



EU Competition Developments

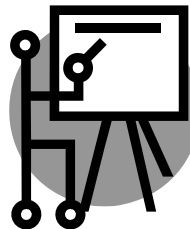


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The Future of the Global Law Firm
Symposium



Introduction

- EU Professional Services Competition Initiative (and *ABS*)
 - Global context
 - EU Overview
 - EU Conclusions
- Stakeholder Responses
- Potential impact on U.S. lawyer regulation





Global Context of the EU Initiative

- Politics are local.... but global trends exist
 - **Australia:** Started in 1994, now 1st publicly traded firms
 - **OECD:** Competition Roundtables and Regulatory Principles
 - **UK:** 2004 Clementi Report & 2007 Legal Services Act
 - **Canada:** 12-07 Self-Regulated Professionals Review
 - **IILACE:** anecdotal reports of competition authority interest
- **My Thesis:** Given global *ABS* developments, U.S. legal profession should be ready to respond

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Overview of EU Developments

- **2003:** DG Competition launches investigation of professional services (6 professions)
 - **2004:** Commission Report
 - Five issues identified, including *ABS*, fixed fees, ad bans
 - Commission relied on lengthy IHS (Vienna) Study
 - **2005:** Commission Follow-up Report called for more changes; accompanied by Staff Progress Report
- Some *ABS* changes, but no other EU Member State (non UK) proposals for publicly-traded firms... yet?

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Regulation Indices in the IHS Study (p.3)

	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

Calculating the Regulation Index

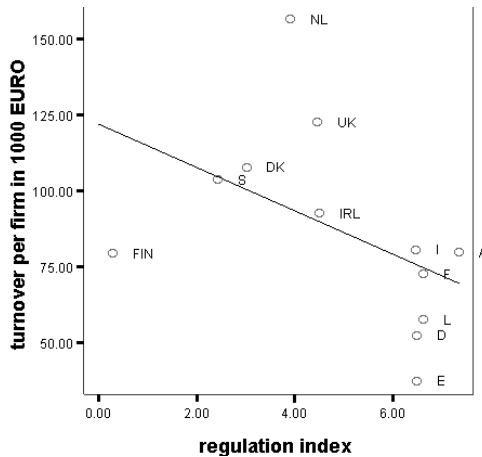
- The “Legal” regulation index was the sum of its market entry index and the conduct index
- 25% of conduct index was based on ABS rules



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%

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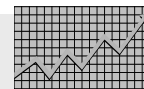
Using the Regulation Index



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

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Some Conclusions



IHS Study Found:

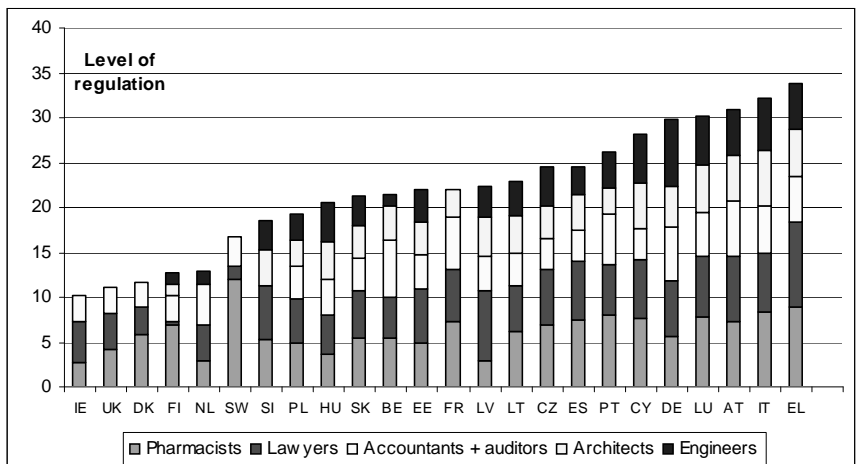
- No sign of “market breakdown” where less regulation
- No reason to question based on regulation levels the high quality and essential values of services in various countries
- In law, accounting and pharmacy, there were regulatory-induced “suboptimal” outcomes for the whole economy (and for consumers in particular). Therefore:

“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.”

- **Commission Report:** relied heavily on the IHS study
- **2005 Follow-up Report:** stated the Commission was “fully committed to bringing about wide scale reform to this sector.”

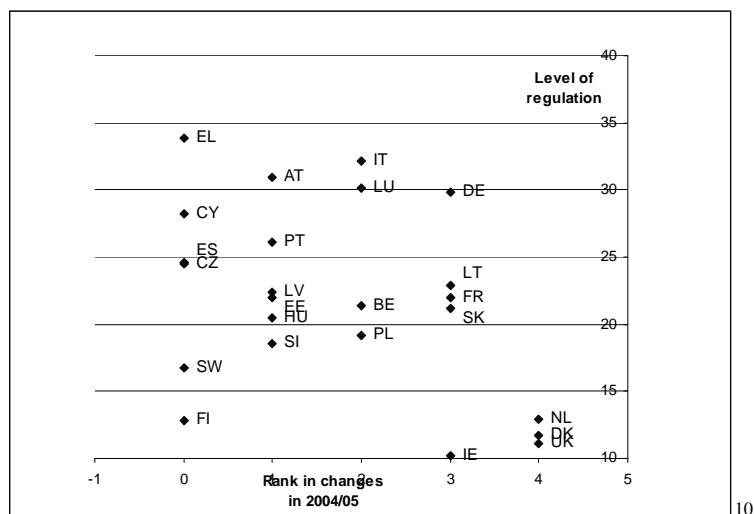
Figure 1 in EU Follow-up Report

(Regulation levels in EU Member States)



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Reform activity against level of existing regulation



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The Report's *ABS* Analysis

- Potential negative impact of *ABS* prohibitions:
 - can inhibit new services of cost-efficient models
 - can inhibit integrated services (e.g. in rural areas)
 - reduces access to capital
- Proponents say *ABS* bans avoid conflicts of interest and ensure personal responsibility
- *ABS* restrictions are least justifiable:
 - if they restrict scope for collaboration among members
 - in professions where no need to protect independence
- Even if justified, there might be alternative mechanisms that are less restrictive of competition

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The 2005 Follow-up Report

- Rules should state objectives and explain why they are the least restrictive means. Proper justifications include:
 - “asymmetry of information”
 - “externalities” including the impact on third parties
 - the ‘public goods’ nature of the service
- Need to better consider what is meant by the public interest in different markets
 - Consumers and one-off users may have a greater need of some carefully targeted regulatory protection.
 - The main users of professional services (businesses & gov’t) may have very limited or no need for regulatory protection.
 - Current regulatory set-up is unsatisfactory because it lacks flexibility and hinders innovative demand-driven services.

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The 2005 Follow-up Report (2)

- Systematic pro-competitive reform would bring about significant economic and consumer benefits.
- 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

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Table 3-8, IHS Study (on ABS)

Country	Profession	Incorp. for-bidden?	Interprof. co-operation forbidden?			
			any	incorp. gen.	with non lib. prof.	incorp. w. non lib. prof.
Austria	Rechtsanwalt (Lawyer)	N	Y	Y	Y	Y
Belgium	Advocaat /Advocate	Y	N	Y	N	Y
Denmark	Advokat (Attorney at Law)	N	Y	Y	Y	Y
Finland	Advocate	N	N	N	N	N
France	Avocat	N	N	Y	N	Y
Germany	Rechtsanwalt (Attorney at law)	N	N	N	Y	Y
Greece	Dikigoros (Advocate)	Y	Y	Y	Y	Y
Italy	Accocato (Lawyer)	Y	Y?	N?	Y	Y
Ireland	Barrister	Y	Y	Y	Y	Y
	Solicitor	Y	Y	Y	Y	Y
Luxembourg	Avocat (Advocate)	N	Y	Y	Y	Y
Netherlands	Advocaat (Attorney at Law)	N	N	N	Y	Y
Portugal	Advogado	Y	N?	Y	Y	Y
Spain	Abogado	Y	N	Y?	Y?	Y?
	Precurador	Y	N	Y?	Y?	Y?
Sweden	Advokat (Advocate/avocat)	N	N	Y	N	Y
United Kingdom (Engl.+Wales)	Solicitor	N	N?	Y	N	Y
	Barrister	Y	Y	Y	Y	Y

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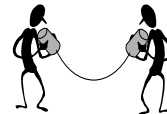
Staff Progress Report on *ABS*

- Incorporation is widely forbidden. Where used, it is common to have a 50% rule for capital or voting
- Cites ongoing studies and reforms. Also states:
 - This is an area where many Member States shy away from reform given concerns about safeguarding the independence of the professions. But this should not mean that reform cannot and should not be made, rather that it may need to be addressed in a more holistic way. As noted above, there are already examples of such a holistic approach from Ireland and the UK, and experience shows that significant consumer benefits can flow from relaxing business structure restrictions. In the US, for example, relaxing controls has seen the emergence of legal ‘clinics’ making access to legal advice available to consumers who would otherwise have considered lawyers too expensive. The Commission Services call on Member States to pursue reform in this area imaginatively and proactively. ¹⁵

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Stakeholder Reactions

- The CCBE is a major stakeholder
- CCBE Responses include:
 - Comment on the IHS Study methodology
 - Comments on the Commission’s legal analysis
 - Comments offering rule justifications
 - Economic Submission Paper
 - Citation to other analyses
- Commission and other conferences
- Dueling EU Parliament resolutions





U.S. Implications

- Many think *ABS* can't or won't happen here
- MDP debates are cited as examples
- BUT....
 - There are competing market forces and views
 - The OECD and global trends create pressure
- **My advice:** Be prepared to respond
 - With new vocabulary
 - Using the EU/OECD methodology



To Read More About It...



- EU DG Competition, Professional Services Sector, http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html
- Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 Northwestern J. Int'l L. & Business 1 (2008)(forthcoming)
- OECD, Guiding Principles for Regulatory Quality and Performance (2005), www.oecd.org/dataoecd/19/51/37318586.pdf
- OECD, Competition in Professional Services, DAF/CLP(2000)2, <http://www.oecd.org/dataoecd/35/4/1920231.pdf>
- OECD: Competitive Restrictions in Legal Professions, DAF/COMP (2007) 39, <http://www.oecd.org/dataoecd/12/38/40080343.pdf>
- Law Society of England and Wales' Links Page for Legal Services Reform, <http://www.lawsociety.org.uk/newsandevents/news/majorcampaigns/view=newsarticle.law?CAMPAIGNSID=169105>
- [UK] Solicitors' Regulation Authority, ABS Consultation (responses due April 21, 2008), <http://www.sra.org.uk/consultations/429.article>
- Competition Bureau Canada, Self-Regulated Professions - Balancing Competition and Regulation (Dec. 2007), <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>
- New South Wales' Office of Legal Services Commissioner, Incorporated Legal Practices, http://www.lawlink.nsw.gov.au/lawlink/olsc/11_olsc.nsf/pages/OLSC_ilp
- Law Council of Australia, Further Reading, <http://www.lawcouncil.asn.au/natpractice/furtherreading.html>
- Steve Mark & Georgina Cowdroy, Incorporated Legal Practices, 22 Penn State Int'l L. R. 67jg (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=673021