal professions and its effects the Commission has undertaken in 2002 and 2003 a substantial stocktaking exercise.

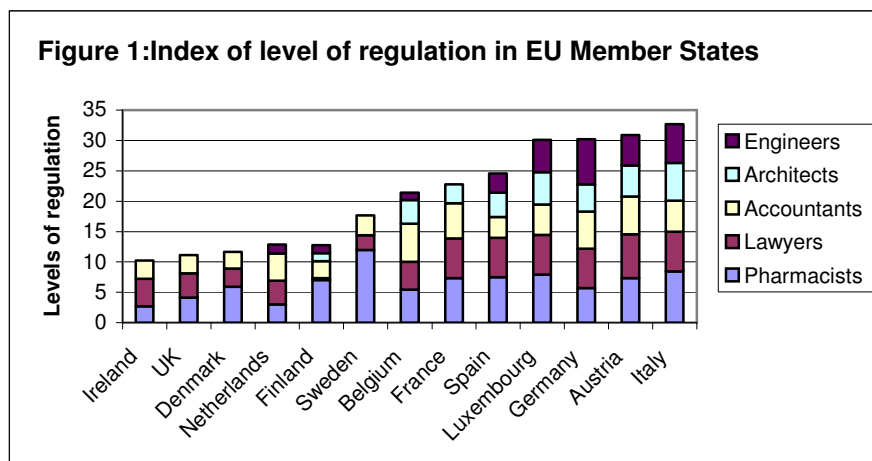
⁹ Category 74 of the NACE classification 'Other business activities' which includes legal, accounting and auditing activities; consultancy; market research; business and management consultancy; holdings architectural and engineering activities and related technical consultancy; technical testing and analysis; advertising; labour recruitment and provision of personnel; investigation and security activities; industrial cleaning and miscellaneous others.

¹⁰ Source: EU Labour Force Survey Eurostat.

¹¹ Source: Eurostat, Developments for services during the second quarter of 2003, Statistics in focus 36/2003.

¹² "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.

16. First, in order to gather structured information on different regulatory regimes and on their economic effects, the Competition Directorate General commissioned in 2002 the independent study mentioned above which was published on the internet in March 2003. It showed significantly different levels of regulation between Member States and also between different professions (Figure 1). It also found that there was no indication of malfunctioning of markets in relatively less regulated countries. On the contrary, the conclusion of the study was that more freedom in the professions would allow more overall wealth creation.



Source: IHS Study.

Note: Greece and Portugal are not included because of a lack of data on certain professions.

17. Second, as a follow-up of the study the Commission services launched an invitation to comment, on 27 March, on “Regulation in Liberal Professions and its Effects”. An overview of the nearly 250 responses received, as well as of the rules and regulations existing in the 15 Member States was made available on the internet¹³. The stocktaking exercise was closed by a Conference on the Regulation of Professional Services held on 28 October in Brussels which brought together 260 representatives of the professions, their clients, consumer organisations, competition authorities, policy makers as well as the academic world.
18. During and after the stocktaking exercise the Commission co-operated closely with other competition authorities. Regulation of professional services was discussed for example in the meeting between the Directors General of National Competition Authorities on 18 June and 19 November 2003. A meeting with the experts from National Competition Authorities was held in November 2003 to discuss a common approach in this field.
19. The stocktaking exercise allowed the Commission to evaluate the different market failures existing in these sectors and the different answers brought to them in different regulatory regimes. The various parties concerned also brought new elements to the debate, such as the diverse cultural sensitivities and the need to empower consumers.

¹³ These and other related documents are accessible at:
<http://europa.eu.int/comm/competition/liberalization/conference/libprofconference.htm>.

20. In parallel, the Commission carried out traditional casework. Ten years after its first decision condemning the fixed tariffs for professional services – in that case those provided by Italian customs agents¹⁴ – the Commission is disappointed to see that minimum price levels still persist. This is why on 3 November 2003 it sent the Belgian Architects’ Association a statement of objections informing it that its recommended minimum fee scale could constitute a violation of EU competition rules and that a fine could be imposed.
21. The Commission is not alone in examining closely existing restrictions in the field of professional services. It has coordinated its work with National Competition Authorities since June 2002. In terms of specific cases, almost all National Competition Authorities have dealt with notifications for clearance or exemption under national competition law or complaints against the conduct of professional bodies. The most common cases have been against price-fixing by professional associations, although action against discriminatory conditions of access to the profession, boycotting practices and advertising restrictions has also been taken. Five National Competition Authorities (Denmark, Ireland, Netherlands, Finland, UK) have taken or are taking a general programme of action to bring reform to this sector, in particular to forbid price-fixing arrangements or recommended tariffs.

4. RESTRICTIVE REGULATION IN THE LIBERAL PROFESSIONS

22. Restrictive regulations in the liberal professions include licensing restrictions such as entry requirements and reserved tasks, as well as rules governing conduct such as price regulation, advertising restrictions, and regulation of business structure. Such restrictions may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-efficiently, to lower prices, to increase quality or to offer innovative services. Price regulation, advertising restrictions and entry barriers may for example allow prices to remain above competitive levels. Business structure regulations may inhibit the development of innovative services and cost-effective business models.
23. A significant body of empirical research¹⁵ shows the negative effects that excessive regulation may have for consumers. That research suggests that excessive regulation of advertising and licensing has, in certain cases, led to lower quality and higher prices in professional services markets. Conversely, the loosening of anti-competitive restrictions has had positive effects on prices and quality.
24. On the other hand there are essentially three reasons why some regulation of professional services may be necessary.
25. The first is based on the concept of “asymmetry of information” between customers and service providers. A defining feature of professional services is 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

¹⁴ 93/438/EEC: Commission Decision of 30 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.407 - CNSD) OJ L 203, 13.08.1993 p. 27.

¹⁵ See OECD Journal of Competition Law and Policy No. 4, February 2002, “Competition in Professional Services”, p.56 to 57, and Internet publication for the OECD full report <http://www.oecd.org/dataoecd/35/4/1920231.pdf>. See also the references in footnotes 18 and 19.

they purchase. Professional services are “credence goods” the quality of which cannot easily be judged either by prior observation or, in some markets, by consumption or use.

26. The second argument is based on the concept of “externalities”. In certain markets, the provision of a service may have an impact on third parties as well as the purchaser of the service. An inaccurate audit may mislead creditors or investors. A poorly constructed building may jeopardise public safety. There is a danger that the providers and purchasers of these services fail to take proper account of these external effects.
27. The third argument is based on the concept of “public goods”. Certain professional services are deemed to produce public goods that are of value for society in general. These might include the correct administration of justice or the development of high quality urban environments. There is a danger that without regulation some professional services markets might undersupply or inadequately supply public goods.
28. In certain circumstances, these problems may lead to market failure such as under-supply, over-supply or the provision of poor quality services. Restrictive regulations have therefore been justified as being designed to maintain the quality of professional services and to protect consumers from malpractice. For example, licensing restrictions may preclude incompetent or poorly qualified practitioners from offering services, while disciplinary procedures can be used to sanction providers whose quality fails to meet minimum standards. Advertising restrictions can be used to protect consumers from misleading publicity.
29. In its resolution on market regulation and competition rules for the liberal professions, the European Parliament concluded that 'from a general point of view rules are necessary in the specific context of each profession, in particular those relating to the organisation, qualifications, professional ethics, supervision, liability, impartiality and competence of the members of the profession or designed to prevent conflicts of interest and misleading advertising, provided that they give end users the assurance that they are provided with the necessary guarantees in relation to integrity and experience, and do not constitute restrictions on competition'¹⁶.
30. The following subsections consider individually the five main categories of restrictions in the EU professions: (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi-disciplinary practices. Each section provides a brief overview of arguments for and against the category in question and gives indications about the possible scope for relaxing existing rules.

4.1. Fixed Prices

31. The fees charged for professional services are negotiated freely between practitioners and clients in most Member States. However, fixed prices and maximum and minimum prices remain in place in a small number of cases. These are indicated in Table 1, which represents the current Commission knowledge. Fixed prices or

¹⁶ European Parliament resolution on market regulations and competition rules for the liberal professions, 16.12.2003.

minimum prices are the regulatory instruments that are likely to have the most detrimental effects on competition, eradicating or seriously reducing the benefits that competitive markets deliver for consumers.

32. According to some professional associations, fixed prices provide a mechanism to ensure low prices. However, economic theory suggests that, within an otherwise competitive market, price regulation is unlikely to ensure prices that are lower than competitive levels.
33. Professional associations have also argued that fixed prices protect the quality of services. However, fixed prices cannot prevent unscrupulous practitioners from offering poor quality services. Nor do they remove the financial incentives for practitioners to reduce quality and costs. Moreover, there are a variety of less restrictive mechanisms to maintain quality and protect consumers. For example, measures to improve the availability and quality of information about professional services could contribute to empower consumers to make more informed purchasing decisions.
34. Over the last two decades, a number of Member States have abolished fixed prices in the liberal professions. In the 1970s and 1980s, for example, fixed prices were abolished for conveyancing and architectural services in the United Kingdom. In France, likewise, fixed prices for legal services have been dismantled. The legal, accountancy, engineering and architectural professions now function effectively without fixed prices in most Member States. This suggests that price controls are not an essential regulatory instrument for these professions and that other less restrictive mechanisms might provide an effective means of maintaining high standards.
35. It is possible that maximum prices might protect consumers from excessive charges in markets with high entry barriers and a lack of effective competition. However, this does not appear to be true for the majority of the EU professions.
36. One possible exception might be the Latin notary profession, where price regulation is combined with other regulations such as quantitative entry restrictions and advertising prohibitions that seriously restrict competition. In this market, regulators might need to take a more holistic approach to reform. The removal of price regulation might, for example, need to be accompanied by other pro-competitive reforms, such as the relaxation of quantitative entry and advertising restrictions.

Table 1: Overview of countries and professions with fixed, minimum or maximum prices

Profession	Fixed Prices	Minimum Prices	Maximum Prices
Accountancy / Audit	Greece and Portugal (for statutory audit)	Italy (for public accountants)	Italy (for public accountants)
Tax Consultants	Germany		
Architects		Italy, Germany	Germany
Engineers		Italy, Germany, Luxembourg	Germany
Lawyers		Italy, Austria, Germany.	Italy
Notaries		Belgium, France, Germany, Spain, Greece	Austria, Belgium, France, Germany, Greece, Italy, Netherlands, Spain

Source: the Study mentioned in note 12 and information provided by professional bodies and/or national competition authorities. Pharmacists not included.

4.2. Recommended Prices

37. Recommended prices are published for certain legal, accountancy, architectural and engineering services in a minority of Member States (Table 2). Recommended prices, like fixed prices, may have a significant negative effect on competition. First, recommended prices may facilitate the co-ordination of prices between service providers. Secondly, they can mislead consumers about reasonable price levels.
38. Professional associations have suggested that recommended prices provide consumers with useful information about the average costs of services. They have also suggested that recommended prices reduce the costs of setting or negotiating fees on an individual basis and serve as a guide for practitioners who lack experience of determining fees. They might also reduce the transaction costs of negotiating prices for complex services.
39. In markets where search costs are high, it may indeed be advantageous for consumers to have access to accurate information about typical prices. However, there are alternative methods of providing price information. For example, the publication of historical or survey-based price information by independent parties (such as a consumer organisation) might provide a more trustworthy price guide for consumers, which distorts competition to a lesser extent.
40. It appears moreover unlikely that professionals would need to rely on recommended prices in order to set fees. Professionals, like other service providers, generally gain,

or hire, the business experience needed to set fees. There are a variety of less restrictive mechanisms such as historical or survey-based price information for reducing transaction costs.

41. A number of countries have removed recommended prices for professional services in the last two decades. In the late 1980s, for example, the Finnish Competition Authority instigated the removal of recommended prices in the legal, architectural and other professions. In the late 1990s, recommended prices were removed for lawyers in the Netherlands and for architects in France. In the last two years, recommended prices have also been abolished for architects and construction companies in the United Kingdom.

Table 2: Overview of countries and professions with recommended prices

Profession	Recommended Prices
Accountancy / Audit	Austria, Portugal, Greece
Architects	Austria, Belgium, Denmark, Ireland, Germany, Spain
Engineers	Austria, Luxembourg
Lawyers	Austria, Portugal, Spain
Notaries	Austria, Belgium

Source: the Study mentioned in note 12 and information provided by professional bodies and/or national competition authorities. Pharmacists not included.

4.3. Advertising Restrictions

42. A large number of the EU professions are subject to sector-specific advertising regulation (Table 3). In some cases advertising as such is prohibited. In others, specific media or advertising methods such as radio advertising, television advertising or “cold calling” or specific types of advertising content are proscribed. In certain cases, there is a lack of clarity in existing advertising regulations which, in itself, may deter professionals from employing certain advertising methods.
43. According to economic theory, advertising may facilitate competition by informing consumers about different products and allowing them to make better informed purchasing decisions. Advertising restrictions may thus reduce competition by increasing the costs of gaining information about different products, making it more difficult for consumers to search for the quality and price that best meets their needs. It is also widely recognised that advertising, and in particular comparative advertising, can be a crucial competitive tool for new firms entering the market and for existing firms to launch new products¹⁷.
44. The proponents of advertising restrictions emphasise the asymmetry of information between practitioners and consumers of professional services. According to this

¹⁷ See Directive 97/55/EC of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ No L 290, 23.10.1997, p 18.

argument, consumers find it difficult to assess information about professional services and therefore need particular protection from misleading or manipulative claims.

45. There is however an increasing body of empirical evidence which highlights the potentially negative effects of some advertising restrictions¹⁸. This research suggests that advertising restrictions may under certain circumstances increase the fees for professional services without having a positive effect on the quality of those services. The implication of these findings is that advertising restrictions as such do not, necessarily, provide an appropriate response to asymmetry of information in professional services. Conversely, truthful and objective advertising may actually help consumers to overcome the asymmetry and to make more informed purchasing decisions.
46. Over the last two decades, a number of Member States have relaxed advertising restrictions in the professions. In the 1970s, for example, advertising restrictions were removed for the legal and accountancy professions in the United Kingdom. In the 1990s, restrictive advertising rules were removed for the legal, accountancy and architectural professions in Denmark. In the last few years, strict advertising bans have also been relaxed for the professions in Germany.

Table 3: Overview of countries and professions with significant Advertising restrictions

Profession	Effective Advertising Prohibition	Significant Advertising Restrictions
Accountancy	France	Belgium, Germany, Italy, Luxembourg, Portugal,
Audit	France, Luxembourg, Portugal, Spain,	Belgium, Germany, Greece, Italy
Architects	Italy, Luxembourg	Ireland, Germany, Netherlands, Austria, Greece
Engineers	Luxembourg	Italy, Greece, Ireland
Lawyers	Greece, Portugal, Ireland (for barristers)	Austria, Belgium, France, Ireland (for solicitors), Italy, Luxembourg, Spain
Notaries	France, Italy, Spain, Greece	Austria, Germany
Pharmacists	Ireland, Portugal, Greece	Áustria, France, Luxembourg?

Source: the Study mentioned in footnote 12 and information provided by professional bodies and/or national competition authorities.

¹⁸ Research on advertising restrictions in the legal profession, for example, is summarised by Stephen, F.H. and J.H. Love, 'Regulation of the Legal Profession', in B. Bouckaert and G. De Geest (eds) Encyclopedia of Law and Economics, Volume III: The Regulation of Contracts, Cheltenham, 2000, p.987-1017.

47. The accountancy and technical professions now function effectively without the need for any significant sector-specific advertising restrictions in a large number of Member States. This suggests that sector specific advertising restrictions in these professions may not be essential for protecting consumers from misleading claims. Likewise, the legal, notary and pharmacy professions are able to conduct most forms of advertising in a number of Member States. The professions remain, of course, subject to general legislation that prevents untruthful or deceptive advertising.

4.4. Entry Restrictions and Reserved Tasks

48. The professions are subject to qualitative entry restrictions in most Member States. These can take the form of minimum periods of education, professional examinations and minimum periods of professional experience. In many cases, entry restrictions are coupled with reserved rights to provide certain services. In some Member States the pharmacy and notary professions are even subject to quantitative entry restrictions based on demographic or geographic criteria.

49. Qualitative entry restrictions, combined with reserved rights, ensure that only practitioners with appropriate qualifications and competence can carry out certain tasks. They may thus make an important contribution for ensuring the quality of professional services.

50. However, excessive licensing regulation is likely to reduce the supply of service providers, with negative consequences for competition and quality of service. Empirical research has shown that, in some cases, excessive licensing restrictions have led to higher prices without ensuring higher quality. In a report of 1990, for example, the US Federal Trade Commission assessed a range of empirical studies on licensing restrictions. It concluded that, while a few studies indicated that higher quality might result from business practice restrictions, a majority of studies found quality to be unaffected by licensing or business practice restrictions associated with licensing. In some circumstances, licensing restrictions even had a negative effect on quality.¹⁹

51. Conversely, in some countries the loosening of restrictions in some professions has led to lower prices without any apparent detriment to quality. In Australia, for example, the removal of lawyers' reserved rights to provide conveyancing services and the barristers' monopoly in courtroom work contributed to a 12% drop in overall legal costs. In the United Kingdom, the loosening of reserved rights to provide conveyancing services in the 1980s also led to lower prices. In the Netherlands, the abolition of entry restrictions for real estate agents in the late 1990s led to an increase in new entrants, lower prices for real estate transactions and more flexible provision of services.

52. These experiences suggest that licensing regulations might, in some cases, be excessively restrictive and that consumers might benefit from a relaxation of the existing rules.

53. First, there might be scope to lower entry requirements in cases where they appear to be disproportionate to the complexity of the profession's tasks.

¹⁹ Cox C. and S. Foster, "*The Costs and Benefits of Occupational Regulation*" Bureau of Economics Staff Report to the Federal Trade Commission, 1990, p. 26-27.

54. Secondly, there might be scope to narrow a profession's reserved tasks. In certain circumstances, highly qualified professions hold, in addition to their core activities, reserved rights to carry out other less complex services. In some Member States, for example, lawyers or notaries have an exclusive right to provide conveyancing and probate services as well as an exclusive right to provide legal advice. In such cases, a wider group of service providers might be able to carry out the less complex tasks.
55. Thirdly, there might be scope to remove reserved rights in cases where there are less restrictive mechanisms to guarantee quality. In some markets it might for example be possible to guarantee quality also through independent accreditation or quality controls. In such markets, consumers would be free to choose whether they wish to use a qualified or accredited service provider.
56. Quantitative entry restrictions reduce the number of service providers and thus consumer choice and supply. In certain cases, moreover, quantitative restrictions can create local monopolies.
57. It has been argued that quantitative restrictions based on demographic criteria are necessary to safeguard access to important services. First, it has been suggested that quantitative restrictions increase profitability, protecting the viability of outlets in sparsely populated areas. Secondly, it has been argued that quantitative restrictions halt the redistribution of services away from sparsely populated areas (for example, pharmacists and notaries).
58. In view of their potentially significant detrimental effects it should however be examined whether there are less restrictive and more transparent means (e.g. public service compensations) to guarantee the provision of such services in sparsely populated areas. In any event, such quantitative entry restrictions do not appear to be justified for areas which are not sparsely populated and where there is therefore no danger of under-supply.

4.5. Business Structure Regulations

59. A number of professions are subject to sector-specific regulations on business structure. These regulations can restrict the ownership structure of professional services companies, the scope for collaboration with other professions and, in some cases, the opening of branches, franchises or chains.
60. Business structure regulations may have a negative economic impact if they inhibit providers from developing new services or cost-efficient business models. For example, these regulations might inhibit lawyers and accountants from providing integrated legal and accountancy advice for tax issues or prevent the development of one-stop shops for professional services in rural areas. Certain ownership regulations such as prohibition of incorporation can also reduce access to capital in professional services markets, hindering new entry and expansion.
61. On the other hand, it is argued that business structure and ownership regulations may be necessary to ensure practitioners' personal responsibility and liability towards clients and avoid conflicts of interest. It has also been suggested that these regulations may be necessary to ensure practitioners' independence. If professional service companies were controlled or influenced by non-professionals, this might compromise practitioners' judgement or respect for professional values.

62. In the Commission's view business structure regulations appear to be least justifiable in cases where they restrict the scope for collaboration between members of the same profession. Collaboration between members of the same profession would appear less likely to reduce the profession's independence or ethical standards.
63. Business structure regulations appear likewise to be less justifiable in professions where there is no overriding need to protect practitioners' independence. The architectural and engineering professions, for example, function effectively without these regulations in most Member States. It therefore appears unlikely that business structure regulations are essential to protect consumers of these services.
64. Business structure regulations appear to be more justifiable in markets where there is a strong need to protect practitioners' independence or personal liability. There might however be alternative mechanisms for protecting independence and ethical standards which are less restrictive of competition. In some markets, stringent ownership restrictions might therefore be replaced or partially replaced by less restrictive rules.

5. POSSIBLE APPLICATION OF EC COMPETITION RULES

65. Anti-competitive rules and regulations in the sector of liberal professions are found both in measures adopted by professional associations and in legislative or regulatory instruments adopted by public authorities. A distinction must therefore be made between (i) the liability of the members of the professions and of their associations under Article 81 and (ii) the liability of Member States under Articles 3 (1) (g), 10 and 81.

5.1. Liability of the members of the professions

5.1.1. *Members of the professions as undertakings*

66. Article 81 applies to undertakings. It is settled case law that the concept of undertaking encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.²⁰ Any activity consisting of offering goods or services on a particular market is an economic activity.²¹
67. Three situations are outside the scope of application of Article 81:
 - (1) in principle no economic activity is involved where the State carries out activities that the market could not provide;²²

²⁰ Case C-41/90 *Höfner and Elser* [1991] ECR I -1979, para 21, and Case C-309/99 *Wouters* [2002] ECR I -1577., para 46.

²¹ Case C-35/96, *Commission v. Italy* (CNSD) [1998] ECR I -03851, para 36.

²² Cases C-160/91 *Poucet* [1993] ECR I -637. (compulsory social security system scheme based on principle of solidarity is not an undertaking) and Case C-218/00 *CISAL di Battistello* [2002] ECR I -00691. See on the other hand Case C-67/96 *Albany* [1999] ECR I -5863. (system based on principle of capitalisation is an undertaking) and Case C-180/98, *Pavlov* [2000] ECR I -06451.

(2) the exercise of public authority is also not an economic activity;²³ however, the concept of undertaking is relative: a given entity may be engaged partially in an economic activity and partially exercise public authority;²⁴ in so far as it is engaged in an economic activity it is subject to the competition rules.

(3) employees are not to be considered as undertakings²⁵.

68. It follows that members of the liberal professions, insofar as they are not employees, are engaged in an economic activity because they provide services against remuneration on markets²⁶. Neither the fact that the activity is intellectual, requires authorisation and can be pursued in the absence of a combination of material, non-material and human resources²⁷, nor the complexity and technical nature of the services provided nor the fact that the profession is regulated²⁸, can alter that conclusion.

5.1.2. *Self-regulation as decision of an association of undertakings*

69. A professional body acts as an association of undertakings for the purposes of Article 81 when it is regulating the economic behaviour of the members of the profession²⁹. This is true even where professionals with employee status are admitted, since professional bodies normally and predominantly represent independent members of the profession.

70. It makes no difference that some professional bodies have public law status³⁰ or have certain public interest tasks to perform³¹ or allege that they act in the public interest.³²

71. A body regulating professional conduct is however not an association of undertakings if it is composed of a majority of representatives of public authorities and it is required to observe pre-defined public interest criteria.³³ Rules adopted by a professional body can only be regarded as State measures, if the State has defined the public-interest criteria and the essential principles with which the rules must comply and if the State retained its power to adopt decisions in the last resort.³⁴

²³ Case C-364/92, *Eurocontrol*, [1994] ECR I -0043 para 30, and C-343/95, *Calì e Figli* 1997 ECR I -1547.paras 22-23.

²⁴ This was the case for the public employment office in *Höfner* (op cit note 20), the airport authority in Case C-82/01 P *Aéroports de Paris* [2002] ECR II -3929 and the city of Trier in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-08089. .

²⁵ Opinion of Advocate General Jacobs in C-180/98 and C-184/98 *Pavlov* op cit note 22 and judgment in Case C-22/98, *Becu* [1999] ECR I -4449.

²⁶ Indeed, the Court confirmed in *Wouters* op cit note 20, para 48, that lawyers offer, for a fee, services in the form of legal assistance and representation of clients in legal proceedings. Similar reasoning applies for other professions, such as customs agents in the two *CNSD* (T- 513/93 and C-35/96) cases and medical specialist doctors in *Pavlov* op cit note 22.

²⁷ *CNSD*, op cit note 21, para 38.

²⁸ *Wouters*, op cit note 20, para 49.

²⁹ *Wouters*, op cit note 20, para 64.

³⁰ *Wouters*, op cit note 20, paras 65 and 66.

³¹ Advocate General Léger in his Opinion in Case C-35/99 *Arduino*, [2002] ECR I -01529, para 56.

³² Advocate General Jacobs in his Opinion in *Albany* op cit note 22.

³³ *Wouters*, op cit note 20 paras 61-64 and *Arduino* op cit note 31, paras 37-39.

³⁴ *Wouters*, op cit note 20, para 68.

5.1.3. *Self-regulation as a restriction of competition*

72. Section 4 of the present report lists typical restrictions of competition in the field of professional services. The Commission already examined and condemned fixed tariffs for Italian customs agents³⁵ and Spanish industrial property agents.³⁶ It recently sent a statement of objections against the recommended fee scale established by the Belgian association of architects. The Commission also examined the code of conduct of the Institute of Professional Representatives before the European Patent Office.³⁷ It found that a number of restraints were purely deontological rules and as such outside the scope of Article 81 but that the restriction on comparative advertising could only be temporarily maintained after exemption under Article 81(3).

5.1.4. *Effect on trade between Member-States*

73. Professional regulations are liable to have an appreciable effect on trade between Member States at least where the professional regulation covers a whole country.³⁸

5.1.5. *The “Wouters exception”*

74. According to the Wouters judgment of the European Court of Justice not every agreement between undertakings or every decision of an association of undertakings which restricts competition necessarily infringes Article 81(1) of the Treaty. In that case there was no infringement of Article 81 (1) of the Treaty, since the professional regulation in issue, despite the effects restrictive of competition that were inherent in it, was necessary for the proper practice of the profession, as organised in the Member State concerned.³⁹

75. The Court took several steps in coming to that conclusion:⁴⁰

- Account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of professional services and a specific public interest purpose are provided with the necessary guarantees in relation to integrity and experience.
- It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and if they are therefore necessary in order to ensure the proper practice of the profession, as it is organised in the Member State concerned.

³⁵ Commission Decision of 30.6.1993 93/438/EEC CNSD.,(OJ L 203, 13.08.1993.

³⁶ Commission Decision of 30.1.1995 95/188/EC (OJ L 12 , 02.06.1995) relating to a proceeding under Article 85 of the EC Treaty (IV/33.686 - Coapi), , p.37.

³⁷ Commission Decision of 7.4.1999 1999/267/EC (OJ L 106, 23.04.1999), p.14 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/36.147 EPI code of conduct), . See also judgment of the Court of First Instance in case T-144/99 *Commission v Netherlands* “[2001] ECR I - 03541.

³⁸ *Wouters*, op cit note 20, para 95 and *Arduino* op cit note 31, para 33.

³⁹ *Wouters*, op cit note 20, para 110.

⁴⁰ *Wouters* , op cit note 20, paragraphs 97-110.

- The effects restrictive of competition must not go beyond what is necessary in order to ensure the proper practice of the profession (proportionality test).

5.1.6. *State compulsion as a defence*

76. Undertakings are not liable under Article 81 where the State by measures of public authority requires them to engage in anti-competitive conduct.⁴¹ In such a situation, they cannot be held accountable for infringement of Articles 81 EC⁴².
77. This State compulsion defence, operates only where the State requires certain behaviour.⁴³ Consequently, if a national law merely allows, encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, the State compulsion defence can not operate.⁴⁴
78. Moreover, even where the State requires the undertakings to engage in anti-competitive conduct, if the undertakings remain at least partially capable to autonomously restrict competition - for example because they enjoy a margin of discretion in the implementation of the national legislation⁴⁵ -, both the undertakings and the State can be held liable. Indeed, State legislation which requires economic actors to engage in anti-competitive conduct may itself infringe the EC Treaty, namely Articles 3(1)(g), 10(2) and 81/82 (see below).
79. In its recent *Conorzio Industrie Fiammiferi* or *CIF* judgment the European Court of justice decided that where undertakings engage in conduct contrary to Article 81(1) and where that conduct is required or facilitated by State measures which themselves infringe Articles 3(1)(g), 10(2), and 81/82, a national competition authority has a duty to disapply those State measures and give effect to Article 81. The consequence of that judgment is that when a decision by a national competition authority to disapply national legislation has become definitive, the State compulsion defence is no longer available.⁴⁶ For the period prior to the decision to disapply the legislation, the State compulsion defence is valid and the undertakings enjoy immunity from fines and also immunity from damage claims (see also section 5.1.8 below).⁴⁷

5.1.7. *Article 81(3)*

80. Some rules which fall under Article 81(1) and do not come under the “Wouters exception” might nevertheless benefit from an exemption under Article 81(3) if they fulfil the conditions laid down therein.

5.1.8. *Possible enforcement action*

81. Where a regulation adopted by a professional association infringes Article 81 the Commission can require the association concerned to cease the infringement and/or

⁴¹ Case C-13/77, *GB-Inno-BM*. [1997] ECR I-02115 .

⁴² Case C-198/01, *Conorzio Industrie Fiammiferi* (CIF) [2003] ECR I- 0000 para. 51.

⁴³ C-359/95 P and C-379/95 P, *Ladbroke* [1997] ECR I-6265, paras 33 and 34.

⁴⁴ 42.Joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line v. Commission* [2003] ECR II-0000.

⁴⁵ Case T-513/93, *CNSD* [2001] ECR II -1807, para 71-72.

⁴⁶ *CIF*, op cit note 42, para 55.

⁴⁷ *CIF*, op cit note 42 para 54.

impose fines. National competition authorities have similar administrative enforcement powers.

82. Where undertakings engage in conduct contrary to Article 81(1) and where that conduct is required by State measures which are themselves contrary to Articles 3(1)(g), 10(2) and 81/82 EC it follows from the recent CIF judgment that a national competition authority has a duty to “disapply” the national legislation and give effect to Article 81. In such a case, as regards past conduct, for reasons of legal certainty, the undertakings concerned cannot be exposed to any penalties (criminal or administrative). As regards future conduct, the national competition authority is however free to order the undertakings concerned to cease, and desist from, the conduct in question and impose fines in respect of conduct subsequent to the decision to disapply the national legislation.
83. An infringement of Article 81, which has direct effect, can also have consequences for proceedings before national courts. In the first place, those negatively affected by professional rules contrary to Article 81 may request injunctions and/or introduce actions for damages. Where the conduct contrary to Article 81 was required by national legislation, which is itself contrary to Article 3(1)(g), 10(2) and 81/82, for reasons of legal certainty the conduct in question cannot trigger the award of damages for the period before the anti-competitive national law was disappplied. Secondly, according to Article 81(2) of the Treaty, any agreement or decision of undertakings prohibited pursuant to Article 81, is void. The nullity of professional rules which are contrary to Article 81 can therefore be invoked as a defence in proceedings concerning the enforcement of those rules.

5.2. Liability of Member States

84. Article 81 is, in itself, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States. Nonetheless, read in conjunction with Article 10(2) and with Article 3(1)(g) of the Treaty, Article 81 “requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings”⁴⁸.
85. On that basis, the Court has stated repeatedly that if a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 or reinforces their effects, or divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere, it can be held liable under Articles 3(1)(g), 10 and 81⁴⁹.
86. The *Arduino* judgment suggests that State measures delegating regulatory powers to private operators could be challenged under Articles 3(1)(g), 10(2) and 81 unless the public authorities have the final word and exercise effective control of the implementation. In the *Arduino* case, the participation of the professional association in fee-setting was limited to proposing a draft tariff and the competent minister had the power to amend the tariff, and therefore there was no challengeable delegation to

⁴⁸ *Arduino*, op cit note 31 para 34.

⁴⁹ *Arduino* op cit note 31 paras 34-35.

private operators. In the Commission's view State measures delegating regulatory powers which do not clearly define the public interest objectives to be pursued by the regulation and/or by which the State effectively waives its power to take the decisions of last resort or to control implementation can therefore be challenged under those rules.

87. Based on the above principles, the Commission's view is that the following can be challenged under Art. 3(1)(g), 10 (2) an 81 and 82 EC:

- “rubberstamp approvals”, including simple validations and tacit approvals, granted by Member States for agreements or decisions where the legislative procedures in force do not provide for checks and balances and/or for the authority to carry out consultations;
- practices whereby the authorities of a Member State are only entitled to reject or endorse the proposals of professional bodies without being able to alter their content or substitute their own decisions for these proposals.

88. A proportionality test would seem appropriate to assess to what extent an anti-competitive professional regulations truly serves the public interest. For this purpose it would be useful that each rule had an explicitly stated objective and an explanation how the chosen regulatory measure is the least restrictive mechanism to effectively attain the stated objective.

89. Where a State adopts or maintains in force measures which are contrary to Articles 3(1)(g), 10 and 81 the Commission and other Member States can start infringement proceedings under Articles 226 and 227. Moreover, by virtue of the primacy of Community law, national courts and national administrative bodies have a duty to interpret State regulations in the light of those Community provisions and, if necessary, a duty to disapply State regulations which are in conflict with the Treaty. According to the already quoted CIF judgment the latter duty applies also in cases in which national competition authorities investigate conduct of undertakings required by State legislation to engage in the conduct under investigation. Finally, persons negatively affected by the State measures in issue can introduce an action for damages against the Member State for breach of Community law.

6. NEXT STEPS TOWARDS MODERNISATION

90. In the present report the Commission has identified those groups of regulatory restrictions in the professions which have the biggest potential to harm competition without being objectively justified. Accordingly the Commission would like to see those restrictions reviewed and, where they are not objectively justified, removed or replaced by less restrictive rules.

91. The review and, where necessary, the reform of potentially restrictive existing rules and regulations will require the concerted efforts of all actors involved, each in its area of competence. This section considers how the different actors (competition authorities, regulatory authorities, professional bodies) can contribute to those joint efforts.

6.1. Review of existing rules by the regulators

92. The Commission believes that the best way to achieve overall change would be by voluntary action of those responsible for setting the existing restrictions. They should carry out a thorough analysis of the need for reform in the respective professions and of the compatibility of existing rules with competition law principles. As highlighted above, restrictive regulations are adopted and maintained in force directly by the State or by professional bodies.
93. The Commission invites therefore, first, the regulatory authorities of the Member States to review the legislation or regulations within their remit. They should in particular consider whether the existing restrictions pursue a clearly articulated and legitimate public interest objective, whether they are necessary to achieve that objective and whether there are no less restrictive means to achieve this.
94. The Commission also invites all professional bodies to start a similar review of their rules and regulations. They should apply the same proportionality test as the regulatory authorities of the Member States and, where necessary, change existing rules or propose changes.
95. The Commission proposes to discuss during 2004 with the European organisations of professional bodies on their understanding of the public interest in their domain and how it could be achieved with more pro competitive mechanisms. Consumer organisations will also be consulted. The Commission invites National Competition Authorities to do the same at national level where they have not yet started to do so.
96. The Commission will continue to monitor consumers' opinions on the advantages and disadvantages of this type of regulation. The Commission also intends to continue to research the relationships between levels of regulation and economic outcomes (prices and quality), as well as consumer satisfaction.
97. Experience of past modernisation efforts in the field of professional services in some Member States shows that a simple elimination of anti-competitive mechanisms may not be enough to bring about more competition to this sector. Consequently both regulatory authorities and professional bodies should explore the need to use pro-competitive accompanying mechanisms which increase transparency and enhance consumer empowerment. Such mechanisms could include, for instance, active monitoring by consumer associations, collection and publication of survey based historical data or public announcements of the abolition of tariffs. The Commission intends to investigate the impact of different alternatives where they have been implemented and as a first step, it will explore with consumer organisations at European level how to define best practice.
98. The Commission will extend its fact-finding to the ten acceding Member States in 2004.

6.2. Enforcement in the European Competition Network

99. From May 2004 onwards, following the entry into force of Regulation 1/2003⁵⁰, the national competition authorities and the national courts will have a more prominent role in assessing the legality of rules and regulations in the professions. They themselves can decide on the compatibility of an agreement, decision or practice with Article 81, paragraph 1, and also apply Article 81, paragraph 3, which will entail an exemption from the general prohibition of anti-competitive agreements.
100. To the extent that competition restrictions have their centre of gravity in a Member State, administrative enforcement of the EC competition rules in the liberal professions should then be mainly the task of national competition authorities. The Commission will continue to carry out casework where appropriate.
101. The Commission intends to monitor progress and ensure a coherent application of Articles 81 and 82 through co-ordination in the European Competition Network. In particular market monitoring will be organised and carried out together with national competition experts, as well as with experts from national regulatory and other authorities.
102. The Commission also proposes to discuss with national regulatory authorities the necessity, proportionality and justification of existing regulation. At a later stage, if necessary, the Commission does not exclude infringement procedures.

6.3. Final Remarks

103. The Commission will report in 2005 on progress achieved in eliminating the restrictions identified above, or on the justifications for these rules that have been demonstrated. To this end, the Commission will contact by the end of the year to regulatory authorities to ask them to report on any measure they have adopted which falls within the scope of this Report. Any explicit justification of the restrictive rules which they wish to maintain should then be communicated to the Commission.
104. The Commission concludes by repeating that the efforts of all concerned parties are needed to improve the regulatory environment in which providers of professional services operate in Europe. An environment in which quality and ethical behaviour are guaranteed through more pro-competitive mechanisms will allow the liberal professions to innovate and to increase the quality and choice of their services. More efficient and competitive professional services will benefit consumers directly and, as key inputs for other businesses they will also bring greater productivity to the economy as a whole, thus contributing to the Lisbon agenda of making Europe the most dynamic knowledge based economy in the world.

⁵⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, ([OJ L 1 of 4.1.2003, p. 1](#)),