

2009

The European Commission Project Regarding Competition in Professional Services

Laurel S. Terry

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [Ethics and Professional Responsibility Commons](#)

Recommended Citation

Laurel S. Terry, The European Commission Project Regarding Competition in Professional Services, 29 Nw. J. Int'l L. & Bus. 1 (2009)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

The European Commission Project Regarding Competition in Professional Services

*Laurel S. Terry**

Lawyer regulation has been under assault. Antitrust officials around the world have taken aim at the regulatory systems of the legal profession.¹ This includes European antitrust officials, who have concluded that some lawyer regulators are affected by the “weight of tradition,” “fail to see how things can be done differently,” and do not regulate in the public interest.²

The European proposals are nothing short of breath-taking and include, inter alia, suggested changes to lawyer qualification rules, such as education and training requirements, reduction or elimination of the lawyer monopoly, and changes to the business structure rules to permit multidisciplinary practice or even publicly traded law firms.³ These proposals are part of the European Union Professional Services

* Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law. Professor Terry would particularly like to extend her thanks to Professor Dr. Martin Henssler, Dr. Matthias Kilian, Jonathan Goldsmith, Ron Aronovsky, and others who provided useful comments and information for this article.

¹ Within the last decade, antitrust officials around the world have launched inquiries into the regulation of the legal profession. Such efforts have taken place in Asia, Australia, Europe, North America, and elsewhere but are beyond the scope of this article. See, e.g., COMPETITION BUREAU CANADA, SELF-REGULATED PROFESSIONS—BALANCING COMPETITION AND REGULATION (2007), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02523e.html> [hereinafter CANADIAN COMPETITION REPORT]; Int’l Inst. of Law Ass’n Chief Executives, The Implementation of the Reform of the Legal Profession—Case Studies in Change (Aug. 18, 2006), available at <http://www.iilace.org/pdf/2006NYC-Program.pdf> (meeting notes on file with author).

² *Communication from the Commission: Professional Services—Scope for More Reform: Follow-Up to the Report on Competition in Professional Services*, at 10, COM (2005) 405 final (Sept. 5, 2005), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0405:FIN:EN:PDF> [hereinafter *Follow-Up Report*]. In Europe and elsewhere in the world, antitrust law is known as “competition law” and the officials are competition officials, rather than antitrust officials. The terms will be used interchangeably in this article.

³ *Id.*

“Competition” Initiative (EU Initiative), which has examined and made recommendations concerning five professions in twenty-five countries.⁴ While the antitrust officials’ examinations of lawyer regulations are probably long overdue, there are risks associated with the scope and breadth of the current inquiry and its broad-brush approach.

The economic (and often technical) arguments offered by the EU Competition authorities have launched a wave of dramatic reforms in EU Member States, many of which appear unstoppable. Although most U.S. (and perhaps EU) lawyers would agree that some of these lawyer regulation reforms are appropriate and long overdue (e.g., lifting advertising bans and restrictive fee schedules), many of the proposed reforms are much more controversial and central to the concept of lawyer training and regulation. Because of the breadth and scope of the EU Initiative, however, and its call to EU Member States to conduct further studies, the EU Initiative did not conduct an in-depth country and context-specific study of individual lawyer rules, their justifications, and a rigorous examination of the potential costs and benefits of reforms. For example, the EU Initiative did not attempt to rigorously examine whether or how the suggested changes would affect the administration of justice or rule of law (and how one might measure this). Moreover, because of its broad-brush nature, the EU Initiative provided a rather cursory antitrust analysis of specific service sectors it studied, with relatively little attention paid to elements such as identifying and analyzing the legal markets in different countries.

One goal of this article is to help EU Member States’ policy-makers and citizens understand the broad-brush nature of the EU Initiative and remember that it was a call for further investigation by EU Member States. This article provides a detailed case study of the EU Initiative so that as many individuals as possible in the European Union can understand the issues at stake and participate in rigorous discussions about the justifications for, and costs and benefits of, particular lawyer regulation rules in particular countries.

Although one goal of this article is to empower European stakeholders and policy-makers, it is not this article’s only goal. The EU Initiative is certainly important because of the profound effect it has had and will continue to have on the regulation of the legal profession in Europe. There is an additional reason, however, why it is important. In a globalized world, regulatory changes that happen in one country are increasingly likely to be reproduced in some fashion in other countries.⁵ Thus, the European

⁴ *Id.*

⁵ See Laurel S. Terry, Carole Silver, Ellyn Rosen, Carol Needham, Robert E. Lutz, & Peter D. Ehrenhaft, *Transnational Legal Practice: 2006-07 Year-in-Review*, 42 INT’L L. 833 (2008) (discussing globalization and legal services); Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV.

Union's legal profession antitrust initiatives are important because they have the potential to migrate and change the nature of the lawyer regulation debate in the United States. Other countries, including Canada, have launched similar inquiries.⁶ For this reason, it is useful for U.S. lawyers to be familiar with the EU Initiative. In my view, there is an important role to be served by a detailed case study that shows how and when the EU Initiative evolved so that U.S. lawyers can be better prepared to respond should a similar development "jump the pond" to the United States. This is particularly important in light of the EU Initiative's "tidal wave" momentum, which has been cited in OECD and EU studies and by countries such as Canada.⁷

Section I of this article provides the background and contextual information that is necessary to understand the EU Initiative. This background section includes information about prior antitrust initiatives directed toward the legal profession, EU antitrust law and its enforcement mechanisms, the European Union's Lisbon Strategy, which has been cited as support for the EU Initiative, EU regulation of legal practice, and the European Court of Justice cases that provided part of the impetus for this initiative. Section II of this article introduces the European Commission's Professional Services Stocktaking Exercise (Stocktaking Exercise), which was directed towards five categories of professional services, including legal services. Section III analyzes the two Commission reports that

463 (2005) (discussing migration of lawyer regulatory developments).

⁶ CANADIAN COMPETITION REPORT, *supra* note 1. See also Paul D. Paton, *Between a Rock and a Hard Place: The Future of Self-Regulation—Canada Between the United States and the English/Australian Experience*, 2008 J. PROF. L. 87.

⁷ See, e.g., Organization of Economic Cooperation and Development [OECD], *Competitive Restrictions in Legal Professions*, at 18, n. 5, DAF/COMP(2007)39 (Jan. 28, 2008), available at <http://www.oecd.org/dataoecd/12/38/40080343.pdf> [hereinafter OECD *Legal Professions*] (citing the EU reports); CANADIAN COMPETITION REPORT, *supra* note 1, at v ("Research by the Organization for Economic Co-operation and Development (OECD) confirms the worrisome state of Canada's professional services sector."); CANADIAN COMPETITION REPORT, *supra* note 1, at 15 (citing OECD and Australian studies); Barbara Baarsma, Flora Felso, & Kieja Janssen, *Regulation of the Legal Profession and Access to Law, An Economic Analysis*, SEO ECONOMIC RESEARCH, (2008) at 48, available at http://www.seo.nl/binaries/publicaties/rapporten/2008/2008_1.pdf (citing EU Reports); Christoph Schmid, Gabriel S. Lee, Steffen Sebastian, Marcel Fink, & Iain Paterson, *Preliminary Findings From the Ongoing Study on "Conveyancing Services Regulation in Europe,"* at p. 4, n.2 (Dec. 11, 2006), available at http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/09_zerp.pdf (citing EU Reports); OECD, *Indicators of Regulatory Conditions in the Professional Services*, (spreadsheet) at 'read me' tab, available at <http://www.oecd.org/dataoecd/40/60/35818437.xls> [hereinafter OECD *Regulatory Indicators*] ("These indicators are calculated using the methodology developed in the [IHS] study for the European Commission and effectively extend the time and country coverage of this work.").

resulted from the Stocktaking Exercise.⁸ Section IV reviews some of the stakeholder reactions to the EU Initiative. Section V concludes by discussing the implications of these developments.

I. INTRODUCTION TO AND CONTEXT OF THE EUROPEAN COMMISSION PROJECT REGARDING PROFESSIONAL SERVICES

A. Prior U.S., OECD, Australian, and U.K. Initiatives

As a starting point, it is useful to understand that the EU Initiative did not arise in a vacuum but followed in the wake of a number of similar discussions that took place within the Organization of Economic Cooperation and Development (OECD) and elsewhere.⁹ Because the European Union is a member of the OECD, it participated in, and was aware of, these discussions. European commentator Daniel Vázquez Albert has summarized the OECD's efforts with respect to professional services:

In 1985, the OECD's Committee on Competition Law and Policy presented a Report titled *Competition Policy and the Professions*. This report concluded that in the majority of countries professions were not subject to competition rules and, in consequence, recommended to the States to eliminate existing restrictions regarding access, price, advertising and association structure, with the aim that "exceptions of competition laws not go beyond what is necessary and only serve to reach public interest aims." Regarding access, it recommended that access systems be objective and equitable, and that policies be created that would afford foreign professionals the right to provide their services in both temporary and permanent fashion. With regard to advertising, it suggested the adoption of measurements to assure that consumers be afforded sufficient information to choose between different professionals. In reference to fees, it recommended that the mandatory tariff fixations

⁸ See *Follow-Up Report*, *supra* note 2; *Communication from the Commission: Report on Competition in Professional Services*, at 5, COM(2004) 83 final (Feb. 9, 2004), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0083en01.pdf [hereinafter *Commission Report*].

⁹ The Organization of Economic Cooperation and Development (OECD) was established by fourteen countries in 1960 and has since grown to thirty of the most-developed countries in the world. See OECD, *Ratification of the Convention on the OECD*, http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (last visited Oct. 31, 2008). The OECD brings together the governments of countries committed to democracy and the market economy from around the world to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist other countries' economic development, and contribute to growth in world trade. It also shares expertise and exchanges views with more than 100 other countries. See OECD, *About OECD*, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html (last visited Oct. 31, 2008).

be submitted to review to avoid diversion from the price setting freedom principle. In relation to professional corporations, it emphasized that the use of new business structures to provide professional services could allow for a greater efficiency. In the latest years, the OECD has insisted on the need to reduce restrictions to the rendering of professional services, as the Conferences and Round Tables celebrated on this issue in 1995, 1996, 1997 and 1999 demonstrate. As a consequence of these Conferences and Round Tables, the Committee on Competition Law and Policy has elaborated diverse Reports, among which stand out the following two: Report on Regulatory Reform: Chapter 3, Regulatory Reform and Professional Business Services, of 1997; and Competition in Professional Services, of 2000.¹⁰

The OECD 2000 Report entitled “Competition in Professional Services” to which Professor Vázquez Albert refers consisted of the published proceedings from the 1999 OECD Roundtable on Professional Services.¹¹ This 214 page report included an executive summary, a background note prepared by the OECD Secretariat, contributions from thirteen countries, and a section that memorialized the discussions.¹² Many of the contributions came from antitrust (competition) authorities in OECD Member States and it is not clear whether any lawyer regulators were invited or present.¹³ The Executive Summary of this Roundtable observed that concerns had been expressed about the regulation of professional services.¹⁴ For example, the U.S. delegate to the OECD Roundtable

¹⁰ Daniel Vázquez Albert, *Competition Law and Professional Practice*, 11 ILSA J. INT’L & COMP. L. 555, 568 nn. 8–10 and accompanying text (2004–2005) (footnotes omitted).

¹¹ OECD, *Competition in Professional Services*, DAF/CLP(2000)2, at 2 (Feb. 22, 2000), available at <http://www.oecd.org/dataoecd/35/4/1920231.pdf> [hereinafter *OECD 2000 Roundtable*] (“This document comprises proceedings in the original languages of a Roundtable on Competition in Professional Services, which was held by the Working Party No. 2 of the Committee on Competition Law and Policy in June 1999.”).

¹² *Id.* at 5.

¹³ See generally *id.*

¹⁴ *Id.* at 7:

Concerns have been raised that these structural and behavioural regulations restrict competition more than is appropriate or necessary, raising the price and limiting innovation in the provision of professional services. In addition, where a professional association is delegated certain regulatory powers, such as the power to discipline its members, concerns have arisen that professional associations may use these powers as a tool to restrict entry, fix prices and enforce anti-competitive co-operation between its members. In some cases, studies have found that restricting entry to the most highly qualified providers may lower service quality overall as consumers forego professional services or seek to provide the services for themselves.

commented that one shouldn't allow regulation of quality of service to be promulgated as a disguise for economic regulation and one should also be very careful to avoid a paternalistic excess of quality regulation.¹⁵ OECD members have continued to show interest in professional services regulation: in 2008, the OECD issued a report that focused on the legal profession and identified antitrust issues raised by various kinds of lawyer regulations.¹⁶ This OECD report noted that traditionally the legal professions are heavily regulated; that regulation appears to serve mainly the private interests of the profession rather than broader consumer interests; and that professional bodies may capture public authorities or attain the right to regulate themselves.¹⁷ It further concluded that the benefits of self-regulation, which allows for quality standards to be set by informed professionals, may be outweighed by the harm from potential anti-competitive restrictions.¹⁸ It therefore called on OECD members to identify and remove those lawyer regulation restrictions that are unnecessary or disproportionate to achieve the public interest; it encouraged its members to consider the differences between informed and uninformed buyers and to focus in particular on issues related to independent regulatory authority for legal services, entry restrictions, exclusive rights, and advertising and price restrictions.¹⁹

The trend towards deregulation of the legal profession, which was endorsed in the OECD Roundtable Sessions and subsequent OECD reports, reportedly began in the United States in the 1960s with the Chicago school.²⁰ The U.S. cases applying antitrust law to the legal profession are well-known and include *Goldfarb v. State Bar of Virginia*,²¹ which struck down a voluntary bar association's recommended minimum fee schedule,

¹⁵ See, e.g., OECD 2000 Roundtable, *supra* note 11, at 202. This delegate also said:

[P]rofessional service markets are just like markets for any other goods and services, and the market responds very well to normal incentives to provide the right level and right mix of price and quality. In the areas in which any kind of empirical study of the effect on the removal of regulation on quality has been undertaken, price in market has gone down, with no indication that the level of quality of services has decreased. In terms of a market failure for information of quality, this can be accomplished without the need for government regulation.

Id.

¹⁶ OECD *Legal Professions*, *supra* note 7, at 287–94.

¹⁷ *Id.* at 9.

¹⁸ *Id.*

¹⁹ *Id.* at 10.

²⁰ Albert, *supra* note 10, at 76 (noting that the United States “is, undoubtedly, the country where the trend to subject professional activity to free competition originated.”).

²¹ 421 U.S. 773 (1975).

and *Bates v. State Bar of Arizona*,²² which struck down a lawyer disciplinary rule that prohibited lawyers from advertising. Professor Tom Morgan, who is one of the early and leading U.S. commentators on U.S. legal ethics and lawyer regulation issues, has written an excellent article that summarizes the application of U.S. antitrust law to the legal profession. His article reviews cases in which antitrust allegations against the legal profession or bar associations were upheld, as well as cases in which antitrust allegations were raised, but no violations were found.²³ Because these decisions have been widely cited in the OECD and elsewhere, they are an important part of the factual context of the EU Initiative.

In addition to these U.S. antitrust cases and the OECD initiatives, there were important developments in Australia and the United Kingdom that are part of the backdrop of the EU Initiative. The Australian competition initiative began in 1994 and included the legal profession within its reforms:

On 25 February 1994 the Council of Australian Governments in Hobart determined that it wished to assist in bringing about a more competitive and integrated national market, and more efficient and effective arrangements for the delivery of services in the areas of shared responsibility between Governments. Those objectives related to all spheres of Government, corporate, professional and personal activities. That Council's decision adopted the principles of competition policy, articulated in the Hilmer Report. That report made wide-ranging recommendations, including the application of competition principles to Commonwealth and State Government agencies and authorities, the creation of a new Australian Competition Commission, and a micro-economic reform agenda to ensure the general application of competition policy principles, including in relation to the legal profession. Specifically in relation to the legal profession, it sought to have developed detailed proposals for further reform of the legal profession: with the objective of removing constraints on the development of a national market in legal services and developing other efficiency enhancing reforms.²⁴

In 1994, in response to these developments, the Law Council of

²² 433 U.S. 350 (1977).

²³ Thomas D. Morgan, *The Impact Of Antitrust Law On The Legal Profession*, 67 *FORDHAM L. REV.* 415 (1998). See also John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 *SAN DIEGO L. REV.* 301, 375–79 (1991) (discussing the FTC's California Dental Association decision and the application of antitrust principles to professionals other than lawyers).

²⁴ LAW COUNCIL OF AUSTL., *BLUEPRINT FOR THE STRUCTURE OF THE LEGAL PROFESSION: A NATIONAL MARKET FOR LEGAL SERVICES* 3 (July 1994), available at <http://www.lawcouncil.asn.au/policy/1960506451.html>.

Australia prepared a report entitled "Blueprint for the Structure of the Legal Profession;" this report set forth a plan to develop the national market for legal services that the Australian Competition Commission had called for to reduce barriers and facilitate national practice.²⁵ After this report (and several additional reports, including a 1998 report by the Australian Attorney General),²⁶ numerous changes were made to Australian lawyer regulations.²⁷ In 2001, the Law Council of Australia proposed additional reforms to facilitate national practice, which were approved by the appropriate government entities.²⁸ In 2002, the Australian attorneys general launched a further set of reforms to develop model laws on a number of items related to the legal profession.²⁹ These reforms, known as the Model

²⁵ *Id.*

²⁶ In April 1995, the Council of Australian Governments, which includes the commonwealth, state, and territory governments, signed the Competition Principles Agreement (CPA), which was one of three agreements to give effect to National Competition Policy. See PARLIAMENT OF AUSTL., AUSTRALIA'S NATIONAL COMPETITION POLICY: ITS EVOLUTION AND OPERATION (June 3, 2003), available at http://www.aph.gov.au/library/intguide/econ/ncp_ebrief.htm. In August 1998, the Attorney General's Office in the state of New South Wales released a comprehensive issues paper that focused on the National Competition Policy Review and the Legal Profession Act 1987. See NAT'L COMPETITION POLICY REVIEW OF THE LEGAL PROFESSION ACT (Austl.: New S. Wales), available at http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/ncp_index [hereinafter NSW NATIONAL COMPETITION POLICY REVIEW]. In December 1998, the Attorney General's office released a report that supplemented the issues paper. This report (and reports in other Australian states and territories) led to changes in Australia's lawyer regulations. See Steve A. Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN. S. INT'L L. REV. 671 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=673021 (explaining that NSW's MDP rules were changed as a result of this report).

²⁷ By 2001, all but two Australian states and territories had adopted the legislation called for in the Blueprint. See LAW COUNCIL OF AUSTL., SUBMISSION TO THE STANDING COMMITTEE OF ATTORNEYS-GENERAL TOWARDS NATIONAL PRACTICE BY THE LAW COUNCIL OF AUSTRALIA, at 1 (Oct. 2001), available at <http://www.lawcouncil.asn.au/natpractice/NationalPractice.pdf>; see also NSW NATIONAL COMPETITION POLICY REVIEW, *supra* note 26.

²⁸ See, e.g., LAW COUNCIL OF AUSTL., FEDERAL PROFESSIONAL STANDARDS LEGISLATION, available at <http://www.lawcouncil.asn.au/policy/1960581107.html> ("On 5 December 1998 the Law Council agreed to support the development of federal professional standards legislation to complement existing or future State and Territory professional standards legislation, so as to extend the application of the State and Territory schemes to federal practice and liability in federal law."). See generally LAW COUNCIL OF AUSTL., POLICIES AND GUIDELINES: NATIONAL PROFESSION, available at <http://www.lawcouncil.asn.au/policies.html>; LAW COUNCIL OF AUSTL., SUBMISSION TO THE STANDING COMMITTEE OF ATTORNEYS-GENERAL TOWARDS NATIONAL PRACTICE BY THE LAW COUNCIL OF AUSTRALIA (Oct. 2001), available at <http://www.lawcouncil.asn.au/natpractice/NationalPractice.pdf> (Law Council asked for attorney general endorsement of its approach).

²⁹ LAW COUNCIL OF AUSTL., NATIONAL PRACTICE: BACKGROUND, available at <http://www.lawcouncil.asn.au/natpractice/background.html>:

Laws initiatives, are wide ranging and include eleven major areas, including admission, reserved tasks (e.g. UPL), business structure, ethics and discipline, and fees and fiduciary accounts, among other things.³⁰ The changes to Australian lawyer regulation have been quite dramatic and have led to, inter alia, the world's first publicly-traded law firms.³¹ While there may have been a number of factors that contributed to these changes, including globalization, it is clear that the Australian antitrust initiatives were a major impetus for these regulatory changes.³² Moreover, it is clear that the EU competition authorities were aware of these Australian developments because they participated in OECD sessions that included reports about them.³³

In addition to these U.S., OECD, and Australian developments, EU competition officials were aware of the United Kingdom's antitrust review of the legal profession and resulting reforms.³⁴ The U.K. developments include the 2001 report by the Office of Fair Trading,³⁵ which was followed by an important government report³⁶ that led to the Clementi Review and Report,³⁷ ultimately resulting in the Legal Services Bill (the Act) that was

[T]he Standing Committee of Attorneys-General (SCAG) commenced a further phase of examining the regulation of laws through the National Practice Model Laws Project. This project coincides with the Council's National Practice Project and is essentially about reviewing and seeking national consistency in the standards and 'rules' applying to the regulation of lawyers.

³⁰ LAW COUNCIL OF AUSTL., NATIONAL PRACTICE—THE MOVE TOWARDS A NATIONAL LEGAL PROFESSION, available at <http://www.lawcouncil.asn.au/natpractice/home.html>.

³¹ See Alexia Garamfalvi, *Law Firm Goes Public*, LEGAL TIMES (May 22, 2007), available at <http://www.law.com/jsp/article.jsp?id=1179751700602>; Slater & Gordon, Ltd. Prospectus, <http://www.slatergordon.com.au/docs/prospectus/Prospectus.pdf>; Australian Securities Exchange, Slater & Gordon Limited (SGH), <http://www.asx.com.au/asx/research/CompanyInfoSearchResults.jsp?searchBy=asxCode&allinfo=&asxCode=sg>h (last visited Oct. 31, 2008). To view the portions of the 2004 Legal Profession Act relating to Incorporated Legal Services and Multi-Disciplinary Partnerships, Sections 132–182, go to http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s134.html (last visited Oct. 24, 2007).

³² See NSW NATIONAL COMPETITION POLICY REVIEW, *supra* note 26, at Chapter One, Introduction (explaining why 1995 amendments to the Trade Practices Act of 1974 led to the 1998 competition review of the legal profession).

³³ See, e.g., OECD 2000 Roundtable, *supra* note 11, at 108–111.

³⁴ *Id.* at 9–10.

³⁵ See OFFICE OF FAIR TRADING, COMPETITION IN THE PROFESSIONS—A REPORT BY THE DIRECTOR GENERAL OF FAIR TRADING, OFT 328 (Mar. 2001), available at http://www.oft.gov.uk/shared_oftr/reports/professional_bodies/oft328.pdf (U.K.).

³⁶ U.K. DEP'T FOR CONSTITUTIONAL AFFAIRS, COMPETITION AND REGULATION IN THE LEGAL SERVICES MARKET—A REPORT FOLLOWING THE CONSULTATION IN THE PUBLIC INTEREST? (2003), available at <http://www.dca.gov.uk/consult/general/oftreptconc.htm>.

³⁷ DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN

adopted in the United Kingdom in October 2007.³⁸ The reforms in the Act are quite dramatic: the Act changes the regulatory structure for solicitors and barristers in England and Wales by creating a Legal Services Board and an Office for Legal Complaints, both of which require a majority of members who are not lawyers.³⁹ The Act also allows legal services to be provided by firms organized under new business models according to rules to be developed by the new Legal Services Board. Depending on the rules the Board adopts, such business models could include publicly traded law firms.⁴⁰

In summary, when the EU Competition authorities launched their review of professional services, they did so knowing that they were following in the wake of a number of other countries. Among other things, they knew that almost thirty years prior, the U.S. Supreme Court had found that with respect to the legal profession, minimum fee schedules and advertising bans violated U.S. antitrust laws.

ENGLAND AND WALES—FINAL REPORT (Dec. 2004), *available at* <http://www.legal-services-review.org.uk/content/report/index.htm>. See also Legal Services Review Homepage, <http://www.legal-services-review.org.uk/index.htm> (last visited Oct. 31, 2008).

³⁸ U.K. Ministry of Justice, Legal Services Act 2007, *available at* <http://www.justice.gov.uk/publications/legalservicesbill.htm> [hereinafter Legal Services Act 2007] (including links to the bill and explanatory notes, the latter of which includes links to the Clementi Report and other important background information). See also U.K. Department of Constitutional Affairs, The Legal Services Bill, <http://www.dca.gov.uk/legist/legalservices.htm> (last visited Oct. 31, 2008) (including the draft bill and explanatory notes and background information).

³⁹ Legal Services Act 2007, *supra* note 38, § 2 and sched. 1 (Schedule 1, § 2(1) requires lay persons to be a majority of the Legal Services Board); *id.*, § 114 and sched. 15 (Schedule 15, § 2(1) requires lay persons to be a majority of the Office for Legal Complaints). See also Legal Services Bill, 2006, H.L. Bill [9], Explanatory Notes, para. 33, *available at* <http://www.publications.parliament.uk/pa/ld200607/ldbills/009/en/07009x—.htm>. Under Article 212 of the 2007 UK Legal Services Act, with minor exceptions, the Act applies only to England and Wales. See Legal Services Act 2007, *supra* note 38, article 212, *available at* http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_16#pt9-pb6-11g213. Changes related to lawyers in Northern Ireland and Scotland will be made by the Northern Ireland Assembly and Scottish Parliament, respectively. In January 2009, the Scottish Parliament introduced for comments its own legal profession reform bill. See Scottish Government, *Reform of the Legal Profession*, News Release, <http://www.scotland.gov.uk/News/Releases/2009/01/07101312>.

⁴⁰ Legal Services Act 2007, *supra* note 38, Part 5, Alternative Business Structures. For example, art. 72(2) defines a licensable body (B) as one in which another body (A) is a manager of B or has an interest in B and if non-authorized persons are entitled to exercise, or control the exercise of, at least 10% of the voting rights in A. The exact terms on which law firms can be publicly traded will be established once rules are made by the Legal Service Board and in accordance with those rules. See UK MINISTRY OF JUSTICE, LEGAL SERVICES REFORM UPDATE SEPT. 2008, *available at* <http://www.justice.gov.uk/docs/legal-services-reform-update-0908.pdf>.

B. The European Union's Competition (Antitrust) Provisions, Competence and Enforcement Mechanisms

In order to understand the EU Initiative, it is useful to have some background information about EU competition (antitrust) law. The Treaty Establishing the European Community (EC Treaty)⁴¹ includes nine competition articles, which are divided into two sections.⁴² The first six articles apply to private undertakings⁴³ and the last three articles apply to aid given by Member States.⁴⁴ EC Treaty Article 10 requires Member

⁴¹ For those who are not European Union experts, references to the "EC" and "EU" can be confusing. There are, in fact, three "European Communities," not one, and the European Union or EU is technically a different legal entity than the European Community or EC. In this article, however, the acronyms EC and EU are used interchangeably to refer to the European Community or EC. Three separate initiating treaties established the European Coal and Steel Community (ECSC); the European Atomic Energy Community (Euratom); and the European Economic Community (EEC). Generally speaking, when the shorthand terms "European Community" or "EC" are used, they intend to refer to the Community originally created by the 1957 Treaty of Rome. The Treaty of Rome has been amended several times. In 1985, after a conference that was held in Luxembourg, EC Members agreed to amendments in a document called the Single European Act (SEA). Numerous changes occurred, including an agreement to complete a single internal market by 1992. A second set of major amendments was adopted on February 7, 1992 at Maastricht, the Netherlands, in the Treaty on European Union (TEU). The TEU contained significant new agreements on economic and political integration and also created a new entity called the "European Union." The core of the "European Union" consists of the European Community, rather than the European Economic Community. The TEU was followed by the 1997 Amsterdam Treaty which adopted further provisions concerning economic and political integration. These amendments have been consolidated into a single document that has been published by the EU, although it has never been officially adopted as a separate document by the Member States. See Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. (C 321) 37, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf> [hereinafter EC Treaty]; see also Eur-Lex, Treaties, <http://eur-lex.europa.eu/en/treaties/index.htm> (last visited Oct. 31, 2008) (including links to all treaties).

⁴² EC Treaty, *supra* note 41, arts. 81–89 (TITLE VI: Common Rules on Competition, Taxation and Approximation of Laws, Chapter 1, Rules On Competition. Section 1 of Chapter 1 of Title VI includes Articles 81–86, which are "rules applying to undertakings." Section 2 of Chapter 1 includes Articles 87–89, which address "aids granted by states.")

⁴³ *Id.* With respect to private undertakings, Article 81 identifies conduct that is prohibited if it has as its object or effect the prevention, restriction or distortion of competition in the EU. Article 81 makes such agreements restricting competition void, but also includes exceptions. Article 82 prohibits abuse of a dominant market position. Article 83 authorizes the relevant EU bodies to develop competition directives. Article 84 explains the role of the Member States in the absence of enforceable EU directives. Article 85 sets forth the authority of the European Commission. And the last undertakings section, Article 86, addresses public undertakings and undertakings to which EU Member States grant special or exclusive rights.

⁴⁴ *Id.* arts. 87–89. In the section on "Aids from Member States," Article 87 contains a general rule that prohibits state aid or resources that distort or threaten to distort competition, unless such aid or resources are otherwise permitted by the EC Treaty. Article 87 also

States to act in a manner consistent with these EC Treaty requirements.⁴⁵

Both the European Commission and the EU Member States are entitled to enforce EU competition law. The Competition Directorate, which is known as "DG Competition," is the EU department responsible for administering EU competition policy; its mission is "to establish and implement a coherent competition policy for the European Union."⁴⁶ Neelie Kroes is the current Commissioner responsible for competition policy and has taken an active role in the debate about legal services and EU competition policy.⁴⁷ Within DG Competition, Directorate D is responsible for legal services.⁴⁸

The authority of EU Member States to enforce EU competition law dates from May 1, 2004, when Regulation 1/2003 became effective.⁴⁹ That regulation directs EU Member States to apply EC Treaty Articles 81 and 82

identifies actions that shall be viewed as EC Treaty-compatible and actions that may be viewed as EC Treaty-compatible. Article 88 explains possible enforcement procedures by the Commission and the Council. Article 89 sets forth the qualified-majority procedure to be used in developing regulations.

⁴⁵ *Id.* art. 10:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

⁴⁶ European Commission, Competition, http://ec.europa.eu/comm/competition/index_en.html (last visited Oct. 31, 2008).

⁴⁷ See, e.g., Neelie Kroes, European Comm'r for Competition, Commissioner's Opening Speech to the EP Juri Committee, (Nov. 29, 2005), *available at* http://ec.europa.eu/comm/competition/speeches/text/sp2005_022_en.pdf.

⁴⁸ See Directorate-General for Competition (May 1, 2008) *available at* http://ec.europa.eu/dgs/competition/directory/organ_en.pdf; see also Interview with Jonathan Goldsmith, CCBE Secretary General, Brussels (May 3, 2006).

⁴⁹ See European Competition Network, Frequently Asked Questions, <http://ec.europa.eu/comm/competition/ecn/faq.html> (last visited Oct. 31, 2008) [hereinafter ECN FAQ]:

The entry into force, on 1 May 2004, of Council Regulation 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 EC developed the enforcement powers of the competition authorities of the EU Member States (also referred to as national competition authorities or NCAs). Regulation 1/2003 made it compulsory for national competition authorities (NCAs) to apply Article 81 of the EC Treaty where they apply national competition law to agreements or concerted practices which may affect trade between EU Member States, and to apply Article 82 of the EC Treaty where they apply national competition law to any abuse prohibited by Article 82.

as well as their own competition law.⁵⁰ By recognizing the competence of EU Member States to enforce EU competition law, Regulation 1/2003 greatly expanded not only the enforcement possibilities but also the potential for conflicts among and between the EU and its Member States. As a result, Regulation 1/2003 required EU Member States and the European Commission to work in close cooperation.⁵¹ In order to implement this aspect of Regulation 1/2003, a network of European competition authorities (ECN) was formed in 2004.⁵² The ECN “is a forum for discussion and cooperation in the application and enforcement of EC competition policy” and “is the basis for the creation and maintenance of a common competition culture in Europe.”⁵³

Because the ECN provides a forum for Member State competition authorities to discuss similar issues, it undoubtedly makes it more likely that the competition authorities in Member States will have similar views on similar issues.⁵⁴ Indeed, in response to a survey, EU Member States have indicated that the ECN has contributed to their own competition law reforms.⁵⁵ The ECN does not, however, have any enforcement powers itself.⁵⁶ Although much of what happens in the ECN remains confidential,

⁵⁰ Council Regulation (EC) 1/2003, 2003 O.J. (L 1), available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R0001&model=guichett [hereinafter Regulation 1/2003]. See also *id.* at arts. 11–15 (Chapter IV, Cooperation); Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, available at http://europa.eu.int/comm/competition/antitrust/others/js_en.pdf (which was adopted together with Regulation 1/2003).

⁵¹ See Regulation 1/2003, *supra* note 50, art. 11.1 (“The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.”).

⁵² See Commission Notice on Cooperation Within the Network of Competition Authorities (Text with EEA relevance), O.J. (C 101) 43–53, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(02):EN:HTML); European Commission, Competition, European Competition Network, Overview, http://ec.europa.eu/comm/competition/ecn/index_en.html (last visited Oct. 31, 2008).

⁵³ Regulation 1/2003, *supra* note 50, art. 1. See also ECN FAQ, *supra* note 49 (stating that the purposes of the ECN include “to agree on working arrangements and cooperation methods, in keeping with Regulation 1/2003, and to provide an efficient framework for the obligatory and optional information mechanisms; [and] to establish a continual dialogue between the different enforcers, to discuss and build a common competition culture approach.”).

⁵⁴ ECN FAQ, *supra* note 49 (“In addition, the authorities meeting in the ECN can exchange their experience and views regarding particular sectors of the economy. This is the common competition culture enhancement role of the ECN.”).

⁵⁵ See ECN WORKING GROUP ON COOPERATION ISSUES, RESULTS OF THE QUESTIONNAIRE ON THE REFORM OF MEMBER STATES’ NATIONAL COMPETITION LAWS AFTER EC REGULATION NO. 1/2003 (as of April 14, 2008), available at http://ec.europa.eu/comm/competition/ecn/ecn_convergencequest_28112007.pdf.

⁵⁶ ECN FAQ, *supra* note 49.

the ECN has undertaken efforts to make its work more transparent. In April 2006, the European Commission issued a press release announcing the launch of its new ECN webpage and its greater efforts at transparency.⁵⁷

In summary, it is noteworthy that both the European Commission and the EU Member States are entitled to enforce EC Treaty Articles 81 and 82 regarding competition. Further, as a result of the ECN, the competition authorities in EU Member States regularly speak with one another and attempt to coordinate and harmonize their policies whenever possible.

C. European Union's Lisbon Strategy

The European Commission reports that are the focus of this article refer to the effect of existing lawyer regulations on the EU's Lisbon Strategy.⁵⁸ Thus, in order to understand these reports, one must be familiar with the term "Lisbon Strategy."

The Lisbon Strategy was first articulated at the March 2000 meeting of

⁵⁷ Press Release, Competition: European Competition Network Launches One-stop Access Website, (Apr. 3, 2006), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/421&format=HTML&aged=0&language=EN&guiLanguage=en>:

The European Competition Network—the European Commission together with the national competition authorities in the EU—has launched a website providing businesses, their advisors, and citizens with information about antitrust enforcement, annual reports and background documents about the Network. The ECN website will inter alia provide one-stop access to news releases from all the national competition authorities, plus the Commission.

The ECN webpage provides additional information about their confidentiality-transparency policy:

The competition authorities cooperating within the ECN are under professional secrecy rules and cannot disclose outside the Network any information received pursuant to Regulation 1/2003, unless it is necessary to prove an infringement of Articles 81 and 82 EC. They must in particular protect the business secrets and other confidential information of companies from being unduly disclosed to anyone outside the Network. . . . Nonetheless, the authorities cooperating within the ECN have started to select ECN-related information that would not fall under the professional secrecy rule and could thus be communicated to the outside in order to increase transparency where possible. The first concrete result is the regular publication of aggregate figures of new investigations in the Network and of envisaged decisions of which the NCAs have informed the Commission pursuant to their legal obligation. This information is available on the Commission / DG Competition Internet website.

ECN FAQ, *supra* note 49.

⁵⁸ See, e.g., *Commission Report*, *supra* note 8, paras. 8–10, 104; *Follow-Up Report*, *supra* note 2, paras. 3, 24, 28.

the European Council.⁵⁹ The conclusions of that meeting were memorialized in a seventeen page document that contained a number of specific suggestions, as well as an often-cited agreement that the European Union should “become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.”⁶⁰

The goals of the Lisbon Strategy included efforts to “strengthen employment, economic reform and social cohesion as part of a knowledge-based economy.”⁶¹ Since 2000, the European Council has repeatedly endorsed and refined the Lisbon Strategy.⁶²

The European Council has encouraged the European Commission to take steps to implement its Lisbon Strategy.⁶³ The European Commission

⁵⁹ Presidency Conclusions, Lisbon European Council, (Mar. 23–24, 2000), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm [hereinafter Lisbon Strategy]. As it explains on its website:

The European Council is the main decision-making body of the European Union. The ministers of the member states meet within the Council of the European Union. Depending on the issue on the agenda, each country will be represented by the minister responsible for that subject (foreign affairs, finance, social affairs, transport, agriculture, etc.). The presidency of the Council is held for six months by each member state on a rotational basis.

Council of the European Union, European Council, http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=348&lang=EN&mode=g (last visited Oct. 31, 2008). Although the European Council is the main decision-making body of the EU, there are a number of issues for which community legislation is adopted jointly by the Parliament and the Council using a co-decision procedure. *See id.*

⁶⁰ Lisbon Strategy, *supra* note 59, para. 5.

⁶¹ *Id.* at introduction.

⁶² *See, e.g.*, Presidency Conclusions, Brussels European Council paras. 1–20 (Mar. 8–9, 2007) *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/93135.pdf [hereinafter 2007 Presidency Conclusions]; Presidency Conclusions, Brussels European Council, para. 39 (Mar. 25–26 2004) (revised), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/79696.pdf; Presidency Conclusions, Stockholm European Council (Mar. 23–24, 2001), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html.

⁶³ *See, e.g.*, *Report from the Commission: The Concrete Future Objectives of Education Systems*, COM (2001) 59 final (Jan. 31, 2001), *available at* http://europa.eu.int/comm/education/policies/2010/doc/concrete-future-objectives_en.pdf (Commission issued a work plan for the Lisbon Strategy entitled *Report on the Concrete Future Objectives of Education and Training Systems*. This was later adopted by the Council); *Communication from the Commission: A Coherent Framework of Indicators and Benchmarks For Monitoring Progress Towards the Lisbon Objectives in Education and Training*, COM (2007) 61 final (Feb. 21, 2007), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0061:FIN:EN:PDF>; *Communication from the Commission: More Research for Europe –Towards 3% of GDP*, COM (2002) 499 final (Sept. 11, 2002) (proposing that EU Member States spend 3% of their gross national product on education; recommendation adopted by

relied on the Lisbon Strategy to justify its professional services-related competition initiatives.⁶⁴ As the Commission's 2004 Report explained, "[m]ore 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."⁶⁵ Although it is beyond the scope of this article to address the Lisbon Strategy in detail, it is important to realize that it has been cited repeatedly as justification for the EU Initiative.

D. The Respective Authority of the European Union and EU Member States with Respect to the Regulation of Legal Practice

In addition to the threshold information about EU competition law, one must also understand certain threshold information about the regulation of the legal profession in Europe in order to place the EU Competition Report in its proper context. Traditionally, legal practice in the European Union has been regulated by each EU Member State.⁶⁶ Although this still remains largely true, lawyer regulation in individual EU Member States has been heavily influenced by the European Union and its directives.

The European Union has adopted two lawyer-specific directives which cover both services and establishment. The Lawyers' Services Directive (Directive 77/249) allows EU lawyers to provide temporary services in another EU Member State.⁶⁷ The Lawyers' Establishment Directive

Council); 2007 Presidency Conclusions, *supra* note 62, paras. 3, 7.

⁶⁴ *Commission Report*, *supra* note 8, at 3, paras. 8–10:

The Lisbon European Council in March 2000 adopted an economic reform programme with the aim of making the European Union 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.

Follow-Up Report, *supra* note 2, paras. 3, 24, 28.

⁶⁵ *Commission Report*, *supra* note 8, para. 104.

⁶⁶ See, e.g., Case 107/83 *Ordre des Avocats du Barreau de Paris v. Klopp* 1984 E.C.R. 2971 para. 17 (stating that a Member State is in principle free to regulate the exercise of the legal profession in its territory).

⁶⁷ Council Directive 77/249/EEC, 1977 O.J. (L. 78) 17 [hereinafter *Lawyers' Services Directive 77/249*]. For a more detailed discussion of this directive, see Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 *FORDHAM INT'L L.J.* 556, 576–585 (1991–92). This directive was adopted pursuant to the freedom of services that is found, inter alia, in Articles 50 and 54 of the EC Treaty, cited *supra* note 41. Article 54 states that: "As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions

(Directive 98/5) allows EU lawyers to establish themselves permanently in another Member State.⁶⁸ Lawyers are also subject to the 1998 and 2005 Recognition directives because portions of these directives have been incorporated by reference into Directive 98/5.⁶⁹

As a result of these directives and the European case law that both preceded and interpreted these directives,⁷⁰ EU lawyers have much more mobility across borders than U.S. lawyers do.⁷¹ EU lawyers can provide temporary services in another EU Member State without any formalities and—provided they have three years of practice of EU law—can become established by satisfying minimal registration requirements. Although some European bars initially resisted many of the reform efforts, EU bar representatives are now very proud of their lawyer mobility system and commend it to the rest of the world.⁷²

without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49.” *Id.*

⁶⁸ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than that in Which the Qualification was Obtained, 1998 O.J. (L.77) 36. Information about where and how this Directive has been implemented into the Member States’ law is available on the CCBE’s website. See CCBE Committees & Working Groups, Committees - Free Movement of Lawyers—Members, http://www.ccbe.eu/index.php?id=94&id_comite=8&L=0 (last visited Oct. 31, 2008). This directive was adopted pursuant to Article 49 of the EC Treaty, cited *supra* note 41. See also EC Treaty, *supra* note 41, art. 3(c) (calling for the abolition of obstacles to freedom of movement for persons and services within the European Community); *id.*, art. 7a (stating that the internal market is to comprise an area without internal frontiers and constitutes one of the objectives of the Community).

⁶⁹ Council Directive 89/48/EEC 1988 O.J. (L. 19) 16 [hereinafter Diplomas Directive]; Directive 2005/36/EC of the European Parliament and of the Council 2005 O.J. (L.255) 22 (Text with EEA relevance). The 2005 Recognition Directive replaced Directive 89/48. They are relevant to lawyers seeking to establish themselves in a different EU Member State because some of their provisions have been incorporated by reference into the Lawyers Establishment Directive, 98/5, cited *supra* note 68.

⁷⁰ The European Court of Justice has decided over a dozen cases related to the legal profession and the freedom to provide services and the freedom of establishment. In some instances, these cases predated and provided impetus for the EU Directives; in other instances, these cases interpreted these Directives. These cases will soon be listed on the CCBE’s webpage. See E-mail from Jonathan Goldsmith, CCBE Secretary General, to author (Nov. 6, 2008) (on file with author).

⁷¹ See generally ABA, Center for Professional Responsibility, Commission on Multijurisdictional Practice, <http://www.abanet.org/cpr/mjp/home.html> (last visited Oct. 31, 2008). One of the nine MJP-related resolutions adopted by the ABA included changes to Rule of Professional Conduct 5.5 in order to create “safe harbors” for U.S. lawyers who are licensed in one jurisdiction who want to practice in another U.S. jurisdiction. See ABA COMM’N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201B TO THE HOUSE OF DELEGATES (Aug. 12, 2002), available at <http://www.abanet.org/cpr/mjp/home.html>.

⁷² Compare the European Court of Justice cases involving lawyers, *supra* note 70 (where the bar associations resist lawyer mobility), with Chicago Public Hearing of ABA Comm’n on Multijurisdictional Practice, at 104–121 (Aug. 3, 2001), available at

Although the EU lawyer directives are limited to cross border practice situations, there are several other directives that apply to EU lawyers' domestic practice. These directives include the December 2006 Services Directive, which is a wide-ranging directive that places limits, inter alia, on the type of advertising and fee rules that a jurisdiction may have;⁷³ the E-Commerce Directive;⁷⁴ and the Money Laundering directives.⁷⁵ In addition to these directives, the European Union has become increasingly active in the field of higher education, including legal education, even though it does not have direct competency to regulate in this area.⁷⁶

In summary, although lawyer regulation traditionally has been a matter of EU Member State regulation, and much of it remains within their province, the European Union has played a major role in shaping the contours of contemporary European legal practice. The EU Initiative thus follows in the wake of a number of EU-level reforms to lawyer regulation.

E. The Intersection of EU Competition Law and Lawyer Regulation—The European Court of Justice's *Wouters* and *Arduino* Cases

The first EU cases to address legal services and competition policy were the February 2002 European Court of Justice cases known as *Wouters v. Nederlandse Orde van Advocaten (NOVA)* and *Arduino*, which were decided on the same day.⁷⁷ *Wouters* challenged the Dutch bar's ban on multidisciplinary partnerships (MDPs) between lawyers and accountants

http://www.abanet.org/cpr/mjp/mjp-trans_chicago.doc (where representatives of the CCBE and Law Society of England and Wales, in their testimony, laud the EU directives supporting lawyer mobility).

⁷³ Council Directive 2006/123, 2006 O.J. (L.376) 36.

⁷⁴ Council Directive 2000/31, 2000 O.J. (L.178) 1(EC).

⁷⁵ See, e.g., *Commission Staff Working Document on the Application to the Legal Profession of Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering*, SEC (2006) 1793 (Dec. 19, 2006), available at http://ec.europa.eu/internal_market/company/docs/financial-crime/lawyers_en.pdf (explaining the relationship of the first, second and third money laundering directives). *Id.* at 2–3.

Although [the Second Money Laundering Directive, which amended the first Directive] has been formally repealed by a new directive, this new Directive (so-called “Third Directive”) builds on the previous one and does not substantially change the nature of the obligations of the legal profession in relation to the prevention of money laundering.

⁷⁶ See, e.g., Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107, 121, 146–152 (2008).

⁷⁷ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577, 2002 ECJ CELEX LEXIS 681 (Feb. 19, 2002) [hereinafter *Wouters*]; Case C-35/99 *Arduino*, 2002 E.C.R. I-1529 (Feb. 19, 2002) [hereinafter *Arduino*].

and *Arduino* challenged Italy's minimum fee rules. Although the European Court of Justice permitted the Dutch MDP ban and Italian fee rules to stand, the Court's decisions set forth the circumstances under which EU Member State lawyer regulations will be subject to antitrust principles.⁷⁸

Wouters and *Arduino* are important not only because they were the first cases to apply EU antitrust provisions to lawyer regulations, but also because they continue to be cited regularly in connection with the debate about the EU Initiative. Thus, it is useful to have additional background information about these cases. *Wouters* involved two challenges to the Netherlands Bar Association (NOVA)⁷⁹ rule that prohibited partnerships between lawyers and auditors. At the time this case arose, NOVA had a regulation known as SV 93, which permitted a lawyer to form a partnership with members of another profession only if the profession was recognized by NOVA. NOVA permitted lawyers to be partners with notaries and tax advisors, but not with auditors.⁸⁰ Two lawyers who worked for PricewaterhouseCoopers and Arthur Andersen challenged this rule. They were unsuccessful in the Netherlands courts and appealed these decisions to the European Court of Justice.

The European Court of Justice hearing on the case was held on December 12, 2000.⁸¹ On July 10, 2001, Advocate General Philippe Léger issued his opinion.⁸² On February 19, 2002, the European Court of Justice

⁷⁸ During the late 1990s, the multidisciplinary practice among lawyers and non-lawyers was a much-discussed topic. For extensive information about these debates, see ABA, Center for Professional Responsibility, Commission on Multidisciplinary Practice, <http://www.abanet.org/cpr/mdp/home.html> (last visited Oct. 31, 2008).

⁷⁹ The Netherlands Bar Association is formally known as The General Council of the Dutch Order of Attorneys (NOVA).

⁸⁰ Laurel S. Terry & Clasina B. Houtman Mahoney, *What If . . . ? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership Bans*, in PRIVATE INVESTMENTS ABROAD: PROBLEMS & SOLUTIONS IN INTERNATIONAL BUSINESS IN 1998, § 7.04[1] (Matthew Bender 1999).

⁸¹ *Wouters*, *supra* note 77, at I-1656.

⁸² *Id.* at I-1482. There is no counterpart in the U.S. system to the Advocate General. As one commentator has explained:

Article 166 of the EEC Treaty provides that the Advocate-General is to assist the Court in its decision making process In practice, the Advocate-General submits to the Court an opinion on what he believes the law to be on the particular issue. These opinions are not legal authority but they do provide background on the various issues posed and they do give insight into the Court's reasoning of its decisions.

Gregory P. Crinion, *AM&S Europe Limited v. Commission of the European Communities: Confidentiality of Lawyer-Client Communications in Commission Competition Investigations*, 1984 WIS. INT'L L.J. 131, 138 n. 32.

issued its ruling,⁸³ in which the Court found that:

- the Netherlands rule was subject to the competition provisions in Article 81 of the EC Treaty;
- the Netherlands MDP rule in question did not violate Article 81 [even though it had the effect of restricting competition and was likely to affect trade between Member States];
- the Netherlands rule was not subject to the competition provisions in Article 82 of the EC Treaty; and
- the Netherlands MDP rule did not violate the EC Treaty provisions on freedom of establishment.⁸⁴

The *Wouters* opinion is significant in many respects. This opinion was the first time that the Court had ruled that a European Bar association was an “undertaking” within the meaning of Article 81(1) of the EC Treaty and thus subject to its antitrust provisions.⁸⁵ In reaching this conclusion, the Court explicitly rejected the argument offered by Germany, Austria, and Portugal to the effect that the Bar “may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions of the State” and that

⁸³ See *Wouters*, *supra* note 77, at I-1656.

⁸⁴ *Id.* at I-1696–97. The conclusion section of the ruling stated:

1. A regulation concerning partnerships between members of the Bar and other professionals, such as the Samenwerkingsverordening 1993 (1993 regulation on joint professional activity), adopted by a body such as the Nederlandse Orde van Advocaten (the Bar of the Netherlands), is to be treated as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty (now Article 81 EC).

2. A national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

3. A body such as the Bar of the Netherlands does not constitute either an undertaking or a group of undertakings for the purposes of Article 86 of the Treaty (now Article 82 EC).

4. It is not contrary to Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 and 49 EC) for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

⁸⁵ *Id.* at I-1679, paras. 58–59.

the Netherlands has “made the Bar of the Netherlands responsible for ensuring that individuals have proper access to the law and to justice, which is indeed one of the essential functions of the State.”⁸⁶ In finding that the Bar was not a “public authority,” the Court reasoned that the Bar of the Netherlands was “neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies, . . . nor exercising powers which are typically those of a public authority [But instead] acts as the regulatory body of a profession, the practice of which constitutes an economic activity.”⁸⁷

In determining whether the Dutch MDP rule violated Article 81, the Court concluded that it had as its object or effect the restriction of trade and that it was likely to affect trade between the Member States; the Court permitted the MDP ban, however, because it found that the Dutch authorities could properly have found that the restriction on trade was “necessary.”⁸⁸ After reviewing the arguments that had been offered, the Court concluded that the Dutch MDP rule “could therefore reasonably be considered necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.”⁸⁹ In elaborating upon this point, the Court stated that the Dutch Bar had been given the authority to adopt rules to ensure the proper practice of the profession, including rules that address “the duty to act for clients in

⁸⁶ *Id.* at I-1677–78, para. 53.

⁸⁷ *Id.* at I-1679, paras. 58–59. Although the *Wouters* court concluded that the Netherlands bar and the specific rule in question were subject to the Article 81 of the EC Treaty, it later distinguished between two different kinds of bar rules and suggested that one set of rules would be subject to the competition rules of current Article 81, whereas the other rules would not. The first situation—in which the antitrust provisions are not applicable—occurs when a Member State:

[G]rants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.

Id. at I-1681, para. 68. The second situation it described is where the “rules adopted by the professional association are attributable to it alone.” *Id.* The Court found that in this situation, Article 81 of the EC Treaty applies and “the association must notify those rules to the Commission,” but the Commission can issue a block exemption regulation pursuant to Article 81(3). *Id.* at I-1681, para. 69.

⁸⁸ *Id.* at I-1691, para. 110. After finding that the Netherlands MDP rule constituted a restriction on trade, the Court concluded that this restriction was appreciable and that it affected intra-community trade. *Id.* at I-1687–88, para. 95 (finding that the restriction affected intra-Community trade); *Id.* at *45, para. 96 (finding that the restriction in trade was “appreciable”).

⁸⁹ *Wouters*, *supra* note 77, at I-1690, para. 107.

complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.”⁹⁰ The Court noted that accountants are not subject to comparable requirements of professional conduct and that there may be incompatibilities between the lawyer’s rules and the accountant’s rules.⁹¹ It therefore concluded that the Bar:

[W]as entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts” and that the regulation “could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.”⁹²

The Court reached this conclusion despite the fact that the Advocate General had concluded that the Court did not have enough facts before it and should remand to the Dutch Court.⁹³ Not surprisingly, this section of the *Wouters* opinion has been extensively cited by European bars who point to the great deference the Court gave to the Dutch Bar’s conclusions regarding necessity.⁹⁴

⁹⁰ *Id.* at I-1689, para. 100.

⁹¹ *Id.* at I-1689–90, paras. 103–04.

⁹² *Id.* at I-1690, paras. 105, 106.

⁹³ Compare *Wouters*, *supra* note 77, at I-1688–91, para. 110 (stating that bar could “reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned”) with *Wouters*, *supra* note 77, at I-1640, paras. 200–01 (“To my mind, it is possible that the national court will conclude that the contested Regulation is compatible with . . . the Treaty, if it finds that there exist objective reasons for authorising lawyers registered in the Netherlands to enter into multi-disciplinary partnerships with notaries, tax advisers and patent agents, but for prohibiting them from entering into multi-disciplinary partnerships with members of the professional category of accountants. I therefore propose that the Court should reply to the fifth question to the effect that it is not contrary to . . . the Treaty for a professional association of lawyers, such as the Association, to adopt a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnership with members of the professional category of accountants, if it appears that that measure is necessary in order to safeguard lawyers’ independence and professional secrecy.”).

⁹⁴ See, e.g., THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE (CCBE), CCBE, POSITION ON MULTI-DISCIPLINARY PARTNERSHIPS (MDPs) (2005), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_mdp1_1182254536.pdf; THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE (CCBE), ANALYSIS OF THE NOVA I JUDGMENT AND GUIDANCE TO BARS ON PROFESSIONAL RULES FOLLOWING THE NOVA I DECISION (2002), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument

The *Wouters* opinion not only gave deference to the bars on the issue of whether a restrictive rule was necessary, but also gave deference to the bars on the issue of proportionality and whether the restrictive rule could have been drawn more narrowly. Indeed, despite a recommendation to the contrary by the Advocate General,⁹⁵ the Court appears to have completely deferred to the Dutch Bar authorities' analysis on this proportionality point, stating that "the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot . . . be attained by less restrictive means."⁹⁶ The concluding paragraph of this section of the Judgment states:

[The Dutch Bar rule] does not infringe Article [81](1) of the Treaty, since *that body* could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.⁹⁷

The Court ended its analysis with the "freedom of services" and "freedom of establishment" questions, concluding that even if the services and establishment provisions in the EC Treaty applied to the Dutch MDP ban and even if such a ban constituted a restriction on the freedom of movement, the restriction would be justified for the reasons set out in its competition analysis.⁹⁸

On the same day that the European Court of Justice decided *Wouters*, it also decided *Arduino*, which involved antitrust challenges to the minimum and maximum fee schedules used in Italy.⁹⁹ *Arduino* was a criminal case brought against defendant Manuele Arduino as a result of a traffic collision in which the other driver also sought damages. The trial court ruled that Arduino had to pay the costs of the other driver, but the

/analysisguidance_en1_1183706551.pdf.

⁹⁵ The Advocate General had concluded that the Court was "not in possession of sufficient evidence to settle the question itself of the proportionality of the contested Regulation." *Wouters*, *supra* note 77, at I-1634, para. 196.

⁹⁶ *Id.* at I-1691, para. 108. Although the Advocate General stated that the Court did not have enough information to decide the issue and recommending referring the question back to the state courts, his opinion included his view that the Dutch Bar rule was "proportionate" and that he did not find persuasive the arguments that less restrictive means were available to protect the independence of the legal profession and lawyer secrecy. *Id.* at I-1633, paras. 190, 194. This may have given the Court comfort when it issued its ruling.

⁹⁷ *Id.* at I-1691, para. 110 (emphasis added). In light of its competition rulings, the Court declined to address the fifth and sixth questions that had been posed to it by the Dutch court that concerned EC Treaty Article 90(2) and the conditions under which the state must supervise the adoption of bar rules. *Id.* at I-1693, paras. 117–118.

⁹⁸ See *id.* at I-1695, paras. 122–23.

⁹⁹ See *Arduino*, *supra* note 77.

Court did not use the Italian Bar fee schedule in setting these costs¹⁰⁰ and did not state the reasons why it did not apply the schedule.¹⁰¹ The fee schedule in question had been adopted by the Italian Bar pursuant to federal legislation.¹⁰² Italian law authorized the court to set fees above the maximum fees and below the minimum fees provided the court gave reasons for its decision and the case met the specified criteria.¹⁰³

On appeal, the Italian Supreme Court of Cassation held that it was unlawful for the lower court to have ignored that tariff without an explanation, so it set aside the lower court's award of costs, and referred the case back to the lower court on this point.¹⁰⁴ On remand, the lower court stated that there were two conflicting lines of cases about whether the minimum fee schedule constituted an agreement restricting competition under the EC Treaty.¹⁰⁵ The lower court stayed further proceedings and referred to the European Court of Justice two questions about the interpretation of the competition principles now found in Article 81 of the EC Treaty, asking whether the Italian fee schedule was covered by the EC Treaty, and if so, whether it was covered by any of the exceptions found in Article 81(3) of the EC Treaty.¹⁰⁶

¹⁰⁰ *Id.* at I-1567, para. 13.

¹⁰¹ *Id.* at I-1569, para. 23.

¹⁰² Article 57 of an Italian federal law required the Italian Bar to establish every two years the criteria for determining fees for civil and criminal proceedings and for out-of-court work. *Id.* at I-1564, para. 6. The Bar in question was the Consiglio Nazionale Forense, otherwise known as the National Council of the Bar, or CNF. CNF is governed by Articles 52 to 55 of the Royal Decree-Law. It is composed of members of the Bar elected by their fellow members, with one representative for each appeal court district, and is established under the auspices of the Minister for Justice. *Id.* para. 5. The federal law further provided that after the Italian bar prepared a new draft fee schedule, that fee schedule had to be approved by the Italian Minister of Justice. *Id.* paras. 5-6. Before adopting the fee schedule, the Minister of Justice was required to consult with an Interministerial Committee on Prices and the Council of State. *Id.* para. 6. The law further provided that the criteria should be based on the monetary value of the dispute, the level of the court, and, in criminal matters, the duration of the proceedings. *Id.* at I-1565, para. 7. For each procedural step, or series of steps, the law required maximum and minimum limits. *Id.* Actual fees in a case were determined by a court on the basis of these criteria, having regard to the seriousness and number of the issues dealt with. *Id.* para. 8. With a few exceptions, such court-award fees had to remain within the maximum and minimum fee schedules. *Id.* para. 8.

¹⁰³ *Id.* at I-1565, para. 8. The *Arduino* opinion stated that "in cases of exceptional importance, taking account of the special nature of the disputes and where the inherent value of the service justifies it, the court may exceed the maximum limit. Conversely, where the case is easy to deal with, the court may fix fees below the minimum limit." *Id.*

¹⁰⁴ *Id.* at I-1567, para. 14.

¹⁰⁵ *Id.* at I-1568, para. 15.

¹⁰⁶ *Arduino*, *supra* note 77, at I-1568, para. 18. The exact questions referred were:

(1) Does the decision of the CNF, approved by Ministerial Decree No 585/94, fixing binding tariffs for the professional activity of members of the Bar, come

The *Arduino* decision contains a number of statements in which the Court explained the meaning of EU competition law.¹⁰⁷ Following these sections of the opinion, the European Court of Justice applied the principles it had enunciated to the facts of the case and concluded that the fee schedule in question did not violate the competition provisions in the EC Treaty.

The Court cited three main reasons in support of its conclusion. It relied on the fact that the draft fee schedule approved by the bar was not compulsory, but required ministerial approval and could be amended.¹⁰⁸ Moreover, the Minister was required to obtain an opinion from two public bodies before the fee schedule could be approved.¹⁰⁹ The Court also noted that fees are to be settled by the courts, and that in certain exceptional circumstances and by duly-reasoned decision, a court could depart from the maximum and minimum fees.¹¹⁰

After setting forth these observations, the *Arduino* Court concluded that Italy had not engaged in either of the actions that would constitute a violation of the EC Treaty.¹¹¹ It had not delegated responsibility to private economic operators such that it would deprive the provisions of their

within the scope of the prohibition in Article 85(1) of the EC Treaty? If the answer to (1) is in the affirmative: (2) Does the case none the less correspond to one of the situations envisaged in Article 85(3) of the Treaty to which that prohibition does not apply?

Id.

¹⁰⁷ After reciting the facts of the case, the *Arduino* Court began its analysis by noting that although Article 81 of the EC Treaty applies to “undertakings” and not to Member State legislation or regulatory measures, national legislation would be subject to the competition rules if it renders ineffective the competition rules applicable to undertakings. *Id.* at I-1572, para. 34. The Court then set forth the standards that would be used to evaluate whether Member State legislation violates Article 81. It concluded that the EC Treaty is infringed if a Member State either: (1) requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects; or (2) divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. *Id.* para. 35. The Court also found that even if a Member State requires a professional organization to produce a draft fee schedule, that fact does not automatically divest the final fee schedule of the character of legislation. *Id.* para. 36.

¹⁰⁸ *Id.* at I-1573, para. 41.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* para. 42.

¹¹¹ *Id.* The Court did, however, say that the draft fee schedule would not, itself, be treated as legislation since the Italian national legislation did not contain either the procedural arrangements or substantive requirements capable of ensuring, with reasonable probability, that, when producing the draft tariff, the Italian Bar would conduct itself like an arm of the State working in the public interest. *Id.* paras. 38–39. On the other hand, the Court found that Italy had not waived its power to make decisions of last resort or to review implementation of the tariff. *Id.* para. 40.

character as legislation.¹¹² Nor was Italy open to the criticism that it required or encouraged the adoption of agreements, decisions, or concerted practices contrary to Article 81 of the EC Treaty or reinforced their effects.¹¹³ Accordingly, the *Arduino* Court concluded that the EC Treaty did not:

[P]reclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, where that State measure forms part of a procedure such as that laid down in the Italian legislation.¹¹⁴

Because *Wouters* and *Arduino* were decided shortly before the European Commission launched its liberal services stocktaking and because they have been cited regularly since then, these cases are an important part of the context of the EU Initiative.¹¹⁵ Since *Wouters* and *Arduino*, there have been other European Court of Justice competition cases involving the legal profession. Although analysis of these later cases is beyond the scope of this article, one such case found that Italy's fee schedule rules were contrary to EU lawyers' freedom to provide services.¹¹⁶

II. THE EUROPEAN COMMISSION STOCKTAKING EXERCISE FOR THE "LIBERAL PROFESSIONS"

A. Post-*Wouters* Developments—The Commission's Initial Response

A few months after the 2002 European Court of Justice's *Wouters* and *Arduino* decisions, the European Commission called together high-level national competition authorities. The meeting was called to discuss policy issues related to competition law and the liberal professions and to "reach a common view on the interpretation of the *Wouters* and *Arduino* judgments"

¹¹² *Arduino*, *supra* note 77, para. 43.

¹¹³ *Id.*

¹¹⁴ *Id.* para. 44. In many respects, *Arduino* is comparable to the "state action" defense in U.S. antitrust law.

¹¹⁵ In a subsequent Italian case involving legal fees, the Commission urged the ECJ to reverse *Arduino*. See Joined Cases C-94/04 & C-202/04 *Cipolla v. Fazari, née Portolese and Macrino, Capodarte v. Meloni*, 2006 E.C.R. I-11421, 4 C.M.L.R. 8, at para. 27 (2006) [hereinafter *Cipolla and Meloni*]. The Court declined to do so and concluded that Italian rules that set forth a minimum fee schedule did not violate the EC Treaty's competition provisions, but did violate non-Italian EU lawyers' freedom to provide services, and that it was up to the national courts to determine whether the restrictions were warranted.

¹¹⁶ See, e.g., Case C-250/03, *Mauri v. Ministero della Giustizia*, 2005 E.C.R. I-01267 (ECJ rejected petitioner's competition and establishment challenges to Italy's rule that prohibited him from sitting for the oral portion of the bar exam after failing the written portion); see also *Cipolla and Meloni*, *supra* note 115.

and to “avoid uneven implementation of ECJ case law at national level.”¹¹⁷ While the *Wouters* and *Arduino* cases were pending, DG Competition had issued an “invitation to tender” a study of the liberal professions;¹¹⁸ the resulting contract was awarded to the *Institut für Höhere Studien* (IHS).¹¹⁹ By early July 2002, IHS had circulated a questionnaire to European bar associations, among others, and had requested their responses by July 28, 2002.¹²⁰ After receiving the IHS questionnaire, the Council of Bars and Law Societies of Europe (CCBE), among others, protested the short

¹¹⁷ See *Competition: Study on the Economic Impact of Member States’ Regulation in the Field of Liberal Professions*, 4 CCBE INFO 4, 5 (Jan. 2003), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_04_enpdf1_1180966023.pdf.

¹¹⁸ See Report on the Economic Impact of the Regulation of Liberal Professionals in Different Member States, Invitation to Tender, Open Procedure, 2001 O.J. (S.191-130731), COMP/D/01/11 (Oct. 4, 2001) (on file with author).

¹¹⁹ See IAIN PATERSON ET. AL., RESEARCH REPORT: ECONOMIC IMPACT OF REGULATION IN THE FIELD OF LIBERAL PROFESSIONS IN DIFFERENT MEMBER STATES: REGULATION OF PROFESSIONAL SERVICES: REGULATION OF PROFESSIONAL SERVICES: STUDY FOR THE EUROPEAN COMMISSION, DG COMPETITION: FINAL REPORT—PART 1—MAIN REPORT 9 n. 1 (2003), available at http://ec.europa.eu/comm/competition/liberalization/conference/prof_services_ihs_part_1.pdf [hereinafter IHS REPORT, PART 1].

The Institute of Advanced Studies (IHS) carried out a study in 2002 for the European Commission, Directorate-General for Competition, into the regulatory structure and economic impact of various Professional Services / Liberal Professions. The professions covered at present are all those belonging to Legal Services, Accountancy Services, Technical Services, and Pharmacy Services.

citing Contract No. COMP/2002/D3/S12.334490. Institut für Höhere Studien (Institute for Advanced Studies) (IHS) is a sixty year old private non-profit institution based in Vienna, Austria. IHS consists of three research departments (Economics & Finance, Political Science and Sociology) and receives approximately one-third of its budget from commissioned studies such as the study on professional services that it prepared for the Commission on profession. See Institut für Höhere Studien: Institute for Advanced Studies, About IHS, <http://www.ihs.ac.at/index.php3?id=120> (last visited Oct. 31, 2008) (According to its website, IHS employs approximately sixty “scientific” employees and offers postgraduate course programs that currently enroll approximately fifty students. IHS was founded by two prominent Austrians living in exile, the sociologist Paul F. Lazarsfeld and the economist Oskar Morgenstern, with the financial help of the Ford Foundation, the Austrian Federal Ministry of Education, and the City of Vienna. It was founded on the principle that scientific enterprise, scientific co-operation and scientific problem solutions offer a platform for critical discussions, a possibility for consensus formation, and an open and interdisciplinary place for scientific research and critical scientific expertise).

¹²⁰ See *European Commission Study on the Economic Impact of Member States’ Regulation in the Field of Liberal Professions*, 3 CCBE INFO 3 (Oct. 2002), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_03_enpdf1_1180966126.pdf (On July 9, 2002, the Austrian *Institut für Höhere Studien* circulated a questionnaire to the liberal professions concerned in the prior study with the intention of gathering information about each profession’s structure, background, and regulatory framework).

response time and the format of the questions.¹²¹

The IHS questionnaire was in English and contained fifteen pages of questions, divided into three sections, with an additional three pages of notes that mostly consisted of definitions of the terms used.¹²² Each of the three sections of the questionnaire included twelve sets of questions.¹²³ For many of these questions, the respondents were requested to simply check the appropriate box; for other questions, respondents were asked to provide narrative information.¹²⁴ Respondents were encouraged to file their questionnaire responses electronically and were told not to worry about changes in the questionnaire format.¹²⁵ The narrative boxes in the first section of the form, dealing with regulation, were quite small and consisted of one single spaced line. For some of the questions about regulation, there was no opportunity to provide narrative information.¹²⁶ Other questions

¹²¹ *Id.* (The CCBE did not answer the questionnaire it received. The CCBE did, however, write a letter to the European Commission as well as to the Institute suggesting that the deadline was “too short given the complexity of the questions.”). For additional information on the CCBE, *see infra* notes 383–388.

¹²² IAIN PATERSON ET. AL., RESEARCH REPORT: ECONOMIC IMPACT OF REGULATION IN THE FIELD OF LIBERAL PROFESSIONS IN DIFFERENT MEMBER STATES: REGULATION OF PROFESSIONAL SERVICES: REGULATION OF PROFESSIONAL SERVICES: STUDY FOR THE EUROPEAN COMMISSION, DG COMPETITION: FINAL REPORT—PART 3—REFERENCES AND ANNEXES, at Annex ES (Jan. 2003), *available at* http://ec.europa.eu/comm/competition/liberalization/conference/prof_services_ihs_part_3.pdf [hereinafter IHS REPORT, PART 3].

¹²³ *Id.* Part I of the Questionnaire was entitled “Information On Professional Regulations” and included five sets of questions: (1) General Information; (2) Organizational Characteristics of the Profession, including how regulations are created, implemented and enforced; (3) Market Entry Regulations; (4) Regulations on Market Behavior; (5) Other Instruments for Quality Control. Part II of the Questionnaire was entitled “Background to the Regulatory Framework” and included questions about: (1) Changes, Reforms and Innovations in Regulations; (2) Regulations Currently Being Reviewed; (3) Reasons for Regulation/Liberalization. Part III of the Questionnaire was entitled “Structure and Dynamics of the Profession” and included four additional questions: (1) Data Source-Year; (2) Membership of the Professional Body; (3) Stages in access to the profession; and (4) Questions about the profession as a whole, including figures for total employment, size, number and nationality of firms, market concentration, turnover, and other topics. *Id.*

¹²⁴ *Id.* at Annex E3, p. 1 (Data sheets were completed “electronically” and contained two question formats: (1) “yes” or “no” questions requiring the participant to click a square box; and, (2) questions requiring a word or sentence answer to be typed into a rectangular box).

¹²⁵ *Id.* at Annex E3, p. 17 (stating that an electronic version was preferred and that “on filling out this document electronically it may increase in length and lose its original ‘shape’. This is not important: just send the filled-in version without regard to appearance.”).

¹²⁶ *Id.* at p.7. For example, Questions 4.7 and 4.8 asked whether there were special regulations on interprofessional co-operation and if so, to check off one of five boxes to explain whether it is completely forbidden or the context in which it is partially forbidden; these questions did not ask the respondent for any narrative comment other than to describe their regulation if the boxes were inaccurate. The questions did not ask respondents to provide any reasons for the regulation.

about regulation provided the opportunity for narrative explanation.¹²⁷ In no case, however, were the respondents asked for any explanation of, or justification for, their regulations.

The narrative boxes in the second section consisted of 1 x 3 inch squares, although respondents were invited to indicate if they wanted to include a longer exposition, report, or study results. (This section of the questionnaire asked for information about areas in which regulation had changed in the last ten years, information about regulations currently under review, and information about regulations in other countries and the reasons for their liberalization or regulations.) The third section called for numerical data of various sorts.

In November 2002, after it had sent a letter to the Commission and IHS expressing concerns about the IHS questionnaire and study, the CCBE met with Commission representatives to discuss these issues.¹²⁸ The CCBE expressed four concerns during this meeting: (1) that the questionnaire did not fit the legal profession; (2) that the terminology used was unclear or imprecise on several points; (3) that the questionnaire did not ask why certain regulations were in place; and (4) that in light of the tight time schedule, the CCBE had concerns about the quality of the study.¹²⁹ According to the CCBE, the Commission responded, *inter alia*, by stating that there was “no per se query of professional rules for the moment.”¹³⁰

The IHS Study is dated January 2003¹³¹ but was made public in March

¹²⁷ *Id.* at p. 8. Question 5.1, which asked whether there “was special information or benchmarking systems for the profession, where information about the quality of services of individual firms is given?” If so, respondents were directed to “please describe briefly and give a short overview of the experience with these instruments.”

¹²⁸ See *Competition: Study on the Economic Impact of Member States’ Regulation in the Field of Liberal Professions*, *supra* note 117, at 4 (On November 6, 2002 the CCBE met with the Directorate General Competition of the European Commission to discuss concerns raised by the July 2002 study conducted by the Austrian Institute for Advanced Studies. These concerns were also communicated in a letter sent by the CCBE to the Austrian Institute and the Commission prior to the meeting).

¹²⁹ *Id.* at 4–5.

¹³⁰ *Id.* at 5:

At the meeting, the Commission noted that the primary objective of the study was fact finding in the field of liberal professions, but that there was no plan to date for what it would do with the information received. Further, it was indicated that there was no per se query of professional rules for the moment.

The CCBE was informed that the final report of the Austrian Institute would be made available to the public at the beginning of 2003.

¹³¹ See European Commission: DG Competition: Professional Services: Studies, http://ec.europa.eu/comm/competition/sectors/professional_services/studies/studies.html (last visited Oct. 31, 2008) (includes separate links to the three parts of the report; Part 1 is

2003 in conjunction with European Commissioner Monti's launch of the stocktaking Stocktaking Exercise.¹³² Commission representatives have indicated that the IHS Study was the first of its kind.¹³³ The sections that follow discuss the IHS Study and this Stocktaking Exercise.

B. The March 2003 Launch of the European Commission's Stocktaking Exercise

1. *Berlin Speech by Commissioner Monti*

The European Commission launched its liberal professions Stocktaking Exercise on March 21, 2003 in Berlin in a speech by EC Competition Commissioner Mario Monti to the German Bundesanwaltskammer (BRAK).¹³⁴ The BRAK (which is referred to in English as the German Federal Bar) is an umbrella organization for

entitled "Economic impact of regulation in the field of liberal professions in different Member States Regulation of Professional Services, Study for the European Commission, DG Competition by Institut für Höhere Studien (IHS), Wien, January 2003."). For the general Commission webpage on professional services, see European Commission: DG Competition: Professional Services: Overview http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html (last visited Oct. 31, 2008) [hereinafter European Commission, DG Competition].

¹³² Bundesrechtsanwaltskammer [Chamber of Government Attorneys] (BRAK): *Ältere Meldungen* [Senior Reports]: Wettbewerb und Freie Berufe [Competition and the Liberal Professions]/ Europäische Konferenz der BRAK [BRAK European Conference], http://www.brak.de/seiten/05_01.php#euro (last visited Oct. 31, 2008) ("Auf der Konferenz nahm Wettbewerbskommissar Monti erstmalig Stellung zu den Ergebnissen des Institutes für Höhere Studien in Wien." [At the conference, Competition Commissioner Monti for the first time adopted the position espoused by the Institute for Advanced Studies, Vienna.] [hereinafter BRAK, Wettbewerb].

¹³³ See, e.g., Anne-Margrete Wachtmeister, Head of Unit: Liberal Professions Team: DG Competition, Overview of the Commission's Stocktaking Exercise (Part I), Address Before the Liberal Professions Conference (Oct. 28, 2003) (on file with author) [hereinafter Remarks of Wachtmeister at the October 2003 Conference] (a transcript of the speech was previously available at http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20031028/index.html):

[T]he [IHS] study is, to our knowledge, the first of its kind, as an economic overview of the professions in the EU. This fact should be considered in any assessment of its methodology and findings. Part of our recent work has therefore been to review the significant body of academic research on the economic effects of regulation in the professions.

¹³⁴ Mario Monti, Comm'r for Competition: European Comm'n, Competition in Professional Services: New Light and New Challenges, For Bundesanwaltskammer Berlin (Mar. 21, 2003) available at http://ec.europa.eu/comm/competition/liberalization/conference/speeches/mmonti_berlin_032003_en.pdf [hereinafter Monti Berlin 2003 speech].

Germany's official lawyer regulatory entities.¹³⁵ Commissioner Monti had been invited to address a three-day BRAK conference that focused on the meaning of the *Wouters* and *Arduino* cases.¹³⁶ During his speech, Commissioner Monti announced that the European Commission would initiate a Stocktaking Exercise that focused on the liberal professions and that it was important to examine whether the existing regulations were necessary.¹³⁷ He explained the purpose of the Stocktaking Exercise as follows:

The present level of rules and regulation of liberal professions owe some debt to historical convention. How many are still needed in the modern world? Do they hinder or favour the development of the sector? Let me be provocative: Do they protect the consumers or the professionals? I propose to assess whether existing rules and regulations, which, remember, were devised and enacted in a very

¹³⁵ Dierk Mattik, *Regulation of the Lawyer Profession and the Duties and Functions of the Lawyer Organisations in Germany*, DEITSCHERANWALTVEREIN [GERMAN BAR ASSOCIATION] at 2, 4, available at <http://www.anwaltverein.de/downloads/regulation.rtf?PHPSESSID=fd3e57eef7ec9343b401e0436046332d>. The DAV, which is the German voluntary bar, offers the following English explanation of the BRAK:

[I]n consideration of the tradition established in German law, the implementation and application of the law affecting lawyers has been transferred [by the German legislature] to a particular authority (Rechtsanwaltskammer; regional bar), which are staffed by members of the profession.

The 28 regional bars themselves are amalgamated at the federal level into the German Federal Bar (Bundesrechtsanwaltskammer; "BRAK") in the form of compulsory membership. The BRAK is also a public law corporation. The BRAK must fulfill the tasks allocated to it by law. These include, among others, in particular:

- in questions that affect all of the regional bars, ascertaining the opinions of the individual bars and establishing the majority opinion through common discussion;
- in all matters that affect all of the regional bars, presenting the opinion of the German Federal Bar to the competent authorities, courts, and organisations and to represent all regional bars to these institutions.

¹³⁶ BRAK, Wettbewerb, *supra* note 132 ("Vom 20.3. bis 22.3.2003 fand die vierte Europäische Konferenz der BRAK in Berlin statt Thema der Konferenz waren die Auswirkungen der Kartellrechtsprechung des EuGH, insbesondere der Urteile vom 19.2.2002 ("*Wouters*" und "*Arduino*") auf das nationale Berufsrecht." [From March 20 to March 23, 2003, BRAK's fourth European conference took place in Berlin The conference's theme was the effects of the ECJ's cartel jurisdiction, especially the effects of the judgments of February 19, 2002 (*Wouters* and *Arduino*) on national labor law.]).

¹³⁷ Monti Berlin 2003 speech, *supra* note 134, at 10–12.

different economic context to that which exists today, continue to serve the legitimate purposes of the protection of the public interest. I would also like to assess whether they are the most efficient mechanisms available in the current market situation.

It is clear that across the [European Union] there are different regulatory mixes. As the study shows, different regulatory choices produce different outcomes in the market and it is possible that some regulatory mixes have more beneficial market outcomes than others. It should be difficult to argue against those that have the least distorting effect on the workings of the market, while delivering the same, or even higher, turnover.¹³⁸

This speech signaled the launch of the Stocktaking Exercise.

2. *Simultaneous Publication of the IHS Study*

During his March 2003 speech to the BRAK, Commissioner Monti also announced the results of the IHS Study.¹³⁹ Following Commissioner Monti's speech, the European Commission posted the IHS Study on its website.¹⁴⁰

¹³⁸ *Id.* at 11. Mr. Monti's additional comments about the stocktaking exercise included the following paragraph which appeared before the quoted paragraphs:

In the light of the outlined market trends, current regulatory trends and case-law developments, I believe the time is right to take stock. My services and myself are increasingly asked for our views on various types of rules and regulations in the sector of professional services. It is the Commission's role as the guardian of the Treaty continuously to monitor markets, to ensure that competition in the internal market is not distorted and to propose action where necessary and justified. In this my colleague in charge of the Internal Market, Mr. Bolkenstein and myself, are working together in parallel.

Our aim will be to better understand and evaluate the present market situation. To evaluate to what degree the consumer is satisfied, whether there are artificial barriers to the optimal use of resources as well as whether improvements to the existing rules and regulations are possible. To do this, further informed input is needed in the first place from those directly concerned, such as users of services, service providers and those responsible for the regulations.

Id. at 10–11. Mr. Monti also commented that he hoped the exercise could serve as a stimulus for rethinking public regulation. He encouraged countries to learn how things are done in other countries and to keep their minds open to new solutions. *Id.* at 11–13.

¹³⁹ *Id.* at 8–10.

¹⁴⁰ European Commission, DG Competition, *supra* note 131:

At the time of Commissioner Monti's speech, DG Competition published an independent study on regulation in the professions carried out by the Institute for

The study, entitled *Economic Impact of Regulation in the Field of Liberal Professions in Different EU Member States*, consisted of three lengthy sections: Part 1 was the main report,¹⁴¹ Part 2 was entitled “Case Studies,”¹⁴² and Part 3 was entitled “References and Annexes.”¹⁴³ The final paragraph of the Report’s Executive Summary stated the IHS’s views that there was too much professional services’ regulation in some EU Member States. It stated in part: “We are led by this study to the overall conclusion that the lower regulation strategies which work in one Member State might be made to work in another, without decreasing the quality of professional services, and for the ultimate benefit of the consumer.”¹⁴⁴

The European Commission’s own summary of the IHS Study echoed the conclusion that there appeared to be too much professional services regulation in some countries since the countries with higher levels of regulation did not appear to have fewer complaints than countries with lower levels of regulation:

In order to gather structured information on different regulatory regimes affecting liberal professions and on their economic effects, the Competition Directorate-General commissioned in 2002 an independent study on the economic impact of regulation in the field of liberal professions in the different Member States. The report was finalised in March 2003 and is available on the Competition Directorate-General’s Internet [website]. . . .

The study develops ‘regulation indices’ for comparisons among the professions covered by the study, these being legal services (lawyers

Advanced Studies in Vienna, Austria. In order to obtain an overall understanding of the regulation of liberal professions DG Competition also invited interested parties to comment on the justification for and effects of restrictive rules and regulations in the professions.

See also *Commission XXXIIIrd Report on Competition Policy 2003 (Published in Conjunction with the General Report on the Activities of the European Union—2003)*, ISSN 0259-3157 (2004) at 60, para. 189, available at http://ec.europa.eu/comm/competition/annual_reports/2003/en.pdf [hereinafter *EU 2003 Competition Report*] (“An independent study carried out for the Commission by the Vienna-based Institute for Advanced Studies (IHS) was made accessible to the public by the Competition DG in order to stimulate the debate.”).

¹⁴¹ IHS REPORT, PART 1, *supra* note 119 (141 pages).

¹⁴² IAIN PATERSON ET. AL., RESEARCH REPORT: ECONOMIC IMPACT OF REGULATION IN THE FIELD OF LIBERAL PROFESSIONS IN DIFFERENT MEMBER STATES: REGULATION OF PROFESSIONAL SERVICES: STUDY FOR THE EUROPEAN COMMISSION, DG COMPETITION: FINAL REPORT—PART 3—CASE STUDIES: GERMANY, FRANCE, at Annex ES (Jan. 2003), available at http://ec.europa.eu/comm/competition/liberalization/conference/prof_services_ihs_part_2.pdf [hereinafter IHS REPORT, PART 2] (277 pages).

¹⁴³ IHS REPORT, PART 3, *supra*, note 122 (forty-nine pages).

¹⁴⁴ IHS REPORT, PART 1, *supra* note 119, at 6.

and notaries), accountancy services (accountants, auditors and tax advisers), technical services (architects and consulting engineers) as well as pharmacy services (pharmacists in retail business), and across countries. There is one index for regulation of market entry, one for regulation of conduct and an overall index. Countries with most regulations for all professions are Austria, Italy, Luxembourg and (with one exception) Germany, and possibly Greece. Belgium, France, Portugal and Spain appear to be in the medium field, whereas the [United Kingdom], Sweden and Denmark (with the exception of pharmacists), the Netherlands, Ireland and Finland show rather liberal regulatory regimes from a comparative point of view.

The study goes on to point out that there are no apparent signs of problems in those countries where there is less regulation. The study data also seem to indicate that low regulation is not a hindrance but rather a spur to overall wealth creation, because in countries with low degrees of regulation there are relatively lower revenues per professional, but a proportionally higher number of practising professionals generating a relatively higher overall turnover.¹⁴⁵

Because the consequences of the EU Initiative are so significant and because the European Commission and others continue to rely heavily on the IHS Study, it is worthwhile to examine this study in more detail. Many summaries of the IHS Study, including its own Executive Summary, include the chart shown below which listed the level of regulation for five professions in fifteen countries, with larger numbers and darker colors indicating a higher level of regulation.¹⁴⁶

¹⁴⁵ *EU 2003 Competition Report*, *supra* note 140, at pp. 305–06.

¹⁴⁶ *Id.*; IHS REPORT, PART 1, *supra* note 119, at 3.

Total IHS Regulation indices for different professions

	Accountants	Legal	Architects	Engineers	Pharmacists
Austria	6.2	7.3	5.1	5	7.3
Belgium	6.3	4.6	3.9	1.2	5.4
Denmark	2.8	3.0	0	0	5.9
Finland	3.5	0.3	1.4	1.3	7.0
France	5.8	6.6	3.1	0	7.3
Germany	6.1	6.5	4.5	7.4	5.7
Greece	5.1	9.5	n.a.	n.a.	8.9
Ireland	3.0	4.5	0	0	2.7
Italy	5.1	6.4	6.2	6.4	8.4
Luxembourg	5	6.6	5.3	5.3	7.9
Netherlands	4.5	3.9	0	1.5	3.0
Portugal	n.a.	5.7	2.8	n.a.	8
Spain	3.4	6.5	4.0	3.2	7.5
Sweden	3.3	2.4	0	0	12
UK	3.0	4.0	0	0	4.1

In addition to this table, which assigns a number value to the regulation of five professions in fifteen countries, Part 1 of the IHS Study included a number of additional tables and charts with data related to the legal profession. These charts and tables, which are reproduced in the Appendix to this article, included five tables that summarized the responses that the IHS had received to the multiple-choice questions contained in its questionnaire.¹⁴⁷ In each of these tables, the authors provided a color-coded summary of the data showing which countries had high levels of regulation and which did not.¹⁴⁸ Following these tables, there was an unlabeled table entitled “Legal services (Lawyers): IHS Regulation Indices.” For each of the fifteen countries, it listed a regulation index for entry requirements and conduct requirements, a total regulation index and then ranked the countries from 1-15 according to their total regulation index, with rank 1 indicating the heaviest regulation.¹⁴⁹

¹⁴⁷ See Appendix 1, *infra* (reproduces Table 3-5 Legal Services (Lawyers) General (summarizing subparts of question 2); Table 3-6 Legal Services (Lawyers): Qualification Requirements (summarizing questions 3.4-3.7); Table 3-7 Legal Services (Lawyers): Scope of Activities; Table 3-8 Legal Services (Lawyers): Conduct; Table 5-1 Overview—Legal Services 2000).

¹⁴⁸ IHS REPORT, PART 1, *supra* note 119, at 28 (explaining color-coding) and 45–47 (showing color coding in Tables 3-5, 3-6 and 3-7). See also *id.* at 83 (contains a color coded summary of market entry regulations/ for all professions and all countries).

¹⁴⁹ *Id.* at 50.

Legal Services (Lawyers): IHS regulation indices

	Entry	Conduct	Total	Rank
Greece	3.5	6.0	9.5	1
Austria	4.1	3.3	7.3	2
France	3.9	2.7	6.6	3
Luxembourg	3.8	2.8	6.6	3
Germany	3.7	2.8	6.5	4
Spain	3.4	3.1	6.5	4
Italy	2.6	3.9	6.4	5
Portugal	3.5	2.2	5.7	6
Belgium	2.5	2.1	4.6	7
Ireland	2.4	2.1	4.5	8
England & Wales	2.9	1.2	4.0	9
Netherlands	2.1	1.8	3.9	10
Denmark	2.1	0.9	3.0	11
Sweden	2.0	0.4	2.4	12
Finland	0.0	0.3	0.3	13

Although the determination of whether a country had a high level of regulation was based on point values the study authors assigned to their multiple-choice questions, for the most part, the study simply articulates the point values assigned and compares these values to a prior study, without discussing how the authors decided on the particular weighting system and why alternative weightings were rejected.¹⁵⁰ With respect to the market entry regulation index the authors developed, 40% of a country's score was based on its responses regarding "licensing," with different points assigned depending on the number of exclusive tasks and shared tasks that a respondent listed.¹⁵¹ There was no analysis of the nature of the reserved tasks—points were simply assigned for the number of reserved tasks listed. The market entry regulation index allocated 20% to the issue of whether there were quotas or economic needs test.¹⁵² The remaining 40% weighting was based on overall education requirements, including the duration of university education, the duration of compulsory practice, the number of professional exams, and the number of entry routes to the profession.¹⁵³

In setting each country's "score" for the "conduct regulation index," 25% of the score was based on a country's responses regarding price and fee regulations; 15% was based on a country's responses regarding

¹⁵⁰ *Id.* at 30–33. The authors used the same methodology to calculate the market entry regulation index for each of the five professions.

¹⁵¹ *Id.* at 30.

¹⁵² *Id.* This was an "all-or-nothing" analysis with countries receiving zero points if the answer was "no" and six points if the answer was "yes."

¹⁵³ *Id.*

advertising; 15% was based on a country's responses regarding whether there were limitations on location, with countries receiving an all-or-nothing set of point values here; 20% was based on a country's responses regarding diversification, which included rules about the conditions for opening branch offices; and 25% was based on combining the score for a country's regulations regarding inter-professional relationships, meaning MDPs, and a country's rules regarding acceptable partnership and corporate forms.¹⁵⁴ The overall index was based on the sum of the market entry and conduct regulation indices.¹⁵⁵

In addition to this summary table, there were a number of additional charts and tables that were relevant to legal services. It is difficult to convey the technical nature of these charts without seeing them; accordingly, they are reproduced in the Appendix at the conclusion of this article. These charts were contained in different sections of the study, including sections entitled "Hypotheses Derived from the Analysis,"¹⁵⁶ "Findings Revisited Using GAP-Analysis,"¹⁵⁷ and "Excursus: Scope for Liberalisation by Comparison with Peers."¹⁵⁸

Although Part 1 of the IHS Study was lengthy and some of it was technical,¹⁵⁹ its conclusions are relatively straightforward. The authors concluded that some countries regulate more heavily than other countries,¹⁶⁰ that the countries with less regulation did not appear to have more consumer complaints,¹⁶¹ and that professional services in the countries with more regulation appeared to be less efficient and

¹⁵⁴ IHS REPORT, PART 1, *supra* note 119, at p. 32.

¹⁵⁵ *Id.* at p. 33.

¹⁵⁶ See Appendix 1, *infra* (includes Table 5-5 Output measures and degree of regulation (including legal) Chart 5-1 Distribution of Key Ratios in EU Member States—Legal Services (which includes information on Professional Density (per Mio. of Population); Volume per capita in EUR; Volume per person employed in 1,000 EUR).

¹⁵⁷ See Appendix 1, *infra* (Table 5-9 GAP Analysis Table (Including legal services); Chart 5-5 Productivity vs. Regulation Index—Legal Services; Chart 5-8 Productivity vs. Regulation index (legal + accountancy + technical); Chart 5-10 Volume per firm in 1000 EUR vs. Regulation Index—Legal Services).

¹⁵⁸ See Appendix 1, *infra* (Chart 5-12 Scope for Reducing Regulation—Assuming Constant Returns-to-Scales (Legal Services, Illustrative); and Chart 5-13 Scope for Reducing Regulation—Assuming Decreasing Returns-to-Scales (Legal Services, Illustrative)).

¹⁵⁹ IHS REPORT, PART I, *supra* note 119.

¹⁶⁰ See, e.g., IHS REPORT, PART 1, *supra* note 119, at 82–83 (Chart: Summary Market Entry Regulations/Color Coding and Overview: Total IHS Regulation Indices for Different Professions) (reproduced in Appendix 1, *infra*).

¹⁶¹ See, e.g., *EU 2003 Competition Report*, *supra* note 140, at 305–06, 60 para. 189 ("This study revealed significantly different levels of regulation between Member States and between different professions. It found that there was no proof of malfunctioning of markets in relatively less regulated countries. On the contrary, more freedom in the professions would, it concluded, allow more overall wealth creation.").

profitable.¹⁶² Therefore it appeared that countries with higher levels of regulation could reduce that regulation without adverse affects.¹⁶³ The last section of Part 1 stated:

In the absence of evidence to the contrary, it is assumed that none of the markets for professional services has experienced the dire consequences of market breakdown predicted by theories based on the presence of conditions known as 'market failure.' Indeed, since the economic outcomes of professional services in those member states where they are subject to lower degrees of regulation are comparable with professional services in more highly regulated member states, the predictions of public interest theory seem wide of the mark, and that, on the contrary, regulation could be reduced—at least to the level of their peers in other member states of the [European Union].¹⁶⁴

Part 2 of the IHS Study contained analyses of the five professions in selected countries, focusing on legal services in Denmark, Germany, Italy, England and Wales, and France.¹⁶⁵ Similar to Part 1, this section of the report contained a number of charts and tables to support its analysis.¹⁶⁶

Part 3 of the IHS Study was approximately forty pages long and contained four pages of references; the remaining pages included additional charts and tables that included information on the data used in the study, including the sources IHS used for various information, information about the numbers of professionals in each country, IHS's synthesis of the questionnaire answers, and a copy of the questionnaire itself.¹⁶⁷

The IHS Study has been heavily criticized on both economic and non-economic grounds by many in the European legal profession; a number of these critiques are discussed in greater detail *infra* in Section IV. They include critiques directed to Part 1 and critiques directed to the case studies

¹⁶² See, e.g., IHS REPORT, PART 1, *supra* note 119, at 119 (reproduced in Appendix 1, *infra*: Chart 5-8 Productivity vs. Regulation Index (legal + accountancy + technical, excluding Belgium)); see also *id.* at 127.

¹⁶³ See, e.g., IHS REPORT, PART 1, *supra* note 119, at 124:

By similar reasoning we can surmise that the degree of regulation in any other member state can still be reduced by any 'leftwards' and/or 'upwards' movement up to a point on a 'boundary' delimited by the peers. Thus it may be supposed that a reduction in the degree of regulation in other countries can still result in an equal performance in productivity as exists at present, at least, once again based on comparison with the situation of 'peers'.

¹⁶⁴ *Id.* at 127.

¹⁶⁵ IHS REPORT, PART 2, *supra* note 142, Table of Contents.

¹⁶⁶ *Id.*

¹⁶⁷ IHS REPORT, PART 3, *supra* note 122.

that appear in Part 2.¹⁶⁸ To my knowledge, neither IHS nor the Commission has responded publicly to these critiques. Despite the unanswered critiques, the Commission has relied heavily upon the IHS Study since it was issued and continues to cite it with approval without responding to the critiques directed towards it.

3. March 2003 Publication of the Stocktaking Questionnaire—Invitation to Comment

Less than one week after Commissioner Monti's speech in Berlin, the European Commission began its Stocktaking Exercise with a document entitled "Invitation to Comment."¹⁶⁹ The Invitation to Comment was a sixteen page document that consisted of two parts: the first part explained the rationale for the Stocktaking Exercise and the second part was a questionnaire that asked many of the questions that had not been included in the IHS questionnaire.¹⁷⁰ The questions in this second part were divided into three sections, with some questions addressed primarily to users of professional services, other questions addressed primarily to service providers and regulators, and a third section that sought comparative data.¹⁷¹

The explanatory section of the Invitation to Comment was almost as long as the questionnaire itself. In the first section, which set forth the

¹⁶⁸ Several commentators have critiqued the case studies aspect of the IHS Report, arguing that IHS misunderstood some information, omitted key information, and made poor choices about the jurisdictions selected for the legal services case study. See MARTIN HENSSLER & MATTHIAS KILIAN, POSITION PAPER ON THE STUDY CARRIED OUT BY THE INSTITUTE FOR ADVANCED STUDIES, VIENNA, ECONOMIC IMPACT OF REGULATION IN THE FIELD OF LIBERAL PROFESSIONS IN DIFFERENT MEMBER STATES, (Sept. 2003) available at <http://www.anwaltverein.de/downloads/praxis/Positionspapier-Henssler-Kilian-Englisch-Endversion.pdf>. (This paper is also available in its original language, German, at <http://www.brak.de/seiten/pdf/aktuelles/ihs.pdf>); see also OECD *Legal Professions*, *supra* note 7, at 26–27 (concluding that the IHS study may have overstated its conclusions because: (1) its assumption that higher turnover equals higher profit could be incorrect; (2) it does not use a regression analysis to fully control the risk of spurious correlation; and (3) it presents only a very broad picture of regulation and does not sufficiently take account of different effects of different forms of regulation in different professions across different Member States, each of which has its own peculiarities); RBB ECONOMICS, ECONOMIC IMPACT OF REGULATION IN LIBERAL PROFESSIONS: A CRITIQUE OF THE IHS REPORT (Sept. 9, 2003) available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/rbb_ihs_critique_en1_1183706206.pdf. [hereinafter RBB ECONOMICS] (RBB Economics is a commercial company that provides competition expertise to its clients. See *infra* note 345 and accompanying text for more information on RBB Economics).

¹⁶⁹ *Commission Services Working Document, Regulation in Liberal Professions and its Effects, Invitation to Comment* (Mar. 27, 2003) (on file with author) [hereinafter *EU Invitation to Comment*].

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 9.

rationale for its Stocktaking Exercise, the Commission referred to the Lisbon Strategy.¹⁷² The Commission explained that a key part of the Lisbon Strategy was developing an internal market strategy for services that had as its goal a fully functioning, borderless market for EU services and that the existing and pending directives were designed to facilitate such seamless service.¹⁷³ It further explained that the primary victims of a dysfunctional internal services market were small and medium sized enterprises.¹⁷⁴ In the next part of the introductory section, the Commission provided a brief review of regulation of the “liberal professions.” It noted that there had been recent regulatory reforms in some EU Member States, in the Commission’s own initiatives, and in the OECD initiatives cited earlier.¹⁷⁵ The Commission cited with approval the principles of high-quality regulation that emerged from the OECD and provided the following abbreviated summary of these regulatory principles:

- exclusive rights and restrictions of the freedom to determine competitive action should be limited to the strict minimum;
- entrance requirements to a profession should clearly relate to the core tasks of the profession and be determined by public authorities; and
- whereas small or one-off consumers may in certain respects need special protection, the same is unlikely to apply to business to business transactions.¹⁷⁶

The next section of the introduction was entitled “Competition Policy and Liberal Professions.” In this section, the Commission stated its views about the appropriate overall goal of professional regulation, focusing on cost and choice:

The Commission’s established policy is to fully apply the competition rules to this sector, whilst recognising its specificities and acknowledging the liberal professions’ special status in the economies of the Member States and in society in general. The overall goal must be to improve welfare for all users of professional services and for consumers in particular: better choice and better value for money.¹⁷⁷

¹⁷² *Id.* at 2, para. 1. See Lisbon Strategy, *supra* note 59, for a discussion of the Lisbon Strategy.

¹⁷³ *Id.* at 2–3, para. 2–4 (citing the e-Commerce Directive and the pending directive on recognition of professional qualifications).

¹⁷⁴ *Id.*

¹⁷⁵ *EU Invitation to Comment*, *supra* note 169, at 3–6.

¹⁷⁶ *Id.* at 4, para. 8 (citing six much lengthier principles).

¹⁷⁷ *Id.* at 5, para. 10.

Referring indirectly to the *Wouters* and *Arduino* cases,¹⁷⁸ the Commission noted that professions have certain inherent characteristics which they may be allowed to retain, even if they are anticompetitive.¹⁷⁹

After providing this introduction to the issues, the Commission explained its Stocktaking Exercise. The Commission cited the IHS results and noted that the study pointed out that there were no apparent signs of problems in countries where there is less regulation and that low regulation is a spur to wealth creation, rather than a hindrance.¹⁸⁰ It then noted that this was an opportunity for regulators to re-evaluate and possibly reform regimes put in place years ago.¹⁸¹ The Commission explained that it had instituted the stocktaking because it wanted to:

[U]nderstand and evaluate the present market situation, the degree of user satisfaction, whether there are artificial barriers to the optimal use of resources as well as whether improvements to the existing rules and regulations are possible. To do this, further informed input is needed in the first place from those directly concerned, such as users of services, service providers and those responsible for the regulations. It must be remembered that the above-mentioned study represents one input, of economic nature, to the debate which is now launched and where all points of view will be considered.¹⁸²

The Commission gave respondents approximately two months to respond.¹⁸³

¹⁷⁸ See *supra* notes 77–158 and accompanying text for a discussion of these cases.

¹⁷⁹ *EU Invitation to Comment*, *supra* note 169, at 5, para. 12:

It is also clear from the above-mentioned recent case-law and from the Commission's practice that some types of rules and regulations must be considered as inherent to the profession in question and therefore in principle will not be caught by the prohibition of anti-competitive agreements, decisions and practices. Indeed, were they prohibited, the profession as such would be deprived of its essential characters. Without such genuine 'deontological' rules the profession could not function as a body of professionals providing a particular range of professional services and there could hence be no potential for competition between providers of services. The application of the competition rules clearly must not produce such results.

¹⁸⁰ *Id.* at 6–7.

¹⁸¹ *Id.* at 7, para. 19.

¹⁸² *Id.* at 7, para. 20.

¹⁸³ The *EU Invitation to Comment* is dated March 27, 2003; Respondents were asked to submit comments by May 31, 2003. *EU Invitation to Comment*, *supra* note 169, at 8. The Commission's summary of responses, however, said that respondents had until June 15, 2003 to respond. *Commission, DG Competition, Invitation to Comment, Regulation in Liberal Professions and its Effects, Summary of Responses* (Oct. 2003), available at http://ec.europa.eu/comm/competition/liberalization/conference/summary_of_consultation_r

Because the consequences of the EU Initiative are so significant and because the European Commission has relied, and continues to rely, very heavily on its stocktaking exercise, as well as on the IHS Study, it is worthwhile to examine the data collected and questions asked. Unlike the IHS questionnaire, the Commission's stocktaking questionnaire asked open-ended questions that called for narrative responses. Some of the questions they asked consumers included the following:

- Please name any reasons that have discouraged you from making use of the services of this profession.
- Would you like to indicate which, in your view, are the essential rules that a professional must comply with?
- In your view, to what extent do the users of the services of this profession need protection through regulation of access to entry to the profession? Your reply may consider separately businesses, continuous consumers, sophisticated buyers and small, one-off consumers.
- In your view, to what extent do the users of the services of this profession need protection through regulation of professional conduct? Your reply may consider separately businesses, continuous consumers, sophisticated buyers and small, one-off consumers?
- In your view, is the market for the services of this profession a competitive one? Do you feel you have enough choice both as far as the provider of services is concerned and in the services you purchase?

The "providers" section of the questionnaire began with three general questions.¹⁸⁴ The questionnaire then listed eleven categories of rules and asked respondents to use a five point scale to indicate "[t]o what extent do

sponses.pdf [hereinafter *Summary of Responses*].

¹⁸⁴ *Id.* at 13–14. Question 15 stated:

Would you like to indicate which, in your view, are the essential rules that a professional must comply with? You may wish to take into account that the e-commerce Directive lists the examples of independence, professional secrecy and fairness towards clients and other members of the profession, as professional rules to be complied with.

Question 16 stated: "The e-commerce Directive also mentions 'the dignity and honour of the profession'. What exactly do you understand by 'dignity and honour of the profession'? To what extent do you think this is an important factor for the proper practice of the profession?" *Id.* Question 17 consisted of a chart listing eleven categories of rules such as fee scales, advertising restrictions, MDP bans and territorial restrictions on scope of activity. For each of these eleven categories, the *Invitation to Comment* asked respondents to indicate on a chart, on a scale from -2 to 2 whether the rule in question "act[s] in or against your interests as a provider of the services?" *Id.*

you feel that the following rules act *in or against your interests* as a provider of the services?”¹⁸⁵ The next section listed these same eleven categories of rules and invited (but did not require) respondents to address the questions listed below with respect to one or more of these rules:

- In your opinion, what is the goal of the rule or regulation you are considering? If you know the source of the rule or regulation in question, please indicate it (law, code of conduct, other).
- In your view, could this rule or regulation be justified as a measure to protect consumers? In particular, to what extent do you think it protects the small, one-off consumer?
- In your opinion, would businesses, continuous consumers, sophisticated buyers, need such protection?
- In your view, does this rule or regulation promote or hinder competition in the market? Why?
- In your view, what is the role of this profession in safeguarding the public interest? What exactly do you understand by ‘public interest’ (for example: the correct administration of justice, public health, public safety, protection of the environment)?
- To what extent could the same purposes be attained by less restrictive measures?
- What is the effect of such rule or regulation on the market?
- In your view, to what extent does this rule or regulation limit the possibilities for cross border services or affect the possibilities of professionals to enter new markets?
- Finally, are there any other remarks you would like to make?¹⁸⁶

The final section of the Invitation to Comment asked respondents whether the availability, cost, and quality of services differed within Europe and the relationship of cost to quality.¹⁸⁷

C. The October 2003 Events

There were three significant events that took place in October 2003: (1) DG Competition’s publication of the summary of the responses it received from the Invitation to Comment; (2) DG Competition’s publication of a document entitled “Overview of Regulation in the EU Member States;” and (3) a conference on liberal professions hosted by DG Competition. Each of these three developments is discussed below.

¹⁸⁵ *Id.* at 14, question 17.

¹⁸⁶ *Id.* at 15–16.

¹⁸⁷ *Id.* at 16–17.

1. Publication of the "Summary of Responses" to the Stocktaking Exercise

In October 2003, approximately one week before the Commission's October 28, 2003 Conference on Regulation in Professional Services,¹⁸⁸ the Commission published a summary of the responses it had received to its March 2003 Invitation to Comment.¹⁸⁹ The Commission received a total of 246 comments, 33 of which addressed the issue of the regulation of the legal profession.¹⁹⁰ Eighteen of these responses came from professional bodies, whereas the other responses came from business users, practitioners and one consumer association.¹⁹¹

The summary included an introductory section, followed by comments that were organized by profession. The introductory section included three legal services-specific paragraphs.¹⁹² The document also included four and one half pages of additional comments about legal services, many of which offered justifications for regulations in the five areas being examined by the Commission.¹⁹³ Those commenting included the CCBE and Cologne professors Dr. Martin Henssler and Dr. Matthias Kilian, who had prepared a report commissioned by the German Hans-Soldan Stiftung. Their

¹⁸⁸ See European Commission, Competition, Professional Services, Conferences, Conference on the Regulation of Professional Services, Oct. 28, 2003, http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20031028/index.html (last visited Oct. 31, 2008) [hereinafter October 2003 Conference] (papers and videos from this conference are available on this webpage); Remarks of Wachtmeister at the October 2003 Conference, *supra* note 133, at 1 ("The second step in the Commission's investigation was the invitation for interested parties to comment on restrictive professional rules. We received 246 responses and published a summary of them last week.").

¹⁸⁹ See *Summary of Responses*, *supra* note 183.

¹⁹⁰ See *id.* at 1, para. 1 (noting 246 responses); *id.* para. 51 (thirty-three responses for the legal profession).

¹⁹¹ *Id.* para. 51.

¹⁹² *Id.* paras. 11–13:

11. A large majority of respondents considered price regulation to be inappropriate for legal services. A number of professional bodies argued that fixed and recommended prices were not in the interests of consumers.

12. A significant number of respondents were in favour of some regulation of advertising of legal services. However, most believed that lawyers ought to be able to advertise their services. Only a small minority was in favour of highly restrictive rules.

13. A large number of respondents were in favour of regulation of co-operation between lawyers and other groups. However, some suggested that current rules are overly restrictive and that they are hindering the development of multidisciplinary practices.

¹⁹³ *Id.* at 9–13, paras. 51–81.

comments are discussed in Section IV, *infra*.

2. The Commission's October 2003 Overview of Regulation in the EU Member States

At approximately the same time it issued its *Summary of Responses* document, DG Competition issued a document entitled "Overview of Regulation in the EU Member States."¹⁹⁴ This twenty page document is no longer linked from the Commission's Professional Services sector webpage; it was—in essence—a draft of the Commission's February 2004 Report. This Overview included an introductory section, in which DG Competition identified the professions that were the most and least regulated,¹⁹⁵ and the countries with the most and least regulation.¹⁹⁶ This section also included a chart summarizing the level of regulation for five professions in thirteen EU Member States that was later reproduced in the February 2004 Report.¹⁹⁷

The next section of the overview identified the "key restrictions" for each profession. This section was primarily descriptive of the existing regulations in various EU Member States. The legal services portion included three paragraphs devoted to summarizing the existing restrictions regarding entry and exclusive rights for legal services;¹⁹⁸ two paragraphs on price restrictions;¹⁹⁹ three paragraphs on contingency fees;²⁰⁰ four paragraphs on advertising;²⁰¹ five paragraphs on business structures;²⁰² and three paragraphs on inter-professional cooperation.²⁰³ In 2004, the Commission issued a document that provided a similar stocktaking overview for the Eastern European countries that had recently joined the

¹⁹⁴ Commission, *DG Competition, Stocktaking Exercise on Regulation of Professional Services: Overview of Regulation in the EU Member States*, available at <http://www.cgil.it/politiche-economiche/Professionalit%C3%A0OrdiniEAssociazioni/IIQuadroEuropeoEInternazionale/ServiziProfess09.10.03.pdf?T=Professioni,%20Ordini%20e%20Associazioni%20professionali%20-%20II%20quadro%20europeo%20e%20internazionale;L=2> [hereinafter *Stocktaking Exercise*].

¹⁹⁵ *Id.* paras. 6, 8. The most highly regulated professions were notaries and pharmacists and the least highly regulated were architects and engineers. *Id.* paras. 6, 8. Lawyers and accountants were described as "relatively highly regulated." *Id.* para. 7.

¹⁹⁶ *Id.* para. 4. The countries with the most regulation were Austria, Germany, Greece, Italy and Luxembourg. *Id.* The countries with the least regulation were Denmark, Finland, Ireland, the Netherlands, and the United Kingdom. *Id.* para. 5.

¹⁹⁷ *Id.* at 1–2. See *infra* note 230 for this chart.

¹⁹⁸ *Id.* paras. 54–56.

¹⁹⁹ *Id.* paras. 57–58.

²⁰⁰ *Stocktaking Exercise*, *supra* note 194, paras. 59–61.

²⁰¹ *Id.* paras. 62–65.

²⁰² *Id.* paras. 66–70.

²⁰³ *Id.* paras. 71–73.

European Union.²⁰⁴ The 2004 document included an updated table that included the “regulation index” number for most of the new EU Member States.²⁰⁵

3. Commission Conference on Professional Services

The third important development in October 2003 was a conference on professional services sponsored by the European Commission.²⁰⁶ This conference began with presentations by four EU officials. The first speaker was the Deputy Director of DG Competition, who gave the opening remarks.²⁰⁷ The second speaker was Anne-Margrete Wachtmeister, the head of the Services unit of DG Competition who reviewed the results of the IHS Study and the Stocktaking Exercise.²⁰⁸ The third presentation was by Professor Niels Philipsen, a University of Maastricht professor who had been visiting the European Union and in charge of the liberal professions regulatory project.²⁰⁹ He briefly summarized the economic research regarding price regulation, advertising restrictions, entry regulation and the effect of deregulation in the professions (primarily through loosening the exclusive tasks reserved to the profession). His remarks also briefly touched on regulating for quality.²¹⁰ After his summary of the literature, he

²⁰⁴ Commission, *DG Competition, Stocktaking Exercise on Regulation of Professional Services: Overview of Regulation in the New EU Member States*, COMP/D3/MK/D(2004), available at http://ec.europa.eu/comm/competition/liberalization/conference/overview_of_regulation_in_the_eu_professions.pdf. There were three pages devoted to legal services restrictions. See *id.* paras. 37–60.

²⁰⁵ *Id.* at 20, Annex.

²⁰⁶ October 2003 Conference, *supra* note 188.

²⁰⁷ Gianfranco Rocca, Deputy Director General: DG Competition, Opening Remarks, Conference on the Regulation of Professional Services (Oct. 28, 2003) available at http://ec.europa.eu/comm/competition/liberalization/conference/speeches/gianfranco_rocca.pdf [hereinafter Remarks of Gianfranco Rocca].

²⁰⁸ See Remarks of Wachtmeister at the October 2003 Conference, *supra* note 133. Ms. Wachtmeister’s six-page powerpoint is available with the conference materials. See *Overview of the DG Competition’s Stocktaking Exercise on Professional Rules: Wachtmeister and Philipsen Powerpoint*, available at http://ec.europa.eu/comm/competition/liberalization/conference/speeches/am_wachtmeister_and_n_philipsen_powerpoint.pdf [hereinafter *October 2003 Wachtmeister Conference Powerpoint*].

²⁰⁹ Niels Philipsen, Professional Services Team: DG Competition, Overview of the Commission’s Stocktaking Exercise (Part II), Conference on the Regulation of Professional Services (Oct. 28, 2003) available at http://ec.europa.eu/comm/competition/liberalization/conference/speeches/niels_philipsen.pdf.

²¹⁰ *Id.* at 1:

One can conclude that, although quality regulation may often be needed to some extent in professional markets, it is doubtful whether price regulation leads to any benefits for consumers. As early as 1970, the UK’s Monopolies and Mergers Commission argued that ‘price competition in the supply of a professional service

endorsed the IHS Study, stating:

The IHS report on the professions reached the conclusion that excessive levels of regulation appear to be linked with higher prices. A small number of correspondents have questioned this finding, in particular the authors' reliance on turnover figures as an indication of profits in a given profession. This could be a valid point. However, as I have shown with my examples, the IHS conclusions are broadly in line with other empirical and academic work. I would therefore like to conclude by saying that most academic studies on individual professions point to similar links between excessive regulation and economic inefficiency.²¹¹

The fourth presentation was by the head of a different EU division—the DG Internal Market—who discussed other EU initiatives that were under consideration in order to reduce barriers and facilitate an internal market in services.²¹² Although the audience was invited to ask questions in the later sessions, they were not invited to do so during these first four sets of remarks.²¹³

Following these introductory remarks and a coffee break, the conference began with the first of its three substantive sessions. The title of the first panel session, which focused heavily on the issue of MDPs, was: "Regulation and Business Development: Focusing on Rules that Impact on Business Development, Including Inter-Professional Co-operation, Business Structure, New Entry and Innovation."²¹⁴ This session included seven speakers, four of whom represented organizations²¹⁵ and three of whom

is likely to be the most effective single stimulant to greater efficiency and to innovation and variety of service.'

²¹¹ *Id.* at 3.

²¹² Jonathon Stoodley, Head of Unit: DG Internal Market, Presentation of DG Internal Markets Projects for Professional Services, Conference on the Regulation of Professional Services (Oct. 28, 2003) (A transcript of Mr. Stoodley's remarks do not appear on the conference website, but he is listed as presenting at http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20031028/index).

²¹³ See Remarks of Gianfranco Rocca, *supra* note 207, at 2 ("It is during these three sessions [after the coffee break] that we invite you to ask questions of our panelists and speakers.").

²¹⁴ See October 2003 Conference, *supra* note 188.

²¹⁵ See *id.* The speakers in this session representing organizations were: (1) Helge Jakob Kolrud, President, Council of the Bars and Law Societies of Europe, on Professional Rules and Business Development; (2) Luis Matias, Pharmaceutical Group of the European Union, PGEU Presentation [protect health]; (3) Fredrik Häggglund, ICA Förbundet Invest AB, Sweden [representing the Swedish Grocers' Federation], Why the Swedish Consumers Would be the Winners; (4) David Devlin, European Federation of Accountants, Speaking Notes.

presented their personal views.²¹⁶ Some of these speakers urged the Commission to reduce regulation,²¹⁷ whereas three of the speakers representing organizations were much more cautious or even disapproving of the Commission's initiatives.²¹⁸

The second panel session was entitled "Regulation and Consumer Protection: Focusing on Price Regulation, Recommended Prices, Advertising Restrictions and Other Professional Rules Justified as in the Consumer Interest."²¹⁹ Five of the six speakers in this session represented organizations.²²⁰ Once again, some of the speakers urged caution,²²¹ whereas other speakers urged the Commission to continue their efforts to reduce unnecessary regulation.²²²

The third session was entitled "Reform in the EU Professions: Focusing on Recent Deregulation in Certain Member States and Whether

²¹⁶ See *id.* The speakers in this session, who presented their own views, were: (1) Maître Hans Gilliams, Attorney for ECJ plaintiff Jos Wouters, who spoke personally and offered introductory observations; (2) Maître Jacques Vergès, Avocat à la Cour (Barreau de Paris), Intervention de Maître Jacques Vergès; (3) Jeremy Jennings OBE, Ernst & Young, who is Ernst & Young's Global Director of Regulatory & Government Relations.

²¹⁷ See October 2003 Conference, *supra* note 188, Remarks of Gilliams, Remarks of Hägglund, Remarks of Devlin (Mr. Gillmans expressed his belief that consumers could benefit from self-regulation and noted that self-regulation can often be implemented without conflicting with competition rules. Additionally, Mr. Gillmans commented that, in a democratic system, the public authorities should be able to define "what constitutes the 'public interest'" and that the inquiry into whether or not rules are consistent with the public interest should be conducted on a "case by case basis." Finally, Mr. Gillmans noted that where there is consensus as to what "core values of the profession are," and where public policy "allows the relevant profession to implement these core values," then regardless of restrictive effects, these values are compatible with competition rules. "However, the 'exemption' from the competition rules only applies to rules that are demonstrably necessary for the relevant core values and provided those values can not be protected in alternative, less restrictive ways." It is the responsibility of the "author of the restrictive practice," however, to show that there is a necessity for this practice).

²¹⁸ See *id.*, Remarks of Kolrud, Remarks of Devlin, Remarks of Matias.

²¹⁹ See October 2003 Conference, *supra* note 188.

²²⁰ *Id.* The organizational speakers were: (1) Jim Murray, European Consumers' Organisation, Speaking Notes; (2) Arno Metzler, Federal Association for Liberal Professions, Germany, Regulierung der Freien Berufe und Verbraucherschutz; (3) Dorothea Herzele, Federal Chamber of Labour, Austria, Regulierung der Freien Berufe: Dient sie auch dem Wohl der KonsumentInnen und der ArbeitnehmerInnen? Presentation; (4) Katarina Nilsson, Architects' Council of Europe, Regulation of Professional Services and Consumer Protection; (5) Phil Evans, Consumers' Association, United Kingdom, Speaking Notes. The speaker who did not represent an organization was Professor Harald Herrmann, Friedrich-Alexander University, Germany, Normstrukturen des europaweiten De-Regulierungstrend und Kartellrecht, Presentation.

²²¹ See, e.g., October 2003 Conference, *supra* note 188, Remarks of Katarina Nilsson.

²²² See, e.g., *id.*, Remarks of Jim Murray, Remarks of Dorothea Herzele, Remarks of Phil Evans.

Similar Reforms Could be Applied Elsewhere in the European Union.”²²³ This session included five representatives, followed by comments and concluding remarks by Commissioner Monti.²²⁴ The speakers included government representatives from Italy, Germany, the Netherlands, and Ireland, and one academic.²²⁵

III. THE EUROPEAN COMMISSION REPORTS

A. The February 2004 EU Commission Report on Competition in Professional Services

In February 2004, several months after the October 2003 events described above, the European Commission issued its *Report on Competition in Professional Services* (Report).²²⁶ This twenty-four page report addressed competition principles with respect to different kinds of professionals, including: (1) accountancy/audit; (2) tax consultants; (3) architects; (4) engineers; (5) lawyers; (6) notaries; and (7) pharmacists.²²⁷ The Report focused on five areas of concern: (1) price fixing; (2) recommended prices; (3) advertising regulations; (4) entry requirements and reserved rights [i.e., monopoly rights]; and (5) regulations governing business structure and multi-disciplinary practices.

The Report built on the documents that had been previously circulated. The first section of the Report provided background and contextual information, including information about the importance of the services market to the EU economy.²²⁸ The next section of the Report summarized the Commission’s actions in the field of competition for professional services, identifying the IHS Study, the Stocktaking Exercise, the Commission’s coordination with the National Competition authorities and

²²³ See *October 2003 Wachtmeister Conference Powerpoint*, *supra* note 208.

²²⁴ October 2003 Conference, *supra* note 188.

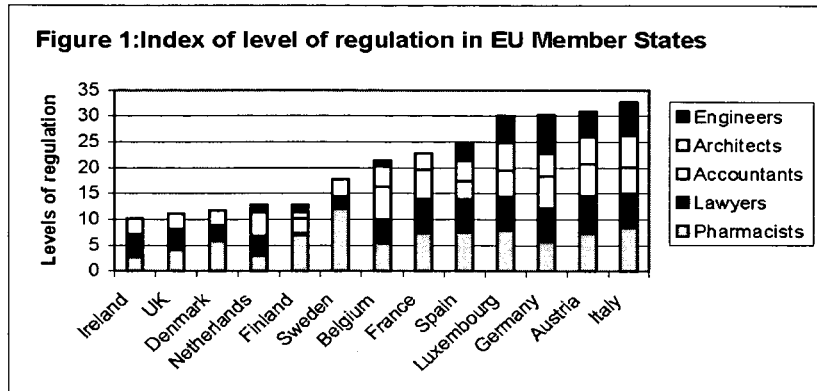
²²⁵ *Id.* Talks included: (1) Regulation of Professional Services, Giuseppe Tesaro, Competition Authority, Italy; (2) Reform in the EU Professions, Dr. Kurt Franz, Ministry of Justice, Germany; (3) The Case for Agnosticism and Diversity in the Regulation of Professions, Benito Arruñada, Pompeu Fabra University, Barcelona; (4) Mark Hameleers, Ministry of Economic Affairs, The Netherlands (presentation not available); (5) Dr. John Fingleton, Competition Authority, Ireland. Presentation in English and French.

²²⁶ See *Commission Report*, *supra* note 8; see also Europa, Summaries of Legislation, Competition in Professional Services, Summary of Commission Communication of 9 February 2004 Entitled “Report on Competition in Professional Services,” <http://europa.eu/scadplus/leg/en/lvb/l23015.htm> (last visited Oct. 31, 2008) [hereinafter Commission Description] (summary of the Report and Follow-Up Report prepared for information only and not designed to interpret or replace the reference document, which remains the only binding legal text).

²²⁷ See, e.g., *Commission Report*, *supra* note 8, paras. 1, 16.

²²⁸ *Id.* paras. 5–7.

the Commission's complaint against the Belgian architects for their minimum fee schedule system.²²⁹ This section of the Report also reproduced Figure 1 from the IHS Study, which listed the level of regulation in thirteen countries for five professions:²³⁰



Source: IHS Study.

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

After summarizing the Commission's activities, the Report continued with a section entitled "Restrictive Regulation in the Liberal Professions" that presented the Commission's views that the five categories of 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."²³¹ Citing the OECD study discussed earlier, the Commission stated that:

[A] significant body of empirical research 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.²³²

The Commission opined that there are "essentially three reasons why some regulation of professional services may be necessary:"

- (1) the concept of "asymmetry of information" between customers and service providers and that professional services are

²²⁹ *Id.* paras. 7–9. Each of these was described in the prior section of this article.

²³⁰ *Id.* para. 16, Figure 1.

²³¹ *Id.* para. 22.

²³² *Id.* para. 23.

“credence goods” the quality of which cannot easily be judged either by prior observation or, in some markets, by consumption or use;

- (2) the concept of “externalities” because in certain markets, the provision of a service may have an impact on third parties as well as the purchaser of the service and there is a danger that the providers and purchasers of these services fail to take proper account of these external effects; and
- (3) the concept that certain professional services are deemed to produce public goods that are of value for society in general, such as the correct administration of justice and there is a danger that without regulation some professional services markets might undersupply or inadequately supply public goods.²³³

The Report noted that these three 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.”²³⁴ The Commission then cited the European Parliament’s December 2003 resolution concluding that:

[F]rom 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.²³⁵

This section concluded by stating that the Report would continue by considering individually each of the five areas of concern and would provide a “brief overview” of arguments for and against the category in question and give indications about the possible scope for relaxing existing rules.²³⁶

The Commission’s Report devoted approximately two pages to each of the five issues and within those two pages, the Report addressed the approaches used by all five professions being examined. These sections relied heavily on the IHS findings and the first three topics—price fixing,

²³³ *Commission Report*, *supra* note 8, paras. 9–10.

²³⁴ *Id.* para. 10.

²³⁵ *Id.* para. 29 (citing the December 2003 European Parliament Resolution on Market Regulations and Competition Rules for the Liberal Professions, discussed *infra* at note 313).

²³⁶ *Id.* para. 30.

recommended prices and advertising—including tables based on the IHS Study.²³⁷

With respect to fixed fees, the Report observed that 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.”²³⁸ It further concluded that “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.”²³⁹

On the issues of recommended fees and the legal profession, the Report found that recommended prices may have a significant negative effect on competition because they may facilitate the coordination of prices between service providers and can mislead consumers about reasonable price levels.²⁴⁰ The Commission was skeptical of professional associations’ arguments that recommended prices can provide consumers with useful information about the average costs of services, reduce the costs of setting fees, serve as a guide for practitioners who lack experience in determining fees, or reduce the transaction costs of negotiating prices for complex services.²⁴¹ It pointed out that there are alternative methods of providing price information, that it was unlikely that professionals would need to rely on recommended prices in order to set fees, and that a number of jurisdictions and professions had eliminated recommended fees.²⁴²

With respect to advertising regulations, the Commission summarized the benefits of advertising,²⁴³ rejected the argument that restrictions were needed to protect consumers from misleading or manipulative claims, and observed that:

[R]esearch suggests that advertising restrictions may under certain

²³⁷ *Id.* para. 36, Table 1; para. 41, Table 2; para. 46, Table 3.

²³⁸ *Id.* para. 34.

²³⁹ *Commission Report*, *supra* note 8, para. 35.

²⁴⁰ *Id.* para. 37.

²⁴¹ *Id.* para. 38.

²⁴² *Id.* paras. 39–41.

²⁴³ *Id.* para. 43 (stating that advertising can facilitate competition by informing consumers about different products and allowing them to make better informed purchasing decisions and that it can be a crucial competitive tool for new firms entering the market and for existing firms to launch new products, and that in contrast, advertising restrictions 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).

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.²⁴⁴

It also noted that a number of professions in a number of EU Member States had removed advertising restrictions.²⁴⁵

The next topic the Commission addressed was “entry requirements and reserved rights,” the latter of which referred to the monopoly rights of the profession. The Commission began by summarizing some of the qualitative entry restrictions, including minimum periods of education, professional examinations, and minimum periods of professional experience, observing that “[q]ualitative 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.”²⁴⁶ It continued by observing that “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.”²⁴⁷ The Commission cited the experiences in the United Kingdom, the Netherlands, and Australia, in which shrinking the lawyers’ and real estate agents’ reserved work had led to lower prices.²⁴⁸ The Commission also cited a 1990 U.S. Federal Trade Commission report that had found 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.”²⁴⁹ The Commission concluded: “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.”²⁵⁰

The Commission then provided suggestions to Member States about ways in which the entry restrictions for the professions might be reduced.

²⁴⁴ *Id.* para. 45.

²⁴⁵ *Commission Report*, *supra* note 8, paras. 46–47.

²⁴⁶ *Id.* paras. 48–49.

²⁴⁷ *Id.* para. 50.

²⁴⁸ *Id.* para. 51.

²⁴⁹ *Id.* para. 50 (citing Carolyn Cox & Susan Foster, *The Costs and Benefits of Occupational Regulation*, available at http://www.ramblemuse.com/articles/cox_foster.pdf).

²⁵⁰ *Id.* para. 52.

The Commission suggested that it might be possible to lower the entry or monopoly requirements if: (1) the requirements appear to be disproportionate to the complexity of the profession's tasks; (2) highly qualified professions hold monopoly rights to perform less complex services (such as conveyancing), in addition to their core activities; and (3) if there could be less restrictive mechanisms to guarantee quality, for example, through independent accreditation or quality controls.²⁵¹ The Commission also discussed quantitative controls.²⁵²

The final issue the Commission turned to was alternative business structures restrictions, which it described as including rules that restrict the ownership structure of professional services companies, the scope for collaboration with other professions, or the opening of branches, franchises or chains.²⁵³ The Commission offered an argument against these types of restrictions, stating:

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.²⁵⁴

The Commission then summarized two arguments offered in support of such restrictions: (1) they may be necessary to ensure practitioners' personal responsibility and liability towards clients and avoid conflicts of interest and (2) they may be necessary to ensure practitioners' independence because if professional service companies were controlled or influenced by non-professionals, this might compromise practitioners' judgement or respect for professional values.²⁵⁵

After this summary, the Commission opined that in its view, business structure restrictions appear to be less justifiable when they restrict the scope for collaboration between members of the same profession or when there is no overriding need to protect practitioners' independence.²⁵⁶ On the other hand, it opined that such restrictions would be more justifiable in markets where there is a strong need to protect practitioners' independence

²⁵¹ *Commission Report, supra* note 8, paras. 53–55.

²⁵² *Id.* paras. 56–58.

²⁵³ *Id.* para. 59.

²⁵⁴ *Id.* para. 60.

²⁵⁵ *Id.* para. 61.

²⁵⁶ *Id.* paras. 62–63.

or personal liability, although there might be alternative mechanisms for protecting independence and ethical standards which are less restrictive of competition.²⁵⁷ It concluded this section by stating that in “some markets, stringent ownership restrictions might therefore be replaced or partially replaced by less restrictive rules.”²⁵⁸

Following its analysis of these issues, the Commission discussed the possible application of the EC Treaty competition provisions to them. This section of the Report was divided into nine sections with the following conclusions:

- (1) Members of the professions who are not employees are undertakings as defined in Treaty Article 81;
- (2) Self-regulation can constitute an association of undertakings, but a body regulating professional conduct is 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. Further, 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 retains its power to adopt decisions in the last resort;
- (3) Some of the rules of other professions reviewed in the report, including fee and advertising restrictions, were a restriction of competition;
- (4) Professional regulations are liable to have an appreciable effect on trade between EU Member States;
- (5) A *Wouters* exception exists, whereby certain professional regulations that restrict competition are permitted;²⁵⁹

²⁵⁷ *Commission Report, supra* note 8, para. 64.

²⁵⁸ *Id.* para. 65.

²⁵⁹ *Id.* paras. 74–75. According to the Commission, such excepted regulations must be:

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

Id.

- (6) The state compulsion defense applies only if the State requires certain behavior and does not apply if a national law merely allows, encourages or makes it easier for undertakings to engage in anti-competitive conduct;
- (7) There is an Article 81(3) exception in addition to the *Wouters* exception;
- (8) Both the Commission and the Member States have the power under Article 81(1) to enjoin conduct or fine the actors; and
- (9) Member States can themselves be liable because the Treaty requires them 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.” The Commission stated its view that “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 be challenged. The Commission also said that “rubber stamp” approvals did not count nor did “all or nothing” approvals in which the authorities of a Member State had to accept or reject the proposals of the professional bodies but could not alter their content or substitute their own decisions for these proposals. A proportionality test is appropriate to assess the extent to which an anti-competitive professional regulation truly serves the public interest.²⁶⁰

After this discussion of its views about the application of the EC Treaty competition provisions to professional services, the Commission commented on the “steps towards modernization” that could be taken, including having regulators review the existing rules and the Commission’s intent to coordinate with the members of the ECN.²⁶¹ In the “Final Remarks” section of the Report, the Commission noted that it would report back in 2005, asked Member States to notify it of new regulations, and stated:

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

²⁶⁰ *Id.* paras. 17–22.

²⁶¹ *Id.* paras. 23–24.

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.²⁶²

The Commission concluded its Report by inviting “[r]egulatory authorities in the Member States and professional bodies . . . 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.”²⁶³

B. The September 2005 Commission Follow-Up Report and Staff Summary Report

In 2005, as promised, the Commission issued a Follow-Up Report entitled “Professional Services—Scope for More Reform” (Follow-Up Report).²⁶⁴ The Follow-Up Report was accompanied by a document prepared by the Commission staff entitled “Progress by Member States in Reviewing and Eliminating Restrictions to Competition in the Area of Professional Services” (Staff Progress Report).²⁶⁵ Because the Follow-Up Report and Staff Progress Report were prepared after the European Union enlargement, they included data from twenty-five EU Member States, in contrast to the Commission’s original report, which had presented data for thirteen of the then-fifteen EU Member States.²⁶⁶

The September 2005 Follow-Up Report was eleven pages long and divided into seven sections.²⁶⁷ The Commission reviewed the importance

²⁶² *Id.* paras. 103–04.

²⁶³ *Commission Report*, *supra* note 8, para. 5.

²⁶⁴ *See Follow-Up Report*, *supra* note 2.

²⁶⁵ *Commission Staff Working Document, Progress by Member States in Reviewing and Eliminating Restrictions to Competition in the Area of Professional Services*, SEC(2005) 1064 (Sept. 5, 2005), available at http://ec.europa.eu/comm/competition/sectors/professional_services/reports/annex.pdf [hereinafter *Staff Progress Report*].

²⁶⁶ *See Follow-Up Report*, *supra* note 2. The European Free Trade Area (EFTA) countries of Iceland, Liechtenstein and Norway prepared their own report on professional services regulation. *See* EFTA SURVEILLANCE AUTHORITY, REPORT ON REGULATION OF PROFESSIONAL SERVICES IN THE EFTA STATES, Case No. 477716, Event. No. 307279 (July 15, 2007), available at <http://www.eftasurv.int/information/reportsdocuments/competition/reports/dbaFile7459.pdf>. This report used a similar structure and approach and concluded that lawyers in Iceland, Liechtenstein and Norway were subject to a medium level of regulation, with Iceland receiving a “score” of 2.8, Liechtenstein receiving a 4.1 and Norway receiving a 4.0 on the IHS scale. *Id.* at 22.

²⁶⁷ *Follow-Up Report*, *supra* note 2. The seven sections were: (1) Background; (2) Better defining the public interest; (3) Activities by the Commission and national competition authorities; (4) Progress by Member States; (5) Application of the EC competition rules; (6) Conclusions; and (7) Way Forward.

of professional services, its prior work in the area, and the justifications for regulating professional services.²⁶⁸ After noting that it had undertaken analysis of the markets (which was contained in the annexed Staff Progress Report), it summarized its findings as follows:

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 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.²⁶⁹

After offering this conclusion, the Commission summarized the activities of the Commission and national competition authorities since 2004, discussed the progress that had been made by Member States, and again summarized the Commission's views about the competition laws.²⁷⁰ The "Progress by Member States" section of the Follow-Up Report included three charts: the first summarized the level of regulatory reform activity during 2004 and 2005, the second summarized the level of regulation in all countries for all five professions, and the third combined the data in the first two tables so that the Commission could compare whether the most reform had occurred in the jurisdictions with the highest level of regulation.²⁷¹ The first two of these charts are reproduced below.

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

²⁶⁸ *Id.* at 3–5. The Commission identified the same three justifications for regulation that it had set forth in its 2004 Report. See *Commission Report*, *supra* note 8.

²⁶⁹ *Follow-Up Report*, *supra* note 2, para. 13.

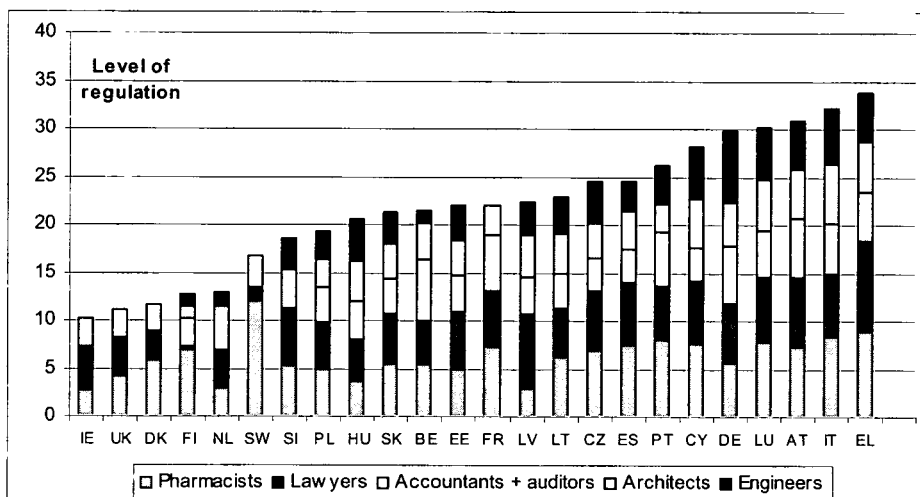
²⁷⁰ *Id.* paras. 6–9.

²⁷¹ *Id.* paras. 7–8.

Level of activity	Member States
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. Source: *Follow-Up Report*, *supra* note 2, para. 19.

Figure 1: Index of level of regulation in Member States



Source: *Follow-Up Report*, *supra* note 2, para. 19.

The “Conclusions” section of the Follow-Up Report included three paragraphs, in which the Commission expressed its impatience with the pace of reform and observed that “[t]he 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.”²⁷² In the seven

²⁷² *Id.* paras. 24–26. The Commission stated:

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-launched the Lisbon agenda refocusing on growth and employment, and agreed that Member States should present national reform

paragraphs of the “Way Forward” section, the Commission announced that it remained “fully committed to bringing about wide scale reform to this sector.”²⁷³ It urged the Member States to take the initiative for reform. It stated that as a first step, Member States should begin work to identify restrictions that could be removed quickly without further analysis, such as fixed and recommended priced restrictions and certain advertising restrictions, while simultaneously performing a more substantial structural analysis of regulatory structures “to assess the need and open the way for wider reforms.”²⁷⁴ The Commission announced that it would act as a facilitator, help spread best practices, publicize its findings, consider appropriate enforcement actions, and “continue and improve its relations with national regulatory authorities by organising a more structured debate and raising the profile of this work with them.”²⁷⁵ The “Way Forward” section also repeated the Commission’s conclusions that there were problems in the professional services sector, stating:

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

programmes for supporting growth and employment at national level, and appoint a Lisbon national coordinator.

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.

Id.

²⁷³ *Id.* para. 27.

²⁷⁴ *Id.* paras. 28–29.

²⁷⁵ *Follow-Up Report*, *supra* note 2, paras. 31–33.

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.²⁷⁶

As explained in greater detail in Section IV, *infra*, the Commission's conclusions and key assumptions have been controversial.²⁷⁷

The Staff Progress Report was much longer than the Follow-Up Report and included much of the data that was the basis for the Follow-Up Report's conclusions.²⁷⁸ Following the introduction was a section that set forth the Commission's methodology. After a summary of the Commission's analysis, this section concluded by stating that "a further differentiation of the markets of professional services would allow a better identification of the public interest involved and of the degree of regulation indispensable to protect this."²⁷⁹ This section contained the basis for the conclusion that one-off users—generally individual customers and households—may have a greater need for carefully targeted protection than the main users of business services, namely business and the public sector, who may have little or no need for such regulation given that they are better equipped to choose providers who best suit their needs.²⁸⁰

The next section of the Staff Progress Report summarized the activities of the Commission and the Member States related to professional services and competition law.²⁸¹ The Staff Progress Report continued by summarizing the reforms that had occurred.²⁸² This section was organized according to five focus issues, with each section listing the reforms that had taken place in various countries in the targeted professions with respect to the identified issue.²⁸³ The next section of the report discussed court cases that had been filed, including the Commission's Belgian Architects' Fee case and a number of cases filed by the national competition authorities.²⁸⁴

²⁷⁶ *Id.* para. 30.

²⁷⁷ See *infra* Part IV. The CCBE, for example, has challenged the conclusion that the main users of legal services are businesses and the public sector as well as the conclusion that there is little or no need for regulatory protection when lawyers represent these clients. See CCBE, COMMENTS ON COMMISSION PROGRESS REPORT ON COMPETITION IN PROFESSIONAL SERVICES, Nov. 19, 2005, at 3–5, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/CCBE_response_follow1_1182254403.pdf.

²⁷⁸ Compare *Follow-Up Report*, *supra* note 2 (eleven pages) with *Staff Progress Report*, *supra* note 265 (thirty-eight pages).

²⁷⁹ *Staff Progress Report*, *supra* note 265, para. 21.

²⁸⁰ *Id.*

²⁸¹ *Id.* paras. 22–31.

²⁸² *Id.* paras. 32–88.

²⁸³ *Id.* The Staff Progress Report focused on the issues of (1) Entry restrictions and reserved tasks; (2) Business structure regulation; (3) Fixed prices; (4) Recommended prices; and (5) Advertising restrictions.

²⁸⁴ *Id.* paras. 89–94.

In its final narrative section, the Staff Progress Report concluded:

There has been some substantive progress in refining and eliminating disproportionate restrictions to competition in legislation and in the rules and regulations of professional bodies during 2004/05. . . .

Some promising work is underway in a number of countries (Denmark, [the] Netherlands, Poland and UK) which could lead to significant change in the structure of the legal professions,

Most progress is being made in those countries where there is a structured programme of pro-competitive or regulatory reform in place [I]n these countries there is a close partnership between government and national competition authorities. In other countries, the reform process had not yet gotten underway, or can best be described as haphazard.²⁸⁵

After this narrative material, the Staff Progress Report continued with fourteen pages of tables that summarized the material previously covered.²⁸⁶ These tables presented the information on existing regulations and reform efforts in several ways, including by issue, by country and by profession. Appendix 1 to this article reproduces the legal profession excerpts from the Staff Progress Report. These tables demonstrate that a number of EU Member States not only accepted the Commission's February 2004 invitation "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[.]" but a number decided to change their rules.²⁸⁷

C. Activity Occurring After the September 2005 Follow-Up Report

Although the pace of the Commission's activities regarding professional services slowed down after its September 2005 Follow-Up Report and accompanying Staff Progress Report, professional services continued to be an area of Commission interest. For example, "Professional Services" is one of only twelve "sectors" listed in the "sectors" menu of the homepage of the European Commission's "Competition" Department.²⁸⁸ Moreover, even though the pace of the Commission's activities slowed

²⁸⁵ *Staff Progress Report*, *supra* note 265, paras. 95–97.

²⁸⁶ *Id.* paras. 25–38.

²⁸⁷ *Commission Report*, *supra* note 8, at 4. See also Appendix 2 to this article, *infra*.

²⁸⁸ European Commission, Competition, http://ec.europa.eu/comm/competition/index_en.html (last visited Oct. 31, 2008). The sectors listed are: (1) agriculture; (2) consumer goods; (3) energy; (4) financial services; (5) information and communication technologies; (6) media; (7) motor vehicles; (8) pharmaceuticals; (9) postal services; (10) professional services; (11) sports; and (12) telecommunications.

down after 2005, its efforts helped instigate significant ongoing activity in the EU Member States. It is beyond the scope of this article to review all the initiatives directed toward legal services, but a brief review of some of the post-2005 EU Member State activity demonstrates the impact of the EU Initiative. For example, after a Danish Commission recommended major changes to the organization of the Danish Bar and Law Society and to the way complaints against lawyers are handled, the Bar agreed to give up its representative functions and operate solely as a regulator.²⁸⁹ This action followed the European Court of Human Rights decision in *Sorensen and Rasmussen* which addressed mandatory bar membership.²⁹⁰ The Polish government initiated efforts to adopt legislation to revise its lawyer discipline system.²⁹¹ The Polish Constitutional Tribunal found unconstitutional a number of provisions that addressed lawyer admission and training; the efforts to develop a replacement law have been very controversial.²⁹² In October 2006, the Dutch National Competition Authority launched a public consultation on the legal services market in the Netherlands seeking input on such issues as outside investment in law firms; it has now issued a report to which the Government has responded.²⁹³ In December 2006, the Irish Competition Authority released its final report on legal services finding, inter alia, “that the market for legal services is permeated with unnecessary and disproportionate restrictions on competition and is in need of substantial reform” and recommended thirty-nine reforms; other developments are underway because of publicized solicitor fraud.²⁹⁴ Different conclusions are found in the November 2006

²⁸⁹ *Competition: National Competition and Regulatory Developments*, 17 CCBE INFO 4, 4–5 (Jan. 2007), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_17_enpdf1_1179229661.pdf [hereinafter *National Developments*, 17 CCBE] (in October 2006, the Lawyers’ Commission published its report on the Danish legal services market and recommended that the Danish Bar and Law Society become a public institution); Email from Jonathan Goldsmith, CCBE Secretary General, to Laurel Terry (Dec. 2, 2007) (on file with author) [hereinafter Goldsmith Email].

²⁹⁰ *Competition: National Developments*, 15 CCBE INFO 4, 4 (May 2006), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_15_enpdf1_1180964538.pdf [hereinafter CCBE INFO No. 15].

²⁹¹ *National Developments*, 17 CCBE, *supra* note 289, at 5.

²⁹² *Poland*, 19 CCBE INFO 4, 5 (Oct. 2007) available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_19_enpdf1_1193300073.pdf [hereinafter *Poland*] (noting that the IBA and the CCBE have sent a delegation to meet with representatives of the Courts, Parliament and the legal profession, in order to share their concerns and that in September 2007, the CCBE organized a roundtable entitled “Defending the rule of law in Poland”); Goldsmith Email, *supra* note 289.

²⁹³ *Poland*, *supra* note 292, at 5–6; Goldsmith Email, *supra* note 289.

²⁹⁴ *National Developments*, 17 CCBE, *supra* note 289, at 3–5; THE COMPETITION AUTHORITY, *COMPETITION IN PROFESSIONAL SERVICES: SOLICITORS AND BARRISTERS* (Dec. 2006) available at http://www.tca.ie/controls/getimage.ashx?image_id=1627; Goldsmith Email, *supra* note 289.

report of the Northern Ireland Legal Services Review Group, which concluded that external ownership of law firms could carry with it unwanted problems and therefore the existing restrictions should be retained.²⁹⁵ The Law Society of Scotland, on the other hand, voted in May 2008 to allow alternative business structures and is working with the government to develop legislation; this vote followed in the wake of a government consultation launched in 2007 after a 'super complaint' filed by consumer group "Which?".²⁹⁶ Two notable reforms were also adopted in Spain: (1) a 2006 Royal Decree on the employment relationship of lawyers providing services as employees in a law firm, and (2) a 2007 law permitting multidisciplinary services between lawyers and non-lawyers and permitting non-lawyers to be shareholders.²⁹⁷

The most high-profile review of the legal profession was undoubtedly the United Kingdom's "Clementi Report" and resulting legislation.²⁹⁸ Although the U.K. initiative was instituted in response to the 2001 report by the U.K. Office of Fair Trading and other events, including problems with the lawyer complaint system,²⁹⁹ there is a significant overlap between the issues in the U.K. review and the EU Initiative. Among other things, the Legal Services Act of 2007³⁰⁰ changes the regulatory structure for solicitors and barristers in England and Wales by creating a Legal Services Board and an Office for Legal Complaints, both of which require a majority of members to be non-lawyers.³⁰¹ The Legal Services Act also allows the new

²⁹⁵ See *National Developments*, 17 CCBE, *supra* note 289, at 5.

²⁹⁶ See The Law Society of Scotland, Alternative Business Structures, http://www.lawscot.org.uk/Members_Information/members_information/ (last visited Oct. 31, 2008).

²⁹⁷ See Email from Sieglinde Gamsjäger, Senior Legal Advisor, CCBE to author (Oct. 13, 2008) (on file with author).

²⁹⁸ See generally Sydney M. Cone III, *International Legal Practice Involving England and New York Following Adoption of the United Kingdom Legal Services Act 2007*, 28 NW. J. INT'L L. & BUS. 415 (2008); Jonathan Goldsmith, *The Core Values Of The Legal Profession For Lawyers Today And Tomorrow*, 28 NW J. INT'L L. & BUS. 441 (2008).

²⁹⁹ See DIRECTOR GENERAL OF FAIR TRADING, COMPETITION IN THE PROFESSIONS—A REPORT BY THE DIRECTOR GENERAL OF FAIR TRADING, OFT 325 (Mar. 2001), available at http://www.oft.gov.uk/shared_oftr/reports/professional_bodies/oft328.pdf [hereinafter FAIR TRADING]; Judith L. Maute, *Bar Associations, Self-Regulation And Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53 (discussing failures in the lawyer complaint system that provided some of the impetus for the reforms).

³⁰⁰ Legal Services Act 2007, *supra* note 38. See also U.K. Ministry of Justice, Home, Publications, Legislation, Legal Services Act 2007, <http://www.justice.gov.uk/publications/legalservicesbill.htm> (last visited Oct. 31, 2008) (including links to the bill and explanatory notes, the latter of which includes links to the Clementi Report and other important background information). The Clementi Report was not, however, instituted in response to the EU Competition Report or Stocktaking, but in response to the 2001 U.K. Office of Fair Trading Report. See FAIR TRADING, *supra* note 299.

³⁰¹ See Legal Services Act 2007, *supra* note 38, at art. 2 and sched. 1 (The Legal Services

Legal Services Board to adopt rules that would permit legal services to be provided by firms organized under new business models, including multidisciplinary practice and outside equity investment.³⁰² Although the U.K. developments were largely independent of the EU Initiative, many of them were occurring simultaneously and thus the EU Initiative was part of the context and background in which the U.K. legislation was adopted. As this very brief discussion shows, the EU developments, along with developments in the OECD and the United Kingdom, have triggered an avalanche of responses by EU Member States.

In addition to triggering activity by EU Member States, the Commission's interest in professional services has triggered activity on the part of other EU institutions. For example, in November 2005, the U.K. Presidency of the European Council organized a conference entitled "Better Regulation of Professional Services."³⁰³ This one-day conference included a number of different papers and presentations on the subject of regulating professional services.³⁰⁴ In December 2006, the European Council Finnish

Board); *id.* at art. 114 and sched. 15 (Office for Legal Complaints); *see also* Legal Services Bill, *supra* note 39, para. 36.

³⁰² Legal Services Act 2007, *supra* note 38, at Part B, Alternative Business Structures. The Solicitors Regulatory Authority (SRA), the front-line regulator for solicitors, has published regulations, currently scheduled to take effect in March 2009, that would allow legal disciplinary practices. The SRA has stated that it does not expect full ABS rules to be in place until at least late 2011. *See* Solicitors Regulatory Authority, Legal Services Act FAQs, <http://www.sra.org.uk/sra/legal-services-act/lsa-questions-faqs.page> (last visited Oct. 31, 2008).

³⁰³ European Commission, Competition, Professional Services: Conferences, Better Regulation of Professional Services, (Brussels, Nov. 21, 2005), http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20051121/index.html (last visited Oct. 31, 2008) (organized by the U.K. Presidency of the Council) [hereinafter U.K. Presidency Conference]. This conference was a follow-up to a conference that had been organized several months previously by the Luxembourg Presidency of the European Council. European Competition Day, Programme (Luxembourg, May 3, 2005), http://www.eco.public.lu/salle_de_presse/evenements/2005/05/03_journee_conc/program_e_n.pdf (last visited Oct. 31, 2008).

³⁰⁴ U.K. Presidency Conference, *supra* note 303. The first session consisted of presentations by competition authorities from the European Commission, Ireland, and Finland, who addressed the meaning of better regulation and considered the practical experience of Member States promoting better professional regulation. The second session, which was entitled "Promoting Reform—The Analytical Process," included presentations by competition authorities from Portugal, Denmark, Poland, and Spanish academic Benito Arrunada whose two papers focused on the analytical processes associated with reform in the professions. The third session was entitled "Promoting Reform—How to Tackle Reform in Practice" and included presentations by government representatives from the United Kingdom, Germany, and the Netherlands that focused on "practical examples of reforms undertaken by Member States and the obstacles they encountered along the way." In addition to these three sessions, the heads of the European Union and the U.K. Competition divisions gave introductory remarks, along with Baroness Ashton, who was the U.K. Parliamentary Under-Secretary in the Department for Constitutional Affairs. Closing

Presidency organized a conference entitled "The Economic Case for Professional Services Reform" in order "to discuss recently published economic studies that had examined the case for reform in the area of professional services."³⁰⁵ (These conferences built on the work done in the October 2003 Conference discussed earlier and a May 2005 conference held in Luxembourg.)³⁰⁶ The European Parliament has also been active on issues related to professional services; these activities are discussed in Section IV (A), *infra*.

In sum, as this brief discussion has shown, although the Commission has been relatively inactive since its September 2005 Follow-Up Report, its impact has been wide-spread. There continues to be significant activity and reforms related to the EU Initiative.

IV. STAKEHOLDER CRITIQUES OF THE COMMISSION'S WORK

As the prior sections noted, the IHS Study and Commission documents were highly controversial within Europe. The sections that follow summarize the positions asserted by some of the leading stakeholder groups that criticized aspects of the Commission's work.³⁰⁷

A. European Parliament

The European Parliament is the only directly-elected body of the European Union.³⁰⁸ As the directly elected representatives of EU citizens, it should not be surprising that the Parliament has taken an interest in the

Remarks were given by representatives of EU and the U.K. Competition departments. *Id.*

³⁰⁵ European Commission, Competition, Professional Services, Conferences: The Economic Case for Professional Services Reform (Brussels, Dec. 13, 2006), http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/index.html (last visited Oct. 31, 2008) [hereinafter Finnish Conference]. This one-day conference included the first public discussion on the preliminary findings of an external study commissioned by the EU competition department that examined the impact of professional services regulation on the functioning of the European Union conveyancing services market. A second session looked at the Finnish experience of professional services in a low regulatory environment as well as Italy's efforts to reform its professional services. Although the Commission's narrative description of the Conference did not refer to it, this Conference also included a discussion of a study by Leuven University on the deregulation of pharmacies in Belgium and a Copenhagen Economics study of the Legal Profession. As is discussed *infra* notes 370–382, the Copenhagen Economics study conflicted with the IHS Study in some significant respects.

³⁰⁶ See *supra* notes 206–225 and 303.

³⁰⁷ This section does not purport to present all of the arguments offered. For additional information about the thirty-three comments the Commission received about legal services, see *supra* note 190.

³⁰⁸ Hans-Gert Pöttering, President of European Parliament, Welcome Message to the European Parliament Website, <http://www.europarl.europa.eu/parliament.do?language=EN> (last visited Oct. 31, 2008).

legal profession. The EU Parliament has a Legal Affairs Committee, which has adopted several resolutions regarding the legal profession. One of the earliest Parliament resolutions on these issues is a 2001 carefully-worded three page resolution about the use of mandatory fees.³⁰⁹ On the one hand, this resolution called on the Commission “to keep a close eye on the rules adopted and the decisions taken by Associations of members of liberal professions which make it difficult for nationals of other Member States to provide services freely”³¹⁰ and urged the Commission “to dismantle persistent barriers to the cross-border provision of services.”³¹¹ On the other hand, the resolution recognized “the importance attached in some Member States to compulsory tariffs with a view to providing high-quality services to citizens and to creating a trustful relationship between liberal professions and their clients” and called upon the Commission to “follow strictly the interpretation of the Court of Justice in the application of competition rules to the compulsory tariffs of liberal professions.”³¹² Reading this resolution, one senses the competing constituencies that had appealed to the Parliament.

This sense of competing interests and constituencies is evident in some of the other Parliament resolutions. For example, in December 2003, following the launch of the stocktaking and the October 2003 developments, the European Parliament adopted a resolution that addressed the EU Initiative.³¹³ This resolution has been characterized as “favorable” to the liberal professions.³¹⁴ It was developed in response to a set of questions from the Group of the European People’s Party (Christian Democrats) and European Democrats to Commissioner Monti at the European Parliament Plenary Session on October 8, 2003.³¹⁵

³⁰⁹ See European Parliament Resolution on Scale Fees and Compulsory Tariffs for Certain Liberal Professions, in Particular Lawyers, and on the Particular Role and Position of the Liberal Professions in Modern Society, 2001 O.J. (C 21E) 364, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/ce021/ce02120020124en03640366.pdf> [hereinafter Resolution, Scale Fees]. The European Parliament, in 1994, adopted a resolution about notaries. This article focuses on lawyers, so it is not addressed here. See 1994 O.J. (C 44) 36.

³¹⁰ Resolution, Scale Fees, *supra* note 309, para. 6.

³¹¹ *Id.* para. 13.

³¹² *Id.* para. 7.

³¹³ See European Parliament Resolution on Market Regulations and Competition Rules for the Liberal Professions, 2004 O.J. (C 91E) 126, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/ce091/ce09120040415en01260128.pdf> [hereinafter 2003 Parliament Resolution].

³¹⁴ See *Competition: European Parliament Activities*, 8 CCBE Info 7 (Apr. 2004), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_08_enpdf1_1180965637.pdf [hereinafter *European Parliament Activities*].

³¹⁵ *Id.* at 7. See *Competition: European Commission/European Parliament Activities: European Parliament*, 7 CCBE Info 2 (Jan. 2004) [hereinafter *EC/European Parliament*].

Among other things, the December 2003 EU Parliament resolution states that the “liberal professions are the expression of a fundamental democratic order based on law and, more particularly, are an essential element of European societies.”³¹⁶ It further noted that “that the goal of promoting competition in the professions must, in each individual case, be reconciled with the objective of maintaining purely ethical rules specific to the profession and that the pursuit of this goal must respect the public interest tasks with which liberal professions are entrusted.”³¹⁷ The CCBE appears to have lobbied in favor of this resolution.³¹⁸

The CCBE may not, however, have been the only entity to lobby Parliament. One month after the adoption of its December 2003 resolution, the European Parliament adopted a resolution that endorsed much of the Commission’s competition policy and included language that was quite negative about professional services’ regulation.³¹⁹ For example, this resolution includes the statement that “professional bodies too often, in some Member States, use their self-regulatory powers to benefit the interests of their own members, more than those of the consumers.”³²⁰

Later, however, the Parliament seemed to swing back in the other direction. In November 2005, Commissioner Kroes was asked to meet with the European Parliament’s Committee on Legal Affairs in order to discuss

Activities];

The European Parliament is considering putting forward a resolution on liberal professions. The various political groups within the Parliament are currently considering such a resolution. This follows an oral question of the Group of the European People’s Party (Christian Democrats) and European Democrats put to Commissioner Monti at the European Parliament Plenary Session on 8 October with regard to DG Competition activities in the field of liberal professions. The question was: “MEPs want to know if the Commission can confirm that rules which are necessary, in the specific context of each profession, in order to ensure the impartiality, competence, integrity and responsibility of the members of that profession or to prevent conflicts of interest and misleading advertising, and which, in addition, do not represent obstacles to the free movement of services, are not held to be restrictions of competition.”

³¹⁶ 2003 Parliament Resolution, *supra* note 313, para. 1.

³¹⁷ *Id.* para. 9.

³¹⁸ *EC/European Parliament Activities*, *supra* note 315, at 8 (“The CCBE has actively followed the making of the resolutions and expressed its views.”).

³¹⁹ European Parliament Resolution on Competition Policy, P5_TA(2004)0053 (Jan. 29, 2004), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+P5-TA-2004-0053+0+DOC+XML+V0//EN> [hereinafter January 2004 Resolution]. See also *European Parliament Activities*, *supra* note 314, at 9 (citing the Jan. 24, 2004 resolution).

³²⁰ January 2004 Resolution, *supra* note 319, para. 15.

the Commission's reform efforts for the legal profession.³²¹ Thereafter, in March 2006, the European Parliament issued a lengthy and substantive resolution about the legal profession;³²² this resolution refers explicitly to the Commission's Follow-Up Report and expressed concerns about the EU Initiative.³²³ The March 2006 Resolution includes the following cautionary remarks, in which Parliament:

- recognized the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of the law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice;
- invited the Commission not to apply EU competition law to matters that, under the EU constitutional framework, are left to the jurisdiction of the Member States, such as access to justice, which includes issues such as the fee schedules to be applied by courts to liquidate lawyers' fees;
- invited the Commission to apply the competition rules, where applicable, in compliance with the case law of the Court of Justice;
- reminded the Commission that the aims of the rules governing legal services are the protection of the general public, the guaranteeing of the right of defence and access to justice, and security in the application of the law, and that for these reasons they cannot be tailored to the degree of sophistication of the client;
- reaffirmed the importance of rules which are necessary to ensure the independence, competence, integrity and responsibility of members of the legal professions so as to guarantee the quality of their services, to the benefit of their clients and society in general, and in order to safeguard the

³²¹ Neelie Kroes, Comm'r, Eur. Comm'n on Competition, Opening Speech to the EP Juri Committee (Nov. 29, 2005), *available at* http://ec.europa.eu/comm/competition/speeches/text/sp2005_022_en.pdf.

³²² See European Parliament Resolution on The Legal Professions and the General Interest in the Functioning of Legal Systems, P6_TA(2006)0108, *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0108&language=EN> (the Resolution included twenty paragraphs in addition to the "whereas" paragraphs and the paragraphs that cited, *inter alia*, both of the Commission's Reports, the UN's Basic Principles on the Role of Lawyers, the Council of Europe's Recommendation on free exercise of the role of the lawyers, the Commission's 2001 and 2003 resolutions, and many of the EU directives applicable to lawyers).

³²³ See, e.g., CCBE INFO No. 15, *supra* note 290 ("The European Parliament has been following very closely the activities of DG Competition concerning the liberal professions over the past months. Further to an initiative of the Legal Affairs Committee, the European Parliament adopted on 23 March 2006 a resolution in support of the legal professions.").

- public interest;
- noted the high qualifications required for access to the legal professions, the need to protect those qualifications that characterize the legal professions, in the interests of European citizens, and the need to establish a specific relationship based on trust between members of the legal professions and their clients;
- asserted that fee scales and compulsory tariffs did not violate the competition provisions in the Treaty provided that their adoption was justified by the pursuit of a legitimate public interest and that Member States actively supervise the decision making; provided their adoption; and
- called on the Commission to consider carefully the principles and concerns expressed in the resolution when analyzing the rules governing the exercise of the legal professions in the Member States.³²⁴

Although the CCBE and others may have been relieved to see this resolution, Parliament adopted another resolution six months later and the tone of the October 2006 resolution was quite different than the March 2006 resolution.³²⁵ The Commission includes a link to this October 2006 resolution on its website,³²⁶ but does not include a link to the prior resolutions.

Like the previous resolutions, the October 2006 resolution cited a number of documents and included many “whereas” clauses. Instead of citing documents that focused on the legal profession, however, it focused on documents related to the Lisbon Strategy and the EU Initiative including the IHS Study. Among other things, this later resolution calls on all those involved in the reform process to engage in a constructive manner.³²⁷ This resolution also expressed hostility towards mandatory and minimum fees,³²⁸

³²⁴ *Id.* at 3–4.

³²⁵ European Parliament Resolution on Follow-Up to the Report on Competition in Professional Services, P6_TA(2006)0418 (Oct. 12, 2006), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-20060418+0+DOC+XML+V0//EN&language=EN> [hereinafter October 2006 Resolution].

³²⁶ See European Commission, DG Competition, *supra* note 131.

³²⁷ October 2006 Resolution, *supra* note 325, para. 4.

³²⁸ *Id.* para. 5, indicating that:

[T]he mandatory nature of fixed or minimum rates and the ban on negotiating fees based on the result achieved might be detrimental to the quality of service to the public and to competition; calls on the Member States to overcome these constraints with measures which are less restrictive and more likely to comply with the principles of non-discrimination, necessity and proportionality, by setting up mechanisms to consult all the interested parties.

advertising restrictions,³²⁹ and MDP bans.³³⁰ It called upon the Commission to ensure that treaty provisions on the protection of competition and the internal market were properly observed in the liberal profession sectors.³³¹ The October 2006 resolution expressed the view that it was important to improve ethical standards and consumer protection in the field of professional services and that the adoption of codes of conduct by professional service providers should be drawn up with the involvement of all relevant stakeholders.³³² This resolution called on the Commission to show the extent of new jobs and additional growth that can be expected from a systematic pro-competitive reform of the sector.³³³ Finally, it urged the Commission to examine more carefully the differences in the extent to which the various professional categories in each Member State have opened up the market and the expected impact of the full removal of unnecessary obstacles to competition, including an assessment of the expected impact on professional sectors that have limited resources or that are restricted to certain regions.³³⁴

As these examples show, the European Parliament has been a relatively active stakeholder in the debate, but it has sent the Commission

³²⁹ *Id.* para. 9 (stating that it was “necessary, in order to strengthen small and medium-sized enterprises and increase the capacity for innovation and competitiveness of professional services, that restrictions on the scope for cooperation be eliminated and the setting up of inter-professional service providers be facilitated.”).

³³⁰ *Id.* para. 11 further indicating that:

[S]pecial regulations in the field of advertising can be largely dispensed with, that the continuity of such regulations should be limited to duly justified exceptional cases, and that the reduction of regulation should be aimed at enabling professionals to inform users of the services they offer via advertising, providing consumers with information on their professional qualifications and specialisations, and on the nature and cost of the services offered.

³³¹ *Id.* para. 6.

³³² *Id.* para. 10.

³³³ October 2006 Resolution, *supra* note 325, para. 10.

³³⁴ *Id.* paras. 3–4. This Resolution also:

[A]cknowledge[d] the right to issue regulations based on traditional, geographic and demographic specificities; emphasize[d] . . . that rules should be chosen which restrict competition as little as possible and that, within the existing system, substantive reform processes must be pursued in order to help attain the Lisbon targets; encouraged Member States constructively to examine the practical experience of other Member States in the process of reforming professional services so as to derive the maximum possible benefit for their own reform endeavours.

and the legal profession mixed signals about its views on the EU Initiative.

B. Other Commentators

In addition to the papers and analyses presented at the EU Presidential Conferences,³³⁵ the studies by national competition authorities,³³⁶ and the resolutions of the European Parliament, several other sources have monitored and commented on the IHS Study and the Commission's work regarding professional services. These include the papers presented at the European University Institute's 2004 annual competition conference,³³⁷ which was devoted to the topic of "The Relationship between Competition Law and the (Liberal) Professions." The papers from the conference were posted on the Conference webpage and later published.³³⁸

While a number of commentators have supported the IHS Study and the Commission's analysis, especially those who were consulted by the national competition authorities or who have spoken at the Presidential conferences, several commentators have criticized—in whole or in part—the IHS Study and the Commission's work. For example, after noting the Commission's request that professional services' regulation be reviewed, academic economists Roger Van den Bergh and Yves Montangie accepted that invitation and examined the Latin notary market.³³⁹ They concluded

³³⁵ See *supra* notes 188, 303, and 305.

³³⁶ See *supra* notes 291–301.

³³⁷ EUROPEAN COMPETITION LAW 2004: THE RELATIONSHIP BETWEEN COMPETITION LAW AND (LIBERAL) PROFESSIONS (Claus-Dieter Ehlermann & Isabela Atanasiu, eds., Hart Publishing 2006).

³³⁸ *Id.* The original conference papers are available at European University Institute, Ninth EU Competition Law and Policy Workshop, [http://www.eui.eu/RSCAS/Research/Competition/2004\(papers\).shtml](http://www.eui.eu/RSCAS/Research/Competition/2004(papers).shtml) (last visited Oct. 31, 2008).

³³⁹ See, e.g., Roger Van den Bergh & Yves Montangie, *Competition in Professional Services Markets: Are Latin Notaries Different?*, 2 J. COMPETITION L. & ECON. 189 (2006); Roger Van den Bergh & Yves Montangie, *Theory and Evidence on the Regulation of the Latin Notary Profession: A Law and Economics Approach*, ECRi-report 0604 (June 2006), at 15, available at <http://media.ecri.nl/publications/theory-and-evidence-regulation-latin-notary-profes.pdf> [hereinafter Van den Bergh & Montangie *Notary Profession*]. Professors Van den Bergh and Montangie are affiliated with the Erasmus Competition and Regulation institute (ECRi) at Erasmus University, Rotterdam, the Netherlands. *Id.* at 1. In their report, they state that they:

[A]pplaud any scientific discussion on the benefits and disadvantages of professional regulation. In our view, only thorough scientific research based on sound theory and supported by empirical evidence can be a solid basis for any policy change in this regard. Therefore, the Commission's initiative is most welcome as it may urge both the community of professionals and scientists to shed light on some issues of regulation that have not been (thoroughly) researched so far.

that the Commission had relied “too heavily on the results of the IHS Study and other limited empirical evidence that suggests that regulation mainly has negative effects.”³⁴⁰ Citing several of the studies discussed in greater detail below, they concluded that in light of the criticisms of the IHS Study, that study “should not form the basis for specific policy conclusions.”³⁴¹ After setting forth the theoretical economic arguments that could be offered in support of, and in opposition to, several common types of regulation, they pointed out that none of the arguments have been unequivocally confirmed by empirical evidence.³⁴² They concluded that in the absence of data, the Commission’s broad-brush approach was inappropriate, stating:

This report does not contain a plea in favour or against specific forms of regulation of any profession. But in our view, it does show that there are no miracle formulas to decide if and to what extent regulation of a certain profession is necessary or justified. Such decisions can only be made on a case-by-case basis. We believe that this report shows that policy decisions regarding the regulation of professions should not focus on the limited amount of existing evidence but should be based on careful, well balanced and thorough theoretical and empirical analysis for each type of regulation and for each profession.³⁴³

They proceeded to outline the type of research that would be helpful with respect to notaries and indicated that in the absence of that research, it would be premature to alter certain restrictions.³⁴⁴

Several commentators have addressed the legal profession specifically. For example, shortly after the IHS Study was issued, the CCBE

Id. at 15.

³⁴⁰ Van den Bergh & Montangie *Notary Profession*, *supra* note 339, at 76.

³⁴¹ *Id.* at 77.

³⁴² *Id.* at 76.

³⁴³ *Id.* at 80.

³⁴⁴ *Id.* For example, their Report stated:

In sum, empirical research could show that from a cost-benefit perspective, mandatory intervention by a Latin notary is superior to a registration system entrusted to civil servants. This could support the conclusion that the organisation of the Latin notary profession decreases transaction costs and ensures the provision of public goods without causing disproportionate restrictions of competition. Consequently, reserved tasks of notaries could be qualified as restrictions of competition that do not go further than necessary to guarantee the provision of public goods by increasing legal certainty. Again, as long as reliable empirical work is lacking, any policy conclusion on the desirability of reserved tasks in the field of conveyancing is premature.

commissioned a study from RBB Economics.³⁴⁵ RBB Economics prepared a twenty-one page report that was highly critical of the IHS Study with respect to both its methodology and its conclusions, finding that the “study has major weaknesses, which make it inappropriate as a foundation for policy measures.”³⁴⁶ RBB Economics elaborated upon its conclusion as follows:

First, the [IHS] paper lacks any real theoretical framework—it is not clear at the outset what relationships the authors expect to find, and how to interpret any relationships they do find. The theoretical discussion is also biased in that it presupposes that there will always be too much regulation—the question of why there might be too little regulation is not addressed. Secondly, the analysis which has been carried out has major methodological flaws. In particular, by using only simple correlation techniques, and separately examining a number of related variables, the authors are highly likely to have produced “spurious” correlations. Both the significance and the sign of the correlations are likely to be misleading. Thirdly, the report presents only a selection of the results, leaving it open to the accusation of “publication bias”. The results presented tend to support the “contra-regulation” theories although the evidence that is presented seems weak.

Furthermore, given the objective nature of the index, the results should have been more thoroughly tested for their sensitivity to the assumptions embodied in the index. Finally, the interpretation the authors put on the results is highly questionable, and is particularly ambiguous given the lack of any clear theoretical framework. With no data on quality, the result that higher fees are associated with more regulation could be equally supportive of both pro- and contra-regulation theories. Moreover, the interpretation of “volume” per employee as productivity is highly questionable. Indeed, in the absence of any correlation analysis on the volume of output per professional, the relationship could be interpreted as implying lower fees where there is higher regulation. Finally, given the lack of causality in the report, it is not possible to make any policy recommendations on the basis of the results.³⁴⁷

Professor Martin Henssler and Dr. Matthias Kilian prepared a second paper that challenged aspects of the IHS Study from the perspective of the

³⁴⁵ RBB ECONOMICS, *supra* note 168. See RBB Economics, About RBB Economics, Experience, <http://www.rbbecon.com/about/experience.html> (last visited Oct. 31, 2008).

³⁴⁶ *Id.* at 20.

³⁴⁷ *Id.* See also *supra* note 168 (summarizing the critiques of the IHS Study found in OECD *Legal Professions*, *supra* note 7).

legal profession.³⁴⁸ Their report, which was commissioned by the German Hans-Soldan Institute, challenged both the methodology and the conclusions in the IHS Study. They found that the data was:

[P]artly obsolete or it is interpreted wrongly because of a lack of detailed knowledge of the market situation. There is no way of assessing, however, if and in how far the Case Study data and the evaluations have influenced the benchmarking and the establishment of the index at all, since the Study does not reveal the respective bases that were used.³⁴⁹

Henssler and Kilian provided several examples to support their point that the IHS Study was flawed. For example, they argued that it was more appropriate to view per capita profits, rather than per capita turnover as the measure of economic productivity. They also noted that the IHS Study improperly identified the objectives of regulation since it ignored the interests of the public. Additionally, they criticized the IHS Study for its lack of comparative data on important variables, and they criticized IHS for failing to supply data to support its assumption that there has not been market failure in markets with a low degree of regulation. The Henssler-Kilian report was particularly critical of the IHS's failure to add Finland as one of its case studies in light of the IHS Study's conclusion that the Finnish legal services market was an ideal market.³⁵⁰ The Henssler-Kilian report also criticized the information sources that formed the basis of the IHS Study, noting that not all of the professional organizations returned the questionnaires, that such questionnaires were only partly useful, and that it is "generally necessary to substantiate the results through independent interpretation of primary and secondary sources."³⁵¹ With respect to such secondary sources, Henssler-Kilian indicated that there were a large number of reference works that had not been evaluated, including comprehensive studies of the legal profession in Sweden, Finland, Norway, France, England and Wales, Ireland, Spain, and Denmark, along with subject-specific studies; Henssler and Kilian found that the secondary sources selected were "chosen for incomprehensible reasons."³⁵²

In addition to these general critiques regarding methodology, Henssler and Kilian challenged the accuracy and context of some of the data contained in the German legal services case study in the IHS Study. For

³⁴⁸ See, e.g., HENSSLER & KILIAN, *supra* note 168.

³⁴⁹ *Id.* at 11.

³⁵⁰ *Id.* at 3. In addition to the criticism regarding the lack of analysis for Finland, Henssler and Kilian criticized the four countries selected for the legal profession case studies.

³⁵¹ *Id.* at 9.

³⁵² *Id.*

example, they pointed out that the “per capita turnover” rate for Germany was calculated without taking into account the relatively high number of in-house lawyers in Germany, which made the data misleading.³⁵³ They also noted that the calculations for Germany were misleading because a number of lawyers retain their admission status in the interest of the profession’s pension scheme, but without significant income.³⁵⁴ Further, they criticized the “staleness” of some of the data, noting that more than 70% of law students become lawyers, not the 45% figure used in the IHS Study as an indicator to show market access barriers for lawyers.³⁵⁵ They asserted that the report inaccurately summarized the main tasks of German lawyers.³⁵⁶ In addition, they criticized the IHS Study for failing to point out that one reason why German lawyers adhere to the fee scale is because of the market power of the insurance companies offering legal expense insurance.³⁵⁷ They also noted that the German system of “Selbstverwaltung” (self-administration) through “Kammern” (bars), which is instituted by public law, is fundamentally different from the meaning of the English term “self-regulation” as used in the IHS Study.³⁵⁸

The Henssler-Kilian report also challenged the validity of the IHS data and IHS’s interpretation of that data regarding market entry regulations. As one example, they pointed out that the IHS Study indicated that Germany had a high level of regulation on this issue and Finland had a score of zero, meaning no regulatory barriers. But they noted that if one assumes that legal training is fundamental and indispensable for legal professionals, then Germany should score better than Finland because in the past, Germany has made legal education and qualification spots available to 100% of those who were interested and who were in possession of the certificate proving they had satisfied the requirements for entrance to the university, whereas Finland gave only 11.2% this opportunity.³⁵⁹ They also noted that Germany was rated as having a high level of regulation because of its system of two exams and a practical training period. They pointed out that the IHS Study did not account for the fact that in Germany, graduates were guaranteed the necessary practical training, whereas in other countries this was not true.³⁶⁰ They also challenged the 70% weight assigned to the

³⁵³ *Id.* at 10.

³⁵⁴ HENSSLER & KILIAN, *supra* note 168, at 10.

³⁵⁵ *Id.* at 11.

³⁵⁶ *Id.* at 12. They argued that the IHS Study omitted the case-law on reserved tasks and improperly relied upon the German Code of Conduct.

³⁵⁷ *Id.* at 12.

³⁵⁸ *Id.* at 13.

³⁵⁹ *Id.* at 17.

³⁶⁰ HENSSLER & KILIAN, *supra* note 168, at 17, noting that:

In other legal systems, University graduates have to fight for a limited number of

“duration of education” factor, noting that in Spain, the short education time had proved to have anti-competitive effects.³⁶¹

The Henssler-Kilian report criticized the IHS Study’s analysis of fees because it did not look at the effects of the regulation on the market price of legal services. Henssler and Kilian argued that the underlying assumption of the study seemed to be that the regulation of fees existed in order to serve the profession’s interest in a decent wage.³⁶² They criticized the IHS Study for not considering the effect of a fee scale on cross-subsidization, in which the fees in high value cases subsidize the fees in low-value cases, providing greater access to justice.³⁶³ They also criticized the IHS Study for failing to raise or address the issue of the value of fixed fees in ensuring a market for consumer-friendly legal expense insurance.³⁶⁴ They pointed out that Germany had the highest density of legal expense insurance in Europe, with 44% of the population carrying such insurance.³⁶⁵ As a result, Germany was able to maintain a less elaborate legal aid system than was present in some of the deregulated countries, which meant a lower burden for German taxpayers.³⁶⁶ They also explained why—in the deregulated legal markets cited favorably in the IHS Study—the climate for legal expense insurance

training contracts without the guarantee of ever obtaining one (England and Wales), are themselves directly responsible for finding a ‘stagiaire’ position—an endeavour with an uncertain outcome (Netherlands), or they are forced to pass a highly competitive selection procedure for a law academy (France). In Germany, by contrast, every young lawyer who succeeds University education has a guaranteed training position. 97.12% of jurists pass the ensuing final examination which gives access to the legal services market without any additional professional preconditions. . . .

³⁶¹ *Id.* at 17:

Nor is the criterion ‘duration of education’, ERED1/2, with a weighting of 70%, very helpful. The conditions in Spain, in particular, which is the only European country where a one-step (University) education is sufficient for access to the legal profession, demonstrate that a starting position which *prima facie* appears to be rather conducive to competition, has in fact the opposite effect: A much deplored Spanish grievance is, for example, the fact that—due to the lack of a structured qualification system—Spanish University graduates are forced to work in law firms for no or very little money in order to get practical training. Only this practical training will enable them to act on the market with any prospects of success.

³⁶² *Id.* at 20.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ HENSSLER & KILIAN, *supra* note 168, at 20.

was poor.³⁶⁷ Finally, they argued that the IHS Study had not clearly indicated the degree to which Germany's fee system is optional.³⁶⁸

Henssler and Kilian concluded their report by noting that in light of its methodology deficits, fragmentary evaluation of sources, the failure to take into account the effects of certain regulations at a national level, and the often unconvincing interpretation of the information obtained, as the effects of certain regulations:

[T]he Study cannot be used as a basis for further legislation. Massive intervention in the administration of justice of the individual Member States cannot be based on a Study which admittedly had to work on an unsatisfactory empirical foundation and numerous unverifiable hypotheses. Even more importantly, a purely economic evaluation, as chosen by the Study, has to be complemented by an appreciation of the objectives pursued by professional rules and regulations. Insofar as provisions aim at enhancing access to justice, strengthening consumer rights and guaranteeing high-quality lawyers' services, these important concerns in the public interest cannot be sacrificed for deregulation, which would then become deregulation merely for its own sake.³⁶⁹

Copenhagen Economics prepared a third study that examined the issue of competition in the legal profession. Although this report does not directly critique either the Commission reports or the IHS Study, it is interesting because of the difference in approach. Copenhagen Economics is an international consulting company that provides private and public decision makers with economic analyses; it previously had been retained by the Commission to prepare a report about the economic effects of the Commission's proposed Internal Market Services Directive.³⁷⁰

In 2006, Copenhagen Economics produced for the Danish Bar and Law Society a report that focused on the economic effects of legal services regulation.³⁷¹ This report, which was seventy-two pages long, addressed many of the same points covered in the IHS Study and used some of the

³⁶⁷ *Id.* at 20–21.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 22.

³⁷⁰ COPENHAGEN ECON., ECONOMIC ASSESSMENT OF THE BARRIERS TO THE INTERNAL MARKET FOR SERVICES: FINAL REPORT (Jan. 2005), available at http://ec.europa.eu/internal_market/services/docs/services-dir/studies/2005-01-cph-study_en.pdf. This Report found that the proposed directive would "yield significant economic gains to all Member States. European consumers, businesses and governments will benefit from enhanced productivity, higher employment, increased wages and lower prices." *Id.* at 7.

³⁷¹ COPENHAGEN ECON., THE LEGAL PROFESSION: COMPETITION AND LIBERALISATION (Jan. 2006), available at http://www.cbbe.eu/fileadmin/user_upload/NTCdocument/The_legal_profession1_1195120689.pdf [hereinafter COPENHAGEN ECONOMICS].

IHS data.³⁷² Like the IHS Study, this report included technical antitrust and economic information that was not easily accessible to the non-expert.³⁷³ However, it also included much information that was not technical or inaccessible.

The Copenhagen Economics report began by outlining the arguments generally offered in support of regulation (market failure either because of asymmetric information or externalities) and in favor of liberalization (regulation can result in weaker competition and higher prices).³⁷⁴ It then analyzed the market for legal services in Denmark and the existing regulations and quasi regulations.³⁷⁵ In essence, the Copenhagen Economics report adopted a cost-benefit approach, in which it recommended that regulations with high costs and low benefits be removed, regulations with low costs and high benefits be retained and the other regulations be considered and possibly modified.³⁷⁶

After reviewing Denmark's existing lawyer regulations (and quasi regulations, such as the Code of Conduct), Copenhagen Economics offered the following conclusions and evaluations:

Firstly, "the law on legal services, and debt collection and detective undertakings" should be abolished. "The law on legal services, and debt collection and detective undertakings" prevents anybody—apart from lawyers—from marketing legal services and thus create entry barriers for other advisers. However, we argue that it will be necessary to give consumers a possibility for complaining, e.g. to the Consumer Ombudsman, to ensure the quality of the legal services from advisers who are not lawyers.

Secondly, education requirements, lawyers' monopoly of representing a client in a court of law, and ownership requirements should be modified. The education requirements create a bottleneck for entry to the legal profession, and a modification of the requirements would probably mean more lawyers and more competition.

Modification of lawyers' monopoly of representing a client in a

³⁷² See, e.g., *id.* at 38.

³⁷³ See, e.g., *id.* at 28 (For example, Box 2.3 is the Herfindahl-Hirschman Index which shows the degree of concentration in a business area).

³⁷⁴ *Id.* at 8–10.

³⁷⁵ *Id.* at 11–37.

³⁷⁶ *Id.* See also Dr. Henrik Ballebye Olesen, Senior Economist, Copenhagen Economics, The Legal Profession—Competition and Liberalisation, at the Economic Case for Professional Services Reform (Brussels, Dec. 13, 2006), available at http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/01_henrik_ballebye_olesen.pdf (powerpoint presentation at the Finnish Conference, which is cited *supra* note 305).

court of law will probably create more competition in the less complicated legal cases. Furthermore, the number of legal cases will probably increase if other advisers with lower prices can represent clients in court. However, the effects on competition are modest because a modification of the monopoly only affects a minor part of the market. It will be important to tailor the modifications so they do not result in major decreases in quality.

We conclude that there will not be significant gains by modifying the ownership requirements because it is unlikely that other owners can own and operate the law firms more efficiently than lawyers. However, modifications can be implemented if these do not jeopardize the independence of the lawyers and do not undermine lawyers' client confidentiality obligation. In turn we conclude that the following elements of present regulation in all significance should be kept. A modification or removal of this part of the regulation will in all likelihood not be beneficial for the society.

The rules for code of conduct (ethical rules for lawyers) should be preserved. The legal profession should continue to regulate the code of conduct because this ensures the lawyer's independence from the state and because lawyers themselves are best qualified to assess the quality of legal services. There are no signs that the rules for code of conduct are abused to restrict competition.

The mandatory membership of the Danish Bar and Law Society should be kept because it is a condition for the current regulation of lawyers' conduct and because the membership does not introduce any significant competition limitations.³⁷⁷

Copenhagen Economics provided principles that could be extended beyond the Danish legal market. It concluded that liberalization is most likely to be beneficial if the profession is heavily regulated, if competition is weak, and if consumers respond to price competition.³⁷⁸ On the other hand, it noted that liberalization had the potential to damage consumers and society. The Copenhagen Economics report observed that it was already difficult for the clients to assess the quality of their legal services.³⁷⁹ The report concluded that if liberalization reduced the requirements for legal advisers, it could affect the quality of legal services. It noted that this problem might be more acute for private clients and small enterprises

³⁷⁷ COPENHAGEN ECONOMICS, *supra* note 371, at 5 (emphasis in original).

³⁷⁸ *Id.* at 4.

³⁷⁹ *Id.* In applying these principles, it concluded that the Danish legal profession was not heavily regulated, and that there was no indication of weak competition in the legal profession in Denmark because Danish lawyers compete against other types of advisers and foreign lawyers and that consumers were more concerned with quality than with price. *Id.*

because large business clients had better opportunities for assessing the quality of the lawyer's work.³⁸⁰ This section of the report also noted that liberalization could have "damaging consequences if it decreases the independence of the lawyers or the quality of their court work. The citizen's access to independent lawyers is a prerequisite for ensuring access to justice and the lawyers' work in court contributes to define 'case law' to the benefit of the whole society."³⁸¹ Its final conclusion was that "there probably are gains to be made by liberalising the legal profession in a way which does not lead to damaging consequences that could risk being greater than the potential gains."³⁸²

In my view, the Copenhagen Economics report did a better job than the IHS Study in considering the specific context of the particular legal market in question and the specific justifications offered in support of various regulations and in evaluating both the cost and benefit of such regulations. This article cannot provide a comprehensive summary of this report, but it is worth consulting because of its deliberate and well-balanced approach. While one may disagree with some of the conclusions, the Copenhagen Economics report is framed in terms that allow a principled debate about the important policy issues at stake.

C. The CCBE

The CCBE is another important stakeholder in the debate about the legal services. The CCBE is the officially recognized representative organization for the legal profession in the European Union, representing over 700,000 lawyers.³⁸³ Its members are nominated by regulatory bodies of the Bar and Law Societies in the EU Member States and from Switzerland and the three member countries of the European Economic Area; it also has representatives from several Observer States.³⁸⁴

The CCBE has a Competition Committee that monitors the activities of the Commission and the Member States.³⁸⁵ It reports regularly on the legal profession-related competition developments throughout the European Union.³⁸⁶ Its representatives have participated in many of the activities

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ CCBE, Introduction, <http://www.ccbe.eu/index.php?id=2&L=0> (last visited Oct. 31, 2008).

³⁸⁴ *Id.*

³⁸⁵ See CCBE, CCBE Committees and Working Groups, Committee: Competition: Members, http://www.ccbe.eu/index.php?id=94&id_comite=4&L=0 (last visited Oct. 31, 2008).

³⁸⁶ See, e.g., *Poland*, *supra* note 292; *National Developments*, 17 CCBE, *supra* note 289; CCBE Info No. 15, *supra* note 290. The CCBE Info documents are available at CCBE, Newsletter: CCBE-Info, <http://www.ccbe.eu/index.php?id=27&L=0> (last visited Oct. 31,

reported in this article.³⁸⁷ Moreover, the CCBE appears to have actively lobbied the European Parliament with respect to some of the resolutions described earlier.³⁸⁸

The CCBE has remained steadfastly opposed to much of the EU Initiative, even though its methods of presenting its objections have varied over time. It has prepared eight different documents that are relevant to the EU Initiative, five of which have gone directly to the Commission and three of which are available for consultation by its Member Bars.³⁸⁹ The CCBE's first intervention in the EU Initiative was the response it filed to the Commission's questionnaire.³⁹⁰ This was a seventeen page document that responded to the Commission's original Invitation to Comment. This response cited the *Wouters* case extensively to explain the provisions in the CCBE Code of Conduct; it also challenged the methodology used in the IHS Study.³⁹¹

Several months later, in September 2003, the CCBE sent the Commission the RBB Economics study discussed earlier in this article.³⁹² Unlike the CCBE's first submission, this submission provided technical, economic critiques of the IHS Study.³⁹³

The CCBE's third submission challenged portions of the legal analysis contained in the Commission's February 2004 Report.³⁹⁴ Among other

2008).

³⁸⁷ CCBE Representatives spoke at the October 2003 Commission conference and the 2006 Finnish Presidency Conference. See Helge Jakob Kolrud, Council of the Bars and Law Societies of Europe, Professional Rules and Business Development, Conference on the Regulation of Professional Services (Brussels, Oct. 28, 2003) available at http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20031028/helge_jakob_kolrud.pdf; Giuseppe Scassellati-Sforzolini, Chair of the CCBE Competition Committee, The Economic Case for Professional Services Reform (Brussels, Dec. 13, 2006), available at http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/02_scassellat_sforzolini.pdf. See *supra* notes 188 and 305 (citing the 2003 and 2006 Conferences). The CCBE did not participate in the May 2005 European Competition Day or the November 2005 UK Presidency Conference. See *supra* note 303.

³⁸⁸ See *supra* notes 313–334.

³⁸⁹ All of these documents are available on the webpage of the CCBE Competition Committee, *supra* note 385.

³⁹⁰ See CCBE *Response to the European Commission Competition Questionnaire on Regulation in Liberal Professions and its Effects* (May 28, 2003), http://www.ccbe.eu/fileadmin/userupload/NTCdocument/ccbe_response_28050311183706306.pdf (last visited Oct. 31, 2008); *supra* notes 120–130 for information about this questionnaire.

³⁹¹ *Id.*

³⁹² RBB ECONOMICS, *supra* note 168.

³⁹³ See, e.g., *id.* at 7 (citing the missing volume variable, critiques the use of GAP adjustment, cites spurious correlation and critiques the pooling of variables).

³⁹⁴ CCBE, *Comments on the Commission's Legal Analysis in its Report on Competition in Professional Services*, (June 30, 2004), available at http://www.ccbe.eu/fileadmin/userupload/NTCdocument/competition_legal_cr1_1183705984.pdf [hereinafter CCBE *Legal*

things, it criticized the Commission for failing to address EC Treaty Article 86(2), asserted that the Commission had misapplied the *Wouters* and *Arduino* cases, and questioned whether current law provided a proportionality test.³⁹⁵

The CCBE's fourth submission was issued in response to the Commission's September 2005 Follow-Up Report.³⁹⁶ This document was the shortest of the CCBE's responses, but one of the most focused and pointed. After noting that the profession was open to reforms, it noted that reforms should be subject to the protection of lawyers' core values and the necessities of the judicial system.³⁹⁷ It cited the Commission's own observation that reforms were best carried out at a national level.³⁹⁸ It argued that the scope of the Commission's exercise aimed to reshape the regulatory framework in Member States went beyond the application of EC and national competition rules.³⁹⁹ The CCBE further argued that the principle of "less regulation is better regulation," without any understanding of how the specific market actually operated, was not required by the EC Treaty or appropriate.⁴⁰⁰ The CCBE also critiqued the Commission for failing to respond to the errors in the IHS Study and initial report.⁴⁰¹ In this document, the CCBE also criticized the Commission's Follow-Up Report for failing to provide a traditional competition law analysis, for failing to address Article 86(6), and for drawing a distinction between categories of users.⁴⁰² On this latter point, the CCBE noted that the goal of regulation was not simply to protect the consumer, who might be sophisticated, but also to protect the public interest, such as the shareholders of Enron and Worldcom.⁴⁰³ The CCBE argued that it was not appropriate to draw a distinction based on the size (and presumed sophistication) of the client.⁴⁰⁴ It also noted that there had been other economic studies that had concluded that "further deregulation may not in all respects have economic advantages that can match the serious negative impacts on society."⁴⁰⁵

Analysis].

³⁹⁵ *Id.*

³⁹⁶ CCBE, *CCBE Comments on Commission Progress Report on Competition in Professional Services* (Nov. 19, 2005), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/CCBE_response_follow1_1182254403.pdf [hereinafter *CCBE Comments on Progress Report*].

³⁹⁷ *Id.* at 2.

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 3.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 4.

⁴⁰² *CCBE Comments on Progress Report*, *supra* note 396, at 5–6.

⁴⁰³ *Id.* at 5.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 6.

The CCBE's most recent and final submission to the Commission was its March 2006 Economic Submission.⁴⁰⁶ This eleven page paper relied on the Copenhagen Economics analysis and attempted to address the Commission on more of the Commission's own terms.⁴⁰⁷

In addition to these submissions which went to the Commission, the CCBE prepared three position papers that could be cited by its Member Bars with respect to the national competition developments.⁴⁰⁸ These June 2005 position papers were not country or reform proposal specific, but instead addressed issues that have been raised in many of the competition inquiries. One noteworthy point about these CCBE position papers is the topics that are, and are *not*, addressed in these position papers. These position papers address the topics of non-lawyer owned firms,⁴⁰⁹ multi-disciplinary partnerships,⁴¹⁰ and the regulatory and representative functions of bars.⁴¹¹ The CCBE has not issued any position papers on the topic of lawyers' fees and fee schedules nor has it issued any papers regarding lawyer advertising, reserved tasks, or qualification issues.⁴¹² The CCBE position papers rely most heavily on the ECJ's *Wouters* case, rather than *Arduino*,⁴¹³ and are similar to the 2004 position paper the CCBE prepared in response to the Clementi Final Report.⁴¹⁴

⁴⁰⁶ CCBE, *Economic Submission to Commission Progress Report on Competition in Professional Services*, (Mar. 31, 2006), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_economic_submis1_1182239202.pdf [hereinafter CCBE *Economic Submission*].

⁴⁰⁷ *Id.* See also Goldsmith, *supra* note 298.

⁴⁰⁸ See, CCBE, *CCBE Position on Non-Lawyer Owned Firms*, (June 2005), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_non1_1182254612.pdf [hereinafter CCBE *Position Paper 1*]; CCBE, *CCBE Position on Multi-Disciplinary Partnerships (MDPs)*, (June 2005), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_mdp1_1182254536.pdf [hereinafter CCBE *Position Paper 2*]; CCBE, *CCBE Position on Regulatory and Representative Functions of Bars*, (June 2005), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf [hereinafter CCBE *Position Paper 3*].

⁴⁰⁹ CCBE *Position Paper 1*, *supra* note 408.

⁴¹⁰ CCBE *Position Paper 2*, *supra* note 408.

⁴¹¹ CCBE *Position Paper 3*, *supra* note 408.

⁴¹² See CCBE *Position Paper 1*, *supra* note 408; CCBE *Position Paper 2*, *supra* note 408; CCBE *Position Paper 3*, *supra* note 408.

⁴¹³ See CCBE *Position Paper 1*, *supra* note 408; CCBE *Position Paper 2*, *supra* note 408; CCBE *Position Paper 3*, *supra* note 408. The CCBE cites *Wouters* much more than it cites *Arduino*, which was decided the same day as *Wouters*. In my view, the CCBE could be more nuanced in its discussion of what *Wouters* and *Arduino* require in order to satisfy the competition rules, but that is the topic for another article. See also CCBE, *ANALYSIS OF THE NOVA I JUDGEMENT AND GUIDANCE TO BARS ON PROFESSIONAL RULES FOLLOWING THE NOVA I DECISION*, (May 2002), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/analysisguidance_en1_1183706551.pdf.

⁴¹⁴ CCBE, *CCBE Response to the Clementi Consultation Document* (June 4, 2004), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_response_

As this brief survey shows, the CCBE's critiques of the EU Initiative have been multi-faceted but a number of themes are present through these documents. The CCBE has steadfastly critiqued the Commission's methodology for data collection and presentation.⁴¹⁵ Second, the CCBE has argued that the Commission has ignored or downplayed the non-economic factors involved in lawyer regulation.⁴¹⁶ The CCBE has argued that it was important to "carefully evaluate any impact of (de-)regulation on both the client-lawyer relationship and on society" and that it is important to strike the right balance between economic and non-economic factors.⁴¹⁷ Third, the CCBE has challenged some of the economic conclusions contained in the IHS Study regarding the legal profession. For example, IHS concluded that there was a relatively low level of competition in legal services in a number of countries, but the CCBE has cited the Copenhagen Economics report in support of its conclusion that the legal services market in the European Union is highly competitive.⁴¹⁸ The CCBE also challenged other aspects of the Commission's economic analysis. For example, the CCBE cited as an example Copenhagen Economics' report on the Danish legal market, which had concluded that the lack of price competition was due to demand side dynamics (clients are more interested in quality than price) rather than supply side dynamics (since Danish lawyers must compete with other kinds of advisers and foreign lawyers for a large part of the market).⁴¹⁹

A related fourth argument that the CCBE has made is that "an unregulated market for professional services may not produce efficient outcomes."⁴²⁰ The CCBE has cited "a vast economic literature" and has referred to the Copenhagen Economics conclusion that "there is a need for some degree of regulation of the legal profession because a totally free market will lead to serious market failures."⁴²¹ In support of its argument that an unregulated market may not produce efficient outcomes, the CCBE cited the asymmetric information between lawyers and clients and the fact that there are externalities and that legal services may have an impact on

clemen1_1183706107.pdf. See *supra* note 37 for more information on the Clementi Report.

⁴¹⁵ See CCBE *Comments on Progress Report*, *supra* note 396, at 3; see also CCBE *Legal Analysis*, *supra* note 394, at 2.

⁴¹⁶ See, e.g., CCBE *Economic Submission*, *supra* note 406, at 4.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 4 (noting that there are over 700,000 lawyers competing in large and small units, that the number of lawyers is continuously growing, and that the European Union's lawyers directives provided a "model" of a liberalized market for professional services in the European Union).

⁴¹⁹ *Id.* at 4.

⁴²⁰ *Id.* at 3.

⁴²¹ *Id.*

third parties.⁴²²

Finally, the CCBE has argued that the Commission's reports are flawed because of the Commission's focus on client sophistication as the benchmark for evaluating regulation. The CCBE asserted that the purpose of regulation is much broader and cited in support the European Parliament resolution on legal professions which had "reminded" the Commission "that the aims of the rules governing legal services are the protection of the general public, the guaranteeing of the right of defence and access to justice, and security in the application of the law."⁴²³ The CCBE also cited "the recent financial scandals which shook the business world—Enron, Worldcom, Parmalat" arguing that:

[T]he users of those professional services were very sophisticated repeat purchasers of these services, but the victims of the crimes committed were ordinary people, such as shareholders, employees, and pensioners, often numbered in thousands. These victims frequently suffered devastating financial losses. The lawyers in important commercial cases are not regulated just so as to protect the sophisticated business executives who use them (although they will also need protection), but in the public interest, which will include people who may have a direct or indirect stake in the outcome of the transaction, even though they are not the actual clients. The CCBE is concerned that the Commission's current approach does not reflect this public interest.⁴²⁴

In addition to these general points, the CCBE has provided its views on each of the five issues addressed by the Commission. For example, on the issue of education and qualification requirements, the CCBE concluded that one should be very careful when discussing education and qualification as a barrier to entry to the profession because any changes to educational requirements could have detrimental consequences for the client.⁴²⁵ According to the CCBE, the Commission concluded that stricter educational requirements resulted in fewer lawyers and less competition in the legal services market.⁴²⁶ The CCBE characterized this argument as "simplistic" and noted that the crucial point of education requirements is to ensure that clients receive a high-quality service.⁴²⁷ The CCBE also challenged the underlying assumption of the Commission's argument.⁴²⁸ It

⁴²² CCBE *Economic Submission*, *supra* note 406, at 3.

⁴²³ *Id.* at 10.

⁴²⁴ *Id.* at 9–10.

⁴²⁵ *Id.* at 4.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ See, e.g., CCBE, *Economic Submission*, *supra* note 406, at 4.

noted that if there is less education needed to become a lawyer, there would be a larger number of lawyers, which means more competition, but warned that such a general conclusion should be reached only after defining the relevant market and conducting appropriate research about that market.⁴²⁹ The CCBE cited Copenhagen Economics' conclusion that the competitive effects of modifying educational requirements would be relatively modest in Denmark, causing only a modest rise in the number of lawyers.⁴³⁰

On the issue of lawyers' "reserved tasks" and whether lawyers should have the exclusive right to represent clients in court, the CCBE argued that it was important to look at the purpose behind such reserved rights and articulated the following:

Lawyers who are qualified to appear in court serve the interest of the administration of justice best. They are qualified to deal efficiently with the rules of procedure and representation, which are designed to ensure a smooth functioning of the legal system. This will be of benefit to consumers who are ensured qualified advice on a market where the consumer finds it difficult to assess whether advice is good (asymmetric information), and indeed to society as a whole if cases are brought more efficiently and with a sound outcome.⁴³¹

The CCBE cited Copenhagen Economics' conclusion that in Denmark, abolishing the court monopoly would have only a limited impact on competition, but could induce economic losses by increasing the courts' costs.⁴³² The CCBE also cited the Henssler-Kilian report, which had criticized the IHS Study for its failure to analyze the deregulated Finnish market and whether it operated as a predictor for the absence of market failure; it then noted that that Finland was considering changing its legislation to exclusive rights for lawyers in courts.⁴³³ Finally, the CCBE noted competition among lawyers in litigation and the absence of signs of market failure.⁴³⁴

The CCBE has also addressed non-lawyer ownership of firms (whether publicly traded or privately held) and has expressed the view that non-lawyer ownership of firms presents the potential for conflicts between the lawyer and non-lawyer owners.⁴³⁵ It has also cited Copenhagen Economics' conclusion that "investor ownership will not likely entail

⁴²⁹ *Id.* at 5.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ CCBE *Economic Submission*, *supra* note 406, at 5.

⁴³⁵ *Id.* at 6. The CCBE referred to its position paper and cited a number of examples of such conflicts.

significant efficiency gains for the law firms. This is because law firms are not heavily capital dependent and because the general advantages of investor owned companies are not fully applicable to the legal law firms . . . [and would] probably entail motivation and control problems.”⁴³⁶ It also pointed to Copenhagen Economics’ conclusion that while outside ownership of a law firm, such as by a bank, would provide advantages to a consumer because it would be easier to find a lawyer, it could result in certain disadvantages, including compromises to the quality of the advice if the lawyer is not independent and possible increased prices.⁴³⁷

The CCBE has also addressed the topic of self-regulation. It has observed that no EU country has total and unrestricted self-regulation of the legal profession, but a number of EU Member States have a significant amount of self-regulation. The CCBE argued that self-regulation promotes the collective independence of the members of the legal profession and provides a structural defense for the independence of the individual lawyer.⁴³⁸ The CCBE has also cited Copenhagen Economics’ arguments in favor of self-regulation.⁴³⁹

With respect to the issue of mandatory bar membership, the CCBE has stated that it “strongly believes that the abolition of mandatory bar membership would have serious impacts not only on the structure of the legal profession but on the entire administration of justice.”⁴⁴⁰ It has cited Copenhagen Economics’ view that mandatory membership does not restrict competition and that mandatory bar membership should be maintained.⁴⁴¹ The rationale was that the conditions for becoming a lawyer are the same, regardless of whether membership is mandatory. As such, the costs of the

⁴³⁶ *Id.* (citing Copenhagen Economics at 54).

⁴³⁷ *Id.* at 7.

⁴³⁸ *Id.*

⁴³⁹ *Id.* The CCBE cited these arguments:

[L]awyers, given their special knowledge of the profession/business, are in the best position to lay down the requirements for a lawyer’s work. Lawyers will feel greater responsibility for regulation if they are involved in the process of regulation. It is also easier to change rules that are adopted via self-regulation than modifying rules via legislation. The results of this are: lower administration costs for professional associations/authorities, greater acceptance of the rules (since they come from within the profession), better compliance and lower compliance costs for the firms. Lawyers are also in the best position both to observe and evaluate professional misconduct and assist the profession in sanctioning it. Lawyers will have an interest in maintaining a good reputation of the profession, and therefore will strive to ensure that lawyers live up to the requirements of the code of conduct.

⁴⁴⁰ CCBE *Economic Submission*, *supra* note 406, at 7.

⁴⁴¹ *Id.* (citing Copenhagen Economics at 62).

membership are not significant barriers to entry, and there are societal disadvantages to eliminating the mandatory membership.⁴⁴²

The CCBE has taken the position that “cross-disciplinary companies that offer both legal services and other professional services” could cause problems in maintaining the lawyers’ client confidentiality obligations and independence.⁴⁴³ The CCBE has cited Copenhagen Economics’ conclusion that currently there does not seem to be a great demand for multidisciplinary advice and there are only a few law firms with co-operation agreements with other non-legal advisers.⁴⁴⁴ It also notes that concerns about conflicts of interest in the wake of the Enron and other financial scandals appear to have caused a marked decline in the demand for and supply of bundled services.⁴⁴⁵

The CCBE’s position with respect to fees is more nuanced than its position on some of the other issues the Commission has raised. As noted earlier, the CCBE has not prepared a position paper on this issue. In its Economic Submission, the CCBE stated: “The CCBE does not have a position on the desirability of price regulation. However, it notes that the Commission does not seem to have proven its point.”⁴⁴⁶ It pointed to the weaknesses of the Commission’s analysis on this point:

[N]either the Commission reports nor the IHS study on which they were based contain any traditional competition law and economic empirical analysis, but rather base their conclusion on the need for complete price deregulation on the mere assumption that, since there is no indication of market failures in those countr[ies] where pricing is less regulated, if not regulated at all, price controls are not an essential regulatory instrument for liberal professions.

In this regard, it may be noted that, where an economic empirical analysis has been actually carried out, this has shown that, in some countries, the abolishing of price regulation has resulted in higher and less predictable litigation costs.⁴⁴⁷

This section of the CCBE Submission cited the Henssler-Kilian study in support of the point that regulated lawyers’ fees are consumer-friendly because “they allow the development of a functioning and effective insurance market, where consumers can obtain insurance at a reasonable

⁴⁴² *Id.* at 8.

⁴⁴³ *Id.* See also CCBE Position Paper 2, *supra* note 408.

⁴⁴⁴ CCBE Economic Submission, *supra* note 406, at 8 (citing Copenhagen Economics at 51).

⁴⁴⁵ *Id.* at 9.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 10.

price against the risk of having to pay legal expenses.”⁴⁴⁸

The CCBE has also taken a nuanced view with respect to the Commission’s findings on advertising. The CCBE has noted that the data about advertising restrictions may be misleading because there has been no effort to “verify on a case by case basis whether in legal systems with a fairly low regulation index regarding professional rules on advertising, lawyers really have largely unrestricted advertising possibilities, or, whether regulation is effected through unfair competition law or case law.”⁴⁴⁹ It also asserted that the positive effects of completely unrestricted liberalization would not be significant enough to justify the risk of endangering the consumers of the professional services and the integrity of the profession.⁴⁵⁰ The CCBE also argued that a “careful analysis of advertising regulations (where they exist) will show that those restrictions that exist are targeted at protecting potential users who may be deceived because of information asymmetries.”⁴⁵¹ On the other hand, it did argue that the goals of advertising restrictions include protecting the consumers from misleading claims, preventing unfair competition between practitioners, and preserving professional integrity and independence.⁴⁵²

In summary, although the CCBE has provided extensive comments on the EU Initiative, it is not at all clear what impact, if any, these interventions have had. Moreover, in my view, the CCBE has diluted the impact of some of its most significant arguments by relying on other arguments that will be dismissed as “protectionist.” For example, I think it is regrettable that the CCBE offers as an acceptable justification for

⁴⁴⁸ *Id.* See also How to Germany, Insurance: It’s the Law, <http://www.howto-germany.com/pages/insurance.html> (last visited Oct. 31, 2008):

Legal Insurance (Rechtsschutzversicherung) covers any legal costs you encounter, up to €150,000. And, if you want to countersue, it will pay as long as there is a reasonable chance of winning. Legal insurance can be purchased for the entire family, for the job (Arbeitsrechtsschutz) and for traffic infractions (Verkehrsrechtsschutz). If you’re renting your apartment or house, it’s a good idea to have Mietrechtsschutz insurance, which can cost up to €60 per year.

See also Francis Regan, *Whatever Happened to Legal Expense Insurance? Recent Successes and Failures of Legal Insurance Schemes in Australia and Overseas* 26 ALTERNATIVE L. J. 293 (2001) (finding that legal expense insurance has been a qualified success in ensuring access to justice and that it has fared best in the societies with civil law traditions but that the picture is more ambiguous in the common law societies); U.K. Ministry of Justice, *The Market for BTE Legal Insurance* (July 2007), available at <http://www.justice.gov.uk/docs/market-bte-legal-expenses-insurance.pdf>.

⁴⁴⁹ CCBE *Economic Submission*, *supra* note 406, at 11.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

advertising restrictions “preventing unfair competition between practitioners” because this is the type of statement that likely will be viewed as protecting lawyers’ interests, rather than the interests of clients or the public. In my view, the CCBE has raised some valid points and they deserve to become part of the public policy debate about the proper scope of lawyer regulation to a greater degree than they have to date. But if the CCBE issues statements that can easily be dismissed or discounted, there is an increased likelihood that the Commission and others will ignore valid points made by the CCBE. Thus, stakeholders, regulators, and policy-makers may find it useful to examine the CCBE responses to better learn the most effective way to participate in the debate about appropriate lawyer regulation.

V. U.S. IMPLICATIONS AND CONCLUSION

Although it would require a separate article to fully address the implications of the EU Initiative on the United States, a few observations are in order. The EU Initiative has contributed to profound changes in the regulation of lawyers in the European Union. Could it lead to the same result in the United States? Many U.S. lawyers may be tempted to say no. They may think that the EU Initiative is irrelevant to the United States because the United States already has liberal advertising and fee rules, as a result of U.S. antitrust decisions,⁴⁵³ or because we in the United States have “been there, done that” with respect to the debate about alternative business structures and multi-disciplinary practice rules,⁴⁵⁴ or because the U.S. legal profession received a relatively favorable ranking in the OECD’s 2003 index of regulatory indicators.⁴⁵⁵

I am much less sanguine, however. Because the U.S. Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) actively monitor some aspects of lawyer regulation, it is clear that the issue of lawyer regulation is—at least partially—on their radar screens.⁴⁵⁶

⁴⁵³ See *supra* note 21 and 22 (*Goldfarb and Bates*).

⁴⁵⁴ See, e.g., American Bar Association (ABA), Commission on Multidisciplinary Practice, <http://www.abanet.org/cpr/mdp/home.html> (last visited Oct. 31, 2008).

⁴⁵⁵ See OECD *Regulatory Indicators*, *supra* note 7; see also OECD, Economics Department, Indicators of Regulatory Conditions in Professional Services Sectors, http://www.oecd.org/document/24/0,3343,en_2649_34323_35858776_1_1_1_1,00.html (last visited Oct. 31, 2008).

⁴⁵⁶ See, e.g., Federal Trade Comm’n and U.S. Dep’t of Justice, Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law (Dec. 20, 2002), available at <http://www.abanet.org/cpr/model-def/ftc.pdf>; see also U.S. Department of Justice Antitrust Division, Comments, <http://www.usdoj.gov/atr/public/comments/comments.htm> (last visited Oct. 31, 2008) (collecting letters to the following states about UPL issues: Georgia, Indiana, Kansas, Kentucky, Massachusetts, North Carolina, Rhode Island, Virginia, and Wisconsin).

Moreover, in reading the comments of U.S. representatives at the OECD Roundtable Sessions, I do not sense an appreciable difference in tone between the U.S. representatives and the non-U.S. OECD representatives.⁴⁵⁷ Furthermore, as noted elsewhere, the U.S. federal government may be increasingly willing to exercise oversight over certain aspects of lawyer regulation.⁴⁵⁸ Thus, I can imagine the U.S. antitrust authorities deciding to launch their own professional services stocktaking exercise, especially when countries “close to home,” such as Canada,⁴⁵⁹ have done so and when antitrust reforms have occurred in countries, such as the United Kingdom, that also have relatively low regulatory indicators for the legal profession.⁴⁶⁰ Such a stocktaking seems even more likely when one takes into account the fact that OECD members have agreed on *Guiding Principles for Regulatory Quality and Performance*,⁴⁶¹ that the OECD issued in 2008 a Report on Competition in Legal Services, and that the OECD has included the United States in its 2003 indicators of regulatory conditions in professional services.⁴⁶² Thus, I recommend that

⁴⁵⁷ See *supra* note 15 (citing U.S. contributions to the OECD 2000 Roundtable); OECD *Legal Services*, *supra* note 7, at 287–294 (U.S. submission cited the U.S. Supreme Court’s *Bates* and *Goldfarb* cases, the FTC’s actions to limit states’ ability to use UPL rules to insist on lawyer participation in real estate matters, described advocacy efforts related to restrictions on attorney advertising, and described an enforcement action against the American Bar Association, including a June 2006 court decision that found the ABA had violated multiple provisions of the 1996 antitrust consent decree).

⁴⁵⁸ See Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005); Laurel Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 J. PROF. LAW. 179; ABA, Center for Professional Responsibility, Materials about the GATS and Other International Agreements, <http://www.abanet.org/cpr/gats/home.html> (last visited Oct. 31, 2008). But see ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE, REPORT TO THE HOUSE OF DELEGATES #201A (2002), available at <http://www.abanet.org/cpr/mjp/201a.pdf> (affirming state judicial regulation of the legal profession).

⁴⁵⁹ See, e.g., CANADA COMPETITION REPORT, *supra* note 1; see also Mario Monti, Comm’r for Competition: European Comm’n, Comments and Concluding Remarks, Conference on Regulation of Professional Services, at 1 (Brussels, Oct. 28, 2003), available at http://ec.europa.eu/comm/competition/speeches/text/sp2003_028_en.pdf [hereinafter Monti’s Concluding Remarks] (“In fact I just came back from Washington where I discussed the topic of the Regulation of Professional Services with my colleagues at the US antitrust agencies (the Antitrust Division of the Department of Justice and the Federal Trade Commission).”).

⁴⁶⁰ See Legal Services Act 2007, *supra* note 38; OECD *Regulatory Indicators*, *supra* note 7 (the “overall” 2003 indicators of 1.8 for the U.S. and 2.1 for the UK were among the lowest).

⁴⁶¹ OECD, *Guiding Principles for Regulatory Quality and Performance* 3 (2005), <http://www.oecd.org/dataoecd/19/51/37318586.pdf> (last visited Oct. 31, 2008). This document recommended, inter alia, that all regulation “have a sound legal and empirical basis.” See also OECD *Regulatory Indicators*, *supra* note 7.

⁴⁶² See, e.g., OECD *Legal Professions*, *supra* note 7, at 26, 39; OECD *Regulatory Indicators*, *supra* note 7.

U.S. stakeholders begin preparing now for the issues and discussions that will occur if U.S. antitrust officials were to launch their own stocktaking exercise of professional services. Those who are interested in U.S. lawyer regulation should anticipate how they would respond to the types of issues and arguments that have arisen in the EU Initiative.

If an EU-type competition initiative were to be launched in the United States, what lessons could one learn from the EU experience? Let me begin by stating that I support the type of inquiry that the EU Initiative encouraged. I find myself in agreement with most of Commissioner Monti's concluding remarks at the October 2003 launch of the stocktaking exercise.⁴⁶³ In my view, it is appropriate to encourage regulatory

⁴⁶³ See Monti's Concluding Remarks, *supra* note 459, at 11–16:

I would now like to raise the question of who is best placed to consider if the traditional rules are outdated and make the change happen where necessary. First of all, in line with what some speakers have said earlier today, I wish liberal professions would stop defending a blanket exception to all their rules and would seize the opportunity to look at each rule separately and justify it explicitly.

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

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

We are just about to round up the stocktaking. We now have to reflect on what has been said in the written submissions and here today orally. My plan is that the Commission's Report will be released in the beginning of next year. I have already encouraged the professions to revisit their rules. I would be pleased if also the competent regulators used the next few months to reflect how to make a contribution to improving the conditions of competition to the benefit of consumers and professionals alike.

I have one more remark to make. As I have already made clear to the European Parliament, my intention is not that the current regulatory framework should be

authorities and professional bodies “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.”⁴⁶⁴ (I have called upon U.S. policymakers to be similarly rigorous when developing lawyer regulations.)⁴⁶⁵ Lawyer regulators should be able to explain the basis for each of their rules. Moreover, with the benefit of hindsight, we know that it is sometimes appropriate to exercise skepticism towards lawyer regulation because regulators have not always acted to protect clients or the public interest.⁴⁶⁶ Thus, I agree with the European Union that regulators should take stock of their existing regulations and consider whether any adjustments are needed.

On the other hand, I have grave concerns about aspects of the EU Initiative and the forces it has unleashed. Furthermore, I believe it is

changed overnight in a lump exercise. I am in favour of competition between legal systems, as suggested by Professor Van Den Bergh. I am not aiming at harmonisation of all regulations, nor at generalised deregulation. My intention is to encourage and help the competent regulators to improve the conditions of competition, while duly safeguarding the interests of consumers. Let's think together who are the best placed to draw up codes of conduct for the various professions. I tend to believe it is for the governmental experts of professional regulation and the professional organisations together to revisit the rules in place and to abolish any rules that produce anti-competitive effects without being objectively necessary and the least restrictive means to guarantee the proper practice of the profession in question. I would say, at this stage, that the governments have a burden of proof to reassess the regulations, since they have agreed the Lisbon agenda. I think the lack of consensus to support the existing rules is sufficient for US to ask those who defend the status quo to justify their position in today's context.

The Commission's Report on competition in professions would be there to help the governments and the professions by providing some common criteria for their assessment. Let me stress it once again: it is my firm belief that some modernisation of rules affecting competition in professional services is of crucial importance for the EU to meet the Lisbon goal of making the EU the most competitive and dynamic economy in the world by 2010.

⁴⁶⁴ *Commission Report*, *supra* note 8, at 4.

⁴⁶⁵ See Terry, *supra* note 458; see also Laurel S. Terry, Testimony to the ABA Commission on Multidisciplinary Partnerships (Mar. 1999), available at <http://www.abanet.org/cpr/mdp/terryremarks.html>.

⁴⁶⁶ See, e.g., Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989), reprinted in LAWYER IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992); Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469 (2000).

appropriate to ask whether the EU experience offers any lessons about how things could or should be done differently if the United States were to conduct its own professional services stocktaking. For example, I am extremely troubled by the failure of the Commission to respond directly to the critiques of the IHS Study and Commission analyses. When such important policy issues are at stake and when so many stakeholders have been left out of the debate because of a lack of technical expertise, there is an added reason for the decision-makers to respond directly and explicitly to the criticisms offered, rather than to allow the arguments to operate as ships passing in the night. Thus, I would recommend that if a stocktaking exercise were to take place in the United States, the appropriate authorities should publicly respond to any critiques directed to its methodology. (I also hope that at some point in the future, the IHS, the Commission, or both respond to the arguments propounded in the RBB Economics report, in the Henssler-Kilian report, in the OECD Report, and in the CCBE submissions, among others.)

In my view, another important lesson to learn from the EU Initiative is the difficulty, and the importance, of considering non-economic arguments. I am troubled by the failure of the IHS Study or the Commission's reports to consider in a more particularized way the traditional, non-economic arguments offered in support of various lawyer regulation provisions. It is certainly true that when looked at from one perspective, most, if not all lawyer regulation is anti-competitive because it restricts choice and it may increase costs. In analyzing whether lawyer regulations are appropriate, however, it is important to include not only the individual client's interests and abilities to protect themselves, as the Commission did, but the societal interests at stake. I am not convinced that the IHS Study and the Commission's reports have done so in a meaningful way. The recent meltdown in the United States' and global financial markets suggests that it may sometimes be easy—in the short-term—to minimize the need for regulation and to overstate the market's ability to take care of itself. The meltdown also suggests that it is not always easy to recover if the pendulum swings too far. This may be particularly true when one is dealing with "rule of law" issues. "Rule of law" is an easy and trendy term to throw around and it is difficult to determine exactly when it is at risk. However, one should remember how important it is and how fragile it might be. In my view, we in the United States tend to take the rule of law for granted and assume that it will always be there. But this is not necessarily a sound assumption. Lawyer regulation is an integral part of the administration of justice and a rule of law system. Thus, before a society makes substantial and fundamental changes to its lawyer regulation system and system of justice, it is necessary and appropriate to talk about the likely impact of those changes on the justice system and rule of law. Although it likely will be difficult to obtain empirical data on these non-economic issues, I do not

believe that means that one should forgo the discussion and debate simply because there is little empirical data on “rule of law” issues. Although complete deference should not be given to lawyer regulators who defend their rules, one must recognize that when speaking of a system of justice and rule of law, one may not always be able to offer hard data or offer quantifiable measures in support of the arguments. This does not make the arguments any less important however. As the Commission recognized, regulation is about more than lowering costs for individual clients. For these reasons, I find the analysis conducted by Copenhagen Economics to be preferable to the analysis conducted by IHS because it explicitly and concretely confronts specific non-economic policy arguments offered in favor of specific regulatory provisions and tries to balance the costs of such regulations against the benefits of the regulation, taking into account non-economic as well as economic benefits. While I may not agree with all of its conclusions, that approach allows me to participate in the important policy debates at stake and to understand where I might want experts to confirm or challenge the economic portion of the cost-benefit analysis.⁴⁶⁷

Another important lesson to learn from the EU experience is the power and the potential dangers of using a broad-brush approach such as that found in the IHS Study. One might argue that it was unfair of this article in the prior paragraph to compare the IHS and Copenhagen Economics studies because the approaches were so different. The IHS Study made an effort to analyze five to six professions in all EU Member States. Given this scope, it was impossible for IHS to fully consider the arguments offered in support of a particular regulation for a particular profession in a particular country. While this point has merit, it is also true that it is easy for the IHS approach and data to be misused in the future and substituted for the more particularized approach that Commissioner Monti called for. A chart that assigns regulation point values to five professions in thirteen, fifteen, or twenty-five countries and makes the further link that more regulation tends not to produce greater benefits can easily be misinterpreted as the end analysis, rather than a launching point for discussion and a regulation-by-regulation cost-benefit analysis. Numerical data and charts can appear “objective” and can mask non-objective and “non-scientific” assumptions about how the data is collected. The fact that the IHS conclusions have been repeatedly cited, despite the unanswered criticisms of its methodology by commentators that include the OECD,⁴⁶⁸ demonstrates the powerful (and possibly dangerous) use of this type of broad-brush approach. Thus, if the

⁴⁶⁷ For example, it seems to me, at first blush, that if the lawyer’s monopoly is reduced, there is less justification for altering lawyer qualification rules. If clients have a choice about whether to use a lawyer or a different kind of advisor, then high qualification requirements for lawyers do not create an impediment to competition.

⁴⁶⁸ See *supra* note 7.

United States considers launching a stock-taking exercise, it should carefully assess whether a broad-brush study is appropriate or whether it might be interpreted—inappropriately—as the end result, rather than as a “launching point” for discussions.

In sum, the U.S. legal profession and U.S. lawyer regulators should consider the possibility that in the future, there might be an EU-type stocktaking in the United States. They should also consider whether there are any lessons that can be learned from the EU experience. I hope that by providing the details of the EU Initiative, this article helps the U.S. legal profession consider proactively, rather than reactively, whether there are any actions it should take in light of the EU developments.

APPENDIX 1: TABLES AND CHARTS FROM THE IHS STUDY OF
COMPETITION IN PROFESSIONAL SERVICES

The tables and charts reproduced below appear in the IHS Study. The first table in the study represented IHS's view of the level of regulation for five different professions in twelve EU Member States:⁴⁶⁹

Total IHS regulation indices for different professions

	Accountants	Legal	Architects	Engineers	Pharmacists
Austria	6.2	7.3	5.1	5	7.3
Belgium	6.3	4.6	3.9	1.2	5.4
Denmark	2.8	3.0	0	0	5.9
Finland	3.5	0.3	1.4	1.3	7.0
France	5.8	6.6	3.1	0	7.3
Germany	6.1	6.5	4.5	7.4	5.7
Greece	5.1	9.5	n.a.	n.a.	8.9
Ireland	3.0	4.5	0	0	2.7
Italy	5.1	6.4	6.2	6.4	8.4
Luxembourg	5	6.6	5.3	5.3	7.9
Netherlands	4.5	3.9	0	1.5	3.0
Portugal	n.a.	5.7	2.8	n.a.	8
Spain	3.4	6.5	4.0	3.2	7.5
Sweden	3.3	2.4	0	0	12
UK	3.0	4.0	0	0	4.1

The keys for interpreting these tables included the following:⁴⁷⁰

	High regulation
	Medium regulation
	Low regulation
	No such profession (in the form of lib. prof.)
<i>white + italic</i>	Not enough information

lib. prof. = liberal profession

⁴⁶⁹ IHS REPORT, PART 1, *supra* note 119, at 3.

⁴⁷⁰ *Id.* at 28.

The overall index for a particular profession was determined by combining the country's market entry index and its conduct index, with "0" representing the least regulation, and "6" the most.⁴⁷¹ The IHS study included the following chart to explain how it calculated the market entry index:⁴⁷²

	Category/Variables	Coding	Scale	Weighting1	Weighting2
ER	Entry regulation (general)	ERLC*0.40+ ERED*0.40+ ERQT*0.20	0 to 6		
ERLC	Licensing Number of exclusive and shared exclusive tasks	0 = 0 1 = 1.5 2 = 3 3 = 4.5 4 or more = 6	0 to 6		40%
ERED	Requirements in education/does only apply in cases of licensing; if no licensing: "0"	ERED1*0.30+ ERED2*0.40+ ERED3*0.20+ ERED4*0.10	0to6		40%
ERED1	Duration of special education/university or other higher degree	0 to ≥ 6 years	0 to 6	30%	
ERED2	Duration compulsory practising	0 to ≥ 6 years	0 to 6	40%	
ERED3	Number of professional exams	(0 to ≥ 3)*2	0 to 6	20%	
ERED4	Number of entry routes to profession (inv. scale)	(0 = 4 or more routes; 1=3 routes; 2=2 routes; 3=1 route)*2	0 to 6	10%	
ERQT	Quotas/economic needs test	0=no 6=yes	0 or 6		20%

⁴⁷¹ *Id.* at 28.

⁴⁷² *Id.* at 30.

This section also showed how it calculated the conduct regulation index:⁴⁷³

	Category/Variables	Coding	Scale	Weight-Ing 1	Weight-Ing 2
CR	Conduct Regulation (general)	MCPR*0.25+ MCAD*0.15+ MCLOC*0.15+ MCDIV*0.20+ MCIC*0.25	0 to 6		
MCPR	Regulations on prices and fees	0 = no regulations 1 = non binding reference prices on some services 2 = non binding reference prices on all services 3 = maximum prices on some services 4 = maximum prices on all services 5 = minimum prices on some services 6 = minimum prices on all services	0 to 6		25%
MCAD	Regulations on advertising	0 = no spec. regulations 2 = some forms forbidden (like comparative price advertising, direct mailing etc.) 4 = most forms are forbidden (advertising only in very narrow margins allowed) 6 = all forms of advertising are forbidden	0 to 6		15%
MCLOC	Regulations on location	0 = location not restricted 6 = location restricted	0 to 6		15%
MCDIV	Regulations on diversification	0 = no specific regulations 3 = diversification under specific preconditions allowed (branch office head is a professional, maximum number of branch offices etc.) 6 = diversification not allowed in any case	0 to 6		20%
MCIC	Regulations on form of business and interprofessional co-operation (general)	MCIC1*0.5+ MCIC2*0.5	0 to 6		25%
MCIC1	MCIC1 Regulations on form of business	0 = all forms (incl. incorporation allowed in any case) 2 = partnership allowed, incorporation only allowed in specific cases (regulations on ownership etc.) 5 = incorporation forbidden in any case 6 = partnership and incorporation forbidden in any case; only sole practitioners etc. allowed.	0 to 6	50%	
MCIC2	MCIC2 Regulations on interprofessional co-operation	0 = all forms allowed 3 = with all professions but no incorporation; or only with comparable professions in all forms allowed etc. 4.5 = only with comparable professions and no incorporation 6 = generally forbidden	0 to 6	50%	

The tables and charts that followed included various legal services-specific information, including the issues that were evaluated and the point allocations allotted to each issue. These charts and tables are reproduced in the following pages:

⁴⁷³ *Id.* at 32.

Table 3-5 Legal Services (Lawyers): General (summarizing subparts of question 2):⁴⁷⁴

Table 3-5 Legal Services (Lawyers): General

Country	Profession	Level of regulation				Implementation of Regulation by				Disciplinary sanctions decided by		Membership in prof. assoc. compulsory?
		nat.	Subnat.	gov.	self-reg.	gov.	self-reg.	gov.	self-reg.	gov.	self-reg.	
Austria	Rechtsanwalt (Lawyer)	X		X	X	X	X	X	X	X	X	Y
Belgium	Advocaat (Advocate)	X		X	X	X	X	X	X	X	X	Y
Denmark	Advokat (Attorney at Law)	X		X	X	X	X	X	X	X	X	Y
Finland	Advokate Lääkäri	X		X	X	X	X	X	X	X	X	Y (only for title)
France	Avocat	X		X	X	X	X	X	X	X	X	Y
Germany	Rechtsanwalt (Attorney at Law)	X		X	X	X	X	X	X	X	X	Y
Greece	Δικηγόρος (Advocate)	X		X	X	X	X	X	X	X	X	Y
Italy	Avvocato (Lawyer)	X		X	X	X	X	X	X	X	X	Y
Netherlands	Barister	X		X	X	X	X	X	X	X	X	Y
Portugal	Advogado	X		X	X	X	X	X	X	X	X	Y
Spain	Abogado	X		X	X	X	X	X	X	X	X	Y
Sweden	Advokat (Advocate/Attorney)	X		X	X	X	X	X	X	X	X	Y
United Kingdom (England and Wales)	Solicitor Barrister	X	X	X	X	X	X	X	X	X	X	Y (only for title)

⁴⁷⁴ *Id.* at 45.

Table 3-6 Legal Services (Lawyers): Qualification Requirements
(summarizing questions 3.4-3.7):⁴⁷⁵

Country	Profession	University/higher education degree (years)	Practise (years)	Professional exam	Number of „entrance roads“ to profession
Austria	Rechtsanwalt (Lawyer)	U 4	5	Y (1)	1
Belgium	Advocaat (Advocate)	U 5	3	N	1
Denmark	Advokat (Attorney at Law)	U 5	3	Y (1)	1
Finland	Advocate	U 5	4	Y (1)	1
	Lawyer	U 5	0	N	1
France	Avocat	U 5	2	Y (2)	n.a.
Germany	Rechtsanwalt (Attorney at law)	U 3,5	2	Y (2)	1
Greece	Dikigoros (Advocate)	U 4	1,5	Y (1)	1
Italy	Accvocato (Lawyer)	U 4	2+1	Y (1)	1
Ireland	Barrister	U or HE + course 2	1	Y (2)	2
	Solicitor	U or HE + course 2	2	Y (2)	3
Luxembourg	Avocat (Advocate)	U 5	2	Y (2)	1
Netherlands	Advocaat (Attorney at Law)	U 4 + course	3	Y (1+)	1
Portugal	Advogado	U 4	1,5	Y (1)	1
Spain	Abogado	U 5	N	Y (1)	1
	Procurador	U 5	N	Y (1)	1
Sweden	Advokat (advocate/avocat)	U 4,5	5	Y (2004)	1
	Jurist	U 4,5	N	N	1
	Solicitor	U 3-4	2	see case study	3
United Kingdom (England/Wales)	Barrister	U 3-4	1	see case study	2

⁴⁷⁵ IHS REPORT, PART 1, *supra* note 119, at 46.

Table 3-7 Legal Services (Lawyers): Scope of Activities:⁴⁷⁶

Country	Profession	XX = Exercise reserved; X = Activity exercised, but not reserved									
		Advice domestic law	Advice international law	Advice foreign law	Conveyancing of title to real estate and registration of family matters such as marriage contracts	Representation before courts	Representation before administrative authorities (not tax matters)	Tax advice	Insolvency practice	Management consulting etc.	Advice and repr. patent law
Austria	Rechtsanwalt (Lawyer)	XX		XX	X	XX	XX	XX	X	X	
Belgium	Advocaat (Advocate)	X	X	X	-	XX	X	X	X	X	XX
Denmark	Advokat (Attorney at Law)	XX	XX	XX	XX	XX	X	X	XX	X	XX
Finland	Advokaatti	X	X	X	X	X	X	X	X	X	X
France	Avocat	XX	XX	XX	-	XX	X	X	XX	-	XX
Germany	Rechtsanwalt (Attorney at Law)	XX	XX	XX	-	XX	XX	XX	XX	-	XX
Greece	Προσωπικός (Advocate)	XX	XX	XX	7	XX	7	7	7	7	7
Italy	Avvocato (Lawyer)	X	X	X	XX	XX	X	X	X	X	X
Ireland	Barrister	X	X	XX	XX	XX	X	X	X	X	X
Luxembourg	Avocat (Advocate)	XX	XX	XX	XX	XX	7	7	7	7	7
Netherlands	Advocaat (Attorney at Law)	X	X	X	7	XX	X	X	X	X	X
Portugal	Advogado	XX	XX	XX	-	XX	X	X	X	X	-
Spain	Abogado	XX	XX	XX	XX	XX	X	X	XX	X	XX
Sweden	Advokat (Advocate)	X	X	X	X	XX	X	X	XX	X	XX
Switzerland	Advokat (Advocate)	X	X	X	XX	XX	X	X	XX	X	XX
United Kingdom	Barrister	X	X	X	XX	XX	X	X	X	X	XX

⁴⁷⁶ *Id.* at 47.

Table 3-8 Legal Services (Lawyers): Conduct showed the results for each country in the conduct index items:⁴⁷⁷

Country	Profession	Regulation of prices			Advertising prohibition?			Rep. on discrimination	Incorp. for insur. or liability?	Incorp. for insur. or liability?			Comp. indemn. insurance?	Comp. cont. edu- cation?
		min. price	max. price	reference price	All	Most	Some			any	incorp. gen.	with non ins. prot.	incorp. w. non ins. prot.	
Austria	Rechtsanwalt (Lawyer)	Y	N	Y	N	Y	Y	N	Y	Y	Y	Y	Y	Y
Belgium	Advocaat (Advocate)	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Denmark	Advokat (Attorney at Law)	N	N	1779	N	N	Y	N	Y	Y	Y	Y	Y	Y
Finland	Advokaatti	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
France	Avocat	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Germany	Rechtsanwalt (Attorney at Law)	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Greece	Δηγόρος (Advocate)	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Italy	Avvocato (Lawyer)	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Ireland	Barister	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Luxembourg	Solicitor	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Netherlands	Advocaat (Advocate)	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Portugal	Advogado (Attorney at Law)	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Spain	Abogado	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
Sweden	Advokat (Advocate)	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
United Kingdom	Solicitor	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y
United Kingdom (Eng. & Wales)	Barister	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y

⁴⁷⁷ *Id.* at 49.

The study also included a summary of the regulation indexes for the legal profession:⁴⁷⁸

Legal Services (Lawyers): IHS regulation indices

	Entry	Conduct	Total	Rank
Greece	3.5	6.0	9.5	1
Austria	4.1	3.3	7.3	2
France	3.9	2.7	6.6	3
Luxembourg	3.8	2.8	6.6	3
Germany	3.7	2.8	6.5	4
Spain	3.4	3.1	6.5	4
Italy	2.6	3.9	6.4	5
Portugal	3.5	2.2	5.7	6
Belgium	2.5	2.1	4.6	7
Ireland	2.4	2.1	4.5	8
England&Wales	2.9	1.2	4.0	9
Netherlands	2.1	1.8	3.9	10
Denmark	2.1	0.9	3.0	11
Sweden	2.0	0.4	2.4	12
Finland	0.0	0.3	0.3	13

The next set of tables in the study combined the results for different professions. The first was labeled "Summary Market Entry Regulations/Color Coding."⁴⁷⁹

Accountancy Services Country	Legal Services Country	Notary Services Country	Architectural Services Country	Engineering Services Country	Pharmacies Country
Austria	Austria	Austria	Austria	Austria	Austria
Belgium	Belgium	Belgium	Belgium	Belgium	Belgium
Denmark	Denmark		Denmark	Denmark	Denmark
Finland	Finland		Finland	Finland	Finland
France	France	France	France	France	France
Germany	Germany	Germany	Germany	Germany	Germany
Italy	Italy	Italy	Italy	Italy	Italy
Netherlands	Netherlands	Netherlands	Netherlands	Netherlands	Netherlands
Portugal	Portugal	Portugal	Portugal		Portugal
Spain	Spain	Spain	Spain	Spain	Spain
Sweden	Sweden		Sweden	Sweden	Sweden
United Kingdom	United Kingdom		United Kingdom	United Kingdom	United Kingdom
Greece	Greece	Greece	Greece	Greece	Greece
Luxembourg	Luxembourg	Luxembourg	Luxembourg	Luxembourg	Luxembourg
Ireland	Ireland		Ireland	Ireland	Ireland

⁴⁷⁸ *Id.* at 50.

⁴⁷⁹ *Id.* at 82.

This section also included a table showing the “Overview: Total IHS regulation indices for different professions:”⁴⁸⁰

	Accountants	Lawyers	Notaries	Architects	Engineers	Pharmacists
Austria	6.2	7.3	9.6	5.1	5.0	7.3
Belgium	6.3	4.5	9.3	3.9	1.2	5.4
Denmark	2.2	3.0		0.0	0.0	5.9
Finland	3.5	0.3		1.4	1.3	7.0
France	5.8	6.6	10.0	3.1	0.0	7.3
Germany	6.1	6.5	11.0	4.5	7.4	5.7
Greece	5.1	9.5	n.a.	n.a.	n.a.	8.9
Ireland	3.0	2.5		0.0	0.0	2.7
Italy	5.1	6.4	10.7	6.2	6.4	8.4
Luxembourg	5.0	6.6	n.a.	5.3	5.3	7.9
Netherlands	4.5	1.5	6.3	0.0	1.5	3.0
Portugal	n.a.	5.7	n.a.	2.8	n.a.	8.0
Spain	3.4	6.5	9.4	4.0	3.2	7.5
Sweden	5.3	2.4		0.0	0.0	12.0
UK	5.0	4.0		0.0	0.0	4.1

The tables and charts that followed were included in a “benchmarking section” and included information about the volume of legal services in different countries:⁴⁸¹

⁴⁸⁰ *Id.* at 83.

⁴⁸¹ IHS REPORT, PART 1, *supra* note 119, at 95–98.

Table 5-1 Overview—Legal Services 2000:⁴⁸²

Legal Services (27/411)	AUT	LUX	FRA ²	GER	ESP ¹	ITA	BEL	IRL ¹	UK	NLD ¹	DNK	SWE	FIN
Key Variables:													
F in units	2 782	494	30 340	31 195	79 565	87 608	27 196	1 525	24 416	2 675	1 658	4 344	1 557
T in Mio EUR	1 234	130	13 352	11 863	5 041	11 273	14 744	871	25 082	2 565	876	1 388	384
E in units	16 456	1 395	148 018	200 461	127 812	148 663	85 787	11 053	272 000	38 700	14 507	15 881	3 334
Professionals in units ³	4 592	830	39 940	105 724	165 266	139 560	14 886	7 476	111 772	13 222	4 359	8 480	2 120
Population in Mio	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)	(2001)
GDP in Bil. EUR	810	0 44	58 23	82 16	39 39	57 66	10 24	3 73	56 82	15 78	5 33	8 86	5 17
Key Indicators:													
T per Firm in 1000 EUR	442	263	1 405	2 026	585	1 168	248	89	1 548	374	178	247	132
E per 1000 firms	5 894	2 824	4 813	6 426	1 808	1 697	3 154	637	13 325	1 853	528	319	247
T per E in 1000 EUR	78	193	2 455	2 440	3 244	2 577	3 376	88	5 43	2 359	80	87	715
F per Mio. of Pop	2 03	3 233	2 465	2 440	3 244	2 577	3 376	2 663	4 382	2 359	2 722	1 792	645
E per Mio. of Pop	345	1 133	512	380	1 030	1 518	2 655	408	410	170	311	480	301
Prof per 1000 F	1 895	1 680	1 316	3 335	1 323	1 562	547	4 925	4 925	4 925	1 852	1 852	1 382
T per 1000 Prof	5 529	1 57	334	112	1 46	81	360	130	224	194	201	184	181
E per 1000 Prof	3 584	1 831	1 656	1 948	1 214	1 088	5 752	1 450	2 434	2 776	3 53	1 873	1 573
Prof Density (E in Mio. Pop)	507	1 524	874	1 287	2 633	2 318	1 454	2 763	4 37	1 63	818	157	410
T per cap. EUR	152	5 3	225	144	128	195	1 349	5 4	1 183	163	184	857	74
T in % of GDP	0 80	0 62	8 33	0 59	0 98	1 37	5 4	7 2	1 183	0 86	0 50	0 56	0 28
Vol in PO-adjusted Mio. EUR*	1 101	61	12 847	10 849	7 472	12 577	13 715	868	21 584	2 309	597	1 125	340
Vol per cap. in EUR*	136	136	219	132	160	216	273	337	337	147	112	127	86
Vol per firm in 1000 EUR*	384	123	427	348	84	144	354	56	524	553	360	256	219
Vol per E in 1000 EUR*	87	43	58	54	56	55	95	73	73	63	41	71	123
Vol per Prof in 1000 EUR*	530	73	3 4	103	71	90	97	116	193	175	137	133	181
Entry Index	4 1	3 8	3 9	3 7	3 4	2 6	2 5	2 4	3 3	2 1	2 1	2 0	0 6
Conduct Index	3 3	2 8	2 7	2 8	3 1	3 9	2 1	2 1	1 2	1 8	0 9	0 4	0 3
REGULATION INDEX	7 3	6 6	6 6	6 5	6 5	6 4	4 5	4 5	4 5	3 9	3 0	2 4	0 3
*adjusted for relative prices and national output - NB: not shown as high, medium or low (absolute, not relative values)													

Summary statistics	Median	Mean	Standard deviation	Coeff. of variation	Key Indicators:
F in units	4 344	22 720	29 673	131%	T per Firm in 1000 EUR
T in Mio EUR	2 565	6 837	7 752	113%	E per 1000 firms
E in units	38 700	60 083	69 396	109%	T per E in 1000 EUR
Professionals in units	13 222	42 639	51 873	121%	F per Mio. of Pop
Population in Mio	10 2	27 4	28 2	100%	Prof per 1000 F
GDP in Bil. EUR	248	631	687	108%	T per 1000 Prof
					E per 1000 Prof
					Prof Density (E in Mio. Pop)
					T in % of GDP
					Vol in PO-adjusted Mio. EUR*
					Vol per cap. in EUR*
					Vol per firm in 1000 EUR*
					Vol per E in 1000 EUR*
					Vol per Prof in 1000 EUR*

Regulation Index:	Entry Index	Conduct Index	REG. INDEX
2 6	2 1	2 1	4 5
2 6	2 1	2 1	4 5
2 6	2 1	2 1	4 5
2 6	2 1	2 1	4 5

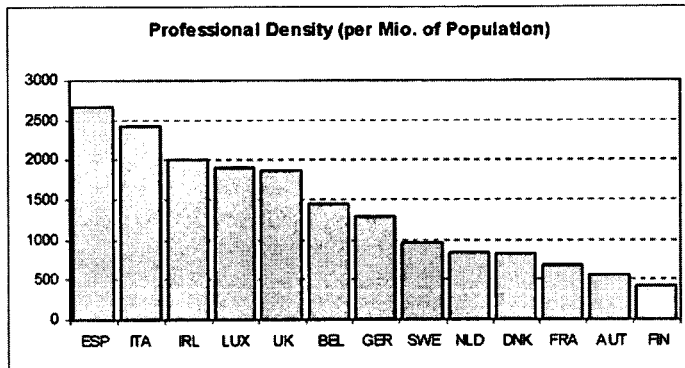
Sources: European I-LIS, national statistics

Colour code:
 not relative to median
 relative to median
 not relative to median

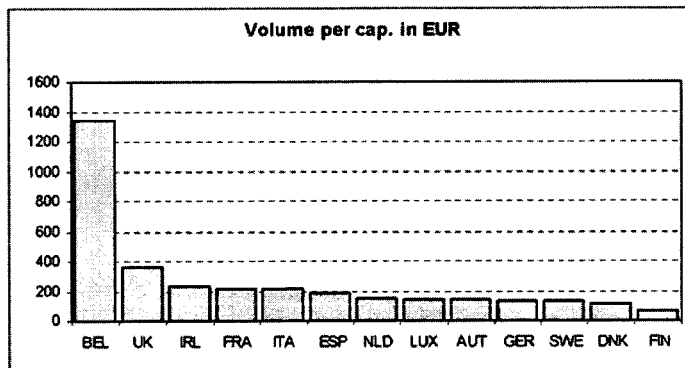
1 199
2 199
3 199
4 199
5 199
6 199
7 199
8 199
9 199
10 199
11 199
12 199

⁴⁸² *Id.* at 97.

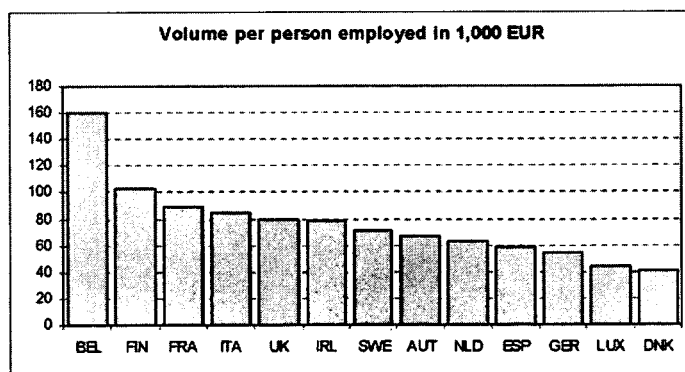
Chart 5-1 Distribution of Key Ratios in EU Member States—Legal Services (including charts on Professional Density (per Mio. of Population); Volume per cap. in EUR; Volume per person employed in 1,000 EUR):⁴⁸³



Sources: EUROSTAT, national statistics, IHS



Sources: EUROSTAT, national statistics, IHS



Sources: EUROSTAT, national statistics, IHS

⁴⁸³ *Id.* at 98.

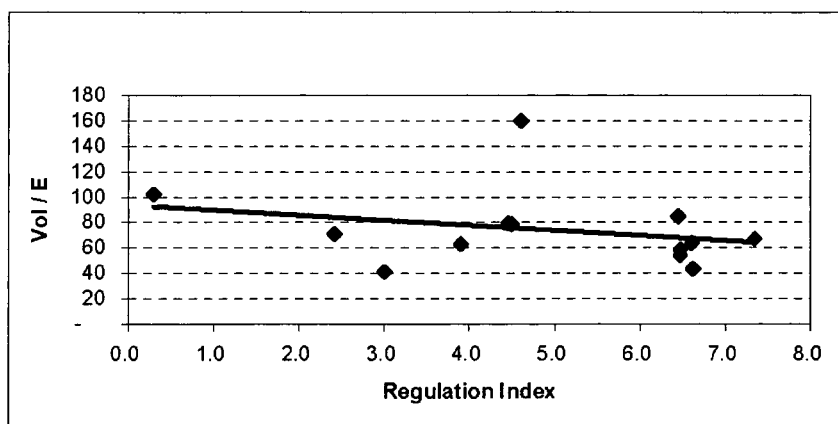
The next section of the study was entitled “Hypotheses derived from the analysis.”⁴⁸⁴ The IHS Study concluded that for legal, accounting, and technical services, there was “a negative correlation between regulation and volume per employed person.”⁴⁸⁵ This section included the following tables and charts in support:⁴⁸⁶

Table 5-5 Output measures and degree of regulation (including legal):⁴⁸⁷

Correlations:	Professional Services			Legal + Accountancy + Technical grouped
	Legal	Accountancy	Technical	
Vol per Firm vs. Regulation Index	-0.14	0.09	-0.49	
Vol per Employment vs. Regulation Index	-0.21	-0.28	-0.37	-0.36

Source: IHS

Chart 5-5 Productivity vs. Regulation Index—Legal Services:⁴⁸⁸



Source: IHS

⁴⁸⁴ *Id.* at 111.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 111–17.

⁴⁸⁷ IHS REPORT, PART 1, *supra* note 119, at 111.

⁴⁸⁸ *Id.* at 112.

It also included Table 5-6 Productivity and Volume per capita growth in Spain:⁴⁸⁹

	1992	1993	1994	1995	1996	1997	1998	1999	2000	growth(p.a. compound)	Range*
Legal services											
F in units					71 802			79 565		3,5	1996-99
T in Mio EUR					3 998			5 041		8,0	1996-99
E in units					119 832			127 812		2,2	1996-99
Vol per cap. in EUR*					154			190		7,2	1996-99
Vol per E in 1000 EUR*					50			58		5,0	1996-99
Accountancy											
F in units								37 084			
T in Mio EUR		2 522						5 041		12,2	1993-99
E in units		79 408						128 490		8,4	1993-99
Vol per cap. in EUR*		96						190		12,0	1993-99
Vol per E in 1000 EUR*		47						58		3,6	1993-99
Technical services											
F in units	57 634		61 020			70 841		77 378	79 679	4,1	1992-2000
T in Mio EUR	6 644					7 824		10 457	11 911	7,6	1992-2000
E in units	124 491					151 195		170 232	184 682	5,1	1992-2000
Vol per cap. in EUR*	231					307		393	441	8,4	1992-2000
Vol per E in 1000 EUR*	72					80		91	94	3,4	1992-2000

relevant start and end years for which compound growth applies

Sources: EUROSTAT, Instituto Nacional de Estadística, IHS

The section entitled "Findings Revisited Using GAP-Analysis"⁴⁹⁰ included:

Table 5-9 GAP Analysis Table (including legal services):⁴⁹¹

Legal Serv. (K7411)	Aut 2000	Lux 2000	Fr 2000 ²	Sp 1990	Ger 2000	It 2000	Bel 2000	Nt 1999	UK 2000	Ni 1999	Ck 2000	Sw 2000	Fin 2000	Median	corr. with reg. ind. ¹
F in units	9.31	12.12	9.05	25.51	13.12	15.39	42.23	17.92	8.05	2.99	5.40	4.13	5.02	9.68	0.58 *
T in Mio EUR	7.45	7.02	7.19	10.00	6.91	12.37	44.20	10.69	9.63	4.63	5.63	4.29	4.46	7.18	
E in units	0.11	8.08	7.54	9.70	0.33	10.23	25.03	14.19	0.97	3.56	7.14	4.61	2.59	0.11	
T per F in 1000 EURO	79.95	57.62	72.77	37.71	52.68	80.89	106.17	92.73	122.04	156.68	100.02	103.87	70.00	70.00	-0.47 *
E per 1000 Euro	07.00	49.97	70.43	26.83	83.09	67.29	54.43	70.90	111.51	110.04	153.29	111.59	40.01	76.43	
T per E in 1000 EURO	91.01	115.03	95.21	102.24	92.43	120.37	194.83	117.60	110.10	131.17	81.59	93.08	173.11	110.16	
E per Mio. of Pop.	0.11	6.58	7.54	6.70	0.28	10.20	25.00	14.19	0.97	3.56	7.14	4.61	2.59	8.11	
T per Mio. of Pop.	9.31	12.12	9.08	25.51	13.12	15.29	42.29	17.93	8.05	2.99	5.40	4.13	5.02	9.68	
T per cap. in EURO	7.45	7.02	7.19	10.00	6.91	12.37	44.90	10.69	9.63	4.69	5.63	4.29	4.40	7.18	
T in % of GDP	7.45	7.02	7.19	10.00	6.91	12.37	44.90	10.69	9.63	4.69	5.63	4.29	4.40	7.18	
Vol in Proportionality EUR*	7.45	7.02	7.19	10.00	6.91	12.37	44.90	10.69	9.63	4.69	5.63	4.29	4.40	7.18	
Vol per cap. in EUR*	7.45	7.02	7.19	10.00	6.91	12.37	44.90	10.69	9.63	4.69	5.63	4.29	4.40	7.18	
Vol per firm in 1000 EUR*	70.95	57.62	72.77	37.71	52.68	80.89	106.17	92.73	122.04	156.68	100.02	103.87	70.00	70.00	-0.47 *
Vol per E in 1000 EUR*	01.01	115.03	95.21	102.24	92.43	120.37	194.83	117.60	110.10	131.17	81.59	93.08	173.11	110.16	-0.53 *
Entry Index	4.09	3.82	3.86	3.40	3.70	2.96	7.02	2.40	3.29	2.00	2.00	1.90	0.90	2.66	
Conduct Index	3.28	3.80	3.79	3.08	2.78	3.89	3.09	2.10	1.18	1.83	0.93	0.44	0.30	2.10	
REGULATION INDEX	7.24	8.82	6.61	6.48	6.48	6.48	4.81	4.60	4.48	3.81	3.81	2.42	0.30	4.81	

* correlations for legal services excluding Belgium

² based on extrapolated values (see Part 2)

Source: EUROSTAT, national statistics, IHS

* Correlation is significant at the 0.05 level (1-tailed)

** Correlation is significant at the 0.05 level (2-tailed)

⁴⁸⁹ *Id.* at 114.

⁴⁹⁰ *Id.* at 115.

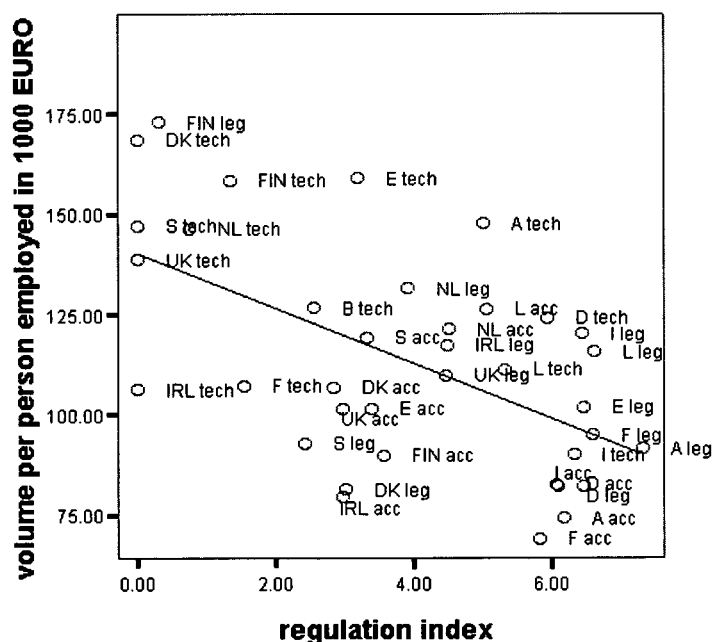
The next section was labeled a check of previous findings.⁴⁹² It included several charts and tables, including a non-labeled chart on correlations:⁴⁹³

When the data for legal, accountancy and technical services are grouped together, the corresponding trend is corroborated (which is not an automatic result of grouping, but instead a confirmation of the effect). A highly significant correlation between productivity and regulation index of -0.5 exists for the totality of all 38 cases (see below), independent of the affiliation to one of the three surveyed branches (and this correlation rises further, to -0.6 if the outlier case of Belgium, legal services, is excluded).

Correlations	regulation index	
volume per person employed (in 1000 euro)	Pearson Correlation	-0.485 **
	Sig. (2-tailed)	0.002
	N	38
volume per person employed (in 1000 euro)	Nonparametric test	
	Spearman's rho	-0.427 **
	Sig. (2-tailed)	0.007
	N	38

** Correlation is significant at the 0.01 level (2-tailed).

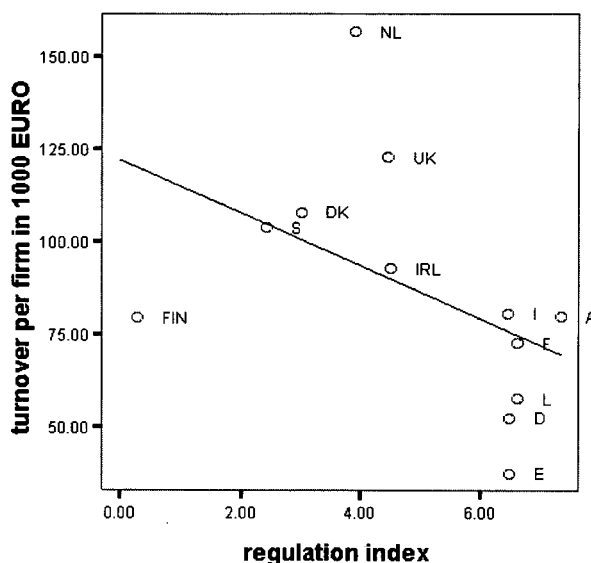
Chart 5-8 Productivity vs. Regulation index (legal+accountancy+technical, excluding Belgium):⁴⁹⁴



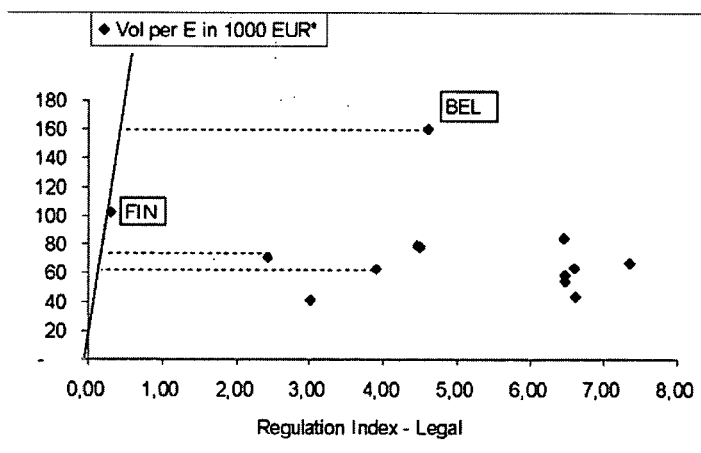
⁴⁹¹ *Id.* at 117.

⁴⁹² *Id.* at 118.

Chart 5-10 Volume per firm in 1000 EUR vs. Regulation index—Legal services:⁴⁹⁵



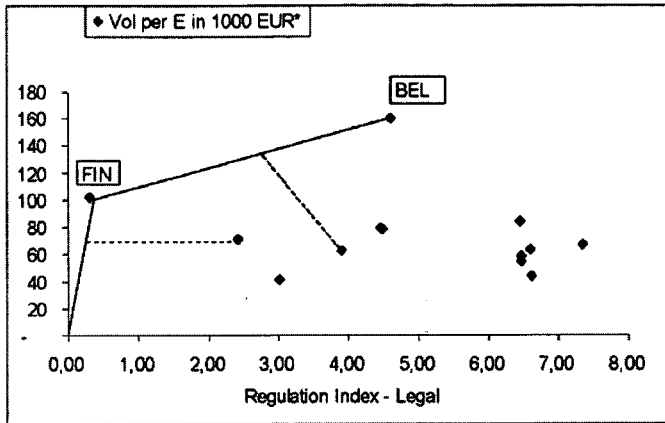
The section of the report entitled “5.5 Excursus: Scope for liberalisation by comparison with peers” included Chart 5-12 Scope for reducing regulation—assuming constant returns-to-scales (legal services, illustrative);⁴⁹⁶



⁴⁹³ IHS REPORT, PART I, *supra* note 119, at 118.

⁴⁹⁴ *Id.* at 118.

and Chart 5-13 Scope for reducing regulation—assuming decreasing returns-to-scales (legal services, illustrative):⁴⁹⁷



APPENDIX 2: EXCERPTS FROM THE 2005 STAFF PROGRESS REPORT

As was noted in the text, the Commission's 2005 Follow-Up Report was accompanied by a Staff Progress Report. This Report included a number of tables that summarized developments that had taken place since the prior report. The legal services portions of these tables are reproduced below:

Staff Progress Report: Legal Profession Excerpt from Annex 1:⁴⁹⁸

Reforms to entry restrictions:
<p>Cyprus: consideration being given to increasing the practical experience requirement to 2 years from the current 1 year.</p> <p>Italy: it is recognised that reform of the general framework for the professions is long over due and proposals are before parliament. These include reviewing access to the professions and business structure regulation.</p> <p>Latvia: requirements have been relaxed with regard to the level of professional experience required and the requirement to take the professional entry examination has been removed for those with PhDs. This is designed to facilitate entry.</p>

⁴⁹⁵ *Id.* at 120.

⁴⁹⁶ *Id.* at 121.

⁴⁹⁷ *Id.* at 122.

⁴⁹⁸ See *Staff Progress Report*, *supra* note 265, at 28. These Annex 1 entries for the legal profession show: reforms to entry restrictions; reforms to reserved tasks; and reforms to business structure.

Staff Progress Report: Legal Profession Excerpt from Annex 1 Continued:

Reforms to entry restrictions (continued):
<p>Lithuania: entry criteria have been relaxed for those with significant professional legal experience (of at least 5 years) so that they do not have to take the professional entry examination. It is designed to facilitate access.</p> <p>Poland: new law under discussion to promote greater access to the legal profession (it creates a new ministry commission to oversee the entry examinations thus providing more transparency and openness, and creates new routes of entry to the legal profession).</p> <p>Spain: reforms planned to increase entry requirements for lawyers by introducing a professional entry examination.</p> <p>UK - Scotland: entry requirements are under review by the Scottish Executive Working Group on Legal Services (this is due to report by Summer 2005).</p>
Reforms to reserved tasks:
<p>Denmark: the governmental committee will also consider current business structure regulation.</p> <p>France: new décret in 2004 relaxed the ownership rules to allow the constitution of legal firms where the capital/shares can be held by other legal firms or natural persons in the legal profession (also see under notaries below). Changes have also been made to the law to allow financial participation by 'sociétés in foreign legal firms.</p> <p>Germany: project underway by the Ministry of Justice on a new law will also consider relaxing the current business structure/ownership restrictions on lawyers (lawyers can currently only co-operate/form partnerships etc. with patent lawyers, tax advisers and accountants).</p> <p>Italy: reform project provides for establishment of professional corporations (currently incorporation is forbidden).</p> <p>NL: the planned government commission to review the Law on Lawyers will also consider regulatory structure, including handling complaints and disciplinary issues, and permissible business structures.</p> <p>UK-England and Wales: Clementi review has made proposals to relax current restrictions on business structure.</p> <p>UK-Scotland: business structure restrictions under review by the Scottish Executive Working Group on Legal Services.</p>

Staff Progress Report: Legal Profession Excerpt from Annex 1 Continued:

Reforms to business structure
<p>Denmark: the governmental committee will also consider current business structure regulation.</p> <p>France: new décret in 2004 relaxed the ownership rules to allow the constitution of legal firms where the capital/shares can be held by other legal firms or natural persons in the legal profession (also see under notaries below). Changes have also been made to the law to allow financial participation by 'sociétés in foreign legal firms.</p> <p>Germany: project underway by the Ministry of Justice on a new law will also consider relaxing the current business structure/ownership restrictions on lawyers (lawyers can currently only co-operate/form partnerships etc. with patent lawyers, tax advisers and accountants).</p> <p>Italy: reform project provides for establishment of professional corporations (currently incorporation is forbidden).</p> <p>NL: the planned government commission to review the Law on Lawyers will also consider regulatory structure, including handling complaints and disciplinary issues, and permissible business structures.</p> <p>UK-England and Wales: Clementi review has made proposals to relax current restrictions on business structure.</p> <p>UK-Scotland: business structure restrictions under review by the Scottish Executive Working Group on Legal Services.</p>

Staff Progress Report: Legal Profession Excerpts from Annex 2:⁴⁹⁹

Fixed prices as [of] February 2004	Minimum prices as [of] February 2004	Maximum prices as [of] February 2004
<p>Czech Republic</p> <p>Estonia (for legal aid cases only)</p> <p>France (for technical and procedural aspects of court work only)</p> <p>Ireland (for legal aid cases only)</p> <p>Luxembourg (for legal aid cases only)</p> <p>Poland (for court work only)</p> <p>Slovenia</p> <p>Spain (for the profession of 'procuradores' only)</p>	<p>Cyprus</p> <p>Germany</p> <p>Greece</p> <p>Italy.</p>	<p>Italy</p>

⁴⁹⁹ *Id.* at 31. These Annex 2 entries for the legal profession show: fixed prices as of February 2004; minimum prices as of February 2004; maximum prices as of February 2004; and reforms made or planned since February 2004.

Staff Progress Report: Legal Professions Excerpt from Annex 2 Continued:

Reforms made or planned since February 2004
<p>France: work underway to legally reinforce the requirement on lawyers to inform clients fully as to how services will be priced.</p> <p>Germany: tariffs out of court work to be removed from 1/7/06.</p> <p>Italy: on 8/4/04 revised tariffs were adopted.</p>

Staff Progress Report: Legal Profession Excerpt from Annex 3:⁵⁰⁰

Recommended prices as [of] February 2004
<p>Austria</p> <p>Denmark (for legal aid cases only)</p> <p>Greece (for legal consultancy services only)</p> <p>Latvia</p> <p>Lithuania</p> <p>Luxembourg (list of criteria that must be taken into account to calculate price)</p> <p>Portugal (list of criteria that must be taken into account to calculate price)</p> <p>Slovakia (for use when agreement cannot be reached independently on price)</p> <p>Spain</p> <p>UK-Scotland (for general business by solicitors)</p>
Reforms made or planned since February 2004
<p>Lithuania: recommended prices were abolished from 6/4/04 via an amendment to the Law on the Bar.</p> <p>Luxembourg: plans to link fees to results of work.</p> <p>Slovakia: revised recommended tariffs were introduced in 2005 by the Ministry of Justice.</p> <p>U.K-Scotland: under review by the Scottish Executive Working Party on the Legal Services Market in Scotland. As a result of the review, the Law Society of Scotland has agreed to withdraw price recommendations and to consult the NCA on a proposed alternative.</p>

⁵⁰⁰ *Id.* at 33–34. These Annex 3 entries for the legal profession show: prices as of February 2004 and reforms made or planned since February 2004.

Staff Progress Report: Legal Profession Excerpt from Annex 4:⁵⁰¹

Effective prohibition on advertising as [of] February 2004	Some advertising restrictions as [of] February 2004
Estonia Greece Hungary Iceland (for barristers only) Lithuania Poland Portugal	Austria Belgium Cyprus Czech Republic Denmark France Germany Iceland (for solicitors)
Reforms made or planned since February 2004	
<p>Denmark: work is underway on legislation to remove the advertising restrictions.</p> <p>Estonia: consideration being given to amending the law to permit price lists to be published.</p> <p>France: project ‘décret’ underway to reform the ethical code so that lawyers will not have to get ex-ante authorization from the professional body for the way they propose to advertise. The décret’ will also allow lawyers to publicise (provide information) on their services to prospective clients via for example a mail shot, but cold calling or canvassing will still not be allowed.</p>	

⁵⁰¹ *Id.* at 35–36. These Annex 4 entries for the legal profession include effective prohibition on advertising as of February 2004; selected advertising restrictions as of February 2004; and reforms made or planned since February 2004.

