

OVERVIEW OF NATIONAL COMPETITION AUTHORITIES' ADVOCACY AND ENFORCEMENT ACTIVITIES IN THE AREA OF PROFESSIONAL SERVICES (February 2004 - Spring 2006)

1. Introduction

1. National Competition Authorities (NCAs) and DG Competition of the European Commission are partners in promoting pro-competitive reform of professional services regulation and have been co-operating closely to bring about wide scale reform of this area in the EU. NCAs' work to promote reform at national level is of the utmost importance given that the professions are mainly regulated at national level. Hence change must be promoted first and foremost at national level. Reform of professional services is of paramount importance for consumers and part of the reinvigorated Lisbon agenda, which features improving regulation to promote competitive markets as a key strand of work.
2. This overview presents how NCAs are promoting the reform of professional services at national level. It is based on NCAs' responses to a questionnaire circulated in March 2006 and has been prepared by DG Competition together with the NCAs who fully endorse its content. The overview covers the period between February 2004 and spring 2006. It sets out the strategies, working methods and instruments NCAs are using in terms of competition advocacy and gives an overview of case enforcement activity. It tries to highlight best practice and draw conclusions about what has been useful based on NCAs' experience. It also provides an update on regulatory reforms made by Member States since the publication of the Commission's 2005 Progress Report on Professional Services (COM(2005)405 final) to complete the picture¹.

2. General strategy

3. In the vast majority of cases there appears to be no overarching governmental strategy or direct government support for reform of professional services and for NCAs' work in this area. There are however some notable exceptions to this lack of governmental support. For example, in one country the NCA's work in the area of professional services is part of a wider government strategy to promote economic growth, which features increasing competition across a range of underperforming sectors as a key deliverable. In another, the government has issued a decree which mandates the NCA to analyse restrictions in the area and report on changes needed. Some NCAs also report the inclusion of professional services reform in Lisbon National Reform Programmes of their country thus giving the process greater political backing and strategic direction.
4. NCAs opt for differing methodologies in the professions they chose to target. Some concentrate their efforts on one or two professions (e.g. pharmacists and notaries) while others opt for a broader approach encompassing many professions. NCAs also differ in whether they concentrate their efforts on advocating reform of restrictions in

¹ This overview is not meant to give official recommendations by the European Commission services on advocacy and case enforcement activities of competition authorities.

Stale regulation (e.g. the law) or self-regulation (e.g. professional codes of conduct). Some opt for tackling both types of restrictions in parallel and this holistic approach to reform has yielded significant success.

5. Organisation of work in this area varies between NCAs. Several have created an organisational entity (e.g. profession's team) with special responsibility for professional services reform and highlight the benefits this is bringing. The amount of staff time dedicated to work in this area is proportionately related to the intensity of activity. A lack of resources generally is singled out as a concern.

3. Advocacy activities

6. Most NCAs agree that the best way of achieving results in the field of professional services is through advocacy. Many different types of advocacy activity are being used and NCAs' experience shows that using a structured approach involving a range of advocacy tools to promote voluntary change, transparent to all stakeholders, works best.
7. NCAs stress the extreme importance of dialogue and all report discussions with national authorities (e.g. ministries) directly responsible for regulating the professions. In most cases there is parallel or multilateral dialogue with the professional bodies concerned, and involving the professions directly from the start has often been vital to achieving a breakthrough. This dialogue takes many forms, including bilateral meetings, conferences, participation in working groups and workshops. It focuses on reviewing the specific restrictions which exist in State regulation or self-regulation (e.g. entry barriers, fixed/recommended prices).
8. NCAs initially use this to get an understanding of the nature and extent of restrictions affecting the professions being considered. It is then built on and structured according to need, often being used to build consensus around what needs to be reformed and how this might be achieved. It is frequently followed up by NCAs issuing a report or series of reports setting out findings and recommendations for change.
9. Some good results are being achieved with this approach and, for example, in one Member State this has resulted both in the professional bodies modifying their self-regulation to make it more competition friendly, and the government and parliament recently adopting an extensive package of measures to remove restrictive regulation and open up the professions to greater competition.
10. In other Member States professional bodies and the national regulatory authorities are less willing to undertake voluntary change. A particular challenge for NCAs is getting professional bodies to take ownership of the reform process and for them then to work in partnership with NCAs to bring about meaningful reform. Showing resolve, maintaining contact with both of these groups of stakeholders and building on the dialogue already initiated is essential. NCAs are also using the threat of enforcement to move things forward and in some cases have chosen to initiate proceedings under competition law against professional associations to force change to self-regulation.

11. An area as yet underdeveloped is the role consumers and consumer bodies could play as advocates and allies for change, NCAs are alert to this and many are planning to open dialogue with them on professional services reform.

4. Forms and instruments of advocacy

12. In NCAs' experience studies, stocktaking exercises and reports are proving to be very useful advocacy tools and a good way of triggering and stimulating both public and private dialogue on reform. General studies covering a range of professions have and continue to be undertaken, as well as profession-specific studies aimed at analysing in detail one (or more) individual professions.
13. Studies play a pivotal role in some NCAs' strategies and a study-based methodology, with a set sequence of steps, has evolved. This generally involves a fact finding stage, followed by the issue of a preliminary report and consultation phase. It culminates in the publication of a final study report setting out a series of recommendations for change. Pressure for change is then maintained by, for example, issuing follow-up statements and organising further meetings on the subject.
14. NCAs' experience shows that studies should however not be limited to fact finding and legal analysis. There is a great need too for economic studies to illustrate the benefits for consumers and society at large of enhanced competition in professional services, along with the further exchange of information and best practice. *Ex-post* evaluation of reforms already undertaken, which show clear benefits, could be extremely useful.
15. NCAs report that gaining public support for change can also be crucial and this means raising public awareness. Publishing studies and organising conferences have proved useful in this respect along with developing contacts with the press and other media. Bringing an international dimension into the advocacy process can add value by promoting what is happening in terms of reform in other Member States, or highlighting the thinking and work of international organisations like the OECD on the subject.
16. Some NCAs report addressing parliament or ministers directly on the subject to rally support for change. Peer pressure (e.g. using the example of other ministries who have made reforms) is being used to encourage other governmental departments to be more proactive.
17. NCAs are also actively involved in monitoring the impact of new draft legislation in the professions on competition (commonly referred to as "competition screening"). This can be via inter-governmental consultation on proposed legislation, as part of a mandatory Regulatory Impact Assessment, or where the NCA participates directly in a governmental working group tasked with drafting the legislation. NCAs' experience shows that the best results have been achieved in the latter case i.e. when they have been directly involved from the very initial stages of the legislative process as part of the working group. Competition screening of existing legislation for restrictions has also been undertaken, primarily as part of more formal studies.

5. Regulatory reforms

18. Regulatory reforms reported largely relate to initiatives already detailed in the European Commission's 2005 Progress Report. This is to be expected given the relatively short time that has elapsed since the 2005 Report's publication. Those reported relate mainly to the relaxation of entry requirements, pricing controls and advertising restrictions. Reforms in the pricing area indicate a clear move away from restrictions on price competition and both changes to State regulation and self-regulation have been made.
19. Two approaches to regulatory reform can be discerned: (i) the incremental approach, involving cautious steps of re-regulation; and (2) the "big-bang" whereby sweeping changes are made all in one go.
20. A number of regulatory reforms are reported in relation to the real estate and health care professions and this comes as a result of NCAs extending their work to professions beyond the six looked at by the Commission in its two reports of 2004 and 2005 on competition in professional services.
21. Currently there is little to report on the success and effectiveness of regulatory reforms already undertaken and this in part relates to the relative infancy of the project, and the fact that many reforms have only recently been put in place.

6. Casework

22. NCAs have dealt with a significant number of cases and this work is successful in supporting advocacy efforts. 22 cases have been opened in this sector under the EC competition rules covering a wide range of professions and restrictions. 12 of these have been closed, 9 are new cases and 1 is reported under the heading of envisaged decision.
23. Twelve of the reported cases relate to restrictions on pricing behaviour contained in professional codes of conduct. These restrictions mainly relate to the use of minimum and maximum fee scales and recommended prices. Pricing practices have been investigated by NCAs under Article 81 EC and the principles laid down in the ECJ's *Wouters* judgement (C-309/99) applied to assess their proportionality.
24. The general conclusion drawn by NCAs has been that price control mechanisms of this sort (both fixed and recommended prices), at the horizontal level made by self-regulating bodies to determine or influence their members' behaviour, violate Article 81 EC and do not fulfil the conditions of Article 81(3) EC. This can be so even for recommended or guide prices as it is settled case law that the fixing of a price, even one which merely constitutes a target or recommendation, affects competition because it enables all participants to predict with a reasonable degree of certainty what the pricing policy of their competitors will be.
25. Three of the cases relate to advertising restrictions contained in codes of conduct of self-regulatory bodies. These included bans on comparative advertising and

advertising on the internet. These were again considered under Article 81 *EC* and the principles outlined in the *Wouters* judgement.

26. NCAs also report a variety of other cases under national competition law. These include price fixing/co-ordination by professional bodies in the health care sector.
27. NCAs have invested a considerable amount of time in examining restrictions in the light of the *Wouters* judgement and applying a proportionality test as elaborated by the ECJ in that judgement.
28. NCAs are also increasingly using the ECJ's *CIF* judgement (C-198/01) to disapply underlying State restrictions (e.g. those contained in State measures or laws) which require or facilitate the anti-competitive conduct of an undertaking or legitimise or reinforce the effects of such conduct. *CIF* could play an important role in an area like the professions where there is often a complex interplay between State regulation and self-regulation.

7. Conclusions

29. NCAs' replies show distinct approaches in how they are going about promoting reform of the professions. This is to be explained in part by the differing circumstances prevailing in Member States and the legal framework in which the professions operate, as well as the level of resources devoted to the project. Some common themes do however emerge.
30. Nearly all NCAs are promoting reform using a combination of law enforcement and advocacy activities. Many see advocacy at least as important as enforcement. *Vis-à-vis* professional bodies and self-regulation, they note that success often depends on the plausible threat of enforcement should advocacy efforts not yield results.
31. No NCA reports plans to scale back advocacy activities and many report giving thought on how to approach advocacy in a more systematic way. This ties in with NCAs' experience that having a well structured and thought through plan of action pays dividends.
32. As prevention is better than cure. NCAs point to the importance of being directly involved as early as possible in discussions on reform to ensure that any new piece of regulation affecting the professions fully respects competition principles.