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

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?
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

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Using the Regulation Index

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

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)

Reform activity against level of existing regulation
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

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.
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.
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.

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
• [UK] Solicitors’ Regulation Authority, ABS Consultation (responses due April 21, 2008), http://www.sra.org.uk/consultations/429article