POLICY ROUNDTABLES

Competition in Professional Services

1999

Introduction

The OECD Competition Committee debated competition in professional services in June 1999. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Michael Wise for the OECD, written submissions from Australia, the European Commission, Finland, Germany, Hungary, Ireland, Italy, Japan, Korea, Mexico, New Zealand, the United Kingdom, the United States, as well as an aide-memoire of the discussion.

Overview

Although the details vary from country to country, all OECD countries regulate the activities of certain occupations and professions, either directly or by delegating regulatory powers to professional associations. These regulations typically govern matters such as entry into the profession, the conduct of members of the profession, the granting of exclusive rights to carry out certain activities, and often the organisational structure of professional firms. Regulation of professional services can protect vulnerable consumers, but it can also prevent innovation and other competition. In many countries concerns have been raised that professional regulation has the direct or indirect effect of restricting competition in the market for professional services, raising the price and limiting variety and innovation in professional services. In addition, some studies have found that quality-based restraints on entry may have the effect of lowering quality overall.

The analytical note describes the basic competition policy problems raised by the self regulation of professional service providers and the means for dealing with them, from law enforcement to advocacy. It also describes how changes in international regulation can promote competition by increasing the possibility of trade across borders for professional business services such as accounting, law, and engineering.

Related Topics

OECD Guiding Principles for Regulatory Quality and Performance (2005)
Enhancing Beneficial Competition in the Health Professions (2005)
Competition in the Pharmaceutical Industry (2000)

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COMPETITION IN PROFESSIONAL SERVICES

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FOREWORD

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.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la concurrence dans le secteur des professions libérales, qui s'est tenue en juin 1999 dans le cadre de la réunion du Groupe de travail no. 2 du Comité du droit et de la politique de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

OTHER TITLES

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EXECUTIVE SUMMARY

In the light of the written submissions, the background note and the oral discussion, the following points emerge:

(1) *Although the details vary from country to country, all OECD countries regulate the activities of certain occupations and professions, either directly or by delegating regulatory powers to professional associations. These regulations typically govern matters such as entry into the profession, the conduct of members of the profession, the granting of exclusive rights to carry out certain activities, and (often) the organisational structure of professional firms. In many countries concerns have been raised that professional regulation has the direct or indirect effect of restricting competition in the market for professional services, raising the price and limiting variety and innovation in professional services. In addition, some studies have found that quality-based restraints on entry may have the effect of lowering quality overall.*

Occupational or professional regulation occurs in every OECD country. This regulation can be divided into two categories: structural regulation and behavioural regulation. Examples of structural regulation include entry restrictions and the granting of exclusive rights to perform certain services. Example of behavioural regulation includes rules regarding the level or structure of professional fees or limitations on advertising.

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.

In addition, in many countries, there are restrictions on the corporate form that firms of professionals can adopt. For example, in some countries, a firm of lawyers can only be organised as a partnership and not as a limited-liability company. In many countries, firms of lawyers cannot take on accountants as partners and vice-versa. Such restrictions can be an impediment to efficiency and innovation. BIAC noted its position that allowing multi-disciplinary practices would be a great benefit to business.

(2) *Professional regulation is often addressed to a perceived "market failure" in the market for professional services. In some cases, consumers are unable to assess the quality of services that have been provided to them and, in some cases, are not in a position to determine which services they should purchase. As a result, it is feared that competition in professional services will lead to consumers being offered low quality and inappropriate services.*

In many economic markets mechanisms other than regulation have arisen for addressing such "asymmetric information" problems. Many of these mechanisms also function effectively in

markets for professional services, limiting the undesirable effects of asymmetric information problems.

In markets where the purchase of professional services is mandated (such as the requirement on public companies to obtain an audit of their accounts), additional regulation is necessary to offset the incentive to evade the regulation through the purchase of low-quality services.

When consumers are unable to assess the quality of services there is a danger that competition will drive down the quality of services delivered to consumers. In the absence of regulation, there are a variety of mechanisms for addressing these problems. Common mechanisms found in other kinds of markets include reputation, contractual guarantees of performance quality, performance bonds, or third-party accreditation or quality rating. Civil liability rules may also enable consumers to recover damages for harm that results, providing an incentive for providers to maintain higher quality. Where consumers make purchases repeatedly or where information about quality is easily spread amongst consumers, providers may find it beneficial to invest in a reputation for providing high-quality services.

In many economic markets, including many markets for professional services, these mechanisms adequately address the "market failure" that arises from information asymmetry. Nevertheless, there are markets where these mechanisms may be imperfect, particularly in markets for professional services where competition between members of a profession is weak, where purchases are rare, where assigning responsibility for outcomes is difficult and any negative consequences are irreversible. For example, private medical surgery might fall into this category. In contrast, large, sophisticated consumers that use the same professional services repeatedly, such as large corporations, are in less need of protection.

In some markets, the purchase of professional services is mandated in order to promote other objectives (an example is the obligation on public companies to obtain an audit of their accounts, as a tool for ensuring that managers and "inside" shareholders fulfil their duties towards "outside" and small shareholders). In this case, regulation of the quality of the services purchased is necessary to offset the incentive to evade the mandatory purchase requirement by purchasing low-quality services.

(3) Regulation of professions should be focused on those markets in which undesirable effects remain and should address the market failure using means which restrict competition least. Principles for high-quality regulation of professional services can be summarised as follows:

- *First, exclusive rights should not be granted where other mechanisms exist which more directly address the market failure with less restriction on competition, such as the collection and publication of information on the quality of professionals, assistance to accreditation or quality-rating agencies or the strengthening of civil liability rules.*

- *Second, where there is no alternative to granting a profession an exclusive right to perform a service, the entrance requirements into that profession should not be disproportionate to what is required to perform the service competently. Where the competencies required for different services differ widely new professions should be created with different entrance requirements.*

- *Third, regulation should focus on the need to protect small consumers. Sophisticated commercial purchasers of professional services (including large corporations and large hospitals) are in a position to assess their own needs and to assess the quality of the*

services they purchase and should not necessarily be required to use the services of a licensed professional.

- *Fourth, restrictions on competition between members of a profession should be eliminated. These include agreements to restrict price, to divide markets, to raise entrance requirements or to limit truthful advertising. Recognition of qualifications of professionals from other countries should be promoted. Citizenship and residence requirements should be eliminated.*

- *Fifth, professional associations should not be granted exclusive jurisdiction to make decisions about entrance requirements, mutual recognition, or the boundary of their exclusive rights. At a minimum these decisions should be subject to independent scrutiny, perhaps by an independent regulator. For example, where entrance to a profession is by means of an examination, the professional association should not have exclusive control over the difficulty of the exam and what constitutes a passing standard.*

- *Sixth, competition between professional associations should be encouraged, provided mechanisms are in place to ensure the entrance requirements for entry into the profession do not drop below the standard of competency required to perform the exclusive service. Where two professional associations have similar entrance requirements they should both be allowed to perform the exclusive services of the other.*

As in all other areas of regulation, regulations relating to the professions should be reviewed against principles of good regulation. Such principles require that the regulation be targeted and not restrict competition more than is necessary. Regulation of professional services should target those markets where the information asymmetry problems cannot be solved by other means, such as markets involving small consumers (and not large corporations), markets where any resulting harm is serious and irreversible (such as in the medical profession) and where other approaches, such as disclosure of quality ratings or enhancing civil liability are, in themselves, insufficient. New Zealand noted that the absence of civil liability for medical malpractice in New Zealand raised the importance of professional regulation in ensuring quality in medical services.

Where exclusive rights are essential, the entry requirements to the profession with exclusive rights should be proportionate to the task to be performed. Some countries (such as the UK and Australia) have enhanced competition in the provision of some services by creating new professions with lower entry requirements for the provision of certain services. In addition, although professional associations often need to be involved in decisions about entry conditions or the scope of the exclusive rights, granting exclusive jurisdiction over these decisions to a professional association risks that these decisions will be taken in the interest of the profession. New Zealand noted a proposal that a separate regulatory body be established to oversee the rule-making activity of the New Zealand Law Society.

(4) *Nearly all countries reported progress in the promotion of competition in professional services. Early targets for reform included price-fixing agreements of professional associations and bans that have the effect of prohibiting truthful advertising. Other reforms have removed quantitative limits on entry and disproportionate entrance requirements. In a few countries new professions have been created with lower entrance requirements to perform tasks previously performed by traditional professions. There is also progress on*

international mutual recognition of qualifications and elimination of citizenship and residence requirements as a step towards opening professions to international competition.

Many countries noted success (through advocacy and competition enforcement) in removing some of the most severe restrictions on competition in this sector, including price-fixing agreements, bans on truthful advertising, quantitative restrictions on entry and disproportionate entrance requirements. As one example, Korea notes that the Act on the Dissolution of Cartels will eventually bring an end to price-fixing measures by lawyers.

In addition, there has been a tendency towards widening the exclusive rights to professions with similar entry requirements and establishing entirely new professions to perform services, which require substantially weaker entry requirements. The UK reports that the division between solicitors and barristers in the legal profession has broken down in recent years, widening the rights for solicitors to appear in from of courts. The UK and Australia report the successful establishment of a new profession of "licensed conveyor", providing conveyancing services, with lower entrance requirements than lawyers. Hungary reports success in eliminating a citizenship requirement.

(5) *With a few exceptions the competition law applies to the professions. OECD countries have enforced the competition laws in this sector. In several countries competition authorities have responsibilities to review and approve rules promulgated by professional associations.*

Despite this progress, reform of professional service regulations remains incremental, possibly due to the concentrated opposition of professional associations to further liberalisation.

Nearly every country noted that the competition law applied without exemption to this sector. An exception is the UK where exemptions for 18 categories of professions have been carried through from the previous competition law into the new Competition Act.

Several countries report competition enforcement actions in this sector. Ireland reports a case brought by third party against an exclusive arrangement between a professional association and an educational institution, giving an exclusive right to the educational institution to train future members of the profession. The US describes a case against an association rule about false or misleading advertising, which was interpreted to prevent comparative advertising that was potentially beneficial to consumers. In another case, the US challenged a group of doctors in Mesa County, Colorado who sought to insist on higher charges and refused to deal with hospitals that did not agree to these rates.

As part of their enforcement activities some competition authorities have responsibility to review and approve rules of professional associations prior to implementation, giving the competition authority the opportunity to oppose anti-competitive arrangements. For example, in the UK, the Lord Chancellors Department, which administers the rules of the Law Society, is required to clear proposed rule changes with the Director General of Fair Trading.

Despite significant progress through competitive advocacy and competition law enforcement, changes in this sector remain relatively slow and incremental, in part because the rents professions can earn from anti-competitive arrangements can be large and the interests of professional associations are highly concentrated.

SYNTHÈSE

Les points ci-après ressortent des communications écrites, de la note d'information et des débats du Groupe de travail :

(1) *Avec des variantes suivant les pays, tous les pays de l'OCDE réglementent les activités de certains métiers et professions, soit directement, soit en déléguant des pouvoirs de réglementation aux associations professionnelles. Ces réglementations régissent en général des questions comme l'entrée dans la profession, le comportement des membres de la profession, l'octroi de droits d'exclusivité pour l'exercice de certaines activités et (souvent) la structure organisationnelle des entreprises professionnelles. Dans beaucoup de pays, certains observateurs ont exprimé la crainte que les réglementations professionnelles aient pour effet direct ou indirect de restreindre la concurrence sur le marché des services professionnels, avec pour résultat une majoration des prix et une limitation de la diversité et de l'innovation dans les services professionnels. Par ailleurs, des études ont montré que des restrictions d'accès fondées sur des critères de qualité peuvent avoir pour effet d'abaisser globalement la qualité.*

Dans tous les pays de l'OCDE, certains métiers ou professions font l'objet de réglementations. Ces réglementations se répartissent en deux catégories : les réglementations structurelles et les réglementations comportementales. Les restrictions à l'entrée sur le marché et l'octroi de droits d'exclusivité pour l'exercice de certaines activités font partie des réglementations structurelles. Les règles concernant le niveau ou la structure des honoraires professionnels ou les restrictions à la publicité font partie des réglementations comportementales.

Certains observateurs ont exprimé la crainte que ces réglementations structurelles et comportementales restreignent davantage la concurrence que cela n'est justifié ou nécessaire, majorant les prix et limitant l'innovation dans la fourniture de services professionnels. En outre, lorsqu'une association professionnelle se voit déléguer certains pouvoirs de réglementation, comme le pouvoir d'imposer une discipline à ses membres, on peut craindre qu'elle utilise ces pouvoirs pour restreindre l'entrée sur le marché, fixer les prix et instituer une coopération anticoncurrentielle entre ses membres. Dans certains cas, des études ont montré que le fait de restreindre l'entrée des prestataires le plus qualifiés peut se traduire globalement par une baisse de la qualité des services, les consommateurs renonçant aux services professionnels ou essayant de les assurer eux-mêmes.

En outre, dans beaucoup de pays, des restrictions sont imposées en ce qui concerne la forme que les entreprises professionnelles peuvent prendre. Par exemple, dans certains pays, un cabinet d'avocats ne peut être organisé que sous forme de société de personnes, et non sous forme de société de capitaux. Dans de nombreux pays, les cabinets d'avocats ne peuvent pas s'associer avec des comptables et *vice versa*. Ces restrictions peuvent nuire à l'efficience et à l'innovation. Le BIAC a fait observer qu'à son avis il serait très avantageux d'autoriser la création de cabinets multidisciplinaires.

(2) *La réglementation des professions libérales vise souvent à pallier un « dysfonctionnement » apparent du marché des services professionnels. Dans certains cas, les consommateurs sont dans l'incapacité d'évaluer la qualité des services qui leur sont fournis et, dans d'autres, ils ne sont pas en mesure de déterminer de quels services ils ont besoin. De ce fait, on peut craindre que sous l'effet de la concurrence dans les services professionnels, les consommateurs ne se voient offrir des services de qualité médiocre et inadaptés.*

Sur de nombreux marchés économiques, des mécanismes autres que la réglementation se sont mis en place pour faire face à ces problèmes d'asymétrie de l'information. Nombre de ces mécanismes fonctionnent aussi dans les marchés de services professionnels, limitant les effets indésirables des problèmes d'asymétrie de l'information.

Sur les marchés où le recours à des services professionnels est obligatoire (certaines sociétés étant par exemple obligées de faire certifier leurs comptes par un commissaire aux comptes), une réglementation supplémentaire est nécessaire pour contrebalancer les incitations à se soustraire à la réglementation en ayant recours à des services de qualité médiocre.

Lorsque les consommateurs ne sont pas en mesure d'évaluer la qualité des services, il est à craindre que la concurrence fasse baisser celle-ci. En dehors de la réglementation, un certain nombre de mécanismes permettent de faire face à ce problème. Les mécanismes les plus courants, utilisés dans le contexte d'autres marchés, sont la réputation, les garanties contractuelles de qualité, les garanties de bonne exécution, l'accréditation par un tiers ou le contrôle de qualité. Les règles en matière de responsabilité civile peuvent aussi permettre aux consommateurs d'obtenir des dommages et intérêts au titre du préjudice subi, ce qui incite les prestataires à assurer des services de meilleure qualité. Lorsque les consommateurs ont régulièrement recours à des services ou lorsque des informations concernant la qualité des services peuvent facilement circuler parmi eux, les prestataires auront sans doute intérêt à investir pour faire en sorte que leurs services aient la réputation d'être de très bonne qualité.

Dans beaucoup de marchés économiques, notamment de nombreux marchés de services professionnels, ces mécanismes permettent de pallier de façon adéquate les dysfonctionnements du marché dus à l'asymétrie de l'information. Néanmoins, il y a certains marchés où ces mécanismes peuvent être imparfaits, notamment les marchés de services professionnels où la concurrence entre les membres de la profession concernée est faible, où les achats de services sont rares, où il est difficile de déterminer qui est responsable des résultats et où toute conséquence négative est irréversible. Par exemple, les cabinets médicaux privés peuvent entrer dans cette catégorie. En revanche, les gros consommateurs disposant de moyens importants, comme les grandes entreprises, qui utilisent les mêmes services professionnels de façon régulière ont moins besoin d'être protégés.

Sur certains marchés, le recours à des services professionnels est obligatoire pour diverses raisons (certaines sociétés étant par exemple obligées de faire certifier leurs comptes par un commissaire aux comptes, afin que leurs dirigeants et leurs actionnaires « internes » soient tenus de s'acquitter de leurs responsabilités vis-à-vis des actionnaires « externes » et des petits actionnaires). Dans ce cas, il est nécessaire de réglementer la qualité des services utilisés pour contrebalancer l'incitation à contourner l'obligation en faisant appel à des services de qualité médiocre.

(3) *La réglementation des professions libérales devrait surtout concerner les marchés sur lesquels des effets indésirables subsistent et devrait pallier les dysfonctionnements du marché par les*

moyens qui restreignent le moins la concurrence. Les principes d'une bonne réglementation des services professionnels peuvent se résumer comme suit :

- *Premièrement, des droits d'exclusivité ne doivent pas être accordés lorsqu'il existe d'autres mécanismes qui permettent de pallier plus directement les dysfonctionnements du marché en restreignant moins la concurrence, comme la collecte et la publication d'informations sur la qualité des professionnels, l'aide aux organismes d'homologation ou de contrôle de qualité, ou le renforcement des règles en matière de responsabilité civile.*

- *Deuxièmement, lorsqu'il n'y a pas d'autre choix que d'accorder à une profession un droit d'exclusivité pour la fourniture d'un service, les conditions d'accès à cette profession ne doivent pas être disproportionnées par rapport aux conditions nécessaires pour assurer de façon compétente le service considéré. Lorsque les compétences requises pour différents services sont très variables, de nouvelles professions doivent être créées, avec des conditions d'accès différentes.*

- *Troisièmement, la réglementation doit viser essentiellement à protéger les petits consommateurs. Les utilisateurs commerciaux de services professionnels qui disposent de moyens importants (les grandes entreprises et les grands hôpitaux, par exemple) sont en mesure d'évaluer leurs propres besoins et la qualité des services qu'ils utilisent, et ne doivent pas systématiquement être obligés de recourir aux services d'un professionnel agréé.*

- *Quatrièmement, les restrictions à la concurrence entre membres d'une même profession doivent être éliminées. Il s'agit des accords qui visent à restreindre les prix, à répartir les marchés, à rendre plus rigoureuses les conditions d'entrée ou à limiter la publicité loyale. La reconnaissance des diplômes des professionnels d'autres pays doit être encouragée. Les conditions de nationalité et de résidence doivent être éliminées.*

- *Cinquièmement, les associations professionnelles ne doivent pas exercer seules le pouvoir de décision en matière de conditions d'entrée sur le marché, de reconnaissance mutuelle ou de limitation des droits d'exclusivité. Ces décisions doivent au minimum faire l'objet d'un examen indépendant, éventuellement par une autorité de régulation indépendante. Par exemple, lorsque l'accès à une profession se fait par voie d'examen, l'association professionnelle ne doit pas avoir l'exclusivité de la détermination du degré de difficulté de cet examen et du niveau requis pour le réussir.*

- *Sixièmement, la concurrence entre associations professionnelles doit être encouragée, à condition que des mécanismes permettent de veiller à ce que les conditions d'accès à la profession ne tombent pas en dessous du niveau de compétences requis pour exercer les services faisant l'objet d'un droit exclusif. Lorsque les conditions d'accès à deux associations professionnelles sont similaires, les membres de l'une doivent être autorisés à assurer les services dont l'autre a l'exclusivité.*

Comme dans tous les autres domaines, la réglementation concernant les professions libérales doit être examinée au regard de principes de bonne réglementation. Ces principes exigent que la réglementation soit ciblée et qu'elle ne restreigne pas la concurrence plus que cela est nécessaire. La réglementation des services professionnels doit être ciblée sur les marchés dans lesquels des problèmes d'asymétrie de l'information ne peuvent être résolus par d'autres moyens, par exemple les marchés de petits consommateurs (et non de grandes sociétés), les marchés où les préjudices subis sont graves et irréversibles (cas de la profession médicale) et les marchés où d'autres approches, telles que la divulgation des résultats de contrôles de qualité ou le renforcement des

règles en matière de responsabilité civile, sont en elles-mêmes insuffisantes. La Nouvelle-Zélande note que l'absence de responsabilité civile en cas de faute professionnelle médicale, en Nouvelle-Zélande, accroît l'importance de la réglementation professionnelle comme moyen de garantir la qualité des services médicaux.

Lorsque les droits d'exclusivité sont indispensables, les conditions d'accès à la profession bénéficiant de ces droits d'exclusivité doivent être en rapport avec les tâches à exécuter. Certains pays (comme le Royaume-Uni et l'Australie) ont intensifié la concurrence en créant de nouvelles professions, avec des conditions d'accès moins rigoureuses, pour la fourniture de certains services. Par ailleurs, s'il est souvent indispensable d'associer les associations professionnelles aux décisions concernant les conditions d'accès à une profession ou le champ d'application des droits d'exclusivité, ces décisions risquent d'être systématiquement prises dans l'intérêt de la profession si une association professionnelle exerce seule le pouvoir de décision. La Nouvelle-Zélande fait état d'une proposition tendant à mettre en place une autorité de régulation chargée de contrôler les règles établies par l'ordre des avocats de la Nouvelle-Zélande.

(4) *Presque tous les pays font état de progrès dans la promotion de la concurrence dans les services professionnels. Les premières cibles des réformes étaient la fixation de prix par les associations professionnelles et les interdictions qui avaient pour effet d'empêcher la publicité loyale. D'autres réformes ont permis de supprimer les restrictions quantitatives à l'accès à certaines professions (numerus clausus) et les conditions d'accès excessivement rigoureuses. Dans quelques pays, de nouvelles professions ont été créées, avec des conditions d'accès moins rigoureuses, pour exécuter des tâches précédemment exécutées par les professions traditionnelles. Des progrès ont également été réalisés dans la voie de la reconnaissance mutuelle des diplômes au niveau international et de l'élimination des conditions de nationalité et de résidence, dans la perspective de l'ouverture des professions libérales à la concurrence internationale.*

Beaucoup de pays font état de résultats positifs (grâce à des actions de sensibilisation et à la mise en œuvre des règles de concurrence) dans l'élimination de certaines des restrictions les plus sérieuses à la concurrence dans ce secteur, comme les ententes sur les prix, les interdictions de publicité loyale, les restrictions quantitatives à l'entrée (*numerus clausus*) et les conditions d'entrée excessivement rigoureuses. Par exemple, la Corée note que la loi sur la dissolution des cartels permettra, à terme, d'empêcher la fixation coordonnée des honoraires des avocats.

Par ailleurs, on observe une tendance à étendre les droits exclusifs à des professions se caractérisant par des conditions d'entrée similaires, ainsi qu'à créer des professions entièrement nouvelles pour assurer des services qui exigent des conditions nettement moins rigoureuses. Le Royaume-Uni signale que la distinction entre « solicitors » et « barristers » s'est estompée ces dernières années, par suite d'un élargissement du droit de plaidoirie des solicitors. Le Royaume-Uni et l'Australie ont créé avec succès une nouvelle profession de « licensed conveyor », assurant des services liés aux mutations immobilières, avec des conditions d'accès moins rigoureuses que pour la profession d'avocat. La Hongrie signale qu'elle est parvenue dans un cas à supprimer la condition de nationalité.

(5) *A quelques exceptions près, le droit de la concurrence s'applique aux professions libérales. Les pays de l'OCDE ont appliqué les dispositions du droit de la concurrence dans ce secteur. Dans plusieurs pays, les autorités de la concurrence sont chargées d'examiner et d'approuver les règles établies par les associations professionnelles.*

En dépit de ces progrès, la réforme de la réglementation concernant les services professionnels reste très progressive, en raison sans doute de la forte opposition des associations professionnelles à une libéralisation plus poussée.

Presque tous les pays signalent que le droit de la concurrence s'applique sans exception aux services professionnels. Le Royaume-Uni est le seul pays où des exemptions concernant 18 catégories de professions, qui existaient déjà en vertu la précédente législation, ont été maintenues dans la nouvelle loi sur la concurrence.

Plusieurs pays signalent qu'ils ont pris des mesures en application du droit de la concurrence dans ce secteur. L'Irlande signale des poursuites engagées par un tiers à l'encontre d'un accord d'exclusivité entre une association professionnelle et un établissement d'enseignement, en vertu duquel cet établissement a l'exclusivité de la formation des futurs membres de la profession. Les États-Unis mentionnent des poursuites engagées à propos d'une règle édictée par une association à l'encontre de la publicité mensongère ou trompeuse, qui a été interprétée de manière à interdire la publicité comparative potentiellement avantageuse pour les consommateurs. Dans une autre affaire, les États-Unis ont engagé des poursuites à l'encontre d'un groupe de médecins du comté de Mesa, dans le Colorado, qui essayait de demander des honoraires plus élevés et refusait de traiter avec les hôpitaux qui n'acceptaient pas ces honoraires.

Dans le cadre de leurs activités de mise en œuvre du droit de la concurrence, certaines autorités de la concurrence sont chargées d'examiner et d'approuver les règles établies par les associations professionnelles avant leur mise en application, ce qui leur donne la possibilité de s'opposer aux accords anticoncurrentiels. Au Royaume-Uni, par exemple, le Lord Chancellor's Department, qui administre les règles de l'ordre des avocats, doit obtenir l'approbation du Directeur général de la concurrence avant toute modification de ces règles.

En dépit des progrès importants qui ont été accomplis grâce à des actions de sensibilisation et à la mise en œuvre du droit de la concurrence, les changements dans ce secteur restent relativement lents et progressifs, notamment parce que les rentes de situation que les professions libérales peuvent tirer d'arrangements anticoncurrentiels peuvent être importantes et parce que les intérêts des associations professionnelles sont très concentrés.

BACKGROUND NOTE*

1. Introduction

This chapter examines regulatory issues in professional services. It concentrates on four -- lawyers, accountants, engineers and architects -- of particular interest to business clients. These professions are typically characterised by high standards of education and practical training, ethical behaviour, and personal accountability, and by moral and financial independence. The professions are also highly regulated. The chapter concentrates on two kinds of regulations: those relating to recognition of qualifications to practise and standards of professional competence, and those affecting competitive conditions in the profession, chiefly restrictions on price, entry and advertising.

Regulations may be necessary to ensure quality. They may also have less desirable effects, of eliminating or restricting economic competition and limiting transparency. Awareness is growing that some regulations may be inappropriate and that a better balance should be struck between the interests served by regulation and the need to ensure competition. The need for ethical standards or codes of behaviour, and the desirability of high standards of professional competence to ensure integrity and public confidence, are unquestionable. But the two objectives of promoting competition and maintaining professional standards are not necessarily contradictory.

Principles guiding reform decisions are suggested by noting that the net effects of professionals' regulation may differ for different kinds of customers. Business customers generally have the knowledge to make their own judgements about standards of professional performance and thus do not need the same level of protection as individuals. Businesses need professional services for more complex, custom-designed work, and they increasingly need professional service providers that can handle multi-national issues and problems. By contrast, individual consumers are more likely to need some protection to ensure quality of service because of their relative lack of sophistication. At the same time, professional services to individuals may be more standardised and thus better adapted to such common marketing concepts as price competition and advertising. Business clients can usually demand price and service competition and can protect themselves concerning quality; what business clients increasingly demand is reform that permits freer trade. Individual clients would benefit most from greater price and service competition, but still require some regulatory protections to assure quality. Regulation of professionals does not typically make distinctions that recognise those differences.

Liberalisation of trade in professional services presents an additional challenge for policy makers. A range of regulations affecting global trade in the professions -- such as restrictions on establishment or nationality and local presence requirements -- impair effective market access and competition. Considerable progress has been made, in particular in international fora such as the OECD and the WTO,

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* This document is the Chapter 3 on Regulatory Reform and Professional Business Services extract from the OECD Report on Regulatory Reform - Volume I: Sectoral Studies (1997). It was submitted as a background document for the roundtable discussion.

towards identifying the principal obstacles to cross-border trade and foreign direct investment. The challenge now is to consider innovative approaches to removing these barriers and advance liberalisation through regulatory reform. National and international reforms can play mutually reinforcing roles here.

Most professions are closely regulated. Indeed, often they are self-regulated, through their trade associations. Self-regulation may enjoy the force of law, where governments defer to trade associations or official professional regulatory bodies are composed of nominees from the profession. Historically, the professions themselves have sought regulatory control, claiming legal backing for it on the grounds that it would be in the larger public interest.

Regulation usually controls entry by defining qualifications and limiting practice to those who demonstrate them. But it also often extends to purely commercial matters, by preventing or controlling price competition, advertising, business relationships, and participation of foreign professionals on nationality grounds. These regulatory controls have turned structurally competitive industries into cartels. Regulations to ensure quality are necessary in some settings but deserve close examination. Regulations to prevent price and other ordinary forms of competition harm consumers without improving quality of service; their principal effect is to benefit members of the profession.

2. Principles of professional regulation to protect consumers

A principal justification offered for regulation is concern that market forces would fail to produce acceptable safety or other quality. One cause of market failure can be information asymmetry: the buyer knows much less about the proposed transaction than the seller does (or vice versa). For most goods or services, initial asymmetry is harmless or correctable. A consumer may know enough to make an adequate judgement, either by investigation before buying or through experience with a trial purchase.

But professional services often fall into the category of “credence” goods: even after buying them, a consumer may not be able to judge their quality adequately. The level of technical complexity and judgement may be very great, compared to what a consumer can know. Moreover, the relationship between skill and outcome may be ambiguous. The finest medical care cannot cure every patient; the most skilful lawyers sometimes lose cases despite their best efforts. Conversely, patients may heal themselves without medical intervention, and disputes may settle out or disappear for entirely fortuitous reasons. A consumer may not be able to tell how the overall result corresponded to the quality or degree of care provided. The consumer must trust the professional’s advice and reputation.

In these circumstances, sellers may have an incentive to reduce overall quality. Unable to judge quality differences well, consumers may make their decisions based on the average quality they expect. Knowing this, and knowing that most consumers will not detect below-average quality, sellers may offer substandard service while charging the “average” price. Lower quality service may then proliferate, and the market for high quality service may even fail.[1]

A related information problem is deceptive over-treatment, which may produce the opposite effect, of too much service rather than too little. Where consumers cannot easily correlate differences in quality or quantity of service to the final outcome and especially where third parties ultimately pay the bills, providers may be tempted to oversupply. The professional who diagnoses the problem and recommends and then performs the needed service may offer a diagnosis that calls for more treatment than is really necessary. This problem is often suspected in services such as automobile or appliance repairs, but it also occurs in professional service settings such as medical care. Doctors in Japan at one time prescribed more medication than any others in the world, because selling medicines was a major source of income for doctors there.

Another reason market responses may fail to produce acceptable quality is externality. The risk is that professionals or their clients may not take into account, in their service and payment decisions, the effects of what they do on third parties who are not directly involved. For example, an individual patient may be satisfied by relief of symptoms, but neighbours may want a more thorough cure to prevent contagion. Or creditors and investors who do not pay for an auditor may make decisions that rely heavily on its report. In these illustrations, the patient or the firm being audited may be tempted to settle for lower quality, or less service, than would be socially desirable. To be sure, what appear to be externalities may become at least partially internalised. A firm that borrows money or sells shares will find it in its own interest to pay more for a more competent and objective auditor that investors and creditors would be willing to rely on.

A typical response to these risks of failure is direct or indirect regulation. Licensing rules may bar from the profession those who are not qualified to provide the services. Standards for services may establish criteria for maintaining and evaluating quality and may attempt to prevent abuses of "over-prescription." Disciplinary rules may identify and expel providers whose quality fails to meet the standard or who do not adhere to fiduciary obligations to their clients. These or similar steps may be necessary to assure quality.

Other, market-based methods can also at least help alleviate these problems of market failure. Information asymmetry can be compensated or corrected by alternative types or sources of information, particularly by reputation. If high-quality providers can establish individual reputations for quality, then high-quality service will remain on the market -- but at a correspondingly high price. And establishing a reputation for honest dealing and refusing to over-prescribe could also, in the long run, be in a provider's own best interests. But if a provider's reputation for high quality and honest dealing does not correspond to the facts, then consumers face a potentially serious problem of deception.

And reputation alone, even when accurate would not overcome all externality problems. Litigation or guarantees, two other non-regulatory responses, may also be inadequate to assure quality. An incompetent professional could face the threat of private lawsuit; however, the same characteristics that make it difficult for the consumer to judge quality may make it difficult to establish incompetence. If the result of the professional's error could be a grave harm, this inherently uncertain, backward-looking, case-by-case method may present unacceptable risks. Similarly, a contractual quality guarantee may be inadequate compared to the risk of harm.

Thus some regulation or licensing to ensure quality may be necessary. The benefits of that regulation, in the form of higher quality, need to be weighed against costs. Historically, those costs have included higher prices and reduced output through reduction in competition, which regulation tends to engender by restricting market entry, controlling prices, mandating service levels, preventing truthful advertising, and prohibiting commercial relationships. Of course, where suppression of competition is necessary to assure quality, then the effects would not be inconsistent, for the anti-competitive effect could be a benefit, not a cost.

3. Professional regulation that restricts competition

But suppression of all competition is not necessary to assure quality. Professional services are characteristically specialised and differentiated, but they are sufficiently subject to market forces that competition among professionals would benefit consumers. The nature and extent of that competition would be expected to vary for different kinds of services, of course. The easier it is to compare input or

output quality, the more likely it would be that consumers would benefit from competition about prices and from advertising that called attention, truthfully, to quality and price differences.

Some professional services are more standardised and routine than others. It is for such services, which are often offered at standard fees for completed work, that permitting price competition and truthful advertising has proven most beneficial to consumers. Other tasks are more uncertain and require more judgement. For these, fees may be customised to the task, often by charging in proportion to the time spent. Hourly rates may vary for different quality services, with more experienced practitioners charging more than others. To this extent, then, price competition even appears for more specialised services. And despite overt prohibitions against price and certain other kinds of competition, professionals have often in fact competed with each other to attract clients and customers for specialised work.

Restraints on entry usually set standards based on educational qualifications and experience. That is, the quality-based initial entry requirements are based on inputs, rather than outputs. Whether these conditions actually lead to better service depends on how well they are correlated with output quality. Very high-test score requirements may ensure that only those with the greatest skill at taking tests are admitted. But the ability to succeed at taking a test may not indicate much about the ability to perform the judgements required in professional practice. The high-test threshold may serve more to deter potentially competitive entry.

Restrictions on competitive practices, such as price competition, truthful advertising, use of non-deceptive trade names, and relationships with other kinds of businesses, as well as limitations on foreign participation on grounds of nationality, do not explicitly address the issue of quality. In theory, it has been claimed that removing these restrictions and permitting these practices would lead to some of the market failures described above. But in fact, barring these practices has correlated with higher prices and less innovation, without improving quality.

Comparative empirical studies of these possibilities have been done in some federal countries, such as Australia, Canada, and the United States, where different local regulations impose different degrees of control.[2] Most studies of these variations have found that permitting competitive practices does not impair the quality of service consumers receive. A review of the economic literature by staff members of the US Federal Trade Commission found that, out of eleven comparative studies, six found the quality effect to be neutral or mixed, two found the restraints improved quality, and three found they actually decreased it.[3] The studies examined different kinds of restraints and different professions and occupations: accountants, lawyers, physicians, optometrists, pharmacists, dentists, medical lab technicians, veterinarians, sanitarians, real estate agents, electricians and plumbers. Because of these differences in method, detailed generalisations from the results should not be drawn. But the general conclusion is clear: relaxing constraints on these aspects of competition does not generally reduce quality of service.

Studies about attorney advertising have illustrated these quality and price effects. Muris and McChesney[4] tested the claim that legal firms following a strategy of advertised lower prices will necessarily produce lower-quality services, and found it unsupported. Rather, they concluded that legal "clinics" used advertising to obtain greater volume and hence lower average fixed costs, so they could charge lower prices without reducing quality. Others have documented how restricting attorney advertising affect prices. A study by the staff of the US FTC concluded that fees for a number of routine legal services were higher in cities where the time, place and manner of advertising was restricted.[5] The price of legal services for an uncontested divorce, for example, averaged $33 more in cities with restrictive advertising regulations. That basic conclusion has been confirmed by others.[6] These results are consistent with findings from other professions, that restricting advertising increase price but does not improve quality.[7]

Another reason advanced for regulation is distributional, to assure that all consumers have access to high-quality services. But some of the studies point to a quality-related distributional effect that policy-

makers should consider carefully. Regulation that succeeds in limiting the profession to the highest-quality providers could ensure that some consumers receive high quality service. But if only high-quality, high-price services are available, many consumers, who cannot afford that level of service, might do without. They would thus endure maladies or problems that access to professional services could help alleviate. Or, these consumers might try to do it for themselves and either fail to improve their situation or even injure them doing it incompetently. Confirming this theoretical prediction, some studies find that the overall level of quality received may actually be lower, where quality-based restraints on entry are higher.[8]

Where restraints on commercial dimensions of professional practice have been relaxed, prices are lower and new services appear in response to consumer demands. Ten comparative studies about price effects all showed that stricter regulation against competitive practices led to higher prices for services.[9] This experience argues for extending reforms more broadly, because it shows that the professions' exposure to market discipline can be increased while maintaining quality, performance standards and necessary consumer protections.

4. Regulatory features of professional services

4.1 Regulations governing professional services

The principal justification given for the strong regulation of PBS and other professional services such as health care is to assure standards of competence, performance, ethical behaviour, and personal accountability.

Entry into a profession is often controlled both directly, by regulating the profession's membership, and indirectly, by regulating the kinds of services that professionals perform.

Regulation of the profession determines and applies requirements for certification of necessary educational and experience qualifications. Similar or equivalent regulations may set and enforce requirements for membership in professional associations. Other forms of direct regulation of professional practitioners include definitions of professional titles and measures to protect the use of those titles, post-qualification educational requirements, ethical standards and codes of conduct, technical and performance standards, additional licensing requirements for specialised areas of practice, and requirements for professional indemnity or liability insurance. An important form of direct regulation is constraints on ownership, management and control of professional firms, and especially prohibitions against business relationships with non-professionals.

Regulation of services defines the specific types of work the regulated professionals do, and by whom and under what conditions the work is to be done. These specific definitions distinguish the activities reserved to professionals from the activities done by others. The distinctions are enforced by rules controlling and disciplining the "unauthorised practice" of the profession. Table 1 sets out several characteristic functions of each of the four PBS sectors, and indicates the degree to which national regulations control whether these functions can be performed by others who are not licensed professionals.

Lawyers in nearly all Member countries have a monopoly on representing clients in court. Legal advice to businesspersons and to private citizens may also be reserved to the profession. The distinction between court work and legal advice was reflected, in the Anglo-Saxon countries, in a distinction between barristers, who specialised in advocacy, and solicitors, whose principal function was counselling. In other countries, notably in continental Europe, activities such as the conveyancing of real estate and the administration of deceased persons' estates are reserved to the notaries. Patent law problems may be

reserved to another set of specialists. Some overlap with other professionals is emerging, though, as accountants enter into areas such as tax law, company law and corporate planning.

Accounting services that are often subject to regulation and even exclusivity include statutory auditing, accounting, public sector auditing, audits of contributions in kind, and insolvency practice. Accounting firms often provide other services such as tax and management advice, that are not subject to regulatory exclusivity. Thus, some accountants' work may overlap with work done by others who are not subject to accounting regulation (such as lawyers), or by others who are not regulated at all (such as management consultants).

Engineering and architecture are subject to fewer service-restrictive regulations. Consulting engineers are involved in all stages of a project, and thus their services overlap substantially with those of other professionals. And licensed architects do not always enjoy an exclusive right to perform architectural work, especially in Europe. It may be that control of professional standards in these more technical professions tends to take place through object-related regulations, norms and standards, including the technical requirements of building codes.

To ensure standards of competence, performance, technical behaviour and accountability, regulations impose education and experience requirements. The educational requirements usually include several years of university or equivalent. The experience requirements may include accomplishment of a practical apprenticeship. And admission to the profession may have to be sanctioned by a professional examination (see Table 2). In a number of OECD countries, a licence to practise will be granted to those individuals who have successfully passed all requirements; in others, admission to the profession is conditioned on certified membership in a professional body. Professions may be divided into specialities, each bearing its own entry requirement and title.

Professionals may be permitted, or even obliged, to use their titles in dealing with the public. Where qualifications are evidenced by certification and uncertified persons are permitted to practice, those persons normally may not use the professional title. For instance, in Finland and Sweden, where anyone may represent another person before the authorities, only persons holding a degree in law and being member of the national bar association may use the title "Avokat."

Most professions have a code of professional ethics. Codes of ethics typically include obligations of loyalty, professional competence, trustworthiness, and confidentiality. And they usually prohibit conflicts of interest, to ensure both that the client's interests are paramount and that properly charged fees are the sole financial remuneration. Personal liability, and minimum insurance cover for errors and omissions, are often mandated, as a necessary condition for having and keeping a licence. When hiring a professional, one is hiring the promise to adhere to certain standards of behaviour, backed up by the profession's disciplinary apparatus. The same services from someone else who did not offer those two features would be different enough that they would probably be priced differently or subject to different standards of, for example, disclosure, in order to protect consumers. In addition to these basically fiduciary standards, however, rules to control business structure, prevent competition, and regulate advertising and marketing are often treated as matters of professional ethics. It is these rules, more than those concerning competence and fiduciary responsibility that are increasingly the subject of reform efforts.

4.2 Professional associations

Professionals are usually organised into associations, which often enjoy official recognition and benefit from a close relationship with the government. These associations frequently intervene in the maintenance and implementation of rules and in the elaboration of new regulations to be endorsed by public regulatory authorities. Pure self-regulation, which was historically important, has declined. But

something like self-regulation may often reappear when regulatory authority is delegated to these associations, either *de facto* or *de jure*.

What particular associations do varies depending on the their status and authority. Often, professional associations enforce codes of conduct. Associations' disciplinary procedures may deal with complaints from clients or other professionals about substandard performance, improper behaviour, or actual damage, loss or injury. Disciplinary panels might impose fines or even strike off practitioners from official registers, as well as employ generally available legal remedies.

For lawyers, membership in Law Societies or Bars is compulsory in most OECD countries (see Table 3). In Europe and in Japan, these associations govern professional conduct and impose disciplinary sanctions. In the US, where lawyers are regulated by the highest court in each state, the state Bar Associations play an important advisory role in the process of accreditation and regulation as well as in the development and application of detailed codes of professional conduct and responsibility.

For accountants, membership in professional bodies is most often required. Governmental or public law professional accountancy bodies with mandatory membership commonly confine themselves to matters of examinations, authorisations, discipline and quality control. Voluntary private sector bodies may assume responsibility for education and training, development of professional technical and performance standards, membership services, and representation of the profession. In the few countries where regulatory responsibility rests with private-sector bodies, they undertake the entire range of activities indicated.

For consulting engineers and architects, membership in professional associations is frequently voluntary. National associations have usually issued codes of conduct containing common criteria such as independence, impartiality and ownership limitations. In the case of architecture, recommended standards on such issues have also been adopted by the International Union of Architects.

Other supra-national regional organisations have appeared.[10] Differences in history, jurisprudence, government involvement, demarcation of activities, and other important factors are, however, so important that it is not straightforward for member organisations, which are the national professional associations, to agree. Representativeness, concerns, and priorities for action may vary widely. Inter-professional rivalry may intensify over jointly contested activities. Nevertheless, as will be shown later in the text, they may play a major role, particularly in the development of worldwide standards.

5. National reforms to permit competition while maintaining quality

Regulatory structures in the professions have come under increasing scrutiny to determine whether they have been serving the interest of the profession more than, or even at the expense of, the public interest.[11] Some of the rules ostensibly about professional ethics, to ensure that services meet the standards of quality and quantity demanded by consumers, at reasonable prices, may serve more to prevent competition among professionals and keep prices high. And to the extent there is a risk that the rules could inhibit competition and thus harm consumers, it may be preferable that the rules be enforced by someone other than the professional bodies themselves. Some degree of professional involvement in supervision of other professionals is essential. To prevent restrictions on competition, though, representatives of consumer interests should also be included in regulatory bodies. These might be major buyers, such as insurance companies, consumer representatives, or officials from competition and consumer protection agencies.

5.1 Types of regulations that may harm consumers by limiting competition

A principal theme of reform is to relax constraints on economic competition that are not necessary to maintain quality of service or to prevent consumer injury. Four common types of professional regulation fit this description: overly strict controls on entry and access, constraints on fee competition, prohibitions against truthful, non-deceptive advertising, and overly strict restrictions on alternative forms of practice.

5.1.1 Entry and access

Licensing regulations determine who will be allowed to practise. Thus decisions whether to issue licenses determine how many providers are in the market. Enough entry control to ensure competence is justifiable, even necessary, for the reason set out in Section 2. But licensing control can be used to meter the level of competition, too. Sometimes professionals have the power to control entry at two levels, by determining who may obtain a license, and by accrediting the schools where potential professionals are trained. It is doubtful that both levels of control are necessary to ensure competence. In the late 1980s, less than 500 law students were accepted each year to the Japanese bar. In other professions in other countries, proposals are sometimes heard to limit the number of new licenses granted, regardless of the licensees' competence, on the grounds that competition is already adequate.

The number of practitioners in most professions is large, suggesting that entry control alone does not suppress competition. But entry controls, combined with tight regulation of what services can be provided, have inhibited the appearance of competition in the form of new kinds of providers or products. And until very recently (and perhaps still), entry controls have kept prices up, too. In Australia, eliminating the lawyers' monopoly on convincing and the barristers' monopoly on courtroom work (as well as permitting advertising) is estimated to lead to a 12 percent drop in overall legal costs there.

One way to resist or correct overly stringent local licensing constraints is by opening access to professionals of proven competence from other jurisdictions. In some countries, particularly for those with a federal structure, market pressures have required professions to permit greater mobility within a country. In Germany, for instance, lawyers from one local jurisdiction, who until very recently were not allowed to associate with those from another, are no longer prevented from serving clients on a national basis. Another example is Australia, where Heads of Government signed, in May 1992, the Mutual Recognition Agreement (MRA). This agreement gave effect to the principles of mutual recognition which notably grants professional service providers (natural persons) registered to carry out an occupation in one State or Territory the possibility to register and carry out the equivalent occupation in any other State or Territory. In addition, the Institute of Chartered Accountants abolished its residence requirement in 1995 for membership, enabling Australian accountants to work overseas and foreign accountants to become members of the Australian Institute.

Another way to overcome these obvious barriers has been to remove traditional distinctions between closely related fields of practice. This is illustrated in the law, where lawyers are increasingly expected to provide advice on complicated transactions and investments affected by interacting national and international laws. Old distinctions and rules that separated the functions of court appearance and counselling are breaking down, in the face of increasing demand for individuals who combine skills of all kinds. In France, for example, the "avocats", whose professional training and organisation were centred entirely upon the courts, and the "conseillers juridiques", not members of the bar and less closely regulated, have recently merged into a single profession. And some common law countries that have maintained the distinction between barristers and solicitors are moving to abolish it.

5.1.2 Fee competition

Until recently, fees for professional services have been set by regulation or agreement, not by market competition. Instead, professional organisations have often been permitted to establish recommended or even mandatory fee schedules, and fee competition and competitive bidding were generally considered unethical. The argument offered to support this price-fixing was that competition would lead to lower prices, and general lowering of price levels would lead to lowering of service quality. Evidently, it was feared that the most competent providers would leave the profession, because they could not be rewarded enough for their superior ability, and reduced earning potential would discourage promising prospects from entering it.

These arguments have been increasingly challenged in OECD countries, as competition policy and law have been extended to professions where there was no evidence of serious market failure. Mandatory fee scales, whether effected under statutory rules or by self-regulation, have been increasingly challenged and generally condemned as anti-competitive or against the public interest.

Fee schedules can take several forms: maximum or minimum, mandatory or voluntary. They can set hourly rates for services of all kinds, or absolute or relative fee levels for specific tasks. Or they might set fees as a percentage of the value of the transaction. Mandatory minimum fee standards are of greatest concern. Recommended, rather than mandatory, fee scales have sometimes been allowed, provided that the charges have been determined independently and it is clearly stated that the practitioner and client concerned are free to agree on a fee without reference to the scale. In some countries, such as Germany, maximum fee scales have been allowed provided that they are not used as mandatory minimum charges. In the US, even maximum fee scales are treated as anti-competitive. Maximum scales can be used to justify lifting prices above competitive levels, even if they are not used as de facto minima. And in the US case that held maximum price fixing by professionals to be illegal, the maximum fee schedule was part of a concerted effort to prevent formation of a lower-cost competing organisation.[12]

One reason advanced for maximum fee limits is to assure that poor or even middle-income consumers can afford high-quality services. Although in some circumstances maximum fee limits may help produce this outcome, alternatives might be considered that present less risk of limiting competition. For example, insurance might permit consumers to afford higher quality service. And some medical and legal professionals provide services to the poorest consumers *pro bono*, either by personal choice or pursuant to guidance from professional associations.

5.1.3 Advertising prohibitions

Advertising and marketing by professionals is usually subject to close regulation, of both manner and content. Basic information concerning name, address and telephone number and some details about specialisation can usually be advertised, but advertisements about prices and comparisons with other practitioners are usually prohibited. Restrictions on advertising appear to have been particularly widespread in the legal and medical professions (see Table 4). Restricting and even banning advertising has been defended as necessary to preserve professional integrity and independence and to protect the public against incompetents. But bans against even truthful, non-deceptive advertising are increasingly being challenged, because such restraints prevent innovation and raise prices.

Advertising in most sectors of the economy plays an important role in informing consumers and ensuring that new products, services, and providers are brought to the public's attention. Advertising thus can encourage innovation and new entry. But in the professions, severe restrictions against advertising can make it difficult for the average consumer to know where to find expert help or determine its likely price.

Abolition of advertising restrictions has benefited consumers. The removal of price advertising restrictions appears to have resulted in lower prices and increased demand for some professional services.[13] In the United States the relaxing of advertising restrictions appears to have facilitated the growth of alternative service providers and led to greater price competition and perhaps an increase in demand for some kinds of legal services.[14] A Canadian study concluded that price advertising by professionals would improve consumer access to services, lower fees and increase efficiency and innovation.[15]

5.1.4 Forms of practice

Professionals have usually been required to practise as individuals or in partnerships with others in the same profession. Corporations or franchise relationships and even branch offices have often been prohibited. And partnership, corporate or employment relationships with non-practitioners have also usually been prohibited. The reason usually given for these prohibitions is to ensure the practitioner's personal responsibility to the client. If financial liability for harm or error could be limited or shared, or if the professional were under the management or investment control of someone who was not subject to profession's ethical requirements, it is feared that the professional's duty to the client might be compromised. Even where other forms of business organisation are permitted, professional firms may be subject to limitations intended to ensure that personal responsibility and professional discipline are not avoided. One method of ensuring that consumers are protected is simply to require that professionals carry adequate liability insurance. Often, though, the right to own or invest in a firm providing PBS services remains tied to the requirement of holding a licence to practise the profession within the jurisdiction issuing the license (see Table 4).

For example, in Japan, a lawyer may only have a single office, which must be within the area of the bar association to which the lawyer belongs, and affiliation with non-lawyers, including patent attorneys, tax attorneys or legal scriveners, is prohibited. In Europe, only in some EU member countries do law firms operate as corporate entities or as associations in which costs, but not fees, are shared. Even in the US, where many jurisdictions allow attorneys to form "professional corporations," and partnership structures can be large, highly complex and varied, some constraints on form of practice remain in place. Restrictions on form of practice also frequently apply to accountants and to health care professionals, but they are less common for architects and virtually non-existent for consulting engineers.

In some situations, these constraints have been relaxed, because they limit the creation of new and possibly more cost-efficient business structures. The result has been the appearance of new forms of delivery for health and medical care and legal services. In the US, where restrictions on employment of doctors by non-professionals are being relaxed, chains of walk-in clinics now offer care in markets where doctors were needed. And advertising has fuelled the growth of legal "clinics" bringing legal advice to individual consumers who had considered lawyers too expensive.

Prohibitions on incorporation and restrictions on partnerships between foreign and locally qualified professionals also represent important obstacles to foreign competition. Alternative approaches were identified at the Third OECD Workshop on Professional Services held in February 1997 (see section 4.2).

Ownership and investment structures may still require some scrutiny, to ensure that professional judgements are not distorted by extraneous considerations. Professionals' fiduciary obligations are an important element of the service they provide, and personal liability for that service is a valuable disciplinary control. In considering whether to permit limited-liability corporate forms, it may be necessary to balance the risk of diluting those protections against the benefits of access to capital or management flexibility. These issues also have important implications for foreign participation (see section 4.1).

5.2 Competition law enforcement and advocacy as methods of reform

A significant source of change is the increasing application of competition laws to professionals. Sometimes this has resulted from direct, explicit decision to extend cartel legislation to professional activities. Sometimes this has been accomplished indirectly, such as by constitutional decisions that change the application of general statutes to bodies organised on provincial or state lines. Reform to implement a pro-competitive policy does not always require bringing law enforcement action. But sometimes the threat or prospect of law enforcement action has been a catalyst to speed up necessary changes.

In the US, the antitrust laws have been applied to the professions since the landmark Supreme Court decision in *Goldfarb v. Virginia State Bar*.[16] *Goldfarb* established that the Sherman Act contained no exemption for the professions. A further Supreme Court Decision in 1978 in *National Society of Professional Engineers v. United States*[17] confirmed the *Goldfarb* rule and illustrated what it would mean in practice. The Society had agreed to an ethical rule that the members would not compete with each other on price before the client had selected one of them to carry out the project. The Court rejected the Society's argument, that price competition was not in the public interest because it would lead to cost cutting and to inferior and perhaps dangerous design work. The Supreme Court reached a similar decision in *FTC v. Indiana Federation of Dentists*[18] where it rejected the dentists' argument, that their boycott of an insurers' x-ray review requirement was justified by considerations relating to quality of care. In 1982, the Court in *Arizona v. Maricopa Medical Society*[19] ruled that agreeing to a maximum fee schedule for physicians' services was *per se* illegal.

Because professional regulation is a responsibility of state government in the US, the "state action" defence is often raised in cases about professional practices. For example, in *Bates v. State Bar of Arizona*[20] the Supreme Court held that a ban on attorney advertising operated by attorneys in Arizona was the direct result of the power of the Arizona Supreme Court to regulate the profession and that this was immune from application of the Sherman Act (instead, the Court struck down the ban under the First Amendment to the Constitution, protecting free speech). On the other hand, in *Goldfarb*[21] the Supreme Court held that the Virginia State Bar was not immune from prosecution when it issued minimum fee schedules. The Court held that there was no sovereign direction and therefore no state action. Similarly, in *U.S. v. Texas State Board of Public Accountancy*[22] the District Court and the Court of Appeals held that although the Board was authorised by state statute to promulgate rules of professional conduct, this authority was insufficient to immunise the Board's action in establishing a rule banning competitive bidding by public accountants. In general, the state action exemption (which could apply to any conduct, not just to professionals) requires showing that the conduct was consistent with a clearly articulated state policy to displace competition, and that it was actively supervised by the state to ensure consistency with that policy.

In the UK**,** although the basic legislation on restrictive trade practices does not apply to professional services, professional conduct may fall under the monopoly provisions of the legislation. During the 1970s and 1980s restrictions in numerous professions were referred to the Monopolies and Mergers Commission for investigation after a major report by the Commission in 1970.[23] In the 1970s eleven references of particular restrictions were made to the Commission. Seven concerned advertising restrictions (barristers in England and advocates in Scotland; solicitors in England and Wales, and in Scotland; veterinary surgeons; surveyors; accountants; and stockbrokers). Two concerned fee scales (architects and surveyors) and two concerned the rule that required Senior Counsel (in Scotland) and Queen's Counsel (in England and Wales) to appear with junior counsel (the "two-counsel rule"). In every case except the restrictions on advertising by barristers and advocates, the Commission found that the restrictions operated against the public interest. Some recommendations have been difficult to implement because many of the rules are supported by statutory authority. The overall result of the recommendations has been some liberalisation of the practices found to be against the public interest, in particular the use of

mandatory scales of fees, so that at the present time freedom to advertise and to set prices competitively appears to be widely accepted in the professions in the UK.

In Denmark, the professions are subject to the Competition Act 1989. They had been covered by the legislation on monopolies, prices and profits, which was repealed when the new legislation became effective. If after investigation the practices are found to be against the public interest, the Competition Council may recommend their modification or abolition. The Council has investigated recommended scales of fees and charges and advertising restrictions in a number of professions. The Council undertook a cross-profession analysis of competitive conditions in the liberal professions. The Commission concluded that many rules exceeded what was necessary to meet the requirements of sound professional practice. These rules typically concerned advertising and marketing recommended fees, employment and business relations. The Council found that there were both statutory rules, which restrained access to the profession and regulated professional activities as well as collegiate rules, which had the effect of supplementing the statutory rules. The Council therefore decided to negotiate with the relevant associations to liberalise the collegiate rules and at the same time approached the public authorities to pay more regard to competitive considerations when regulating the professions. Negotiations with the Law Society resulted in the lawyers being allowed to advertise their special field of interest while the ban on advertising by direct mail was modified so that lawyers are now allowed to make direct advertising to business customers though not to private persons. The Competition Council also ordered the Danish Association of Veterinary Surgeons to terminate its restrictions on advertising fees and its ban on direct advertising to potential customers. These restrictions largely precluded price competition and were held to constitute a barrier to the establishment of new veterinarians.

In Ireland, during the 1980s and 1990s the Fair Trade Commission (now the Competition Authority) undertook several enquiries into practices in the professions in response to a request by the Minister to undertake a wide-ranging study into the professions. Reports were published on concerted fixing of fees and advertising restrictions in the accountancy and engineering professions, restrictions on conveyancing and advertising by solicitors, and restrictive practices in the legal profession. In 1993, the new Competition Authority also took a decision against certain practices of optometrists, including guidelines relating to premises, advertising restrictions and fee-fixing methods. Reports were also issued in relation to practices of architects, surveyors, auctioneers and estate agents and into trademark and patent agents. The general result of these enquiries is that advertising restrictions have been considerably liberalised and fee scales only allowed if such scales are used as guidelines and not as minima.

In Canada, the Supreme Court of Ontario in 1988 prohibited two Ontario law associations from agreeing on the fees members would charge the public for legal services related to residential real estate transactions. The orders also specifically prohibited communications among members concerning the fees charged to clients, the promulgation of fee schedules and the formation of committees on fees. This was the first time that a professional association in Canada had been prevented under the competition legislation from fixing prices on the basis of published fee schedules.

In France, the Conseil de la concurrence has made clear that professional organisation rules may not authorise violations of the rules of competition law, notably those against price fixing agreements. The Conseil has condemned a boycott by local architects intended to maintain fee levels. And the Conseil has recently challenged three local bar associations' fee schedules, emphasising that they had an anti-competitive effect even when they may not have been adopted for an anti-competitive purpose. The authority for this action was established by a 1987 decision involving fee schedules of architects, which was affirmed on appeal in 1992.

In Spain, the law governing professional associations was modified in 1996 to introduce greater competition. In particular, any economic agreement by professional associations must conform to the laws

on competition and unfair competition, and price fixing for professional services is prohibited. And a single membership was established nation-wide, so professionals may practice anyplace in the country without becoming members of the local associations.

In addition to formal actions and investigations of practices in the professions, many OECD competition authorities have been active in advocating more liberal regimes and intervening in official enquiries to attempt to obtain changes in anti-competitive rules operated in certain professions. For example, since the late 1970s the US Federal Trade Commission staff has submitted over 400 comments or *amicus curiae* briefs to state and self-regulatory entities on competition issues relating to a variety of professions, including accountants, lawyers and architects. In Denmark, the Competition Council recommended to the Minister of Industry to liberalise rules regulating the accountancy profession so that economic and legal advisers with similar training and education as accountants could practise together and develop new, multi-disciplinary partnerships. Other Member countries whose competition agencies have advocated increasing competition in the professions include Australia, Canada, the Czech Republic, Finland, Germany, Hungary, Ireland, Italy, Japan, Korea, Mexico, Poland, and Sweden.

5.3 Health Care: An illustrative case study of reform through competition law enforcement

The health care professions illustrate the problems of anti-competitive regulation and the potential benefits of reform. The record of reform in this sector and the methods of accomplishing it are instructive, for health care professions are typically subject to the same kinds of restraints on entry, price competition, advertising, and business structure and practices that are common for professional business services. The following section describes how the issues common to many professional regulation settings were dealt with in health care, principally in the US; this description is not, however, intended to present a recommendation for similar actions concerning health care professions in other jurisdictions.

Health care differs from other professional services in one important respect: the customer who receives the services often does not pay the bills for them directly. But those who do pay, whether governments, insurers, employers, or individual consumers, have an interest in the lower prices and hence lower costs that can result from greater competition and innovation. Patients, of course, have a direct interest in high quality, and other parties have at least an indirect interest in maintaining quality too. Thus reform in health care must deal directly with the complex task of designing institutions that insure risk, ensure acceptable quality, and promote efficiency and innovation.

In the US, an important avenue of reform in this sector has been 20 years of increasing application of the general competition law to health care professionals (as well as other professional groups). Other competition agencies have worked in health care, too, notably in Canada, the Czech Republic, Denmark, Finland, and Sweden. Where possible, exemptions from the competition law have been eliminated and law enforcement actions brought directly against anti-competitive restraints. Where direct application of the law is not possible because the restraints are exempted from competition enforcement, competition agencies have advocated repealing the remaining exemptions or modifying the restraints to make them less anti-competitive.

The purpose of promoting greater competition is to permit the development of the kind of health care delivery institutions that consumers want, need, and can afford. Actions aimed at making alternatives to traditional fee-for-service practices possible do not necessarily depend on a finding that the alternatives are superior. Rather, the goal has been to ensure that the alternatives have had a fair chance to demonstrate their potential.

Advertising has been a major object of concern. Advertising affects three fundamental competition issues: innovation, entry, and price. Controversies over advertising embody the policy problems of maintaining quality and compensating for consumers' lack of information, while preventing deception and other consumer injury. Regulations have often prevented health care professionals from truthful, non-deceptive advertising about prices, discounts, and services. Removing these restraints is critically important to promoting competition, for competition over price and new services will be much less effective, or may not even develop at all, if professionals cannot tell the public that they are doing it.

In 1975, the US Federal Trade Commission challenged the rules of the American Medical Association that suppressed virtually all forms of advertising by doctors and innovative health care delivery organisations. The resulting order, issued in 1979, bars the AMA from prohibiting truthful, non-deceptive advertising, but it permits the AMA to maintain rules against deceptive advertising and oppressive solicitation.[24] That balance, to permit competition but also prevent deception, has been the model for a large number of enforcement actions, advisory opinions, and advocacy comments, addressed to private medical, dental, and speciality associations and to state regulatory boards.

A principal purpose of reform is to permit greater price competition, leading to lower costs. Thus many actions have targeted professionals' joint efforts to dampen price competition and to resist cost controls. These efforts take many forms, and correspond to familiar problem in standard competition law enforcement. The basic one is an actual or threatened boycott, organised by a group of professionals to affect reimbursement rates under third-party payment programs or to frustrate government or private-party cost control measures.

Competition enforcement has particularly targeted restraints on innovation and new entry. The seminal *AMA* case also challenged the "contract practice" rules that made it "unethical" for a physician to treat patients under a salaried contract with a hospital or health maintenance organisation that was controlled by non-physicians. Instead, the rules in effect required that physicians only work for other physicians. Association rules also considered it unethical for a physician to "underbid" or agree to accept compensation that was "inadequate" in light of the usual fees in the community. These rules not only maintained high prices, but also impeded the development of new institutions for delivering health care, by making it difficult for them to recruit professionals under lower-cost, and hence lower-price, arrangements.

To encourage innovation, it has been necessary to prevent conspiracies by incumbent professionals to prevent competition with their traditional practice methods. One general source of such competition is qualified non-physician providers, including nurse-midwives, nurse-anaesthetists, podiatrists, dentists, and optometrists. Another is new kind of institutions such as urgent care clinics and satellite offices. Rules regulating how professionals can work with these para-professionals and institutions have sometimes been used to prevent them from competing, rather than to assure high quality care. For example, professionals have used control over medical payment plans or insurance firms to discriminate against potentially threatening competitors. They have done so by denying coverage or reimbursement to work by or through non-traditional providers.

Reform has thus been accomplished through law enforcement action against blatantly anti-competitive restraints. But at the same time, competition law enforcement has respected legitimate joint actions to maintain standards and quality. Common situations leading to antitrust law complaints is "peer review" and decisions about granting hospital staff privileges. The competition agencies have been careful not to interfere with decisions that have truly been aimed at preventing incompetent or unethical professionals from gaining access. Professionals may be called on to evaluate the quality of each other's performance in dealing with disputes between patients and providers or third-party payers. This is a subject of concern if it is used to coerce fee uniformity or is a mask for barring entry. But efforts to identify and discipline incompetent or unethical providers can be pro-competitive.

The competition-based reform program in the US rests on empirical demonstration of the benefits of permitting innovation and competition. Health care costs are influenced by many factors, so identifying the effect of changing regulations requires analytical care. But several econometric studies, designed to isolate the effects of differences in regulation, have demonstrated that greater competition in several health care sectors has led to lower prices and costs, without sacrificing quality of care. In dentistry, some states limited how dentists could employ the assistance of dental hygienists, and others did not. A FTC staff study found that the restrictions increased the costs of individual procedures by from six to 30 percent, and increased the average cost of a visit to the dentist by from seven to 11 percent.[25] Another series of studies about eye care estimated that restraints on advertising and other commercial practices increased the prices charged for examinations and eyeglasses by as much as 25 percent.[26] The average quality of professional examinations and products was about the same whether or not these practices were permitted. And the range of variation in quality was about the same, too. Where the practices were permitted, those providers who advertised did tend to do less thorough (but still adequate) examinations; significantly, they also tended to charge lower prices.

6. National and international reforms to encourage trade

Traditionally, professional services were essentially national or sub-national in character, and regulatory regimes were conceived in a national context. The internationalisation and then globalisation of economies have increased firms' demand for services in a broader context. Those markets for legal, accounting, architectural and engineering services remain closed or segmented is increasingly an obstacle to economic activity.

Professional services of different types are being integrated in tradable packages. Products have become more complex bundles, as services such as project management, engineering, maintenance, financing, insurance, and consulting are combined with hardware and software. PBS is playing an ever-larger role in the provision of other services, such as finance, construction and telecommunications, especially in market development and the delivery of more complex products.

Liberalisation of PBS has thus become an important issue of national policies and of international trade negotiations.

6.1 Regulations affecting international trade in professional business services

Barriers to the international practice of professional business services abound. Some may be the result of laws and regulations explicitly discriminatory against Foreign Service providers. In addition, some facially non-discriminatory regulations, which appear to apply equally to nationals and foreign professionals, may in effect penalise foreigners and act as *de facto* obstacles. For example, restrictions on the right to own or invest in an accounting firm may be typically expressed in non-discriminatory terms, but the common requirement that the owner or investor hold a local professional license may prevent foreign entry. And international provision of professional services can be affected by generally applicable restrictions on capital movements and immigration, and by generally applicable factors such as national competition policy.

Existing restrictions can impact broadly on trade in professional services, affecting three of the four modes of supply identified by the GATS: cross-border supply, commercial presence, and movement of natural persons.

Overall, regulations affect foreign suppliers of legal and accountancy services to a much higher degree than architectural or even engineering services. Differences in national approaches to regulating these two more “technical” professions are probably more frequently expressed through technical norms.

The most important barriers to trade and investment in professional services imposed on foreign natural persons (see Table 5) and on foreign firms (see Table 6) are discussed below.

6.1.1 Nationality and local presence requirements

Local presence and nationality requirements are prevalent in the OECD area, particularly in the accountancy and legal professions. Such requirements are typically maintained to ensure the availability of a foreign professional for consumer redress in the event of professional malpractice, a command of rules and other conditions in the host market, including language, and the observance of professional standards of competence and conduct by professional bodies. In response to these concerns, local presence and nationality requirements are typically used to limit the scope of professional practice or set the conditions under which a professional may practice (for example, a nationality requirement imposed as a condition of membership in a professional organisation).

Requiring nationality or citizenship as a condition of professional practice is clearly discriminatory. As such measures do not serve as an indicator of the quality-level of a service provider, their existence is increasingly difficult to justify on consumer protection or public interest grounds.

Requirements which either exclude foreign nationals altogether, or that prohibit them from using the professional title or from providing certain services are based on the view that only a national or citizen can provide a service.

Over the last few years, nationality or citizenship requirements have clearly been on the retreat in the OECD area. Nevertheless, they still exist in several countries in all four professions and are most evident in the delivery of auditing services and in law. Concerning legal services, countries that have so far served, as focal points for the promotion of international legal practice no longer impose nationality requirements.

Obligations to be resident established or domiciled in the jurisdiction where the service is provided may prevent serving a market on a cross-border basis or through the temporary entry of personnel even by providers who possess valid host country titles.

This more frequent barrier, imposed on individuals or on firms, is generally motivated by the desire to maintain control over the professional's standards, to allow governments and to assure collection of taxes and compliance with other laws.

Lawyers and accountants are subject to local presence requirements almost everywhere. For engineers and architects, these requirements are less omnipresent.

6.1.2 Restrictions on investment and ownership

The Third OECD Workshop on Professional Services revealed that restrictions on foreign investment and ownership in the four professions are widespread in the OECD area, with some variations by profession. Two categories of restrictions were identified. The first one related to limitations on participation of non-professional investors in professional service enterprises. The rationale for such

limitations is the perceived need to preserve the control of professionals over the management of the enterprise, in order to ensure the quality of service and the independence of professionals with respect to outside interests tempted to use their influence on the enterprise to create unfair advantages for themselves. The second category of restrictions identified related to limitations on investment by foreign professionals. Discriminatory barriers to establishment may result from investment restrictions such as percentage limits on foreign ownership and control both for new firms or for the acquisition of local firms. A number of countries require that a majority of the ownership and control of a firm be in the hands of nationals or locally qualified professionals.

Restrictions requiring that one or more partners in a firm be nationals or residents may also prevent firms from opening branches or subsidiaries or from taking over local firms.

Restrictions on the use of a firm's name may also affect a firm's decision to establish. A firm's ability to attract customers may be seriously limited if it cannot realise the benefits of the goodwill embodied in its name.

Measures expressed in non-discriminatory terms may also deter or prevent foreign establishment or ownership. The requirement to hold a local licence in order to invest in or own a firm virtually excludes foreign investment. Regulating or preventing incorporation or other forms of business organisation also can constrain foreign firms' ability to reach the market by establishing subsidiaries and branches.

Finally, the ability to move personnel between countries quickly and easily is an important element of the internationalisation of business. Yet, as immigration remains a most sensitive issue in many countries, outright prohibition or burdensome procedures often hamper temporary entry of business people.[27] This may inhibit both investment flow and potential cross-border competition.

6.1.3 Restrictions on the exercise of professional activities

Regulations defining the nature of practice, which tend to differ because of regulatory differences between countries may be particularly difficult to deal with on an international basis. A comparison of the scope of the activities open to foreign professionals with that applicable to nationals gives a better idea of the actual effects of the system (see also Table 1).

In legal services, some countries permit foreign lawyers to practice under a licence restricting the scope of practice. This restriction, coupled with restrictions upon partnership with or employment of host country lawyers, seriously limits the practical ability of foreign lawyers to provide integrated legal advice. These restrictions may even be detrimental to the local profession, by depriving it of competitive advantages in the export of legal services to international clients. In Japan, recent measures have been taken to improve this kind of situation. Under a January 1995 amendment to the Special Measures Law concerning the Handling of Legal Business by Foreign Lawyers, for example, "gaikokuho-jimi-bengoshi" -- foreign lawyers qualified under Japanese law -- are permitted to operate joint enterprises with Japanese lawyers.

Accountants or accountancy firms may also meet difficulties in providing the entire range of services they provide in their home country in other jurisdictions. Services that are not regulated in one country may be regulated in another, requiring compliance with additional regulatory obligations. Services provided by the accountancy profession in one country may be reserved to other professions in other countries. Certain combinations of services, either in general or in the case of specific clients, may be permitted in some jurisdictions yet prohibited in others. A uniform service range may often not be offered across several markets. Firms from narrow-scope countries may find themselves at a disadvantage in

broad-scope markets and against broad-scope competitors. The scope-of-practice limitations may also impede the development of multi-disciplinary practices, in which audit, accounting, tax and related advisory work can be provided under a uniform structure with common quality control.

Similarly, architects in some countries are trained in both architecture and engineering and are therefore competent to carry out structural calculations. In others, those functions are separated. Inconsistencies in regulatory treatment may create problems about competence and also may affect professional liability.

6.1.4 Recognition of qualifications

One of the core issues relevant for international practice of individuals, and indirectly of foreign firms, is the extent to which countries recognise or grant credit for qualifications, licences and experience acquired abroad.

Many countries now require that foreign professionals and national candidates pass the same examinations. Only in engineering and, to a lesser extent, architecture, do a number of country renounce altogether a domestic licensing requirement for foreign professionals who have obtained authorisation to practise in their home country. By contrast, in legal and accounting services, lengthy and sometimes full local retraining requirements are imposed on practitioners wishing to practise their profession. The wide array of re-qualification requirements is a *de facto* discrimination, since differences in position and level between a student and a professional are not taken into account if a foreign professional has to submit to re-qualification.

The development of appropriate procedures for the recognition of foreign qualifications to facilitate access to local markets is a key issue for the promotion of international practice in PBS. It is especially important for individuals originating from a country where no title is required, because the function or an activity is free, and who wish to practice in a country where the service is regulated and a title required. It is also central to professionals required to obtain a full licence even if they only intend to provide part of the bundle of activities performed by a fully licensed professional, notably because the professional only performs temporarily an activity abroad.

Liberalisation of professional business services has become an important issue of national trade policy and international trade negotiations and increased efforts are being undertaken to find a balance between ensuring professional standards and facilitating admission of foreign professionals. The European Union has had the longest and widest experience, but the signatory countries of the North American Free Trade Agreement as well as Australia and New Zealand, in the framework of the Closer Economic Relations Trade Agreement, are also developing some interesting approaches. The Canada-US Free Trade Agreement earlier set the stage for agreement between regulators of the Canadian and US architectural professions to develop a process facilitating portability of professional credentials. That system appears to be operating successfully.

Still, the rarity of mutual recognition agreements remains striking. Mutual recognition agreements are not a panacea, of course. Care must be taken that MRAs do not inhibit pro-competitive national reforms by indirectly reinforcing an unsatisfactory *status quo*.

6.2 International agreements and reforms

6.2.1 International agreements and activities in support of liberalised trade in professional services

Existing international agreements cover PBS to varying degrees, and related activities in fora such as the OECD have served to build understanding on PBS and related issues more generally. A brief overview of relevant agreements and activities is presented below, followed by a thematic discussion of regional approaches to three issue areas: nationality and local presence requirements; recognition of professional qualifications; and membership in professional organisations and compliance with professional codes of ethics.

The OECD Codes for Liberalisation of Capital Movements and Current Invisible Operations set out a framework of rules applicable to investment and cross-border trade in PBS. Under the Codes, Member countries have legally binding obligations to notify existing restrictions relating to foreign direct investment, capital movements and cross-border trade in services and not to introduce additional restrictions. Any existing restrictions must be applied in a non-discriminatory manner among OECD countries. Member countries must also submit themselves to a peer review process with a view to progressively removing any remaining restrictions over time.

The OECD Committee on Capital Movements and Invisible Transactions (CMIT), responsible for monitoring and implementing the disciplines of the Codes, has undertaken specific activities designed to advance liberalisation of international trade in PBS. Two Workshops were held in 1994 and 1995[28] in response to a growing need for more transparency and analysis of rules and regulations applying in the professional services sector, notably to support ongoing work under the WTO General Agreement on Trade in Services. At the 1995 Workshop, experts on competition and consumer policy[29] argued that the consumer's interest was best served by free competitive markets in which consumers have the necessary information to exercise a choice between suppliers, with an appropriate right to redress if things go wrong. Notably, it was suggested that there was still insufficient transparency in relation to price and other conditions of supply and that consumers should be more involved in professional policy and regulations.

A third Workshop was held on 20-21 February 1997 on the theme "Advancing Liberalisation through Regulatory Reform". Building on information gathered from OECD Member countries, the objective was to advance liberalisation of international trade in professional services by identifying alternatives to existing restrictions, while maintaining high standards for consumer protection. The outcome of the Workshop took the form of the Chair's Closing Remarks, excerpts of which appear below (Box 1).

Box 1*: Third OECD Workshop on Professional Services*

The Chairman of the Workshop believed there was a convergence of views among governments and the professions with regard to a number of general principles and policy recommendations:

General Principles

- The aim of domestic regulation should be to maintain quality of service and to protect consumers by means that are not more burdensome than necessary to achieve legitimate policy objectives and that do not unnecessarily impede domestic and international competition;
- Discrimination against foreign professionals and investors should be avoided;
- Market access should be based on transparent, predictable and fair procedures.

Specific Policy Recommendations

- Professional service providers should be free to choose the form of establishment, including incorporation, on a national treatment basis. Alternatives to restrictions on forms of establishment are available to safeguard personal liability, accountability and independence of professional service providers.
- Restrictions on partnership of foreign professionals with locally licensed professionals should be removed, starting with the right to temporary associations for specific projects.
- Restrictions on market access based on nationality and prior residence requirements should be removed.
- Restrictions on foreign participation in ownership of professional services firms should be reviewed and relaxed.
- Subject to availability of professional liability guarantees or other mechanisms for client protection, local presence requirements should be reviewed and relaxed.
- National regulatory bodies should co-operate to promote recognition of foreign qualifications and competence and develop arrangements for upholding ethical standards.

With regard to specific circumstances in particular professions, concerns were raised regarding consumer protection, country specific environments, cultural aspects and labour issues. Workshop participants agreed that these concerns need to be addressed in any programme for regulatory reform.

The links between competition policy, regulatory reform and improved economic performance have been studied by the OECD's Committee on Competition Law and Policy (CLP) since the mid 1970s. First conclusions, drawn in a 1979 report[30] and embodied in the same year in a Council Recommendation on Competition Policy and Exempted or Regulated Sectors31 urged Member countries to undertake periodic reviews[32] of regulations and related exemptions from competition laws. The CLP also embarked on an in-depth sector study of professional services.[33] This report found that many professions were not subject to competition laws and identified various practices, which were being increasingly called into question as being anti-competitive. The report encouraged Governments to review restrictions on entry,

price, advertising and business structure. As shown earlier, many countries over the past decade have begun to examine such restrictions in the professions dealt with in this chapter and have concluded that many of them were not justified on competition or more broadly based public interest grounds.

The General Agreement on Trade in Services (GATS), implemented in January 1995 as a result of the Uruguay Round, provides a multilaterally agreed framework of rules for the conduct of trade in services. Key provision address MFN and national treatment, specific market access commitments, and dispute settlement. Successive rounds of negotiations aimed at achieving a progressively higher level of liberalisation are explicitly foreseen in the Agreement.

The GATS Working Party on Professional Services (WPPS) was established by Ministerial Decision to examine and to make recommendations on multilateral disciplines that may need to be developed to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the area of professional services do not constitute unnecessary barriers to service transactions.

As a first step, the Working Party's work programme concentrates on the accountancy profession. The WPPS is mandated to elaborate multilateral disciplines in the sector with a view to giving operational effect to liberalisation commitments. The Working Party is also to develop guidelines for the process of mutual recognition of professional qualifications and encourage co-operation with relevant international organisations developing international standards. Consistent with this mandate, a seminar has been organised with various bodies on international standards in the accountancy sector. In addition, the report of the WTO Council for Trade in Services and the Declaration adopted at the first WTO Ministerial Conference (Singapore, 9-13 December 1996) call for the completion of work on accountancy by the end of 1997 and encourage the work of bodies engaged in the development of international standards for the sector.

To date, the WPPS has focused on the establishment of extensive information on regulations (a process to which the OECD has contributed) and on defining priorities with regard to policy areas targeted for the elaboration of multilateral disciplines. Regarding the latter, the WPPS has in particular concentrated on licensing requirements and procedures in the accounting sector. Some progress has also been made towards the drafting of guidelines for mutual recognition agreements; these may be finalised in 1997.

The North American Free Trade Agreement (NAFTA), which entered into force on 1 January 1994 to establish a new trading framework for Canada, the United States and Mexico, also introduces a set of disciplines for professional services.[34] The Agreement calls, *inter alia*, for the elimination of both citizenship requirements and permanent residency requirements for doing business. However, as Parties to the Agreement could not agree to make the prohibition concerning citizenship fully compulsory, a country's failure to comply may allow other Parties to maintain or reinstate equivalent requirements. On the other hand, NAFTA contains a clear-cut obligation enshrining the right to non-establishment, which provides for Parties, under the Agreement's negative list approach, to lodge reservations against the local presence obligation. NAFTA also aims to guarantee, on a reciprocal basis, the temporary entry into their respective territories of certain categories of business persons who are citizens[35] of Canada, the United States and Mexico by eliminating the requirement for a job validation, labour certification or other forms of labour market tests.[36] At the same time, the need to protect the domestic labour force, permanent employment in each member country, and border security is recognised.

6.2.2 Form of practice

With respect to prohibitions on incorporation, participants at the Third Workshop argued that consumer protection concerns could still be adequately addressed in a corporate environment: mandating minimum levels of capitalisation or professional insurance, for example, could ensure adequate restitution for aggrieved clients in case of malpractice. Personal liability and accountability of practitioners for their acts can be maintained, as can disciplinary actions by professional associations. Participants also maintained that the status of professionals as shareholders and market discipline more generally provide strong additional incentives to incorporated professionals to perform in the best interest of the public they serve. However, it was made clear that while more professional service providers might wish to incorporate if free to do so, they should not be under any obligation to incorporate. Accordingly, participants recommended that professional service providers should be free to choose the form of establishment, including incorporation, on a national treatment basis.

Restrictions on partnerships between foreign-licensed and locally licensed professionals could also be removed, possibly starting with the right to form temporary associations for specific projects. Participants believed that restrictions in this field were especially difficult to justify as partnership was one effective way to respond to the growing demand for integrated services from consumers, especially corporate consumers, and was part of the current more general trend towards multi-disciplinary practice and partnership as promoted by some of the professions.

At the same time, it was noted that an obligation imposed on foreign professionals in several countries, notably in the legal services field, to establish themselves only through partnerships with locally-licensed professionals was another form of restriction on market access that needed to be reviewed and relaxed. Depending on the circumstances, compulsory partnership requirements might entail significant efficiency costs as they may force foreign professionals to share profit with local professionals who may add very little value to the service rendered.

Compulsory partnership requirements are often justified by the perceived need to ensure compliance of the service rendered with local regulatory standards, cultural customs, etc. However, easing market access for foreign professionals do not imply in any way those foreign professionals should be outside the reach of local laws, regulations and practices. In any event, foreign professionals would risk becoming rapidly irrelevant to their clients were they to show insufficient regard for local consumer needs and preferences.

6.2.3 Nationality and local presence requirements

At the Third Workshop, participants called for the abolition of market access restrictions based on nationality as such measures were unreliable indicators of local knowledge and ultimately, the quality of a service provided. Restrictions based on prior residence requirements (as distinct from local presence requirements, which oblige foreign service providers to conduct business through an establishment in the host country) were similarly viewed and thus also to be removed.

The situation with respect to local presence requirements was more nuanced. Participants felt there was scope for relaxing such requirements subject to appropriate assurances of professional liability, availability, and accountability. A range of less burdensome approaches to establishment could be envisaged in this context: for example, financial guarantees (using instruments such as mandatory bonds or professional liability insurance) could be applied on a cross-border basis to preserve the possibility of consumer redress in cases of professional misconduct. Requiring a temporary presence in connection with the provision of a given service or appointing a representative agent in the host country could achieve the

same objective. Another suggestion was to shift the focus of regulation from the activities of a firm or individual to the output of a service provider, thus allowing for rigorous definition of quality workmanship while encouraging greater innovation in the delivery of professional services (for example, construction projects could be in part supervised from remote points using advanced information technology). Finally, it was noted that some professionals might wish to maintain a local presence even if they are not legally required to do so. This was typically the case for architects monitoring the realisation of long-term construction projects in a host market.

Many participants stressed the role of professional associations in defining and upholding high standards of professional conduct. In their view, the development of international codes of ethics and improved collaboration between national professional associations was key to building the mutual confidence necessary to apply alternative approaches to local presence requirements.

Nationality and local presence requirements have been largely eliminated in some regional contexts. The general provisions of the 1957 Treaty of Rome, for example, guarantee the free movement of goods, persons, services and capital within the European Community (EC). In addition, specific rules establish freedom to provide services for a limited period with or without travel to another Member State (Article 59) and freedom of establishment (Article 52). The elimination of discriminatory measures against nationals of other member states such as nationality requirements or residency in another Member State of natural or juridical persons is required. Direct or indirect, formal or de facto non-discriminatory measures are also prohibited. Some of the non-discriminatory measures have been the subject of specific provisions such as recognition of professional qualifications, membership of professional associations and compliance with a professional code of ethics.

6.2.4 Investment and ownership restrictions

Alternatives to limitations on participation of non-professional investors were also identified at the Third Workshop. Participants showed broad support for a proposal that minority participation (*i.e.* up to 49 percent ownership) by non-professional investors could be permitted without compromising these objectives. It was also pointed out that in sectors such as architecture, non-professional investment would bring much needed new capital, thereby allowing professional services firms to compete on international markets.

Specific concerns about professional independence *vis-à-vis* non-professional owners could be adequately addressed by setting appropriate shareholding diversification rules, such as limiting the voting rights of individual non-professional investors to five or ten percent.

Within the limit of permitted non-professional investment, participants saw no justification to discriminate among non-professional investors on the basis of their nationality or to impose any prior residency requirement.

Another category of restrictions placing limitations on investment by foreign professionals could be eased subject to adequate safeguards, such as an obligation on the foreign professional to hold membership in a recognised professional association or a requirement that at least one member of the board of directors be a locally-licensed professional. This raised the more general issue of procedures to facilitate market access to local practice by foreign professionals.

6.2.5 Mutual recognition

Regional experiences with mutual recognition in the professions illustrate a range of possible approaches to facilitating access to local practice by foreign professionals.

As the general provisions of the Rome Treaty were insufficient, the European Commission adopted some 60 Directives between 1964 and 1993[37] for international professional services to be performed across member states.

The initial option was to recognise professional experience of professionals having pursued an activity between three and six years in the state of origin. The second system developed aimed at harmonising professional qualifications. A first variant was based on automatic recognition through co-ordination of education and training; the second variant, applying to architects only, determined the criteria for recognition of training. However, due to the complexity and the limited coverage (to one profession/activity only), EC efforts turned to a horizontal approach in the second half of 1980.

The latest approach, recognition of qualifications (without co-ordination of training) applies to all regulated activities and professions except those addressed by an existing specific Directive (ex. architects). The system is based on Directive 89/48/EEC, which introduces a system for the recognition of higher-education diplomas awarded on completion of professional training of at least three years' duration, and Directive 92/51/EEC, which provides for a general system of recognition of professional education and training. Accordingly, a migrant is granted "semi-automatic" recognition of training, unless the intended professional activities differ from those the migrant is entitled to perform or has performed in the other Member State. In that case, a limited course or an aptitude test may be required.[38] While the framework for free provision of services by architects, engineers and accountants throughout the European Union is now in place, it has yet to be completed for lawyers. To this end, the Commission is currently considering a draft Directive aimed at facilitating the practice of law throughout the European Union under home titles and easing the integration of foreign lawyers into the professional registers of host states.

The Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or CER agreement) provides an alternative approach to granting equivalence of occupations. Under the CER Protocol on Trade in Services (in force since 1989), trained professional service providers must be treated on an equal basis with their counterparts in the respective countries; professionals in either country are exempt from assessment procedures which foreign-trained professionals are normally required to undergo. In 1996, New Zealand and Australia signed the TransTasman Mutual Recognition Agreement (TTMRA) based on the state-level mutual recognition agreement in force in Australia. The TTMRA is expected to come into force in 1997.

NAFTA does not automatically extend the right of professionals to practise in another NAFTA member country. However, Parties to the Agreement are encouraged to develop mutually acceptable standards and criteria for licensing and certification. This is addressed in the Agreement's Annex on Professional Services which contains general provisions on matters relating to transparency, the development of professional standards, temporary licensing, and review procedures. The Annex also includes two detailed work programmes: one on foreign legal consultants to ensure that a person of another party may practice or provide advice on the law of any country in which that national is authorised to practice as a lawyer, and one on temporary licensing for engineers.

The guiding principle is one of equivalence of qualification in the home and host countries, based on a detailed review of the requirements for granting the professional title in both countries. Three criteria for evaluation are thus taken into account: education, examination and experience.

The ongoing development of self-regulatory initiatives may also support the process of international recognition of qualifications and practice competency. In professional engineering services, for instance, some progress has been achieved regarding recognition of foreign qualifications through multilateral recognition schemes. The FEANI[39] model for European recognition of professional engineers status (EurIng) is based upon a minimum of seven years of qualifications, training and experience; the forum developed around the Washington Accord[40] recognises the equivalence of engineering education courses leading to Accredited Engineering Degrees.

Different forms of mutual recognition can be envisaged. At the Second Workshop, several participants had argued in favour of moving away from using educational qualifications as the focal point of MRAs. This point was revisited at the Third Workshop with particular reference to the Australian experience with competency-based assessment for engineers. Rather than focusing on inputs such as educational qualifications, proponents of this output-based form of mutual recognition held that assessing a foreign professional's competence (skills and prior work experience with respect to certain identifiable activities) was a more equitable indicator of the quality of a service. One discussant believed that competency-based assessment held considerable potential for application across different professions, though in practice it might be more easily applied to professions, which produced physically tangible end products (as in the engineering or architectural professions).

Obstacles to mutual recognition remain. Workshop participants cited the complexity and opacity of national training, qualification, and licensing systems, lack of mutual confidence and transparency, and fears that MRAs might lead to a lowering of standards in high-standard countries persisted. Others, speaking from the perspective of actual involvement in MRA negotiations pointed out that MRAs could be time-consuming and costly to negotiate. They may also risk inhibiting pro-competitive national reforms by indirectly reinforcing an unsatisfactory status quo in the absence of adequate scope for regulatory reform. Finally, MRAs present important challenges to the multilateral trading system in terms of finding transparent, open, and equitable modalities for their extension to third countries.

Mutual recognition may not be feasible or appropriate in all cases. Other avenues for facilitating access to local practice by foreign professionals, such as unilateral recognition of foreign credentials, temporary licensing, aptitude tests or facilitated examinations, and abbreviated procedures might be preferred approaches to easing access for foreign professionals in some situations. Here, actual experiences with temporary licensing of architects and engineers (in Canada), procedures for according restricted access without examination (as illustrated by New York law on foreign legal consultants), aptitude tests (used in the EU for foreign accountants) and other case studies help to illustrate workable alternatives.

6.2.6 Towards harmonisation of standards

Market pressures have encouraged development of worldwide standards and their adoption by national regulators.

Several EU member states have adapted standards developed by the IFAC (International Federation of Accountants) in the auditing sector. In other OECD countries such as Australia, the accounting profession and the regulatory accounting standard agencies harmonised national with international accounting standards. The Australian initiative comes within the scope of the MRA, which addressed the question of the applicability and use of standards commonly used in international trade. Uniformity of accounting standards may improve the quality, completeness and comparability of reported information. Indeed, regulators and others such as investors or analysts need reliable data on businesses operating across borders to understand the disposition of assets, to exercise effective management control, and to raise capital from diverse sources. For businesses operating in several countries, similarity of

accounting standards reduces costs. For professional service providers, wider recognition of internationally acceptable standards may facilitate competition between suppliers from different countries.

6.2.7 Membership in professional organisations and compliance with professional codes of ethics

In the case of establishment, migrants normally have to join existing professional organisations and comply with their rules. To prevent professionals from being denied market access on such grounds, the EC Directives establish that the need to join professional organisations can be waived or at least that a simplified inscription or declaration may be sufficient. The Directives further specify that service suppliers are subject to a host country's professional, administrative and other disciplinary provisions. However, impediments to freedom of establishment are not entirely lifted by such provisions. Regulatory bodies of some EU countries indeed stipulate that their laws and regulations also apply to their members working abroad, even if these persons have been authorised to perform services under the law of the host country. A possible solution would be the adoption by the professions and the authorities of additional rules of conduct.

7. Conclusions and suggestions for action

Regulation of the professions is defended as necessary to protect the consumer. Entry controls based on demonstrated qualifications, and licensing or accreditation based on the attainment of certain quality standards, may well be necessary to ensure the maintenance of high standards. But increasing flexibility in defining regulated practices, to permit para-professionals to perform more routine tasks, would not seem to jeopardise quality standards in many professions, and may lead to better or lower-cost services.

Other rules and regulations, whether set by governments or promulgated by professional associations, to control entry, business structure, fees or advertising are claimed to be necessary to promote and preserve the quality and the integrity of the services and of their suppliers. But OECD countries are increasingly re-examining rules and practices that, by limiting competition, may serve the interests of the professions themselves rather than the welfare of the consumers.

In particular, allowing professional associations to fix mandatory scales of fees and charges self-evidently eliminates competition, and there is little or no evidence that such a practice is necessary to ensure quality. This is especially the case for minimum fee fixing, but also applies to maximum fee limits where they have the effect of eliminating competition. Similarly, rules that prevent truthful and non-deceptive advertising, especially price advertising for routine services, discourage price and service competition that could benefit consumers.

Thus, it is recommended that Member countries examine rules and practices to increase economic competition. In particular, governments, especially competition authorities, should rescind or modify regulations that unjustifiably prevent entry and fix prices, and that prohibit truthful, non-deceptive advertising about prices and service offerings.

In addition, it is recommended that Member countries make competition law applicable, subject to safeguards to ensure consumer protection. To do this, government should rescind or modify exemptions of the professions and their self-regulatory bodies from the generally applicable competition law, consistent with preserving sufficient oversight to ensure adequate quality of service. This may require action both by national and sub-national (state and provincial) authorities.

Especially for services to individual clients, consumer protection is still necessary. But to achieve it, Member countries should develop innovative regulatory approaches. Regulatory bodies should revise restrictions on entry, affiliation, and business forms if they unnecessarily prevent entry, including entry by foreign professionals. Alternative rules, such as insurance, bonding, client restitution funds, or disciplinary control at the point of original licensing could provide adequate protection while permitting greater competition. Member countries may also consider the revision of rules, which unduly restrict the freedom of professionals to associate with other practitioners and to adopt innovative, more efficient organisational forms.

The development of Mutual Recognition Model Agreements (MRAs) for the professions is a potentially promising approach. A broad-based approach covering the various facets of "professional qualifications" such as educational qualifications, competence, and skills, could be applied. Care must be taken that MRAs do not inhibit pro-competitive national reforms by indirectly reinforcing an unsatisfactory status quo, however. Multilateral consideration could also be given to development and adoption of core requirements regulating access to services and activities, which, if widely used, could increase transparency, reduce user costs, and stimulate competition. The OECD could play a role in these processes. Whether and how to associate sub-national governments into negotiations and how to ensure workable application of negotiated outcomes in practice may also merit consideration. This issue will be of direct concern to countries in which federal governments conduct negotiations and are usually legally responsible for the enforcement of international commitments but where sub-national governments have *de facto* jurisdiction over the professions.

Advancing liberalisation of international trade and investment in professional services is an important component of regulatory reform. Accordingly, Member countries should implement the policy recommendations reached by the Third OECD Workshop on Professional Services held on 20-21 February 1997: *a)* professional service providers should be free to choose the form of establishment, including incorporation, on a national treatment basis, as alternative measures are available to safeguard personal liability, accountability, and independence of professional service providers; *b)* restrictions on partnership of foreign professionals with locally-licensed professionals should be removed, starting with the right to temporary associations for specific projects; *c)* restrictions on market access based on nationality and prior residence requirements should be removed; *d)* restrictions on foreign participation in ownership of professional services firms should be reviewed and relaxed; *e)* local presence requirements should be reviewed and relaxed subject to availability of professional liability guarantees or other mechanisms for client protection; and *f)* national regulatory bodies should co-operate to promote recognition of foreign qualifications and competence and develop arrangements for upholding ethical standards.

ANNEX

1. Economic features of professional services

The regulatory treatment of professional services is becoming more important because those services are increasingly important in Member country economies.

Growth in the economic importance of PBS is evidenced in Member country data. In terms of overall economic contribution, the national statistics of both France and the United States for 1990 report that the contribution of PBS to GDP had doubled in 20 years. Rapid employment growth is suggested by the trends reported for the broader category of "real estate and business services," of which PBS is part.[41] In just 10 years (from 1980 to 1990), employment in this more inclusive category (in the OECD countries reporting this data) grew by an average of 55 percent, six times faster than overall national employment growth (of nine percent). To be sure, employment patterns vary widely: almost ten percent of employment in the US are in this (broader) category, compared to barely one percent in Portugal.

Professional service employment is also important in qualitative terms. Professionals typically enjoy above average levels of education, skills and pay. They often play a major role in innovation and diffusion of new information technology. They are thus well placed to make a significant contribution to national competitiveness.

The typical business structure in PBS and other professional services sectors consists of individual practices and small firms, operating principally in local markets. In a few Member countries, notably the US and the UK, there are also medium and large size firms, with dozens or even hundreds of professionals. Some of the larger firms may operate on a national or even international scale.

2. Legal services

The US legal industry employed 952 000 persons, including paralegal and other support staff, and its output was approximately US$95 billion in 1992. Of the 777 000 lawyers registered in 1993, most worked in the legal services sector.[42] By comparison, it is estimated that in 1992, the legal services sector in the 12 countries of the European Community employed around 500 000 people and had an output of about ECU four billion (US$52 billion). Around 380 000 persons were registered as legal professionals in 1993, some of whom were employed in other economic sectors (banking, manufacturing, etc.) or in government. Since 1991, the number of lawyers in Japan has been increasing. Legal professionals numbered more than 18 000 in 1993 and exceeded 19 000 in 1996. A further increase is under consideration. In addition, a much larger number of people -- several hundred thousand -- works in the law departments of Japanese business firm. Although they are not technically attorneys who represent clients in courts, they do much of the same kind of legal work that independent lawyers do for business clients in other Member countries.

The establishment of branch offices in foreign countries was mainly initiated by the larger law practices, the more modest firms having been slow to enter international markets. In 1988, 43 of the Top

50-law firm's worldwide were either US or UK firms.[43] Other firms to show up in the Top 50 were from Canada and Australia. The first firm not from one of these four countries, ranking number 92, was from France.[44] Only recently have bigger groupings of law firms spread to industrial and financial centres such as Frankfurt, Brussels, Paris or Hong Kong. The international practice of many US law firms, which have been in the vanguard of the development of the modern business legal service industry, has been to bring a substantial number of non-US lawyers into their organisations, initially as employees and increasingly as partners. The number of US lawyers practising abroad on a permanent basis (probably amounting to no more than 1 000) indeed remains very small compared to the total number practising in the US.[45]

A statistical study of the top US and French law firms suggests a strong relation between financial productivity, partners' leverage, and location of the headquarters.[46] The more lawyers a firm employed the greater the income per partner. Opening a new office increased overhead costs and reduced productivity, except when the office was located abroad. The regulatory environment (past and present) of the country of origin of firms strongly affected financial performance. Greater competition and higher standards in the home country market corresponded to higher labour productivity and greater diversification into non-traditional services.

3. Accounting services

The US accounting-audit services sector was estimated to have realised an annual turnover of $US37 billion and employed nearly 560 000 people in 1992, including some 250 000 accountants.[47] This number is rather low, compared to the 1 150 000 accountants employed by US private industry. The EC accounting industry was estimated to have employed approximately 950 000 persons in 1993, of which 200 000 were certified accountants. The 1991 turnover of the sector was around ECU 43 billion ($US54 billion). Another 215 000 certified accountants were employed by industry and governments. UK accountants, the oldest accounting profession worldwide, represented more than half of all EC accountants.

Variation in the number of registered accountants is explained in part by variations in demand, which result from differing legal requirements to undertake certain activities such as statutory audits. Variations can also be attributed to country differences in who may be called an accountant. For instance, in a number of European countries, such as Germany and France, only those who work in the accounting sector can be certified as accountants.[48] As in legal services, most accounting firms are medium-sized and small practices, even sole practitioners, which concentrate on a limited number of market segments and usually do not have any formal international affiliation. But there are several very large, international firms, the "Big Six" (Arthur Andersen, Coopers & Lybrand, Detroit Ross Tohmatsu, Ernst & Young, KPMG, and Price Waterhouse) which together may earn up to a third of the industry's worldwide revenues.

The core of independent accounting firms' practices is auditing[49] and accounting.[50] Tax services are next in importance. Increasingly, the largest firms are expanding into new business areas such as management consulting[51] and legal services -- the Big Six already compete with law firms in France, Spain and the United Kingdom -- or information technology (IT). Accountancy firms are major users of advanced IT, including expert systems, and are amongst the world's largest providers of IT consulting services, including systems design, software development and facilities management.

The bigger firms are generally grouped into international "networks," in which members use the international network-trading name, sometimes in conjunction with their local trading name. About 20 international practices, which are estimated to have annual worldwide revenues ranging between US$ one billion and US$100 million (1993), are increasingly subjected to severe competition from the vast number of smaller practices and from the firms in the top tier.[52]

Regression analysis of the 29 top world-wide accounting firms in 1993 found a strong correlation between the financial performance and the number of staff, the number of offices and the business mix.[53] Costs associated with additional offices seem to be compensated by company-wide economies of scale. Expansion into new business areas not only reduced the relative dependency on traditional services but also increased profits. Analysis of the 15 top accounting firms in five OECD countries suggested everything else being held constant, that firms operating within markets with higher qualitative standards yield higher incomes.

4. Engineering consulting and architectural services

In the US, the engineering consulting industry employed around 660 000 persons with an output of almost US$62 billion in 1992. Registered US engineers numbered about 1.7 million in 1993. By comparison, there were only 123 000 architects in the US in 1992, and the US architectural service industry employed 124 100 people, which generated an output of US$12 billion.[54] In 1993 employment in the engineering industry of the European Union (EU) only approximated 200 000 persons, realising a turnover of ECU 15 billion (US$18 billion) while, in 1992, there were some 256 000 architects in the EU. It was estimated based on French data published by the INSEE, that overall the EU architectural service sector employed 350 000 to 500 000 persons (assuming between 0.5 and one support staff) and realised an output of around US$30-40 billion.

Engineering is strongly concentrated within developed economies, which represent 57 percent of the worldwide engineering market (North America: 46 percent; Western Europe: 8.5 percent; Japan: 2.5 percent). Furthermore, companies from developed countries cover more than 95 percent of the remaining world-wide demand for engineering services (North American firms: 56 percent; European firms: 32 percent; Japanese firms: eight percent) through large international transactions, notably with the Middle East and eastern Europe. Most OECD Member countries registered a trade surplus in "construction, architecture and engineering."

According to a recent French survey,[55] the number of architects in France substantially increased over the last decade and the number of practices grew impressively. Of all French firms in 1995, 85 percent had less than two employees (65 percent were individual practices) and were realising 25 percent of the sectoral annual turnover. In contrast, the number of firms employing more than 20 persons has decreased since 1986. Activities also changed over the last decade, with architects realising more non-residential projects than individual housing. The depressed construction sector reduced architectural revenues by 35 percent since the early 1990s. Little or no compensation could be achieved through exports, as firms were too small and undercapitalised to be competitive in international projects.[56]

The business structure in the United States is also characterised by the dominance of small practices: 12 500 of the 25 000 practices registered by the American Institute of Architects in 1989 were "one man" practices; only 250 US firms employed more than 50 registered architects. The top 12 US firms account for approximately 30 percent of the income of the entire profession.[57]

Overall, architectural services remain predominantly local or regional. International success is relatively rare and is related either to the top international artistic and intellectual cultures or to "historic" patterns of international trade. For instance the bigger US practices, which come closest to truly global architectural firms, remain strongly dependent upon the international activities of US clients.

TABLES

Table 1: **REGULATIONS CONCERNING KEY ACTIVITIES OF PBS PROVIDERS**

KEY ACTIVITIES FOR:	Australia	Austria	Belgium	Canada	Czech Rep.	Denmark	Finland	France	Germany	Greece	Hungary	Iceland	Ireland	Italy	Japan	Luxembourg	Mexico	Netherlands	New Zealand	Norway	Poland	Portugal	Spain	Sweden	Switzerland	Turkey	U.K.	U.S.
Legal Services																												
Representation before courts	R/S	R/S	R	R/S		R	F[1]	R	R/S					R/S	R		S	R	R/S	R		R	R/S	F[1]	R	R	R/S	R/S
Representation before administratrive agencies	S	S	S	S		F	F[1]	F	S					S/F	R		F	F	F	F		F	F	F[1]	F	F	F	S
Advice on matters predominantly regulated by law	R/S	R	F	R/S		S	F[1]	S	S					F	R		R	F	F	S		R/S	R	F[1]	F	R	F	R/S
Conveyancing (real estate, wills, family matters)	S	S	R	R/S		S	F[1]	R	R					S	R/S		R	R	R/S	S		R	R	F[1]	R	R	R	R/S
Patent law	R/S	R	S	R/S		S	F[1]	R	R/S					S	R/S		S	F	R	S		S	R/S	F[1]	F	S	S	R/S
Accounting Services																												
Statutory audit	R/S	R/S	R	S		R/S	R/S	R	R/S	R/S*			R*	S	R	R*	R	R/S	R	R/S		R	R	R/S	S	S	R	R
Public sector audit	F	R/S	R	S		S	F	R	R	R*			F*	S	X	R*	R	R/S	S	R		X	S	F	F	X	S	R
Audit of mergers and contribution in kind	F	R/S	R	S		F	R/S	R/S	R/S	F*			F*	-	R	R*	R	R/S	R	R/S		R	S	R/S	S	S	R	R
Accounting	F	R/S	R	F		F	F	R	F	R*			F*	F	F	R*	F	F	F	S		X	F	F	F	S	F	F
Insolvency practice	S	F	F	S		F	F	X	S	R*			F*	F	S	F*	S	X	F	S		X	R	X	F	S	R	S
Engineering Services																												
Design and planning	F	S	F	R		F	F	F	F					S	R/S		S	F	S	F		R	R/S	F	F	R	X	R
Representation for obtaining permits	F	S	X	R		F	F	F	F					F	R		S	F	S	F		R	R/S	F	F	R	F	R
Testing and certification	F	S	F	R		F	F	F	F					S	R/S		S	F	S	F		R	R/S	F	F	R	F	R
Feasibility studies	F	S	F	S		F	F	F	F					F/S	F		F	F	F	F		R	S	F	F	F	S	S
Architects																												
Elaboration of blueprints[2]	F	R/S	R	R		F	F	F	F					S**	R		F	F	F	F		F	R	F	F	R	F	R
Request for construction permit	F	R/S	F	R		F	F	R	R					R/F*	S		F	F	F	F		R	R	F	F	S	F	S
Monitoring of construction	F	S	R	R		F	F	S	F					S**	R		S	F	F	F		F	S	F	F	R	F	R
Technical control and certification	F	R	F	S		F	F	X	X					S**	R		S	F	F	F		F	S	F	F	R	S	R
Topographical determination	F	X	X	X		F	F	X	X					S**	S		S	X	X	X		F	S	F	X	X	X	S

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

* Nera Study of the EC Audit and Consultancy Sector, May 1991.

1. Only the professional title is regulated. Services, however, are not regulated, they can provided by a layman.

2. Activity generally reserved to surveyors.

Legend:

R: Activity regulated and reserved to one type of practitioner

R/S: activity regulated and shared between practitioners within a profession

S: Activity regulated and shared between professionals from different professions

F: Free activity, i.e. non-regulated

X: Activity not exercised by the profession

* Submission of the request for construction permit is free. Project making is regulated.

** For small civil constructions, competences are shared with surveyors.

Table 2: **NATIONAL QUALIFICATION REQUIREMENTS**

	Australia	Austria	Belgium	Canada	Czech Rep.	Denmark	Finland	France	Germany	Greece	Hungary	Iceland	Ireland	Italy	Japan	Luxembourg	Mexico	Netherlands	New Zealand	Norway	Poland	Portugal	Spain	Sweden	Switzerland	Turkey	U.K.	U.S.
University/Higher Education Degree																												
Lawyers	X	4	5	4-7		5	5	5	3.5					4	-		5	4	4	6		X	4-6	4.5	3	4	4-5	7
Accountants	X	4	X	4		3-5	3-5	7	4					**	4		5	4-6	4	3-4.5		3	3*	3-4	4*	2-4	X	4
Engineers	4	5	X	4		3-5	3-5	-	3-5					-	2		5	3-5	3	3-5		5	3-5	2-4.5	3-4	4	X	4
Architects	7	5	5	6-7		5	3-7	5	3.5-4.5					-	4		5	3	5	5		X	3-5	4.5	3-4	4	5	5
Practical Experience																												
Lawyers	X	5	3	0.5-1		3	4	2	2					-	2		X	3		2		X	X	5	1-2	1	1-2	-
Accountants	2-3	4-5	3	2-2.5		3	5	3	3-5					***	3		X	3	3	2		-	3	3-5	3	2-10	3	2-3
Engineers	3-4	3	-	4		-	-	-	2-5					-	2		X	0-1	3-5	-		-	-	-	X/-	0.3	0-5	4
Architects	-	3	2	3		-	-	-	2-4					-	2		X	1	3	-		-	-	0.5	X/-	0.3	2	3
Professional Examination																												
Lawyers	X	X	-	X		-	X	X	X					-	X		X	X	X	-		-		-	X	-		X
Accountants	X	X	-	X		X	X	X	X					**	X		X	X	X	X		X	X	X	X	X****	X	X
Engineers	-	X	-	X		-	-	-	-					-	X		X	-	X/-	-		-	-	-	-	-	-	X
Architects	-	X	-	X		-	-	-	-					-	X		X	-	X	-		-	-	-	-	-	-	X

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

Legend

Numbers = Years of qualifications

* = Years of practice

** = Both professionals enrolled on the registers (professional accountants and bookkeepers) and other operators supply accounting services.

*** = As of 1995, a three-year training period is required for professional accountants.

**** = For Certified Public Accountants and Financial Advisors

X = Requirements exist

- = No qualification requirements

Table 3: **MANDATORY MEMBERSHIP IN PROFESSIONAL ORGANISATIONS/ASSOCIATIONS**

MAIN PROFESSIONALS IN:	Australia	Austria	Belgium	Canada	Czech Rep.	Denmark	Finland	France	Germany	Greece	Hungary	Iceland	Ireland	Italy	Japan	Luxembourg	Mexico	Netherlands	New Zealand	Norway	Poland	Portugal	Spain	Sweden	Switzerland	Turkey	U.K.	U.S.
Legal Services																												
Lawyers[1]	Y	Y	Y	Y		Y	Y	Y	Y					Y	Y		n	Y	Y	n		Y	Y	Y	n	Y	Y	n
Notaries	-	-	-	Y		-	-	Y	Y					Y	-		Y	Y	-	-		Y	-	-	n	Y	-	-
Patent Lawyers	n	Y	-	-		-	-	-	Y					Y	-		-	-	n	-		n	-	-	-	-	-	n
Foreign Legal Consultantts	n	-	-	Y		-	-	-	Y					-	Y		-	-	n	-		-	-	-	-	-	-	n
Accounting Services																												
Accountants[2]	n	Y	Y	Y		n	n	Y	Y					-	Y		n	Y	n	n		-	n	n	n	Y	Y	n
Auditors	-	-	-	-		n	-	Y	Y					Y	-		-	-	-	-		Y	n	-	-	-	Y	-
Tax Advisors	-	Y	-	-		-	-	-	Y					n	Y		Y	n	-	-		-	n	-	n	-	-	n
Consulting Engineers	Y	Y	n	Y		n	n	n	Y					n	n		n	n	Y/n	n		Y	Y	n	n	Y[3]	Y	n
Architects	n	Y	Y	Y		n	n	Y	Y					Y	n		n	n	n	n		Y	Y	n	n	Y[3]	Y	n

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

1. The term "lawyer" covers the widest possible functions, such as Attorney at Law, Rechstanwalt, Avocat as well as Barrister/Solicitor.

2. Covers Certified and Chartered Accountants as well as Auditors, if these functions are provided together.

3. Other than public officials.

Legend:

Y = Membership compulsory

n = No membership required

- = No information reported regarding that function

Table 4: **REGULATIONS REGARDING INCORPORATION, INTRA-PROFESSIONAL ASSOCIATIONS, FEE-SETTING, MARKETING AND ADVERTISING**

	Australia	Austria	Belgium	Canada	Czech Rep.	Denmark	Finland	France	Germany	Greece	Hungary	Iceland	Ireland	Italy	Japan	Luxembourg	Mexico	Nethrlands	New Zealand	Norway	Poland	Portugal	Spain	Sweden	Switzerland	Turkey	U.K.	U.S.
Legal Services																												
Form of establishment	L	N	-	N		L	-	L	N					L	N		L		N	-			N	N	N	N	-	L
Fee setting	R	R	R	-		-	-	-	R					R	R		-		-	R		R	-	-	R	R	-	-
Marketing and advertising	P	P	P	-		P	-	P	P					P	P		P	-	P	P		P	P	-	P	P		-
Accounting Services																												
Form of establishment	L	L	L	P/L		L	-	L	L	-		-	N	L	L	L	-	L	N	-		N	-	L	-	L	-	L
Intra-professional associations	X		X	X		X*		X				X		=	X			X*		X			-	X				
Fee setting	R	R	-	-		R	-	R	R				-	R	-	-	-	-	-	-			-	-	R	R	R	-
Marketing and advertising	-	P	P	-		-	-	P	P				P	P*	P	P	P	P	-	-		P	P	-	-	P	P	-
Engineering Services																												
Form of eablisment	-	L	-	-		-	-	-	-	-		-	-	L	-		-	-	-	-		N	L	-	-	L	-	L
Fee setting	-	R	-	-		-	-	-	R	R				R	R		-	-	-	-		R	-	-	-	R	-	-
Marketing and advertising	-	-	-	-		-	-	-	P					P	-		P	-	-	-			-	-	-	-		-
Architects																												
Form of eablisment	-	L	-	N		-	-	L	-	-		-	-	L	-	-	-	-	-	-		N	N	-	-	L	-	L
Fee setting	-	R	R	-		-	-	-	R					R	R		-	-	-	-			-	-	-	R	-	-
Marketing and advertising	-	-	P	-		-	-	-	-					P	-		P	-	-	-			P	-	-	-		-

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

Legend:

R = Minimum or maximum levels imposed for all/some services provided by professionals

P = Prohibited for some/all services provided by professionals

N = No incorporation allowed

L = Only certain forms of incorporation are allowed

X = Restrictions imposed on multidisciplinary practices (i.e. interprofessionalism)

- = No restrictions

* = Subject to permission

**Professional accountants and bookkeepers; no prohibition is imposed on other operators.

Table 5: **REGULATIONS AFFECTING INTERNATIONAL TRANSACTIONS BY FOREIGN NATURAL PERSONS**

	Australia	Austria	Belgium	Canada	Czech Rep.	Denmark	Finland	France	Germany	Greece	Hungary	Iceland	Ireland	Italy	Japan	LuXembourg	MeXico	Netherlands	New Zealand	Norway	Poland	Portugal	Spain	Sweden	Switzerland	Turkey	U.K.	U.S.
Legal Services																												
Nationality requirements	-	X	X	-		-	X	-	-	X		X		X	-		X	-	-	-		-	X	X	X/-	X	-	-
Prior residency requirements	-	na	-	X/-		-	na	-	-	na		X			-		X		-	-		-	X	na	na/X	na	X	X
Requalification requirements1	X/-	na	X	X/-		X	na	X	X	na		na		na	X		na	-	X	X		X	X	na	na/X	na	X	X
Accounting Services																												
Nationality requirements	-	X	-	-		-	X	-	-	X		-	-	X	-	X	X	-	-	-		-	X	-	-	X	-	-
Prior residency requirements	X	na	-	X/-		X	X	-	-	na		X	-	X	-		X	-	X	X		X	-	X	-	na	-	X/-
Accreditation/licensing requirements	X	na	X	X		X	X	X	X	na		X	X	X/-	X	X	X	X	X	X		X	X	X	X	na	X	X
Engineering Services																												
Nationality requirements	-	X	-	-		-	-	-	-	X		-	-	-	-	-	X	-	-	-				-	-	X	-	-
Prior residency requirements	-	X	-	X/-		-	-		-	na				X	-		X	-	X	-		X		-	X/-	-		-
Accreditation/licensing requirements	-	X	-	X		-	-		X	na					X		X	-	X	-			X	-	X/-	X		X
Architects																												
Nationality requirements	-	X	-	-		-	-	-	-	X		-	-	-	-	-	X	-	-	-		X	-	-	-	X	-	-
Prior residency requirements	X	na	-	X/-		-	-	-	-	na				X	-		X	-	X	-		na	-	-	X/-	-		X/-
Accreditation/licensing requirements	X	na	X	X		-	-	X	X	na					X		X	X	X	-		na	X	-	X/-	X	X	X

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

1. Full or partial requalification requirement

Legend:

X = Restriction(s) applicable

- = No restrictions exist

na = Not applicable

Table 6: **REGULATIONS AFFECTING INTERNATIONAL TRANSACTIONS BY FOREIGN FIRMS**

	Australia	Austria	Belgium	Canada	Czech Rep.	Denmark	Finland	France	Germany	Greece	Hungary	Iceland	Ireland	Italy	Japan	LuXembourg	MeXico	Netherlands	New Zealand	Norway	Poland	Portugal	Spain	Sweden	Switzerland	Turkey	U.K.	U.S.
Legal Services																												
Local presence required	-	na	X	X/-		-	X	-	X						X		X		X	-		X	X	X	-	-	-	X/-
Restrictions on foreign investment/ownership	X	na		X		X	X	X	X						X		X		X	X		X	X	X	-	X	-	-
Minimum number of local directors/staff	X/-	na		X		X	X	X	-			X			-		-		-	X		-	X	X	X	X	-	-
Partnership/association/JV restrictions	X/-	X	-	X		X	X	X	-						X		X	X	X	X		-	-	X	-	X	X/-	-
Restrictions on hiring local professionals	X	X		-		-	-	X	-						X		X		-	-		-	-	-	-	X	X	-
Accounting Services																												
Local presence required1	X	X	-	X/-		X	X	-	X	X		X	-	X	X	X	X	-	-	X		X	-	X	X	X	-	X/-
Restrictions on foreign investment/ownership	X	X	X	X	X	X	X	X	X	X			X	X	X	X	-	X	X	X		X	-	X	-	X		X
Minimum number of local directors/staff	X	X		X/-		X	X	X	X			X	-	-	X	-	-	X	-	X			-	X	X	X	-	X
Restrictions on hiring local professionals	-	na		-		-	-	-							na		-	-	-	-			-	-	-	-	-	-
Engineering Services																												
Local presence required	-	X	-	X/-		-	X	-	-	X			-	X	X		X	-	X	-		X	X	-	-	X	X/-	-
Restrictions on foreign investment/ownership	X	X	-	X		-	X	-	X/-						-		-	-	X	-		X	-	X	-	X		X
Minimum number of local directors/staff	X	X	-	X		X	X	-	X/-			X			X		-	-	-	X			-	X	X	X		X
Partnership/association/JV restrictions	-	X	-	-		-	-		-						-		-	-	-	-			-	-	-	X		-
Restrictions on hiring local professionals	-	X	-	X/-		-	X		-						X		-	-	-	-			-	X	-	-		-
Architects																												
Local presence required	-	X	X	X/-		-	X	-	-	X				X	X		X	-	X	-		X	X	-	-	X		X/-
Restrictions on foreign investment/ownership	X	X	-	X/-		-	X	X	-						-		-	-	X	-		X	-	X	-	X		X
Minimum number of local directors/staff	X	X	-	X/-		X	X	X	-			X			X		-	-	-	X			X	X	X	X		X
Partnership/association/JV restrictions	-	X	-	X/-		-	X	X	-						-		-	-	-	-			-	X	-	X	-	
Restrictions on hiring local professionals	-	X	-	-		-	-	-	-						-		-	-	-	-				-	-	-		-

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

1. Establishment of firms and residency of individuals required in order to provide a service.

Legend:

X = Restriction(s) applicable

- = No restrictions exist

na = Not applicable

NOTES AND REFERENCES

1 See AKERLOF, G., "The Market for Lemons: Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics* 84 (1970): 488.

2 See, e.g., Industry Commission (Australia), Final Report, Part B2, Occupational Regulation and the Professions (1995).

3 COX, C. and FOSTER, S., "The Costs and Benefits of Occupational Regulation," Bureau of Economics Staff Report to the Federal Trade Commission (1990): 26-27. The studies reviewed in this survey of the English-language economic literature did not all deal with liberal professions; some dealt with other occupations that are also subject to licensing and other anti-competitive regulatory constraints.

4 MURIS, T. and MCCHESNEY, F. *Advertising, Consumer Welfare and the Quality of Legal Services: the Case of Legal Clinics,* Law and Economics Center, University of Miami, Working Paper 78-5, 1978.

5 Staff report by the FTC's Bureau of Economics and Cleveland Regional Office, "Improving Consumer Access to Legal Services" (1984).

6 SCHROETER, J., S. SMITH, and S. COX, "Advertising and competition in routine Legal Service M: An Empirical Investigation" *The Journal of Industrial Economics* 36 (1987), 49.

7 BOND, R., KWOKA, J., PHELAN, J., and WHITTEN, I. *Effects of Restrictions of Advertising and Commercial Practice in the Professions: the Case of Optometry*. Washington, D.C., Bureau of Economics of the Federal Trade Commission, 1980.

8 Cox & Foster at 29.

9 Cox & Foster at 31.

10 In accounting, most of the members of the regional organisations are also members of the worldwide bodies, and well-established procedures exist for regular consultation and co-ordination of activities, so as to avoid duplication and overlap. No regional organisation is involved in the setting of standards, this being done at either national or worldwide level.
International

11 STILLMAN, R.J.; Public Administration, concepts and cases; Houghton Miffin Company, George Mason University, second edition, 1980, p. 76.

12 See Arizona v. Maricopa County Medical Society, 578 F. Supp. 1262 (D. Ariz. 1984).

13 See, for example, TREBILCOCK, TUOHY and WOLFSON, Professional Regulation (1979), p.322. The authors concluded that there was no case in any of the four professions studied in Ontario for a prohibition on price advertising. They considered that the then prevailing prohibition in the legal profession had significantly contributed to consumer ignorance and confusion about legal fees and that it had impaired the competitive health of some segments of the legal services market.

14 ANDREWS, LORI, (1980), Birth of a Salesman; Lawyer Advertising and solicitation, ABA Press.

15 TREBILCOCK, TUOHY and WOLFSON, *ibid.*

16 421 US 773 (1975).

17 435 U.S. 679 (1978).

18 476 U.S. 447, 463 (1986).

19 457 U.S. 332 (1982).

20 433 U.S. 350 (1977).

21 See footnote 16 above.

22 464 F. Supp. 400 (W.D. Texas 1978).

23 Monopolies Commission, A Report on the General Effect on the Public Interest of Certain Restrictive Practices so far as They Prevail in the Supply of Professional Services, October 1970, Cmnd 4463.

24 94 F.T.C. 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S (1982)(order modified 99 F.T.C. 440 (1982), 100 F.T.C. 572 (1982) and 114 F.T.C. 575 (1991).

25 LIANG, N. and OGUR, J., Restrictions on Dental Auxiliaries (1987).

26 BOND, R. *et al*., Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

27 Because professionals often operate through networks, they are often not in a position to benefit from GATS Members' commitments on intra-corporate transferees.

28 Proceedings of the 1994 and the 1995 workshop were respectively published as OECD Documents: *Liberalisation of Trade in Professional Services* and *International Trade in Professional Services: Assessing Barriers and Encouraging Reform.*

29 See James MURRAY: *Liberalisation and the Consumer* in OECD Document (1996): "International Trade in Professional Services, assessing barriers and encouraging reform".

30 Competition Policy in Regulated Sectors, Report by the Committee of Experts on Restrictive Business Practices (OECD, Paris, 1979).

31 C(79)155(Final).

32 These reviews are to evaluate whether circumstances continued to justify their maintenance and estimate the costs and benefits of continued regulation. The advocacy role of competition authorities was particularly stressed as a way of ensuring more competition.

33 Competition Policy and the Professions OECD, Paris 1985).

34 Pierre SAUVÉ : *The Long and Winding Road: NAFTA and the Professions.* Liberalisation of Trade in Professional Services, OECD Documents (1995).

35 This means, for instance, that a European national employed by a firm established in a NAFTA country cannot enjoy temporary entry benefits in moving about the region. That is to say, firms which otherwise meet the Agreement's rule of origin on investment -- *i.e. bona fide* NAFTA investors -- cannot deploy their skilled personnel within affiliates located in the NAFTA region.

36 Traders and investors, intra-company transferees and professionals continue to require an employment authorisation or work permit to enter another country under the Agreement. Business visitors are exempt from this requirement.

37 Jean-Eric de COCKBORNE : *Professional Services in the European Union.* Liberalisation of Trade in Professional Services, OECD Documents (1995).

38 In the case of legal professions, the aptitude test may be made mandatory.

39 The Fédération Européenne d'Associations Nationales d'Ingénieurs. This association of 23 European professional engineering organisations (of which 18 are from OECD countries, *i.e.*, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom) is said to represent some one million professional engineers.

40 Eight countries are now signatories (six of whom are OECD countries, *i.e.* Australia, Canada, Ireland, New Zealand, United Kingdom, and the United States).

41 Real estate employment is estimated to represent approximately ten percent of the figures reported. Inclusion of real estate in the business service category renders the use of annual output data very difficult as they include very large amounts of the rent-equivalent value of all real estate (owned or leased).

42 *Ibid*, page 10.

43 The largest positive net contribution of legal services to the external trade balance is found in the countries with the largest number of lawyers and the largest law firms, namely the United States and the United Kingdom.

44 UNCTC, Directory of the World's Largest Service Corporations (New York: Moody's Investors Service and United Nations Publications, 1990).

45 Steven C. NELSON: The American Bar Association in Liberalisation of Trade in Professional Services, OECD Documents (1995).

46 See NOYELLE, *supra*, page 56.

47 See Thierry NOYELLE above, who estimated the number of accountants in the accounting industry or the assumption of one certified accountant to one support staff.

48 The distinctions made with regard to the designation of those considered members of the profession have an important impact on the size of the accountancy profession. In some countries, designation is equivalent to education, irrespective of the subsequent career path or activities. In other cases, the professional designation is equivalent to a functional title which the holder must surrender when he or she ceases to undertake accounting activities. In countries where the former system is applied, professional accountants are to be found in a wide range of positions in industry, commerce, the public sector, education and the like as well as in the public practice of accountancy. Where the latter system operates, membership of the accountancy profession is confined to those in public practice. Some countries may actually apply both systems concurrently (e.g. in the United Kingdom), but in such cases the profession is not considered to be confined to those holding the functional titles.

49 Including financial statements (statutory auditing); financial statements (non-statutory auditing); merger auditing; public sector auditing; audit of contributions in kind; other special-purpose engagements.

50 Including accounting, public sector accounting, book-keeping.

51 Derek RIDYART and Jean de BOLLE, *Study of the EC Audit and Consultancy Sector, A Report to DG IV of the European Commission*, NERA, May 1991.

52 See NOYELLE, *supra*, page 36.

53 See NOYELLE, *supra*, page 71.

54 See NOYELLE, *supra*, page 14.

55 Observatoire de l'économie de l'architecture: Architectes: une décennie de profondes mutations, Bulletin de Conjoncture, numéro 4, décembre 1995.

56 Foreign trade accounts for only two percent of the sector's turnover, according to Nicolas Nogue in *Importation and Exportation des Services d' Architecture, Premier Bilan*, Paris: Observatoire de l'Économie de l'Architecture, mai 1995.

57 Dr. Francis DUFFY: Architects' Council of Europe, OECD Documents (1995).

NOTE DE RÉFÉRENCE *

1. Introduction

On trouvera dans ce chapitre une étude des problèmes de réglementation posés dans les services professionnels. Elle concernera à quatre professions -- avocats, comptables, ingénieurs et architectes -- qui intéressent plus particulièrement la clientèle d'entreprises. Ces professions se caractérisent généralement par des normes strictes de formation théorique et pratique, de comportement éthique et de responsabilité individuelle, ainsi que par leur indépendance morale et financière. Ces professions sont en outre très réglementées. Ce chapitre portera plus spécialement sur deux types de réglementation : celles qui ont trait à la reconnaissance des qualifications et aux normes de compétence professionnelles et celles qui affectent les conditions de concurrence au sein de la profession, à savoir avant tout les restrictions sur les tarifs, l'entrée dans la profession et la publicité.

La réglementation peut être nécessaire pour assurer la qualité. Elle peut aussi avoir pour effet moins désirable d'éliminer ou de restreindre la concurrence économique et de limiter la transparence. On se rend de plus en plus compte que certaines réglementations sont sans doute inadaptées et qu'il faudrait trouver un meilleur équilibre entre les intérêts servis par la réglementation et la nécessité d'assurer la concurrence. Il est incontestablement utile de se doter de normes éthiques et de codes de déontologie, de même qu'il est sans aucun doute souhaitable de veiller au respect de normes de compétence professionnelle strictes pour assurer l'intégrité de la profession et la confiance du grand public. Cela étant, les deux objectifs de promotion de la concurrence et de maintien de normes professionnelles ne sont pas nécessairement contradictoires.

On peut entrevoir des principes de nature à orienter les réformes lorsque l'on constate que les effets nets de la réglementation professionnelle peuvent différer selon les catégories de clients. La clientèle d'entreprises dispose de suffisamment de connaissances pour former son propre jugement sur les normes de résultats professionnels et n'a donc pas besoin de la même protection que les particuliers. Les entreprises ont besoin de services professionnels pour des travaux plus complexes et plus spécifiques et ont donc de plus en plus besoin de prestataires de services professionnels à même de traiter des questions et problèmes multinationaux. En revanche, les consommateurs risquent d'avoir besoin de plus de protection en matière de qualité des services en raison de leurs moindres compétences. Parallèlement, les services professionnels aux particuliers pourraient être plus normalisés et donc mieux adaptés à des concepts commerciaux courants comme la concurrence par les prix et la publicité. La clientèle d'entreprises peut généralement imposer la concurrence par les prix et les services et peut se protéger elle-même sur le front de la qualité ; ce que les entreprises revendiquent de plus en plus, c'est une réforme qui favorise la liberté des échanges. La clientèle de particuliers pourrait surtout tirer parti d'une plus grande concurrence sur les prix et les services, tout en ayant besoin d'une certaine protection réglementaire pour garantir la qualité du

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* Ce document est le chapitre 3 sur la réforme de la règlementation et les services professionnels extrait du rapport de l'OCDE sur la réforme de la règlementation - volume I : Etudes sectorielles (1997). Il a été soumis comme document de référence pour la table ronde.

service. Or, la réglementation des prestataires de services professionnels ne prévoit généralement pas de distinctions prenant en compte ces disparités.

La libéralisation des échanges de services professionnels représente un défi nouveau pour les pouvoirs publics. Une série de règlements affectant les échanges mondiaux dans ces professions -- comme les restrictions en matière d'établissement ou les obligations de nationalité ou de présence locale -- font obstacle à un véritable accès au marché et à la concurrence. Des progrès considérables ont été accomplis, notamment dans des structures internationales comme l'OCDE et l'OMC, vers la mise en évidence des principaux obstacles aux échanges transnationaux et à l'investissement direct étranger. Le défi consiste désormais à envisager des approches innovantes pour lever ces obstacles et encourager la libéralisation par la réforme de la réglementation. Or, les réformes nationales et internationales peuvent s'épauler mutuellement en la matière.

La plupart des professions sont étroitement réglementées. De fait, elles sont souvent auto-réglementées, par le biais de leurs associations professionnelles. Ces réglementations internes peuvent avoir force de loi, dans les pays où les pouvoirs publics déléguant leurs pouvoirs aux associations professionnelles ou dans lesquels les organismes officiels de tutelle des professions se composent de personnalités désignées par la profession. Traditionnellement, ce sont les professions elles-mêmes qui ont souhaité un contrôle réglementaire et elles ont voulu lui donner une assise juridique au motif que cette assise serait dans l'intérêt du grand public.

La réglementation contrôle généralement l'entrée en définissant les qualifications et restreignant l'exercice à ceux qui peuvent démontrer ces qualifications. Toutefois, elle étend aussi souvent son champ d'application à des questions purement commerciales, en empêchant ou contrôlant la concurrence par les prix, la publicité, les relations commerciales et la participation de professionnels étrangers en raison de leur nationalité. Ces mécanismes de contrôle ont transformé des branches d'activité structurellement concurrentielles en cartels. La réglementation visant à assurer la qualité est nécessaire dans certaines conditions, mais elle mérite un examen plus attentif. Les règlements empêchant la concurrence par les prix ou sous d'autres formes classiques portent préjudice aux consommateurs sans améliorer la qualité du service ; leur principal effet est d'avantager les membres de la profession.

2. Principes des réglementations professionnelles en matière de protection des consommateurs

L'une des principales justifications avancées en faveur de la réglementation est la crainte que les mécanismes de marché ne parviennent pas à assurer une sécurité, où autre qualité, acceptable. Or, l'une des causes de défaillance du marché peut résider dans l'asymétrie de l'information : l'acheteur en sait beaucoup moins sur l'opération proposée que le vendeur (ou vice versa). Pour la plupart des biens ou des services, l'asymétrie de départ porte peu à conséquence et peut être corrigée. Un consommateur peut en savoir assez pour se former un jugement convenable, en enquêtant avant d'acheter ou grâce à l'expérience acquise lors d'un premier achat.

Toutefois, les services professionnels entrent souvent dans la catégorie des "biens acquis en confiance" : même après les avoir achetés, le consommateur peut ne pas pouvoir apprécier convenablement leur qualité. Ces services peuvent être d'une complexité technique et exiger une capacité de discernement qui sont considérables par rapport à ce qu'un consommateur peut savoir. En outre, la relation entre la compétence et le résultat peut être ambiguë. Les meilleurs soins médicaux ne permettent pas de guérir tous les patients ; les avocats les plus compétents perdent parfois un procès après avoir fait de leur mieux. A l'inverse, des patients peuvent se guérir sans intervention médicale et des différends peuvent se régler ou ne plus avoir lieu d'être pour des raisons entièrement fortuites. Un consommateur risque de ne pas pouvoir dire en quoi le résultat global correspondait à la qualité ou à l'intensité des soins apportés. Le consommateur est obligé de se fier à l'avis et à la réputation du professionnel.

Dans ces conditions, les vendeurs peuvent être incités à réduire la qualité générale de leurs services. Incapables de bien apprécier les différences de qualité, les consommateurs risquent alors de fonder leurs décisions sur la qualité moyenne qu'ils attendent. Sachant cela, et sachant que la plupart des consommateurs ne vont pas détecter la qualité inférieure à la moyenne, les vendeurs vont pouvoir proposer un service inférieur à la norme tout en facturant le prix "moyen". La baisse de la qualité du service risque dès lors de se répandre et le marché des services de haute qualité risque même de présenter des défaillances[1].

On trouve un problème d'information connexe avec les phénomènes trompeurs de traitement par excès, qui peuvent aboutir à l'effet inverse, à savoir trop de services plutôt que pas assez. Lorsque les consommateurs ne peuvent pas facilement établir de corrélation entre les différences de qualité ou de quantité du service et le résultat final, et plus spécialement lorsque ce sont des tiers qui paient la facture en dernier ressort, les prestataires peuvent être tentés de fournir les services en excès. Le professionnel qui diagnostique le problème et recommande, puis réalise le service nécessaire peut formuler un diagnostic qui appelle un traitement excessif du problème par rapport à ce qui est réellement nécessaire. On soupçonne souvent l'existence de telles pratiques dans des services comme la réparation de voitures ou d'appareils ménagers, mais cela se produit dans des structures de services professionnels comme les soins médicaux. A une époque, les médecins au Japon prescrivaient plus de médicaments que tous leurs confrères dans le monde, parce que la vente de médicaments constituait la principale source de revenus pour les médecins de ce pays.

Une autre raison pour laquelle les réponses du marché n'assurent pas la qualité nécessaire provient des externalités. Le risque tient au fait que les professionnels ou leurs clients risquent de ne pas tenir compte dans leurs décisions en matière de service ou de paiement, des effets de ces décisions sur des tiers qui ne sont pas directement concernés. Par exemple, un patient peut être satisfait par la disparition de symptômes, mais ses voisins peuvent vouloir un traitement plus en profondeur pour empêcher la contagion. Ou encore, des créanciers et des investisseurs qui ne paient pas l'intervention d'un commissaire aux comptes peuvent prendre des décisions qui reposent fortement sur son rapport. Dans ces deux illustrations, le patient ou l'entreprise examinée risque d'être tentée d'opter pour une moindre qualité ou des services inférieurs à ce qui serait socialement souhaitable. Certes, ce qui apparaît comme des externalités peut être au moins en partie internalisé. Une entreprise qui emprunte de l'argent ou vend des actions va avoir intérêt à payer plus pour avoir un commissaire aux comptes plus compétent et objectif que celui auquel les investisseurs et créanciers seraient disposés à faire confiance.

La réaction classique à ces risques de défaillance réside dans la réglementation directe ou indirecte. Des règles d'agrément peuvent exclure de la profession ceux qui ne sont pas qualifiés pour assurer les services. Des normes de services peuvent définir des critères de maintien et d'évaluation de la qualité et peuvent s'efforcer de prévenir des abus de "traitement par excès des problèmes". Des règles disciplinaires peuvent désigner et exclure les prestataires dont la qualité ne répond pas à la norme ou qui ne respectent pas les obligations fiduciaires de la profession vis-à-vis de leurs clients. De telles mesures peuvent être nécessaires pour garantir la qualité des services.

D'autres méthodes faisant appel aux mécanismes de marché, peuvent aussi au moins contribuer à atténuer ces problèmes de défaillance du marché. L'asymétrie de l'information peut être compensée ou corrigée par des types ou sources d'information différents, en particulier par la réputation. Si des prestataires de grande qualité peuvent se forger une réputation personnelle de qualité, les services de grande qualité resteront présents sur le marché -- mais à un prix d'autant plus élevé. Qui plus est, se faire une réputation d'honnêteté professionnelle et de refus de traitement surabondant peut, à long terme, être dans l'intérêt bien compris du prestataire. Mais si la réputation de grande qualité et d'honnêteté du prestataire ne correspond pas à la réalité, les consommateurs risquent d'être gravement trompés.

De plus, la réputation à elle seule, même lorsqu'elle est justifiée, ne résout pas tous les problèmes d'externalité. Les actions en justice ou les garanties, deux autres modes de réponse non réglementaires, risquent aussi d'être inadaptées pour assurer la qualité. Un professionnel incompétent peut affronter la menace d'un procès ; toutefois, ces mêmes caractéristiques de la profession qui empêchent le consommateur de juger de la qualité du service risquent de rendre délicat l'établissement de l'incompétence. Si l'erreur du professionnel peut aboutir à un préjudice grave, cette méthode par définition incertaine, a posteriori et au cas par cas, peut présenter des risques inacceptables. De même la garantie contractuelle de qualité risque d'être inadaptée au regard du risque de préjudice.

En conséquence, l'existence d'une certaine réglementation ou d'un agrément peut être nécessaire pour assurer la qualité du service. Les avantages de cette réglementation, en termes d'amélioration de la qualité, doivent être pesés par rapport aux coûts. Traditionnellement, ces coûts recouvraient le renchérissement du service et la réduction de la production par la limitation de la concurrence que la réglementation tend à générer en limitant l'entrée sur le marché, en contrôlant les prix, en imposant des niveaux de service, en empêchant une publicité honnête et en interdisant les relations commerciales. Certes, lorsque la suppression de la concurrence est nécessaire pour assurer la qualité, ces effets ne devraient pas être incompatibles, car l'effet anticoncurrentiel peut être un avantage et non une charge.

3. Réglementation professionnelle limitant la concurrence

Toutefois, la suppression de toute concurrence n'est pas nécessaire pour assurer la qualité. Les services professionnels sont de façon caractéristique spécialisés et différenciés, mais ils sont suffisamment exposés aux mécanismes du marché pour que la concurrence entre professionnels s'exerce à l'avantage des consommateurs. Certes, la nature et l'ampleur de cette concurrence varient sans doute selon les catégories de services. Plus il est facile de comparer la qualité à l'entrée et à la sortie, plus le consommateur a des chances de profiter de la concurrence sur les prix et d'une publicité qui mette en relief, sincèrement, les différences de qualité et de prix.

Certains services professionnels sont plus normalisés et routiniers que d'autres. C'est pour ces services qui sont souvent proposés à des honoraires normaux pour un travail effectué, qu'autoriser la concurrence par les prix et une publicité honnête s'est avéré le plus avantageux pour le consommateur. D'autres missions sont plus incertaines et nécessitent plus de discernement. Dans ces cas, les honoraires peuvent varier en fonction des différences de qualité des services, souvent en facturant le service en fonction du temps passé. Les tarifs horaires peuvent varier selon la qualité, les praticiens plus expérimentés imposant des tarifs plus élevés que d'autres. En ce sens, une concurrence sur les prix se manifeste donc même pour des services plus spécialisés. Or, malgré des interdictions ouvertes à l'encontre de la concurrence sur les prix ou sur d'autres facteurs, les professionnels se sont souvent livrés concurrence afin d'attirer la clientèle pour des travaux spécialisés.

Les restrictions à l'entrée sur le marché prescrivent généralement des normes reposant sur les niveaux de formation et l'expérience. En d'autres termes, les normes d'accès initial fondées sur la qualité reposent sur des facteurs plutôt que sur des produits. La question de savoir si ces conditions d'accès sont synonymes d'amélioration du service dépend de leur corrélation avec la qualité du produit. Imposer d'avoir de très bonnes notes à des examens d'entrée peut faire que seuls ceux qui ont le plus de faculté à passer des examens sont admis. Mais cette faculté ne donne pas beaucoup d'indications sur la capacité à faire preuve du discernement nécessaire à la pratique professionnelle. Définir un seuil d'accès élevé risque de servir à décourager l'arrivée sur le marché d'un professionnel potentiellement compétitif.

Les restrictions en matière de pratiques concurrentielles, comme la concurrence sur les prix, la publicité honnête, l'utilisation de raisons sociales non mensongères ou les relations avec d'autres types d'entreprises, ainsi que les limitations à la participation étrangère pour des raisons de nationalité, ne traitent pas de façon explicite la question de la qualité. En théorie, on a affirmé que la levée de ces restrictions et l'autorisation de ces pratiques aboutiraient aux défaillances du marché évoquées précédemment. En fait, l'interdiction de ces pratiques est allée de pair avec un renchérissement des services et un recul de l'innovation, sans pour autant apporter d'amélioration de la qualité du service.

Des études comparatives sur ces éventuels phénomènes ont été menées dans certains pays fédéraux comme l'Australie, le Canada et les États-Unis, où différentes réglementations locales imposent des contrôles plus ou moins rigoureux[2]. D'après ces études, autoriser de telles pratiques ne porte pas préjudice à la qualité des services dont bénéficient les consommateurs. Selon une enquête passant en revue la documentation économique existante et réalisée par des experts de la Federal Trade Commission des États-Unis, sur onze études comparatives, six ont conclu que l'effet de ces pratiques sur la qualité est neutre ou mitigé, deux que les restrictions amélioraient la qualité et trois qu'elles la faisaient en fait reculer[3]. Ces études ont porté sur divers types de restrictions et différentes professions ou différents métiers : comptables, avocats, médecins, optométristes, pharmaciens, dentistes, techniciens de laboratoires médicaux, vétérinaires, ingénieurs sanitaires, agents immobiliers, électriciens et plombiers. En raison de ces différences de méthode, il est difficile de tirer des conclusions générales de leurs résultats. Toutefois, on peut conclure de façon générale que le relâchement des contraintes sur ces aspects de la concurrence ne provoque généralement pas de baisse de la qualité du service.

Les études sur la publicité des avoués ont illustré ces effets sur la qualité et les prix. Muris et McChesney[4] ont vérifié l'affirmation selon laquelle les cabinets dont la stratégie consiste à faire de la publicité sur leurs honoraires inférieurs produisent nécessairement des services de moindre qualité et ont conclu que cette affirmation n'était pas fondée. Au contraire, ils ont observé que ces "cliniques" juridiques faisaient appel à la publicité pour obtenir un plus grand volume d'affaires et abaisser ainsi en moyenne leurs frais fixes, de façon à pouvoirs facturer des prix plus faibles sans réduire la qualité. D'autres études ont mis en évidence la façon dont les restrictions sur la publicité des avoués affectait les prix. Une étude réalisée par les agents de la FTC a conclu que les honoraires pratiqués pour un certain nombre de services juridiques courants étaient plus élevés dans les villes qui imposaient des restrictions sur la publicité en termes de période, d'emplacement et de méthodes[5]. Le tarif des services correspondant à une procédure de divorce à l'amiable, par exemple, était en moyenne supérieur de 33 dollars dans les villes appliquant une réglementation restrictive en matière de publicité. D'autres études ont conforté cette conclusion fondamentale[6]. Ces résultats sont conformes aux observations réalisées dans d'autres professions selon lesquelles la limitation de la publicité renchérit les services, mais n'améliore pas leur qualité[7].

Une autre raison avancée en faveur de la réglementation invoque la répartition, à savoir veiller à ce que tous les consommateurs aient accès à des services de qualité. Toutefois, certaines études mettent en relief un effet de répartition lié à la qualité que les pouvoirs publics seraient avisés d'étudier de plus près. En effet, les réglementations qui parviennent à limiter la profession aux prestataires de service de la meilleure qualité pouvaient faire en sorte que les consommateurs bénéficient de services de qualité élevée. Mais si l'on ne dispose que de services de qualité élevée, mais à un prix élevé, de nombreux consommateurs ne peuvent pas se permettre des services de ce niveau et s'en passent. Ils risquent donc de subir des maladies ou des problèmes que l'accès aux services professionnels pourrait contribuer à atténuer. Ou encore, ces consommateurs risquent de se débrouiller seuls et dans ce cas, ils ne parviennent pas à améliorer leur situation voire se portent préjudice du fait de leur incompétence. Confirmant cette prédiction théorique, certaines études constatent que le niveau général de qualité des services reçus peut en fait être inférieur dans les professions où les restrictions à l'entrée fondées sur la qualité des prestataires sont importantes[8].

Là où les restrictions portant sur la dimension commerciale de la pratique professionnelle ont été assouplies, les prix baissent et de nouveaux services apparaissent pour répondre à la demande des consommateurs. Dix études comparatives sur les effets de telles mesures sur les prix ont toutes montré que l'application d'une réglementation stricte à l'encontre de pratiques concurrentielles se traduit par un renchérissement des services[9]. Cette expérience plaide pour un élargissement des réformes parce qu'elle montre que l'on peut soumettre plus les professions aux règles du marché tout en préservant la qualité, les normes de résultats et la protection nécessaire du consommateur.

4. Caractéristiques réglementaires des services professionnels

4.1 La réglementation relative aux services professionnels

La principale justification donnée à l'imposition d'une réglementation lourde des services professionnels aux entreprises et des autres services professionnels comme les soins de santé est de garantir des normes de compétence, de résultats, de comportement éthique et de responsabilité individuelle.

L'accès à une profession est souvent contrôlé à la fois directement, en réglementant l'accès des individus à cette profession et indirectement en réglementant les types de services qu'assurent les professionnels.

La réglementation de la profession définit et impose des conditions d'agrément des qualifications nécessaires en termes de formation initiale et d'expérience. Des règlements analogues ou équivalents peuvent faire de même pour l'adhésion aux associations professionnelles. D'autres formes de réglementation directe des praticiens comportent des définitions des titres professionnels et des mesures pour protéger l'utilisation de ces titres, des conditions de formation continue, des normes éthiques et des codes de déontologie, des normes techniques et des normes de résultats, des conditions supplémentaires d'agrément pour des domaines spécialisés au sein de la profession, ainsi que des prescriptions relatives aux garanties professionnelles ou à l'assurance de la responsabilité professionnelle. Une forme importante de réglementation directe réside dans les contraintes en matière de propriété, de gestion et de contrôle des cabinets de services professionnels, notamment l'interdiction de nouer des relations commerciales avec des non professionnels.

La réglementation des services définit les types spécifiques de travaux qu'effectuent les professionnels soumis à la réglementation, ainsi que les personnes effectuant ces travaux et les conditions dans lesquelles elles le font. Ces définitions spécifiques établissent des distinctions entre les activités réservées aux professionnels et les activités pouvant être exercées par d'autres intervenants. Ces distinctions sont observées à l'aide de règles contrôlant et régissant "l'exercice non autorisé" de la profession. Le Tableau 1 présente plusieurs fonctions caractéristiques de chacun des quatre secteurs des SPE ; il indique en outre dans quelle mesure la réglementation nationale contrôle les possibilités d'exercice de ces fonctions par d'autres intervenants qui ne sont pas des professionnels agréés.

Dans presque tous les pays Membres, les avocats ont un monopole de représentation des clients devant les tribunaux. Le conseil juridique aux personnes morales et aux personnes privées peut aussi être réservé à la profession. La distinction entre travail judiciaire et conseil juridique se reflète, dans les pays anglo-saxons, par la distinction entre avocats du barreau (barristers) et avoués (solicitors), dont la fonction principale est le conseil. Dans d'autres pays, notamment en Europe continentale, des activités comme la transmission de biens immobiliers et l'administration des héritages de personnes décédées sont réservées aux notaires. Les problèmes de droit des brevets peuvent être réservés à un autre ensemble de spécialistes.

Un certain chevauchement avec l'activité d'autres professionnels se manifeste cependant avec l'arrivée des comptables dans des domaines comme le droit fiscal, le droit des sociétés et la planification d'entreprise.

Les services comptables qui sont souvent assujettis à une réglementation et même à un régime d'exclusivité recouvrent notamment la vérification obligatoire des comptes des sociétés, le contrôle des apports en nature et la gestion des problèmes d'insolvabilité. Les cabinets comptables fournissent souvent d'autres services, comme des conseils en fiscalité et en gestion, qui ne sont pas soumis à un régime d'exclusivité. En conséquence, le travail de certains comptables peut recouper celui d'autres intervenants non soumis à la réglementation de ce secteur (comme les avocats) ou d'autres spécialistes qui ne sont assujettis à aucune réglementation (comme les conseils en gestion).

L'ingénierie et l'architecture sont soumises à des réglementations moins contraignantes en matière de services. Les ingénieurs-conseils interviennent à tous les stades d'un projet et donc leurs services recoupent sensiblement ceux d'autres professionnels. Quant aux architectes agréés, ils ne bénéficient pas toujours d'un droit exclusif de se livrer à des travaux d'architecture, notamment en Europe. Il est possible que le contrôle des normes professionnelles dans ces professions plus techniques ait tendance à intervenir par des réglementations ou des normes ayant trait à un objet précis, notamment les prescriptions techniques prévues par les codes de la construction.

Pour garantir le respect des normes de compétence, de résultats, de comportement technique et de responsabilité, la réglementation impose des conditions de formation et d'expérience. Les conditions de formation prévoient habituellement plusieurs années d'études universitaires ou équivalentes. Les conditions d'expérience peuvent prévoir une formation pratique en apprentissage. En outre, l'entrée dans la profession peut être sanctionnée par un examen professionnel (voir Tableau 2). Dans un certain nombre de pays de l'OCDE, un agrément est délivré aux personnes ayant satisfait à toutes les conditions ; dans d'autres, l'admission dans la profession est conditionnée par une adhésion officielle à un organisme professionnel. Les professions peuvent être divisées en spécialités, chacune imposant ses propres conditions d'entrée et son propre titre.

Les professionnels peuvent être autorisés, voire contraints à afficher leur titre dans leurs relations avec le public. Lorsque les qualifications sont établies par voie d'agrément et que des personnes non agréees sont autorisées à exercer, ces dernières ne peuvent normalement pas se prévaloir du titre professionnel. Par exemple en Finlande et en Suède, où n'importe quelle personne peut en représenter une autre devant les autorités, seuls les titulaires d'un diplôme de droit membres du barreau national peuvent utiliser le titre "Avokat."

La plupart des professions sont dotées d'un code d'éthique professionnelle. Ces codes comportent généralement des obligations de loyauté, de compétence professionnelle, de sincérité et de confidentialité. De plus, ils interdisent généralement les conflits d'intérêts, afin de faire en sorte que les intérêts du client prévalent et que les honoraires facturés constituent la seule rémunération financière du professionnel. L'assurance responsabilité civile et une couverture minimale par des assurances pour les erreurs et omissions sont souvent obligatoires à titre de condition nécessaire pour obtenir et conserver un agrément. Lors du recrutement d'un professionnel, le client obtient ainsi la promesse du respect de certaines normes de comportement, garanti par les mécanismes disciplinaires de la profession. Les mêmes services fournis par quelqu'un d'autre n'offrant pas ces caractéristiques vont être suffisamment différents pour être facturés différemment ou soumis à des normes différentes, par exemple, en matière de confidentialité, afin de protéger le consommateur. Par delà ces normes fiduciaires essentielles, des règles visant à contrôler la structure des entreprises, entraver la concurrence et réglementer la publicité et les techniques de commercialisation sont cependant souvent traitées comme des questions relevant de l'éthique professionnelle. Ce sont ces règles, plus que celles qui concernent la compétence et la responsabilité fiduciaire qui sont de plus en plus l'objet des efforts de réforme.

4.2 Associations professionnelles

Les professionnels sont généralement organisés en associations, qui bénéficient souvent d'une reconnaissance officielle et de relations étroites avec les pouvoirs publics. Ces associations interviennent fréquemment dans la préservation et le respect des règles et dans l'élaboration de nouveaux règlements devant être avalisés par les autorités de tutelle publiques. L'autodiscipline pure, qui a joué un rôle historique important, est en recul. Toutefois, une sorte d'autodiscipline peut souvent réapparaître lorsque l'autorité de tutelle est déléguée à ces associations, que ce soit *de facto* ou *de jure*.

Ce que font les différentes associations varie en fonction de leur statut et de leur pouvoir. Souvent, les associations professionnelles font appliquer des codes de déontologie. Les procédures disciplinaires des associations peuvent permettre de traiter des plaintes de clients ou d'autres professionnels contre une insuffisance de résultats, des écarts de comportement ou des dommages, pertes ou blessures effectives. Des conseils de discipline peuvent imposer des amendes, voire radier des praticiens des registres officiels, ainsi que faire appel aux recours juridiques d'ordre général.

Pour les avocats, l'adhésion à des sociétés juridiques ou au barreau est obligatoire dans la plupart des pays de l'OCDE (voir Tableau 3). En Europe et au Japon, ces associations régissent la conduite professionnelle et imposent des sanctions disciplinaires. Aux États-Unis, où les avocats sont sous la tutelle de la Cour suprême de chaque État, le Barreau de l'État joue un rôle de conseil important dans le processus d'accréditation et de réglementation ainsi que dans l'élaboration et l'application de codes précis de conduite et de responsabilité professionnelles.

Pour les comptables, l'adhésion à des organismes professionnels est très souvent obligatoire. Dans ce secteur, les organismes professionnels gouvernementaux ou de droit public auxquels l'adhésion est obligatoire, s'en tiennent généralement à des questions d'examen, d'autorisation, de discipline et de contrôle de qualité. Les organismes privés auxquels l'adhésion est facultative peuvent assumer la responsabilité de la formation initiale et continue, de l'élaboration de normes professionnelles en matière de technique et de résultats, de services aux adhérents et de représentation de la profession. Dans les quelques pays où la tutelle revient à des organismes du secteur privé, ces organismes assurent toute la gamme des activités indiquées précédemment.

Pour les ingénieurs-conseils et les architectes, l'adhésion aux associations professionnelles est souvent facultative. Les associations nationales ont généralement publié des codes de déontologie comportant des critères communs, comme l'indépendance, l'impartialité et les limitations sur la propriété des cabinets professionnels. Dans le cas de l'architecture, des normes indicatives sur de telles questions ont aussi été adoptées par l'Union internationale des architectes.

D'autres organisations régionales à caractère supranational sont apparues[10]. Les différences de tradition, de jurisprudence, d'intervention des pouvoirs publics, de délimitation des activités ainsi que d'autres facteurs importants sont cependant si considérables que les organisations adhérentes, à savoir les associations professionnelles nationales, ont du mal à s'entendre. La représentativité, les préoccupations et les priorités d'action peuvent varier considérablement. Les rivalités interprofessionnelles peuvent s'accentuer à propos d'activités contestées. Néanmoins, comme on le verra, ces organismes peuvent jouer un rôle majeur, notamment dans l'élaboration de normes mondiales.

5. Des réformes nationales pour permettre la concurrence tout en préservant la qualité

Les structures réglementaires des professions ont fait l'objet d'un examen de plus en plus serré afin de déterminer si elles ont servi les intérêts de la profession plus que, voire au détriment de ceux du

grand public[11]. Certaines des règles dont l'ambition affichée est d'ordre déontologique pour veiller à ce que les services répondent aux normes de qualité et de volume attendues par les consommateurs, à des prix raisonnables, peuvent servir surtout à empêcher la concurrence entre professionnels et à maintenir des prix élevés. Or, dans la mesure où il existe un risque de voir ces règles empêcher la concurrence et donc porter préjudice aux consommateurs, il peut être préférable qu'elles soient mises en œuvre par quelqu'un d'autre que les organismes professionnels eux-mêmes. Une certaine intervention des professionnels dans la surveillance de leurs confrères et consœurs est essentielle. Pour empêcher des restrictions de concurrence, il conviendrait aussi de prévoir la présence de représentants des consommateurs dans les organismes de tutelle. Il pourrait s'agir de gros acheteurs, comme les sociétés d'assurance, ou de représentants d'organisations de consommateurs ou encore d'agents des organismes de protection de la concurrence et de la consommation.

5.1 Règlements pouvant porter préjudice au consommateur en limitant la concurrence

L'un des principaux thèmes de réforme consiste à assouplir les contraintes pesant sur la concurrence économique qui ne sont pas nécessaires pour préserver la qualité du service ou pour empêcher les préjudices aux consommateurs. Quatre types courants de réglementations professionnelles correspondent à cette description : les contrôles trop stricts à l'entrée et à l'accès à la profession, les contraintes sur la concurrence en matière d'honoraires, les interdictions empêchant le recours à une publicité honnête et non mensongère et les restrictions trop rigoureuses aux formes parallèles d'exercice de la profession.

5.1.1 Entrée et accès

Les règles d'agrément déterminent les personnes autorisées à exercer. En conséquence, les décisions de délivrance d'agréments déterminent le nombre de prestataires sur le marché. Prévoir des contrôles suffisants à l'entrée pour garantir la compétence peut se justifier et même être nécessaire, pour les raisons indiquées dans la Section 2. Mais le contrôle de l'agrément peut servir à définir le niveau de la concurrence. Parfois, les professionnels ont le pouvoir de contrôler l'entrée à deux niveaux, en déterminant qui peut obtenir un agrément et en accréditant les écoles dans lesquelles sont formés de futurs professionnels. Il est peu probable que ces deux niveaux de contrôle soient nécessaires pour assurer la compétence. A la fin des années 1980, moins de 500 étudiants en droit étaient admis chaque année au barreau japonais. Dans d'autres professions d'autres pays, on propose parfois de limiter le nombre d'agréments nouveaux, indépendamment de la compétence des candidats, au motif que la concurrence serait déjà convenable.

Dans la plupart des professions, le nombre de praticiens est considérable, ce qui tend à montrer que le contrôle à l'entrée à lui seul ne supprime pas la concurrence. Toutefois, les contrôles à l'entrée, lorsqu'ils sont associés à une réglementation stricte des services susceptibles d'être fournis, ont entravé l'apparition de la concurrence sous forme de nouveaux types d'intervenants ou de nouveaux produits. En outre, récemment encore (et c'est peut-être toujours le cas) les contrôles à l'entrée ont aussi permis de maintenir des prix élevés. En Australie, l'élimination du monopole des avocats sur la transmission de biens et de celui des avocats du barreau sur le travail de tribunal (ainsi que l'autorisation de la publicité) passe, d'après les estimations, pour avoir provoqué une baisse de 12 pour cent des frais juridiques en général dans ce pays.

Une façon de résister à des contraintes d'agrément d'une rigueur excessive ou de les corriger consiste à ouvrir l'accès à des professionnels dont les compétences sont établies dans d'autres juridictions. Dans certains pays, notamment ceux qui ont une structure fédérale, les pressions exercées par le marché

ont obligé les professions à permettre une plus grande mobilité au sein du pays. En Allemagne, par exemple, les avocats d'une juridiction locale, qui très récemment encore n'étaient pas admis à s'associer à des confrères d'une autre juridiction, ne se voient plus interdire de servir des clients à l'échelle nationale. Autre exemple, l'Australie, où les Chefs de gouvernement ont signé, en mai 1992, l'Accord de reconnaissance mutuelle. Cet accord donne effet aux principes de reconnaissance mutuelle qui permet notamment aux prestataires de services professionnels (personnes physiques) immatriculés pour exercer une profession dans un État ou territoire du pays, la possibilité d'être immatriculé et d'exercer la même activité dans n'importe quel autre État ou territoire. En outre, l'Institute of Chartered Accountants (Institut des comptables agréés) a supprimé en 1995 l'obligation de résidence imposée à ses adhérents, ce qui permet à des comptables australiens de travailler à l'étranger et aux comptables étrangers de devenir membres de l'Institut australien.

Une autre façon de surmonter ces obstacles manifestes a consisté à supprimer les distinctions traditionnelles entre des champs d'exercice étroitement liés. C'est ce que l'on voit dans le droit où l'on attend de plus en plus des avocats qu'ils fournissent des conseils sur des transactions et des investissements complexes affectés par l'interaction du droit national et international. Les anciennes distinctions et règles qui séparaient les fonctions de représentation devant les tribunaux et le conseil s'effacent, devant la demande croissante de clients souhaitant recourir à des personnes dotées de compétences multiples. En France, par exemple, les « avocats », dont la formation et l'organisation professionnelles étaient centrées entièrement sur les tribunaux, et les « conseillers juridiques », n'appartenant pas au barreau et moins étroitement réglementés, ont récemment fusionné en une profession unique. De plus, certains pays de droit coutumier qui ont gardé la distinction entre avocats et avoués sont en passe de l'abolir.

5.1.2 La concurrence sur les honoraires

Récemment encore, les honoraires de services professionnels étaient fixés par la réglementation ou par voie de convention et non par la concurrence sur le marché. Au contraire, les organisations professionnelles ont souvent eu l'autorisation d'établir des tarifs d'honoraires recommandés, voire obligatoires et la concurrence ou les appels d'offres dans ce domaine passaient généralement pour contraires à l'éthique. L'argument présenté pour justifier ce mode de fixation des prix était que la concurrence entraînerait une baisse des prix et que la baisse générale des prix aboutirait à une baisse de la qualité des services. De toute évidence, on craignait que les prestataires les plus compétents ne quittent la profession, parce qu'ils ne seraient pas suffisamment rémunérés pour leurs capacités supérieures et que la réduction des perspectives de revenus ne décourage les candidats prometteurs à l'entrée dans la profession.

Ces arguments ont été de plus en plus contestés dans les pays de l'OCDE, à mesure que la politique et le droit de la concurrence ont été étendus à des professions où l'on n'avait pas de véritables preuves d'une défaillance grave du marché. Les barèmes d'honoraires obligatoires, qu'ils s'appliquent dans le cadre de la réglementation ou d'un régime d'autodiscipline, sont de plus en plus contestés et généralement condamnés en tant que pratiques anticoncurrentielles ou préjudiciables à l'ordre public.

Les tarifs d'honoraires peuvent revêtir plusieurs formes : des maxima ou des minima, des tarifs obligatoires ou facultatifs. Ils peuvent définir des taux horaires applicables à des services de tous types, ou des honoraires en valeur absolue ou relative pour des tâches spécifiques. Ils peuvent aussi fixer les honoraires en pourcentage de la valeur de la transaction. Les normes obligatoires de tarifs minima sont particulièrement préoccupantes. Lorsqu'ils sont recommandés plutôt qu'obligatoires, les barèmes d'honoraires ont parfois été autorisés, à condition que les frais facturés aient été déterminés de façon indépendante et en précisant clairement que le praticien et le client concernés sont libres de convenir d'honoraires sans se référer au barème. Dans certains pays comme l'Allemagne, les barèmes d'honoraires maxima ont été autorisés à condition de ne pas servir de frais minima obligatoirement facturés. Aux États-

Unis, même ces barèmes d'honoraires maxima sont considérés comme anti-concurrentiels. Les barèmes maxima peuvent servir à justifier des relèvements de prix au-delà des niveaux concurrentiels, même s'ils ne sont pas utilisés comme des minima de fait. Et lorsque la fixation de prix maxima par les professionnels est considérée comme illégale, le barème d'honoraires maxima a été utilisé dans le cadre d'efforts concertés pour empêcher la formation d'une organisation concurrente meilleur marché[12].

L'une des raisons avancée en faveur du plafonnement des honoraires consiste à veiller à ce que les consommateurs des tranches de revenus faibles ou moyennes puissent accéder à des services de qualité. Bien que dans certains cas, ce plafonnement permette de parvenir à ce résultat, il convient d'étudier des solutions de rechange qui présentent moins de risques de limitation de la concurrence. Par exemple, une assurance pourrait permettre à des consommateurs de bénéficier de services de qualité. En outre, certains professionnels de la médecine ou du droit fournissent des services aux consommateurs les plus pauvres *pro bono*, soit par choix personnel, soit sur recommandation des associations professionnelles.

5.1.3 Interdictions en matière de publicité

L'utilisation de la publicité et des techniques de commercialisation par les professionnels est généralement soumise à une réglementation rigoureuse, aussi bien sur la forme que sur le contenu. Des renseignements essentiels concernant le nom, l'adresse et le numéro de téléphone ainsi que certaines précisions sur la spécialisation peuvent généralement faire l'objet de publicité, mais la publicité sur les prix et les comparaisons avec d'autres praticiens sont généralement interdits. Ces restrictions semblent avoir été particulièrement répandues dans les professions juridiques et médicales (voir Tableau 4). La limitation et même l'interdiction de la publicité ont été défendues au nom de la préservation de l'intégrité et de l'indépendance professionnelle ainsi que de la protection du public contre les intervenants incompétents. Toutefois, les interdits allant même à l'encontre d'une publicité honnête ou non mensongère sont de plus en plus remis en cause, parce que de telles restrictions empêchent l'innovation et renchérissent les services.

Dans la plupart des secteurs de l'économie, la publicité joue un rôle important d'information des consommateurs et de moyen permettant aux nouveaux produits, services et prestataires d'être portés à la connaissance du public. La publicité peut donc encourager l'innovation et l'arrivée de nouveaux intervenants. Mais dans les professions libérales, de graves restrictions à l'encontre de la publicité font que le consommateur a du mal à savoir où trouver l'aide d'un expert ou à déterminer le prix probable de cette aide.

L'abolition des restrictions en matière de publicité a été bénéfique pour les consommateurs. La levée des restrictions à l'encontre de la publicité sur les prix semble s'être traduite par une baisse des prix et une augmentation de la demande de certains services professionnels[13]. Aux États-Unis, l'assouplissement des restrictions dans ce domaine a, semble-t-il, facilité l'expansion de prestataires de services parallèles et suscité une intensification de la concurrence sur les prix et sans doute un gonflement de la demande de certains types de services juridiques[14]. Selon une étude canadienne, la publicité sur les prix de la part des prestataires de services professionnels permettrait d'améliorer l'accès des consommateurs aux services, d'abaisser les honoraires et d'accroître l'efficience et l'innovation[15].

5.1.4 Les formes d'exercice

Les professionnels ont généralement été obligés d'exercer à titre personnel ou en association avec d'autres membres de la même profession. La constitution de sociétés ou les relations de franchise et même les succursales ont souvent été interdites. En outre, les relations d'associations, de société ou d'emploi avec

des non praticiens ont aussi généralement été interdites. La raison habituellement invoquée pour ces interdictions est le souci de maintenir la responsabilité individuelle du praticien vis-à-vis de son client. Si la responsabilité financière d'un préjudice ou d'une erreur pouvait être limitée ou partagée, ou si le professionnel se trouvait placé sous la direction ou le contrôle financier de quelqu'un qui ne soit pas soumis aux obligations de l'éthique professionnelle, on pourrait craindre en effet que cela ne compromette le devoir du professionnel vis-à-vis du client. Même lorsque d'autres formes d'organisation sont autorisées, les cabinets de professionnels peuvent être soumis à des restrictions pour qu'ils n'échappent pas à la responsabilité individuelle et à la discipline de la profession. Une méthode pour veiller à la protection des consommateurs consiste simplement à imposer aux professionnels d'être couverts par une assurance responsabilité civile convenable. Souvent, le droit de posséder un cabinet fournissant des SPE ou d'investir dans un tel cabinet reste cependant lié à l'obligation de détenir une autorisation d'exercice de la profession dans la juridiction qui la délivre (voir Tableau 4).

Par exemple, au Japon, un avocat ne peut avoir qu'un seul bureau, qui doit être situé dans la zone de compétence du barreau auquel il est inscrit et l'association d'un avocat avec des non avocats, y compris des avoués spécialisés dans les brevets ou les affaires fiscales ou encore des notaires, est interdite. En Europe, c'est seulement dans quelques États membres de l'UE que les cabinets juridiques opèrent en tant que sociétés ou associations dans lesquelles les charges, mais non les honoraires, sont partagées. Même aux États-Unis, où de nombreuses juridictions permettent aux avoués de constituer des "sociétés professionnelles" et où ces structures associatives peuvent être importantes, très complexes et diverses, certaines contraintes sur la forme de l'exercice demeurent. Des restrictions de ce type sont aussi fréquemment appliquées aux comptables et aux professionnels de la santé, mais elles sont moins courantes pour les architectes et pratiquement inexistantes pour les ingénieurs-conseils.

Dans certaines situations, ces contraintes ont été assouplies, parce qu'elles freinent la création de structures nouvelles et éventuellement plus efficientes en termes de coûts. Cela a permis l'apparition de nouvelles formes de prestations de soins médicaux et de services juridiques. Aux États-Unis, où les restrictions à l'encontre de l'emploi de médecins par des non professionnels ont été assouplies, des chaînes d'établissements de soins ambulatoires assurent désormais des soins sur des marchés où l'on avait besoin de médecins. En outre, la publicité a stimulé la croissance des "cliniques juridiques" apportant des conseils juridiques à des consommateurs qui estimaient que les avocats étaient trop chers.

Les interdictions à l'encontre de la constitution de sociétés ou les restrictions concernant les associations entre professionnels de qualifications étrangères et locales représentent aussi d'importants obstacles à la concurrence étrangère. Lors du troisième atelier de l'OCDE sur les services professionnels qui s'est tenu en février 1997 (section 4.2), des approches alternatives ont été identifiées.

Les structures de propriété et d'investissement peuvent nécessiter tout de même une certaine surveillance afin que des considérations exogènes ne viennent pas perturber le discernement des professionnels. Les obligations fiduciaires des professionnels constituent un élément important du service qu'ils assurent et leur responsabilité individuelle pour ce service représente un moyen de contrôle disciplinaire précieux. Lorsque l'on envisage d'autoriser la constitution de sociétés à responsabilité limitée, il peut être nécessaire de peser le risque de dilution de ces mécanismes de protection par rapport aux avantages des facilités d'accès au capital ou de la souplesse de gestion. Ces questions ont également d'importantes implications pour des participations étrangères (voir section 4.1).

5.2 L'application du droit de la concurrence et le plaidoyer pour la concurrence comme méthodes de réforme

L'un des facteurs importants de changement réside dans l'application croissante du droit de la concurrence aux prestataires de SPE. Cela est parfois venu de la décision directe et explicite d'étendre la loi sur les ententes aux activités de ces professionnels. Parfois, cela s'est fait par une voie indirecte, comme des décisions constitutionnelles qui modifient l'application de règlements généraux à des organismes constitués selon des principes propres à des provinces ou des États. Les réformes visant à appliquer une politique de stimulation de la concurrence ne nécessitent pas forcément des initiatives des services opérationnels. Mais parfois, la menace ou la perspective de telles initiatives a servi de catalyseur accélérant les changements nécessaires.

Aux États-Unis, les lois antitrust ont été appliquées aux professions depuis la décision de la Cour suprême qui a fait date dans l'affaire *Goldfarb v. Virginia State Bar*[16]. *Goldfarb* avait constaté que le Sherman Act ne prévoyait pas d'exemption pour les professions. Une autre décision de la Cour suprême de 1978 dans l'affaire *National Society of Professional Engineers v. United States*[17] a confirmé la règle *Goldfarb* en donnant une illustration de son application concrète. La société des ingénieurs était convenue d'une règle éthique aux termes de laquelle ses membres ne se concurrenceraient pas sur le terrain des prix avant que le client n'ait choisi l'un d'entre eux pour mener à bien son projet. La Cour suprême a rejeté l'argument de la société selon lequel la concurrence sur les prix n'était pas dans l'intérêt général parce qu'elle entraînerait des réductions de coûts et qu'elle aboutirait à des travaux de conception de qualité inférieure, voire dangereux. La Cour a pris une décision analogue dans l'affaire *FTC v. Indiana Federation of Dentists*[18] dans laquelle elle a rejeté l'argumentation des dentistes selon laquelle leur boycott d'une obligation d'examens radiologiques imposée par les assureurs se justifiait par des considérations de qualité des soins. En 1982, la Cour a décidé, dans l'affaire *Arizona v. Maricopa Medical Society*[19] que l'entente sur un barème d'honoraires maxima pour les services des médecins était en soi illégale.

Dans la mesure où la réglementation des professions relève de la responsabilité des gouvernements des États aux États-Unis, l'argument de "l'acte de gouvernement" est souvent invoqué sur les pratiques professionnelles. Par exemple, dans l'affaire *Bates v. State Bar of Arizona*[20] la Cour suprême a estimé qu'une interdiction de la publicité faite à un avoué par les avoués de l'Arizona procédait directement du pouvoir de la Cour suprême de l'Arizona de réglementer la profession et que la loi Sherman ne trouvait donc pas à s'appliquer (en revanche, la Cour suprême a contesté cette interdiction au nom du Premier Amendement à la Constitution protégeant la liberté d'expression). Cela étant, dans l'affaire *Goldfarb*[21] la Cour suprême a estimé que le barreau de l'État de Virginie n'était pas à l'abri de poursuites lorsqu'il a publié un barème d'honoraires minima. La Cour a estimé qu'il ne s'agissait pas d'une instance souveraine et qu'il n'y avait pas là d'acte de gouvernement. De même, dans l'affaire *U.S. v. Texas State Board of Public Accountancy*[22] le tribunal de district et la cour d'appel ont estimé que même si le Conseil était réglementairement habilité à promulguer des règles de déontologie professionnelle, ce pouvoir ne suffisait pas à lui conférer l'immunité s'agissant de la fixation d'une règle interdisant les appels d'offres concurrentes de la part des comptables publics. En règle générale, l'exemption des actes de gouvernement (qui peut s'appliquer à toute conduite et non pas uniquement à des professions) suppose que l'on ait établi que la conduite visée était conforme à une mesure explicite de l'État visant à prévaloir sur la concurrence et qu'elle est intervenue sous la supervision active de l'État en vue d'assurer sa conformité avec cette mesure.

Au Royaume-Uni**,** même si la loi de référence sur les pratiques commerciales restrictives ne s'applique pas aux services professionnels, la conduite professionnelle peut tomber sous le coup des dispositions de la législation sur les monopoles. Dans les années 1970 et 1980, la Monopolies and Mergers Commission a été saisie des restrictions intervenant dans de nombreuses professions en vue d'une enquête à la suite d'un rapport important de la Commission établi en 1970[23]. Dans les années 1970, onze affaires de

restrictions spécifiques ont été portées devant la Commission. Sept portaient sur des limitations de la publicité (avocats du barreau ou “barrister” en Angleterre et “advocates” en Ecosse ; notaires ou “solicitors” en Angleterre et au Pays de Galles, ainsi qu’en Ecosse ; chirurgiens-vétérinaires ; géomètres ; comptables ; enfin courtiers en valeurs mobilières). Deux affaires concernaient les barèmes d’honoraires (architectes et géomètres) et deux portaient sur la règle imposant que le Senior Counsel (en Ecosse) et le Queen's Counsel (“avocat de la Couronne” en Angleterre et au Pays de Galles) ne puissent comparaître sans la présence d’un “junior counsel” aux termes de la "two-counsel rule" ou “règle des deux avocats”. Dans tous les cas hormis pour les restrictions sur la publicité des avocats du barreau, la Commission a estimé que ces restrictions s’exerçaient au détriment de l’ordre public. Certaines recommandations de la Commission ont été difficiles à appliquer dans la mesure où nombre de ces règles avaient force de loi. De façon générale, ces recommandations auront abouti à une certaine libéralisation des pratiques jugées contraires à l’ordre public, notamment l’utilisation de barèmes obligatoires d’honoraires, de sorte qu’aujourd’hui la liberté règne dans le domaine de la publicité et la fixation concurrentielle des honoraires semble largement acceptée dans les professions libérales au Royaume-Uni.

Au Danemark, les professions libérales sont soumises à la Loi sur la concurrence de 1989. Elles étaient auparavant couvertes par la législation sur les monopoles, les prix et les bénéfices qui a été abolie lors de la promulgation de la nouvelle loi. Si, après enquête, les pratiques sont considérées comme contraires à l’ordre public, le Conseil de la concurrence peut recommander leur modification ou leur abolition. Le Conseil a enquêté sur des barèmes d’honoraires et de frais recommandés et sur des restrictions à l’encontre de la publicité dans un certain nombre de professions. Le Conseil a entrepris une analyse interprofessionnelle des conditions de concurrence dans les professions libérales. La Commission a conclu que de nombreuses règles allaient au-delà de ce qu'exigeaient de saines pratiques. Ces règles concernent normalement la publicité et les techniques commerciales, les honoraires recommandés, les relations d’emploi et les relations commerciales. Le Conseil a constaté qu’il existait à la fois des règlements restreignant l’accès à la profession et des activités professionnelles réglementées de même que des règles collégiales qui avaient pour effet de compléter les règlements professionnels. Le Conseil a donc décidé de négocier avec les associations concernées pour libéraliser ces règles collégiales tout en s’adressant aux pouvoirs publics afin qu’ils accordent plus d’attention aux considérations de concurrence dans leur réglementation des professions. Les négociations avec la Société des juristes ont permis aux avocats de faire de la publicité dans leur champ de compétence tandis que l’interdiction de la publicité par voie postale a été modifiée pour permettre aux avocats de faire de la publicité directe auprès de leur clientèle d’entreprises, mais non auprès des particuliers. Le Conseil de la concurrence a en outre ordonné à l’Association danoise des chirurgiens vétérinaires de mettre fin aux restrictions à l’encontre de la publicité des honoraires et à son interdiction de la publicité directe auprès des clients potentiels. En effet, ces restrictions entravaient dans une large mesure la concurrence sur les prix et apparaissaient comme un obstacle à l’établissement de nouveaux vétérinaires.

En Irlande, dans les années 1980 et 1990, la Fair Trade Commission (désormais Competition Authority) a entrepris plusieurs enquêtes sur les pratiques de professions libérales, le ministère ayant demandé une étude générale sur ces professions. Des rapports ont été publiés sur la fixation concertée d’honoraires et les restrictions à l’encontre de la publicité chez les comptables et les ingénieurs-conseils, les restrictions sur la transmission de biens et la publicité chez les notaires, ainsi que les pratiques restrictives des professions juridiques. En 1993, la nouvelle Competition Authority a aussi pris une décision à l’encontre de certaines pratiques des optométristes, notamment les principes directeurs relatifs aux installations, les restrictions sur la publicité et les méthodes de fixation des honoraires. Des rapports ont été également établis sur les pratiques des architectes, des géomètres, des commissaires-priseurs et des agents immobiliers ainsi que sur les juristes spécialisés dans les marques commerciales et brevets. Ces enquêtes ont généralement abouti à une libéralisation considérable des restrictions sur la publicité et les barèmes d’honoraires ne sont autorisés qu’à titre indicatif et non comme des tarifs minima.

Au Canada, en 1988, la Cour suprême de l'Ontario a interdit à deux associations de juristes de cette province de s'entendre sur les honoraires que leurs membres devaient appliquer au public pour les services juridiques liés à des transactions immobilières. Les ordonnances d'interdiction couvraient également spécifiquement la communication entre les membres des honoraires appliqués aux clients, la fixation de barèmes d'honoraires et la constitution de commissions sur les honoraires. C'était la première fois au Canada qu'une association professionnelle se voyait interdire, en vertu de la législation sur la concurrence, de fixer ses tarifs sur la base de barèmes d'honoraires publiés.

En France, le Conseil de la concurrence a clairement indiqué que les règlements des organisations professionnels ne peuvent pas autoriser de violations des règles du droit de la concurrence, notamment de celles qui interdisent les accords de fixation des prix. C'est ainsi que le Conseil a condamné un boycott organisé par des architectes locaux pour préserver le niveau des honoraires. En outre, il a récemment remis en question trois barèmes d'honoraires d'associations locales d'avocats, en soulignant qu'ils avaient un effet anti-concurrentiel même s'ils n'avaient pas été adoptés à des fins anticoncurrentielles. Le fondement juridique de cette action a été établi par une décision de 1987 portant sur des barèmes d'honoraires d'architectes, qui a été confirmée en appel en 1992.

En Espagne, la loi régissant les associations professionnelles a été modifiée en 1996 pour introduire plus de concurrence. Plus précisément, tout accord économique conclu par des associations professionnelles doit se conformer aux lois sur la concurrence et sur la concurrence déloyale et la fixation de prix pour des services professionnels est interdite. En outre, le principe de l'adhésion unique a été établie à l'échelle du pays, de sorte que les professionnels peuvent exercer partout dans le pays sans être membre d'associations locales.

Outre ces initiatives et enquêtes formelles sur les pratiques des professions libérales, les autorités de la concurrence de nombreux pays de l'OCDE ont activement plaidé pour la mise en place de régimes plus libéraux et elles sont intervenues dans les enquêtes officielles pour tenter d'obtenir des modifications de règles anticoncurrentielles mises en œuvre dans certaines professions. Par exemple, depuis la fin des années 1970, les agents de la Federal Trade Commission des États-Unis ont soumis plus de 400 avis ou mémoires en *amicus curiae* aux organismes des États ou aux organismes professionnels sur des questions de concurrence relatives à diverses professions, notamment les comptables, avocats ou architectes. Au Danemark, le Conseil de la concurrence a recommandé au ministère de l'Industrie de libéraliser le régime des professions comptables de façon à ce que des conseillers économiques et juridiques présentant des niveaux d'études et de formation équivalents en tant que comptables puissent exercer ensemble et établir de nouveaux partenariats multidisciplinaires. Parmi les autres pays Membres dont les organismes de la concurrence ont plaidé pour une intensification de la concurrence dans les professions libérales, on retrouve l'Allemagne, l'Australie, le Canada, la Corée, la Finlande, la Hongrie, l'Irlande, l'Italie, le Japon, le Mexique, la Pologne, la République tchèque et la Suède.

5.3 Les soins de santé : Etude de cas d'une réforme par application du droit de la concurrence

Les professions des soins de santé illustrent les problèmes posés par les régimes anticoncurrentiels et les avantages potentiels de la réforme. L'expérience des réformes dans ce secteur et les méthodes de leur mise en œuvre sont instructives, car les professions de santé sont généralement soumises aux mêmes types de restrictions en matière d'entrée, de concurrence sur les prix, de publicité et de structures et pratiques commerciales que l'on rencontre couramment dans les services professionnels aux entreprises. La section ci-après décrit la façon dont ont été traitée les problèmes communs à de nombreux types de réglementations professionnelles dans le cas des soins de santé, en particulier aux États-Unis ; cette description n'entend cependant pas recommander l'adoption de mesures analogues concernant les professions de santé dans d'autres juridictions.

Les soins de santé diffèrent des autres services professionnels sous un aspect important : le client qui bénéficie des services n'en paie que rarement directement la facture. Mais ceux qui paient, qu'il s'agisse de l'État, des assureurs, des employeurs ou des consommateurs, ont intérêt à une baisse des prix et donc à une baisse des coûts qui peuvent résulter d'une intensification de la concurrence et de l'innovation. Les patients, bien entendu, sont directement intéressés par la qualité des soins tandis que les autres parties ont aussi au moins un intérêt indirect au maintien de cette qualité. En conséquence, la réforme des soins de santé doit aborder directement la tâche complexe qui consiste à concevoir des institutions qui assurent les risques, garantissent une qualité acceptable et favorisent l'efficience et l'innovation.

Aux États-Unis, l'une des grandes voies suivies par la réforme dans ce secteur a résidé dans l'application croissante pendant 20 ans du droit général de la concurrence aux professionnels de la santé (ainsi qu'à d'autres groupes professionnels). D'autres organismes de la concurrence sont également intervenus dans les soins de santé, notamment au Canada, au Danemark, en Finlande, en République tchèque et en Suède. Là où c'était possible, les exemptions du droit de la concurrence ont été éliminées et des mesures d'application du droit ont été prises directement à l'encontre de restrictions anticoncurrentielles. Lorsque l'application directe du droit n'était pas possible en raison de l'exemption des restrictions, les organismes de la concurrence ont plaidé pour la suppression des exemptions restantes ou la modification des restrictions afin de les rendre moins anti-concurrentielles.

Promouvoir la concurrence a pour objectif de permettre la mise en place d'institutions fournissant des soins de santé du type que souhaitent les consommateurs, dont ils ont besoin et qu'ils peuvent se permettre. Les initiatives visant à rendre possibles des solutions de rechange aux pratiques consistant en une prestation contre honoraire ne reposent pas nécessairement sur le constat que ces solutions sont supérieures. Il s'agissait plutôt de faire en sorte que ces solutions de rechange aient une véritable chance de démontrer les possibilités qu'elles offrent.

La publicité a fait l'objet de toutes les attentions. Elle touche en effet à trois problèmes de concurrence fondamentaux : l'innovation, l'entrée et le prix. Les controverses sur la publicité recouvrent les problèmes stratégiques de maintien de la qualité et de compensation du manque d'information des consommateurs tout en cherchant à éviter les tromperies et autres préjudices à l'encontre des consommateurs. La réglementation a souvent empêché les professionnels de la santé de faire de la publicité honnête ou non mensongère sur les prix, les rabais et les services. La levée de ces restrictions revêt une importance déterminante pour la promotion de la concurrence, car la concurrence sur les prix et les nouveaux services sera beaucoup moins efficace, ou risque même de ne jamais voir le jour, si les professionnels ne peuvent pas expliquer au public ce qu'ils font.

En 1975, la Federal Trade Commission des États-Unis a contesté les règles de l'American Medical Association qui supprimaient pratiquement toutes les formes de publicité de la part des médecins et des structures innovantes de prestations de soins de santé. L'ordonnance prise par la Commission et publiée en 1979, interdit à l'AMA de refuser les publicités honnêtes ou non mensongères, tout en lui permettant de conserver des règles à l'encontre de la publicité mensongère et des sollicitations excessives de la clientèle[24]. Cet équilibre consistant à permettre la concurrence en empêchant les tromperies a servi de modèle à un grand nombre d'initiatives d'application du droit de la concurrence, d'avis et de recommandations adressées aux associations privées de médecins généralistes, de dentistes ou de spécialistes ainsi qu'aux conseils de tutelle des États.

L'un des principaux objectifs de la réforme consiste à permettre une plus grande concurrence sur les prix de façon à abaisser les coûts. En conséquence, de nombreuses initiatives se sont attaquées aux efforts concertés des professionnels pour freiner la concurrence sur les prix et résister à des contrôles des coûts. Ces efforts revêtent de multiples formes et correspondent à un problème familier de l'application du droit normal de la concurrence. La première de ces formes réside dans le boycott ou la menace de boycott,

organisé par un groupe de professionnels en vue de peser sur les taux de remboursement dans les mécanismes de tiers payant ou pour annuler les effets des mesures de contrôle des coûts prises par les pouvoirs publics ou des parties privées.

L'application du droit de la concurrence s'est plus particulièrement attaquée aux restrictions à l'encontre de l'innovation et de l'entrée de nouveaux praticiens. Le cas d'école de l'AMA a aussi remis en cause les règles sur la "pratique contractuelle" d'après lesquelles le traitement de patients par un médecin dans le cadre d'un contrat salarié avec un hôpital ou un organisme de médecine préventive et curative contrôlé par des non médecins est "non éthique". Ces règles imposaient en revanche aux médecins de ne travailler que pour d'autres médecins. Les règles de l'association considéraient aussi comme non éthique le fait pour un médecin "de travailler au rabais" ou d'accepter une rémunération "non convenable" à la lumière des honoraires habituellement facturés par le milieu médical. Ces règles non seulement contribuaient au maintien de prix élevés, mais encore empêchaient la mise en place de nouvelles institutions pour fournir des soins de santé, en rendant difficiles le recrutement de professionnels à moindre coût et donc la mise en place de mécanismes meilleur marché.

Pour encourager l'innovation, il a fallu juguler les manœuvres concertées entre praticiens en place pour empêcher toute concurrence avec leurs méthodes traditionnelles d'exercice. L'une des sources générales de concurrence réside dans des prestataires de soins qualifiés, mais non médecins, comme les sages-femmes, les infirmières anesthésistes, les podologues, les prothésistes dentaires et les optométristes. Une autre source d'innovation réside dans de nouveaux types d'institutions comme les cliniques d'urgence et les cabinets satellites. Les règles relatives à la façon dont les praticiens peuvent travailler avec ces intervenants paramédicaux et établissements ont parfois servi à freiner leur concurrence, plutôt qu'à assurer des soins de grande qualité. Par exemple, des praticiens se sont servis des mécanismes de paiement des soins médicaux ou des sociétés d'assurance pour introduire des discriminations à l'encontre de concurrents potentiellement menaçants. Ils l'ont fait en refusant la couverture ou le remboursement en cas de services fournis par ou par l'intermédiaire de prestataires non traditionnels.

La réforme s'est donc imposée par des initiatives des pouvoirs publics à l'encontre d'entraves manifestes à la concurrence. Mais parallèlement, l'application du droit de la concurrence a respecté les initiatives concertées légitimes visant à préserver des normes et la qualité. Les situations donnant couramment lieu à des plaintes dans le cadre de procédures antitrust sont le "contrôle par les pairs" et les décisions d'octroi d'avantages au personnel des hôpitaux. Les organismes de la concurrence ont veillé à ne pas s'immiscer dans des décisions visant authentiquement à empêcher des praticiens incompétents ou ne respectant pas l'éthique professionnelle à s'installer. Des praticiens peuvent être appelés à évaluer la qualité des résultats de leurs confrères à l'occasion de différends entre des patients et des prestataires de soin ou encore des tiers payant les soins. Cela peut susciter des craintes si cela sert à imposer une uniformité des honoraires ou si c'est une couverture pour interdire l'accès à la profession. En revanche, les efforts visant à repérer et discipliner des praticiens incompétents ou ne respectant pas l'éthique peuvent être positifs pour la concurrence.

Le programme de réforme axé sur la concurrence aux États-Unis repose sur la démonstration empirique des avantages qu'il y a à autoriser l'innovation et la concurrence. Le coût des soins de santé est influencé par de nombreux facteurs, de sorte que la mise en évidence des effets d'une modification de la réglementation impose des travaux analytiques. Toutefois, plusieurs études économétriques, destinées à isoler les effets de différences de réglementation, ont démontré que l'instauration d'une concurrence plus grande dans plusieurs secteurs des soins de santé a entraîné une baisse des prix et des coûts, sans sacrifier la qualité des soins. Chez les dentistes, certains États limitaient les modalités de recours à l'assistance de spécialistes de l'hygiène dentaire et d'autres non. Selon une étude réalisée par des experts de la FTC, ces restrictions se traduisaient par un renchérissement des procédures individuelles de 6 à 30 pour cent, et augmentaient le coût d'une consultation auprès d'un dentiste de 7 à 11 pour cent[25]. Une autre série

d'études sur les soins ophtalmologiques a estimé que les restrictions à l'encontre de la publicité et d'autres pratiques commerciales avaient entraîné une augmentation du prix des examens et des verres médicaux de pas moins de 25 pour cent[26]. Or, la qualité moyenne des examens par les praticiens et des produits était à peu près la même que ces pratiques soient ou non autorisées. En outre, la marge de variation de la qualité était aussi à peu près la même. Lorsque ces pratiques étaient autorisées, les prestataires qui faisaient de la publicité avaient tendance à faire des examens moins approfondis (mais tout de même convenables) et, ce qui est significatif, ils avaient aussi tendance à facturer des honoraires plus bas.

6. Réformes nationales et internationales visant à encourager les échanges

Traditionnellement, les services professionnels étaient essentiellement de caractère national ou infra-national et les régimes réglementaires étaient conçus dans un contexte national. L'internationalisation puis la mondialisation des économies ont renforcé la demande de services par les entreprises dans un contexte plus large. Le fait que les marchés des services des juristes, des comptables, des architectes ou des ingénieurs-conseils restent fermés ou segmentés apparaît de plus en plus comme un obstacle à l'activité économique.

Des services professionnels de types différents sont actuellement intégrés sous forme de lots de services négociables. Les produits constituent désormais des ensembles complexes, à mesure que des services comme la gestion de projets, l'ingénierie, la maintenance, le financement et l'assurance ainsi que le conseil sont associés à des matériels et logiciels informatiques. Les SPE jouent un rôle toujours croissant dans la prestation d'autres services, de financement, de construction ou de télécommunications par exemple, notamment dans le cadre du développement de marchés et de la livraison de produits plus complexes.

La libéralisation des SPE est donc devenue un enjeu important de l'action des pouvoirs publics nationaux et des négociations commerciales internationales.

6.1 Réglementation et échanges internationaux de services professionnels aux entreprises

Les obstacles à l'exercice international des services professionnels aux entreprises fourmillent. Dans certains cas, il peut s'agir de conséquences de lois et réglementations explicitement discriminatoires à l'encontre des prestataires de services étrangers. En outre, certains règlements apparemment non discriminatoires, qui semblent s'appliquer uniformément aux professionnels nationaux et étrangers, peuvent en réalité pénaliser les étrangers et constituer des obstacles *de facto*. Par exemple, les restrictions sur le droit de posséder un cabinet comptable ou d'y investir peuvent généralement être formulées en termes non discriminatoires, mais l'obligation courante que le propriétaire ou l'investisseur détienne un agrément professionnel local peut empêcher l'arrivée des étrangers. De plus, la fourniture internationale de services professionnels aux entreprises peut être affectée par des restrictions de caractère général applicable aux mouvements de capitaux et à l'immigration, ainsi que par des facteurs de portée générale comme la politique nationale de la concurrence.

Certaines restrictions en vigueur peuvent affecter de façon générale les échanges de services professionnels en touchant trois des quatre modes de fourniture mis en évidence par l'AGCS : fourniture transnationale, présence commerciale et déplacements de personnes physiques.

Dans l'ensemble, la réglementation affecte les fournisseurs étrangers de services juridiques et comptables dans des proportions bien plus fortes que les services d'architecture, voire d'ingénierie. Les

différences d'approches nationales de la réglementation de ces deux professions plus "techniques" s'expriment sans doute plus souvent à travers des normes techniques.

On évoquera ci-après les principaux obstacles aux échanges et à l'investissement dans les services professionnels qui sont imposés aux personnes physiques étrangères (voir Tableau 5) et aux entreprises étrangères (voir Tableau 6).

6.1.1 Conditions de nationalité et de présence locale

Les conditions de nationalité et de présence locale prévalent dans la zone de l'OCDE, notamment dans les professions comptable et juridique. Ces conditions sont normalement en vigueur pour assurer la disponibilité du professionnel étranger en cas de recours du consommateur pour faute professionnelle, de faire valoir des règles et autres conditions sur le marché d'accueil, notamment des conditions linguistiques, ainsi que de permettre aux organismes professionnels de veiller à l'observation des normes professionnelles de compétence et de conduite. Dans la pratique, la réponse à ces conditions de nationalité et de présence locale servent essentiellement à limiter le champ d'exercice de la profession ou à définir les conditions dans lesquelles le professionnel peut exercer (par exemple, une condition de nationalité imposée à titre de condition d'adhésion à une organisation professionnelle).

L'exigence de nationalité ou de citoyenneté comme condition d'exercice d'une pratique professionnelle est de toute évidence discriminatoire. Comme de telles mesures ne servent pas d'indicateur quant à la qualité du prestataire de services, leur existence est de plus en plus difficile à justifier au nom de la protection du consommateur ou de l'ordre public.

Les dispositions qui excluent les étrangers de façon générale ou qui leur interdisent de faire usage de leur titre professionnel ou de fournir certains services reposent sur l'idée que seul un ressortissant ou un citoyen du pays peut assurer un service.

Ces dernières années, ces prescriptions de nationalité ou de citoyenneté ont à l'évidence battu en retraite dans la zone de l'OCDE. Néanmoins, elles existent encore dans plusieurs pays pour les quatre professions et elles sont particulièrement présentes dans la fourniture de services de vérification comptable et de services juridiques. En ce qui concerne les services juridiques, les pays qui ont jusqu'ici été au centre de la promotion de la pratique juridique internationale n'imposent plus d'obligations de nationalité.

L'obligation d'être résident, établi ou domicilié dans la juridiction où le service est assuré, peut empêcher la prestation de service sur un marché sur une base transfrontalière ou par le biais d'une entrée temporaire de personnel même par des prestataires qui détiennent des titres de séjour valides.

Cette barrière plus fréquente, imposée aux individus ou aux entreprises, est généralement motivée par le désir de maintenir un contrôle sur les normes de la profession, et pour permettre aux gouvernements de collecter des impôts et de veiller au respect des autres lois.

Les juristes et les comptables sont soumis à des conditions de présence locale presque partout. Ces conditions sont moins omniprésentes pour les ingénieurs et les architectes.

6.1.2 Restrictions sur l'investissement et la propriété

Le Troisième Atelier de l'OCDE sur les services professionnels a révélé que les restrictions à l'encontre de l'investissement et de la propriété par des intérêts étrangers dans les quatre professions sont

répandues dans la zone de l'OCDE, avec certaines variantes d'une profession à l'autre. Deux catégories de restrictions ont été identifiées. La première a trait aux limitations à l'encontre de la participation d'investisseurs non professionnels dans des entreprises de services professionnels. La justification de ces limitations est le souci de préserver le contrôle des professionnels sur la gestion de l'entreprise, pour assurer la qualité des services et l'indépendance des professionnels vis-à-vis d'intérêts extérieurs tentés d'utiliser leur influence sur l'entreprise pour s'octroyer des avantages indus. La seconde catégorie de restrictions touche à la limitation des investissements des professionnels étrangers. Des barrières discriminatoires à l'établissement peuvent résulter de restrictions à l'investissement telles qu'une limite en pourcentage de la propriété et du contrôle par des étrangers à la fois d'entreprises nouvelles ou d'acquisition d'entreprises locales. Un certain nombre de pays exigent qu'une majorité du capital et du contrôle d'une entreprise soit détenue par des professionnels du pays où localement qualifiés.

Les restrictions imposant qu'un ou plusieurs associés d'un cabinet soient des ressortissants ou des résidents du pays peuvent empêcher des entreprises d'ouvrir des succursales ou des filiales ou de racheter des entreprises locales.

Les restrictions à l'encontre de l'utilisation du nom d'une entreprise peuvent aussi affecter la décision de l'entreprise de s'établir dans un pays. La capacité d'une entreprise d'attirer des clients peut être gravement limitée si elle ne peut pas profiter des avantages du fonds commercial que représente sa raison sociale.

Les mesures exprimées en termes non discriminatoires peuvent aussi dissuader ou empêcher l'établissement d'intérêts étrangers ou la propriété d'entreprises par de tels intérêts. L'obligation d'agrément local pour investir dans une entreprise ou la posséder exclut virtuellement l'investissement étranger. La réglementation ou l'interdiction de la constitution de sociétés ou d'autres formes de structures commerciales peuvent aussi restreindre la possibilité pour les entreprises étrangères de pénétrer le marché en créant des filiales ou des succursales.

Enfin, la possibilité de déplacer du personnel entre pays rapidement et facilement constitue un élément important de l'internationalisation des activités. Cependant, l'immigration restant une question très sensible dans de nombreux pays, des interdictions directes ou des procédures particulièrement lourdes viennent souvent entraver l'entrée temporaire de professionnels[27]. Cela peut entraver aussi bien les flux d'investissement que la concurrence transnationale potentielle.

6.1.3 Restrictions sur l'exercice d'activités professionnelles

Les règlements définissant la nature de la pratique, qui tendent à présenter des différences en raison de disparités de régime entre les pays, peuvent être particulièrement difficiles à traiter sur le plan international. Une comparaison du champ d'activité ouvert aux professionnels étrangers avec celui qui s'applique aux professionnels nationaux donne une meilleure idée des effets concrets du système (voir aussi Tableau 1).

Dans les services juridiques, certains pays autorisent les avocats étrangers à pratiquer dans le cadre d'une licence restreignant le champ de leur intervention. Cette restriction, qui va de pair avec des restrictions sur la constitution de sociétés ou sur l'emploi d'avocats du pays d'accueil, limite gravement la possibilité pratique pour ces avocats étrangers de fournir des services de conseil juridique intégrés. Ces restrictions peuvent même s'exercer au détriment de la profession locale, en la privant des avantages concurrentiels de l'exportation de services juridiques à une clientèle internationale. Au Japon, des mesures récentes ont été prises pour améliorer ce type de situation. Aux termes d'un amendement de janvier 1995 à la *Special Measures Law* concernant le traitement des affaires juridiques par des avocats étrangers, par

exemple, les “gaikokuho-jimi-bengoshi” -- avocats étrangers qualifiés aux termes de la loi japonaise -- sont admis à constituer des co-entreprises avec des avocats japonais.

Les comptables ou cabinets comptables peuvent aussi rencontrer des difficultés pour fournir toute la gamme de services qu’ils assurent dans leur pays d’origine ou dans d’autres juridictions. Les services qui ne sont pas réglementés dans un pays peuvent l’être dans un autre, ce qui impose l’observation d’obligations réglementaires supplémentaires. Les services fournis par la profession comptable d’un pays peuvent être réservés à d’autres professions dans d’autres pays. Certaines combinaisons de services, soit de façon générale, soit s’agissant de certains clients, peuvent être permises dans certaines juridictions et interdites dans d’autres. Il est rare que l’on puisse fournir une gamme uniforme de services sur plusieurs marchés. Les cabinets de pays à la réglementation restrictive peuvent se trouver désavantagés dans des marchés de portée plus vaste et vis-à-vis des concurrents de ces marchés. Les limitations du champ d’activité peuvent aussi empêcher le développement de pratiques multidisciplinaires, dans lesquelles des travaux de vérification comptable, de comptabilité, de conseil fiscal et autres activités de conseil, peuvent être assurés dans une structure commune dotée des mêmes mécanismes de contrôle de la qualité.

De même, les architectes de certains pays sont formés à la fois en architecture et en ingénierie et sont donc compétents pour effectuer des calculs de structures. Dans d’autres pays, ces fonctions sont séparées. Les incohérences de traitement réglementaire peuvent susciter des problèmes de compétence et peuvent aussi peser sur la responsabilité professionnelle.

6.1.4 Reconnaissance des qualifications

L’une des questions essentielles touchant à l’exercice international d’une profession de la part de personnes physiques ou, indirectement de personnes morales, consiste à savoir jusqu’à quel point les pays reconnaissent ou tiennent compte des qualifications, des agréments ou d’une expérience acquise à l’étranger.

De nombreux pays imposent désormais que des professionnels étrangers et des candidats nationaux passent les mêmes examens. Il n’y a que dans l’ingénierie et, dans une moindre mesure, dans l’architecture qu’un certain nombre de pays renoncent de façon générale aux conditions nationales d’agrément pour les professionnels étrangers qui ont obtenu une autorisation de pratiquer dans leur pays d’origine. En revanche, dans les services juridiques et comptables, les praticiens souhaitant exercer leur profession doivent subir une nouvelle formation locale, longue, voire complète. Le large éventail de conditions de “re-qualification” constitue une discrimination *de facto*, dans la mesure où les différences de situation et de niveau entre un étudiant et un professionnel ne sont pas prises en compte dès lors qu’un professionnel étranger doit se soumettre à une telle procédure.

L’élaboration de procédures convenables de reconnaissance des qualifications étrangères afin de faciliter l’accès aux marchés locaux constitue un aspect essentiel de la promotion de la pratique internationale des SPE. C’est particulièrement important pour des personnes provenant d’un pays où l’on n’exige pas de titre parce que la fonction ou l’activité y est libre, et qui souhaitent pratiquer dans un pays où le service est réglementé et où l’on exige un titre. C’est aussi essentiel pour les professionnels tenus d’obtenir un agrément de plein droit même s’ils n’ont l’intention de se livrer qu’à une partie des activités effectuées par un professionnel agréé de plein droit, notamment parce que le professionnel n’exerce une activité à l’étranger que de façon temporaire.

La libéralisation des services professionnels aux entreprises est devenue une question importante pour la politique commerciale nationale et les négociations commerciales internationales et les efforts se multiplient pour trouver un équilibre entre l’observation de normes professionnelles et l’admission plus

facile de professionnels étrangers. L'Union européenne a l'expérience la plus longue et la plus étendue dans ce domaine, mais les pays signataires de l'Accord de libre échange nord-américain ainsi que l'Australie et la Nouvelle-Zélande dans le cadre de leur Accord de rapprochement économique, ont aussi définit des approches intéressantes. L'Accord de libre échange Canada-États-Unis avait auparavant préparé le terrain à un accord entre autorités de tutelle de la profession d'architecte au Canada et aux États-Unis afin de définir une procédure de validation des références professionnelles. Ce système semble bien fonctionner.

Toutefois, la rareté des accords de reconnaissance mutuelle reste frappante. Ces accords ne sont certes pas la panacée. Il convient de veiller à ce qu'ils n'entravent pas des réformes nationales allant dans le sens de la concurrence en renforçant indirectement un statu quo non satisfaisant.

6.2 Les accords et réformes à l'échelle internationale

6.2.1 Les accords internationaux et les initiatives en faveur de la libéralisation des échanges de services professionnels

Les accords internationaux existants couvrent les SPE à des degrés divers et des initiatives connexes entreprises dans des structures comme l'OCDE ont servi à mieux connaître les SPE et ces questions de façon générale. On trouvera ci-après un bref aperçu des accords et activités concernés, suivi par un examen thématique des approches régionales de trois domaines : les conditions de nationalité et de présence locale ; la reconnaissance des qualifications professionnelles ; enfin l'adhésion aux organisations professionnelles et l'observation des codes de déontologie des professions.

Les Codes de la libération des mouvements de capitaux et des opérations invisibles courantes de l'OCDE définissent un ensemble de règles applicables à l'investissement et aux échanges transnationaux dans le secteur des SPE. Aux termes de ces codes, les pays Membres ont des obligations juridiquement contraignantes de notifier les restrictions existantes en matière d'investissement direct étranger, de mouvements de capitaux et d'échanges transnationaux de services et de ne pas introduire de nouvelles restrictions. Toutes les restrictions en vigueur doivent s'appliquer de façon non discriminatoire entre pays de l'OCDE. Les pays Membres doivent se soumettre en outre à une procédure d'examen par leurs pairs en vue de la suppression progressive des restrictions subsistantes.

Le Comité des mouvements de capitaux et des transactions invisibles (CMIT), chargé du suivi et de l'application des règles des Codes, a pris des initiatives destinées à faire progresser la libéralisation des échanges internationaux de SPE. Deux ateliers ont été organisés en 1994 et 1995[28] face à la nécessité croissante d'un renforcement de la transparence et d'une analyse des règles et réglementations s'appliquant au secteur des services professionnels, notamment pour appuyer des travaux en cours dans le cadre de l'Accord général sur le commerce des services de l'OMC. A l'occasion de l'Atelier de 1995, des spécialistes des politiques de concurrence et de consommation[29] ont soutenu que l'existence de marchés en libre concurrence sur lesquels les consommateurs pouvaient obtenir les informations nécessaires pour exercer un choix entre les prestataires, en disposant d'un droit de recours si les choses allaient mal, était le meilleur moyen de défendre l'intérêt des consommateurs. Il a en outre été souligné qu'il existait encore des lacunes en matière de transparence sur les prix et autres conditions de prestation des services et que les consommateurs devaient être davantage consultés sur les mesures et les réglementations applicables aux professions.

Le Troisième Atelier sur les services professionnels s'est tenu les 20-21 février 1997 sur le thème "Encourager la libéralisation par la réforme des réglementations". S'appuyant sur des informations

recueillies auprès des pays de l'OCDE, cet atelier avait pour objectif de faire progresser la libéralisation des échanges internationaux de services professionnels en mettant en évidence des solutions de rechange aux restrictions existantes, tout en maintenant des normes rigoureuses de protection du consommateur. Le résultat de cet atelier est synthétisé dans l'intervention de clôture de la présidence, dont on trouvera des extraits dans l'encadré 1 ci-après.

Encadré 1 **:** Troisième atelier de l'OCDE sur les services professionnels

Le Président de l'Atelier a estimé qu'il y avait une large convergence de vue parmi les représentants des autorités et des professions sur un certain nombre de principes généraux et de recommandations à l'intention des pouvoirs publics :

Principes généraux

- La réglementation nationale doit viser à maintenir la qualité des services et à protéger les consommateurs par des moyens qui ne soient pas plus contraignants que ne l'exige la réalisation d'objectifs légitimes de la part des pouvoirs publics et qui n'entravent pas inutilement la concurrence nationale et internationale ;

- Il convient d'éviter les discriminations à l'encontre des professionnels et investisseurs étrangers ;

- L'accès au marché doit reposer sur des procédures transparentes, prévisibles et équitables.

Recommandations spécifiques à l'intention des pouvoirs publics

- Les prestataires de services professionnels doivent pouvoir choisir librement leur forme d'établissement, y compris la constitution de sociétés, selon le principe du traitement national. Face aux restrictions sur les formes d'établissement, il existe des solutions qui préservent la responsabilité civile, la responsabilité professionnelle et l'indépendance des prestataires de services professionnels.

- Les restrictions à l'encontre de l'association de professionnels étrangers avec des professionnels agréés localement doivent être levées, en commençant par autoriser les associations temporaires dans le cadre de projets spécifiques.

- Les restrictions à l'accès au marché reposant sur des conditions de nationalité ou de domiciliation préalable doivent être abolies.

- Les restrictions concernant la participation étrangère à la propriété de cabinets de services professionnels doivent être réexaminées et assouplies.

- Sous réserve de l'existence de garanties de responsabilité professionnelle ou d'autres mécanismes de protection du client, les obligations de présence locale doivent être réexaminées et assouplies.

- Les organismes nationaux de tutelle doivent coopérer pour promouvoir la reconnaissance des qualifications et compétences acquises à l'étranger et pour définir des mécanismes de préservation de normes éthiques.

En ce qui concerne les situations particulières aux différentes professions, des préoccupations se sont exprimées sur la protection du consommateur, les conditions propres aux différents pays, les aspects

culturels et les questions relatives à l'emploi. Les participants à l'atelier sont convenus que tout programme de réforme de la réglementation se devait de répondre à ces préoccupations.

Les liens entre politique de la concurrence, réforme de la réglementation et amélioration des résultats économiques ont été étudiés par le Comité du droit et de la politique de la concurrence (CLP) de l'OCDE depuis la seconde moitié des années 1970. Les premières conclusions, tirées dans un rapport de 1979[30] et reprises la même année dans une Recommandation du Conseil sur la politique de concurrence et les secteurs exemptés ou réglementés[31], incitaient fortement les pays membres à se livrer à un examen périodique[32] des réglementations et des exemptions qu'elles prévoyaient par rapport aux dispositions en matière de concurrence. Le Comité s'est également livré à une étude sectorielle approfondie des services professionnels[33]. Le rapport qu'il a présenté concluait que de nombreuses professions n'étaient pas soumises aux lois sur la concurrence et mettait en évidence diverses pratiques qui étaient de plus en plus dénoncées comme anti-concurrentielles. Le rapport encourageait les gouvernements à revoir les restrictions portant sur l'accès, les tarifs, la publicité et la forme des activités. Comme nous l'avons vu plus haut, de nombreux pays ont au cours de la dernière décennie commencé à passer en revue ces restrictions et ont conclu que bon nombre d'entre elles n'étaient pas justifiées par des motifs liés à la concurrence ou plus généralement à l'ordre public.

L'Accord général sur le commerce des services (AGCS) entré en vigueur en janvier 1995 à l'issue des négociations du cycle d'Uruguay, édicte la première série de règles multilatérales pour la conduite du commerce des services. Ses principales dispositions portent sur le régime NPF et le traitement national, sur des engagements spécifiques en matière d'accès au marché, ainsi que sur le règlement des différends. Des cycles successifs de négociations visant à franchir progressivement de nouvelles étapes dans le processus de libéralisation sont explicitement prévus dans cet accord.

Le Groupe de travail des services professionnels de l'AGCS a été mis en place par décision ministérielle pour examiner les disciplines multilatérales requises pour faire en sorte que les mesures en rapport avec les prescriptions et procédures en matière de qualifications, les normes techniques et les prescriptions en matière de licences dans le domaine des services professionnels ne constituent pas des obstacles non nécessaires au commerce.

Le programme de travail du groupe porte, dans un premier temps, sur la profession comptable et son mandat lui prescrit d'élaborer des règles multilatérales dans ce secteur en vue de donner pleinement effet aux engagements de libéralisation. Le Groupe de travail devrait également émettre des principes directeurs concernant le processus de reconnaissance mutuelle des qualifications professionnelles et suivre les travaux en cours dans d'autres enceintes en matière de normes internationales. Conformément à ce mandat, un séminaire a été organisé avec divers organismes sur les normes internationales dans le secteur de la comptabilité. En outre, le rapport du Conseil du commerce des services de l'OMC et la Déclaration adoptée lors de la première conférence ministérielle de l'OMC (Singapour, 9-13 décembre 1996) appellent à l'achèvement des travaux sur la comptabilité avant la fin de 1997 et encouragent les travaux des organismes étudiant l'élaboration de normes internationales pour ce secteur.

A ce jour, les activités du Groupe de travail ont consisté essentiellement à recueillir une masse d'informations sur les réglementations (processus auquel l'OCDE a contribué) et à définir des priorités en ce qui concerne les domaines d'intervention pour lesquels le Groupe de travail doit proposer des règles multilatérales. En ce qui concerne ce dernier point, le Groupe s'est en particulier attaché aux conditions et aux procédures d'attribution de licences dans le secteur comptable. Quelques progrès ont été réalisés sur la rédaction de principes directeurs sur les accords de reconnaissance mutuelle (ARM), qui devraient être mis en point en 1997.

L'Accord de libre-échange nord-américain (ALENA) entré en vigueur le 1er janvier 1994 afin d'établir un nouveau cadre pour les échanges entre le Canada, les États-Unis et le Mexique, introduit également une série de règles applicables aux services professionnels[34]. Cet accord prévoit entre autres choses l'élimination des conditions de citoyenneté et des obligations de résidence permanente imposées pour exercer des activités. Toutefois, les Parties à l'Accord n'ayant pu s'entendre pour imposer pleinement l'interdiction des conditions de citoyenneté, le non respect de cette interdiction par un pays peut permettre aux autres Parties de maintenir en vigueur ou de réintroduire des conditions équivalentes. En revanche, l'ALENA contient une obligation qui sanctionne sans ambiguïté le droit de non établissement, dans la mesure où il prévoit que les Parties peuvent, en vertu des dispositions relatives aux listes négatives, émettre des réserves à l'égard de l'obligation de présence locale. L'ALENA vise également à garantir, sur une base de réciprocité, l'entrée temporaire de certaines catégories de personnels ressortissants[35] du Canada, des Etats-Unis et du Mexique sur les territoires concernés en éliminant les obligations d'homologation des emplois, de permis de travail et autres formes de conditions requises pour accéder au marché du travail[36]. Dans le même temps, l'accord admet la nécessité de protéger le marché du travail national et l'emploi permanent dans chaque pays membre ainsi que la sécurité aux frontières.

6.2.2 Formes d'exercice

S'agissant des interdictions à l'encontre de la constitution de sociétés, les participants au troisième atelier de l'OCDE ont fait valoir qu'il pouvait être répondu dans le cadre d'une entreprise au souci de protéger le consommateur. Imposer une capitalisation minimale ou une assurance professionnelle, par exemple, pourrait garantir un remboursement convenable des clients lésés en cas de faute professionnelle. Les responsabilités civile et professionnelle individuelles des praticiens peuvent être préservées, de même que les actions disciplinaires des associations professionnelles. Les participants à l'atelier ont aussi affirmé que leur statut d'actionnaires et les règles du marché plus généralement incitent encore plus fortement les professionnels organisés en société à agir au mieux des intérêts du public au service duquel ils se placent. Toutefois, comme on l'a précisé, même si les professionnels devraient être plus nombreux à souhaiter s'organiser en sociétés s'ils étaient libres de le faire, ils ne doivent pas y être obligés. En conséquence, les participants ont recommandé que les prestataires de services professionnels soient libres de choisir leur forme d'établissement, y compris la constitution de société, selon le principe du traitement national.

Les restrictions à l'encontre de l'association de professionnels étrangers avec des professionnels agréés localement pourraient également être levées, en commençant par autoriser les associations temporaires pour des projets spécifiques. Les participants ont estimé que les restrictions dans ce domaine étaient particulièrement difficiles à justifier dans la mesure où ces associations offrent un moyen efficace de répondre à la demande croissante de services intégrés que formulent les consommateurs, en particulier la clientèle de sociétés, et qu'elles entrent dans le cadre d'une tendance actuelle plus générale à un exercice et à une association multidisciplinaire comme le préconisent certaines professions.

Parallèlement, on a noté que l'obligation imposée aux professionnels étrangers dans plusieurs pays, notamment dans le secteur des services juridiques, de s'établir uniquement par le biais d'associations avec des professionnels agréés localement, constituait une autre forme de restriction à l'accès au marché qu'il convenait de réexaminer et d'assouplir. Selon les circonstances, le recours obligatoire aux associations risque en effet de comporter des coûts d'efficience importants, dans la mesure où il peut contraindre les professionnels étrangers à partager leurs bénéfices avec des professionnels locaux qui peuvent n'apporter que très peu de valeur ajoutée au service rendu.

Les obligations d'associations sont souvent justifiées par le souci d'assurer la conformité du service rendu aux normes réglementaires locales, aux habitudes culturelles, etc. Toutefois, ouvrir plus

largement l'accès au marché pour les professionnels étrangers n'implique en aucune manière que ces professionnels échappent à la législation, à la réglementation et aux pratiques locales. En tout état de cause, les professionnels étrangers risqueraient rapidement de ne plus intéresser les clients s'ils ne tenaient pas suffisamment compte des besoins et préférences du consommateur local.

6.2.3 Conditions de nationalité et de présence locale

Les participants au Troisième Atelier ont appelé à l'abolition des restrictions à l'accès au marché reposant sur des critères de nationalité étant donné que de telles mesures ne sont pas des indicateurs fiables quant à la connaissance du terrain local et en fin de compte quant à la qualité du service rendu. Ils ont porté la même appréciation sur les restrictions reposant sur une domiciliation préalable (à ne pas confondre avec les conditions de présence locale, qui obligent les prestataires de service étrangers à opérer par le biais d'un établissement dans le pays d'accueil) et ont donc préconisé également leur abolition.

La situation relative aux conditions de présence locale est plus nuancée. Les participants ont estimé qu'il y avait une marge de manœuvre permettant d'assouplir de telles conditions sous réserve de disposer des assurances convenables quant à la responsabilité civile, la disponibilité et la responsabilité professionnelle des prestataires de services. On pourrait envisager une série d'approches moins contraignantes de l'établissement dans ce contexte : par exemple, des garanties financières (en faisant appel à des instruments comme les cautionnements obligatoires et les assurances responsabilité professionnelle) pourraient s'appliquer de façon transnationale de façon à préserver la possibilité de recours des consommateurs en cas de faute professionnelle. On pourrait atteindre le même objectif en imposant une présence temporaire liée à la prestation d'un service précis ou encore la désignation d'un agent dans le pays d'accueil. Une autre proposition consistait à recentrer la réglementation pour la faire porter non plus sur les activités d'une entreprise ou d'un individu, mais sur la production d'un prestataire de services, de façon à permettre une définition rigoureuse de l'exécution d'un travail de qualité tout en encourageant l'innovation dans les modalités de fourniture des services professionnels (par exemple, des projets architecturaux pourraient être en partie vérifiés à distance par le biais des techniques de l'information). Enfin, on a relevé que certains professionnels peuvent souhaiter maintenir une présence locale même s'ils n'y sont pas juridiquement tenus. C'est généralement le cas des architectes, qui suivent la réalisation de projets à long terme de construction sur le marché d'accueil.

De nombreux participants ont souligné le rôle des associations professionnelles dans la définition et le respect de normes rigoureuses de conduite professionnelle. Selon eux, la mise au point de codes internationaux d'éthiques et l'amélioration de la collaboration entre associations professionnelles nationales sont essentielles à l'instauration de la confiance mutuelle nécessaire pour appliquer des approches nouvelles des obligations de présence locale. Les participants ont en outre admis que l'instauration d'un environnement de plus en plus concurrentiel constituait un facteur déterminant de la promotion de l'intégrité professionnelle.

Les conditions de nationalité et de présence locale ont désormais été dans une large mesure éliminées dans certains cadres régionaux. Les dispositions générales du Traité de Rome de 1957, par exemple, garantissent la libre circulation des biens, des personnes, des services et des capitaux au sein de la Communauté européenne (CE). En outre, les dispositions particulières établissent le principe de la libre prestation de services pour une période limitée avec ou sans déplacement vers un autre État membre (article 59) et le droit d'établissement (article 52). Ces dispositions prévoient l'élimination des mesures discriminatoires contre les ressortissants des autres États membres telles que les conditions liées à la nationalité ou à la résidence dans un autre État membre d'une personne physique ou morale.

6.2.4 Restrictions sur l'investissement et la propriété

Les solutions de rechange à la limitation de la participation d'investisseurs non professionnels ont également été évoquées lors du Troisième Atelier. Les participants ont manifesté un large soutien à ce que des participations minoritaires (à concurrence de 49 pour cent du capital) par des investisseurs non professionnels puissent être autorisées sans compromettre ces objectifs. On a en outre souligné que dans des secteurs comme l'architecture, les investissements de non professionnels apporteraient de l'argent frais indispensable, ce qui permettrait aux cabinets de services professionnels de se porter sur les marchés internationaux.

On peut convenablement répondre au souci d'indépendance professionnelle vis-à-vis de propriétaires non professionnels en définissant des règles convenables de diversification de l'actionnariat, comme une limitation des droits de vote des différents investisseurs non professionnels à cinq ou dix pour cent.

Dans le cadre de la limite autorisée pour les investissements de non professionnels, les participants n'ont pas vu de raison d'introduire des discriminations entre investisseurs non professionnels sur des critères de nationalité, ni de leur imposer des obligations de domiciliation préalable.

Une autre catégorie de restrictions à l'encontre des investissements par des professionnels étrangers pourrait être assouplie sous réserve de mécanismes convenables de sauvegarde, comme l'obligation pour les professionnels étrangers d'adhérer à une association professionnelle reconnue ou l'obligation qu'un membre au moins du conseil d'administration soit un professionnel agréé localement. Cela pose la question plus générale des procédures permettant de faciliter l'accès à l'exercice local pour les professionnels étrangers.

6.2.5 Reconnaissance mutuelle

Des expériences régionales en matière de reconnaissance mutuelle dans le cadre des professions témoignent de l'éventail des approches envisageables pour faciliter l'accès à l'exercice local pour les professionnels étrangers.

Les dispositions générales du Traité de Rome étant insuffisantes, la Commission européenne a, entre 1964 et 1993[37] adopté quelque 60 Directives pour la prestation de services professionnels internationaux d'un État membre à l'autre.

L'orientation adoptée initialement consistait à reconnaître l'expérience professionnelle des membres des professions libérales qui avaient exercé une activité pendant une période de trois à six ans dans leur État d'origine. La deuxième solution consistait à harmoniser les qualifications professionnelles. Une première variante était fondée sur la reconnaissance automatique par une coordination de l'enseignement et de la formation ; la seconde, appliquée uniquement aux architectes, consistait à déterminer des critères de reconnaissance de la formation. Toutefois, en raison de la complexité et de la portée limitée des dispositions (une seule profession/activité), les efforts accomplis au sein de la CE se sont traduits dans la seconde moitié des années 1980 par une approche horizontale.

La dernière approche en date, la reconnaissance des qualifications (sans coordination de la formation), s'applique à toutes les activités et professions réglementées à l'exception de celles visées par une Directive spécifique déjà en vigueur (architectes, par exemple). Ce régime est fondé sur la Directive 89/48/CEE qui introduit un système de reconnaissance des diplômes d'enseignement supérieur qui sanctionnent des formations professionnelles d'une durée minimale de trois ans et sur la Directive

92/51/CEE qui prévoit un deuxième système général de reconnaissance des formations professionnelles. En vertu de ces textes, une personne qui émigre dans un autre État se voit accorder une reconnaissance "quasi-automatique" de la formation qu'elle a reçue, sauf si elle souhaite se livrer à des activités professionnelles réglementées qui sont différentes de celles qu'elle est habilitée à exercer ou a exercé dans son propre État membre. Dans ce cas, elle peut être tenue de suivre une formation courte ou de subir un test d'aptitude[38]. Alors que les conditions de libre prestation de services dans toute l'Union européenne par les architectes, les ingénieurs et les comptables sont désormais réunies, elles ne le sont pas encore pour les juristes. A cette fin, la Commission étudie actuellement un projet de Directive visant à faciliter la pratique du droit dans toute l'Union européenne sous les titres des pays d'origine et à favoriser l'intégration des juristes étrangers dans les registres professionnels des pays d'accueil.

L'Accord de rapprochement économique entre l'Australie et la Nouvelle-Zélande prévoit une autre procédure que celle de la reconnaissance de l'équivalence des emplois. En vertu du Protocole de cet accord sur le commerce des services entré en vigueur en 1989, les fournisseurs de services professionnels ayant reçu une formation devraient être traités à égalité avec leurs homologues de l'autre Partie ; les membres des professions libérales sont dans les deux pays exonérés des procédures d'évaluation auxquelles les professionnels formés à l'étranger doivent normalement se soumettre. En 1996, la Nouvelle-Zélande et l'Australie ont signé l'Accord de reconnaissance mutuelle trans-tasmanien (TransTasman Mutual Recognition Agreement -- TTMRA) reposant sur l'Accord de reconnaissance mutuelle mis en place à l'intérieur de l'Australie. Le TTMRA devrait entrer en vigueur en 1997.

L'ALENA ne confère pas automatiquement aux professionnels le droit d'exercer dans un autre pays participant à cet accord. Les Parties à l'Accord sont toutefois encouragées à élaborer des normes et des critères mutuellement acceptables en matière de licences et de certification. Cet aspect est contenu dans l'Annexe de l'Accord sur les Services professionnels qui prévoit, d'une part, des dispositions générales sur la transparence, l'élaboration de normes professionnelles, l'attribution de licences temporaires et les procédures d'examen ; il propose d'autre part deux programmes de travail détaillés : l'un sur les conseillers juridiques étrangers visant à garantir qu'une personne d'une autre Partie sera autorisée à exercer ou à dispenser des conseils sur la législation de tout pays où cette personne est autorisée à exercer en tant qu'avocat ; l'autre sur l'attribution de licences temporaires pour les ingénieurs.

Le principe appliqué est celui de l'équivalence des qualifications dans les pays d'origine et d'accueil, sur la base d'un examen approfondi des conditions requises pour la délivrance du titre dans les deux pays. Trois critères d'évaluation sont ainsi pris en compte : études, examens et expérience.

Les initiatives d'auto-réglementation qui continuent de se mettre en place sont également susceptibles de contribuer au processus de reconnaissance internationale des qualifications et des compétences nécessaires pour exercer une profession. Dans le domaine des services professionnels en ingénierie, par exemple, certains progrès ont été accomplis au cours de ces dernières années en ce qui concerne la reconnaissance des qualifications acquises à l'étranger par le biais de systèmes de reconnaissance multilatéraux. Le modèle de la FEANI[39] retenu pour la reconnaissance au niveau européen du statut d'ingénieur professionnel (EurIng) se fonde sur une durée minimum de sept années de qualifications, de formation et d'expérience ; le regroupement de pays constitué dans le cadre de l'Accord de Washington[40] reconnaît l'équivalence des enseignements débouchant sur la délivrance de diplômes accrédités d'ingénieurs.

On peut envisager différentes formes de reconnaissance mutuelle. Lors du Deuxième Atelier, plusieurs participants s'étaient prononcés en faveur de l'abandon du recours aux qualifications universitaires en tant que point de référence des ARM. Cette question a été réexaminée lors du Troisième Atelier en se référant à l'expérience australienne de l'évaluation des compétences des ingénieurs. Au lieu de se centrer sur des facteurs à l'entrée comme les qualifications initiales, les partisans de cette forme de

reconnaissance mutuelle fondée sur la production ont estimé que l'évaluation des compétences des professionnels étrangers (savoir-faire et expérience préalable concernant certaines activités identifiables) constituait un indicateur plus équitable de la qualité du service. Un participant a estimé que l'évaluation en fonction des compétences peut ouvrir des perspectives considérables d'application dans les différentes professions, même si dans la pratique elle est plus facile à appliquer dans les professions qui produisent des produits finis concrets (comme chez les ingénieurs ou les architectes).

Des obstacles à la reconnaissance mutuelle n'en demeurent pas moins. Des participants à l'Atelier ont considéré que la complexité et l'opacité des systèmes nationaux de formation, de qualification et d'agrément, le manque de confiance mutuelle et de transparence, ainsi que les craintes de voir les ARM aboutir à un abaissement des normes dans les pays imposant des critères professionnels rigoureux persistent. D'autres ont jugé que l'actuelle négociation des ARM pourrait demander du temps et de l'argent. Elles peuvent aussi inhiber des réformes nationales favorables à la concurrence en renforçant indirectement un statu quo non satisfaisant faute de perspectives convenables de réforme de la réglementation. Enfin, les ARM lancent un défi considérable au système multilatéral d'échanges pour ce qui est de la définition de modalités transparentes, ouvertes et équitables pour leur extension à des pays tiers.

La reconnaissance mutuelle risque de ne pas être réalisable ou adaptée dans tous les cas. D'autres voies facilitant l'accès à l'exercice local par des professionnels étrangers, comme la reconnaissance unilatérale des références étrangères, l'agrément temporaire, des tests d'aptitude ou des examens abrégés, ainsi que les procédures accélérées peuvent être privilégiées pour faciliter l'accès des professionnels dans certaines situations. A cet égard, l'expérience sur le terrain en matière d'agrément temporaire des architectes et ingénieurs (au Canada), les procédures d'accès restreint sans examen (comme dans le cas de la Loi new-yorkaise sur les conseillers juridiques étrangers), les tests d'aptitude (utilisés dans l'UE pour les comptables étrangers) ainsi que d'autres études de cas peuvent contribuer à illustrer des solutions de rechange viables.

6.2.6 Vers une harmonisation des normes

Les pressions exercées par le marché ont encouragé la mise au point de normes mondiales et leur adoption par les autorités de tutelle nationales.

Plusieurs États membres de l'UE ont adopté des normes définies par la Fédération internationale des comptables (IFAC) dans le secteur de la vérification comptable. Dans d'autres pays, comme l'Australie, la profession et les organismes officiels de normalisation comptable ont harmonisé les normes comptables nationales avec les normes internationales. Cette initiative australienne entre dans le cadre de l'ARM, qui a traité de l'application et de l'utilisation de normes d'usage courant dans les échanges commerciaux internationaux. L'uniformisation des normes comptables peut améliorer la qualité, l'exhaustivité et la comparabilité des informations déclarées. En effet, les autorités de tutelle, et d'autres comme les investisseurs ou analystes, ont besoin de données fiables sur les entreprises opérant de façon transnationale afin de comprendre la nature des actifs, d'exercer un contrôle effectif sur leur gestion et de collecter des capitaux de sources diverses. Pour les entreprises opérant dans plusieurs pays, la similitude des normes comptables réduit les coûts. Dans le cas des prestataires de services professionnels, une large reconnaissance de normes internationalement acceptables peut faciliter la concurrence entre fournisseurs de différents pays.

6.2.7 Adhésion aux organisations professionnelles et observation des codes de déontologie

En cas d'établissement, les migrants doivent normalement adhérer aux organisations professionnelles existantes et se conformer à leurs règles. Pour empêcher les professionnels de se voir refuser l'accès au marché pour de tels motifs, les Directives de la CE stipulent que l'on peut être exempté de l'obligation d'adhésion aux organisations professionnelles ou à tout le moins qu'une inscription simplifiée ou une déclaration peut suffire. Les Directives stipulent en outre que les prestataires de services sont soumis aux dispositions professionnelles, administratives ou encore disciplinaires du pays d'accueil. Toutefois, les entraves au libre établissement ne sont pas entièrement levées par ces dispositions. Les organismes de tutelle de certains pays de l'UE prévoient en effet que leurs textes législatifs et réglementaires s'appliquent à leurs adhérents travaillant à l'étranger, même si ces personnes ont été autorisées à fournir des services dans le cadre du régime du pays d'accueil. Une solution envisageable consisterait à faire adopter par les professions et les autorités des règles de comportement supplémentaires.

7. Conclusions et propositions d'action

La réglementation des professions libérales est défendue au nom de la nécessité de protéger les consommateurs. Les contrôles à l'entrée et les procédures d'agrément ou d'accréditation fondés sur le respect de certaines normes de qualité sont sans doute nécessaires pour assurer le maintien de normes élevées. Toutefois, donner plus de souplesse à la définition des pratiques réglementées, afin de permettre à des para-professionnels d'effectuer des tâches plus routinières ne semble pas de nature à mettre en danger les normes de qualité de nombreuses professions et peut conduire à une amélioration des services ou à une baisse de leur coût.

D'autres règles et réglementations, d'origine gouvernementale ou promulguée par des associations professionnelles, en vue de contrôler l'entrée dans la profession, la structure des entreprises, les honoraires ou la publicité passent pour nécessaires afin de promouvoir et de préserver la qualité et l'intégrité des services et de leurs prestataires. Toutefois, les pays de l'OCDE procèdent de plus en plus à un réexamen des règles et pratiques qui, en limitant la concurrence, sont susceptibles de servir les intérêts des professions elles-mêmes plutôt que le bien-être des consommateurs.

Plus précisément, permettre aux associations professionnelles de fixer des barèmes obligatoires d'honoraires et de frais élimine de toute évidence la concurrence et il n'y a guère d'éléments, voire aucun, permettant de dire qu'une telle pratique est nécessaire pour assurer la qualité. De même, les règles qui empêchent une publicité honnête et non mensongère, notamment sur les prix des services courants, découragent une concurrence sur les prix et les services qui pourrait être bénéfique pour les consommateurs.

On recommandera donc que les pays Membres procèdent à un examen des règles et des pratiques en vue de renforcer la concurrence économique. Plus précisément, les pouvoirs publics, notamment les autorités de la concurrence, devraient prendre des initiatives pour révoquer ou modifier les règlements qui empêchent de façon injustifiée l'entrée dans les professions ou fixent les prix et qui interdisent la publicité honnête ou non mensongère sur les prix et les services proposés.

En outre, on recommandera que les pays Membres rendent applicable le droit de la concurrence aux professions libérales, moyennant des sauvegardes destinées à assurer la protection du consommateur. Pour ce faire, il convient de révoquer ou de modifier les exemptions de l'application générale du droit à ces professions et à leurs organismes d'autodiscipline, ce qui n'empêche pas le maintien d'une surveillance suffisante pour veiller à la qualité des services. Cela peut nécessiter l'intervention des autorités à la fois nationales et infra-nationales (États et provinces).

La protection du consommateur n'en reste pas moins nécessaire, plus spécialement pour les services aux particuliers. Mais pour y parvenir, les pays Membres doivent définir des approches innovantes de la réglementation. Les organismes de tutelle doivent revoir les restrictions en matière d'entrée dans les professions, d'affiliation et de forme des entreprises qui empêchent inutilement l'entrée dans les professions, notamment pour les professionnels étrangers. D'autres règles, comme l'assurance, les cautions, les fonds de remboursement des clients ou des mécanismes disciplinaires au lieu initial d'agrément, pourraient apporter une protection convenable tout en permettant plus de concurrence. Les pays Membres pourraient aussi envisager de réviser les règles qui restreignent indûment la libre association des professionnels avec d'autres praticiens et adopter des formes d'organisation innovantes et plus efficientes.

L'élaboration de modèles d'Accords de reconnaissance mutuelle pour les professions est une approche qui peut être prometteuse. Une démarche générale couvrant les diverses facettes des "qualifications professionnelles" comme les niveaux d'étude, la compétence et le savoir-faire, pourrait être mise en œuvre dans ce domaine. Il convient cependant de veiller à ce que les ARM n'inhibent pas des réformes nationales favorables à la concurrence en renforçant indirectement un *statu quo* non satisfaisant faute de perspectives convenables de réforme de la réglementation. Un examen multilatéral pourrait aussi se consacrer à la définition et l'adoption de normes essentielles régissant l'accès aux services et activités qui, si elles sont largement utilisées, pourraient renforcer la transparence, réduire les coûts pour l'usager et stimuler la concurrence. L'OCDE pourrait jouer un rôle dans ces processus. La question de savoir s'il convient d'associer des autorités infra-nationales à la négociation et comment assurer une application viable des résultats des négociations sur le terrain peut mériter aussi un examen. Cette question va concerner directement les pays dans lesquels les gouvernements fédéraux mènent des négociations et sont généralement juridiquement responsables de la mise en œuvre de leurs engagements internationaux, mais où les autorités infra-nationales sont *de facto* juridiquement compétentes vis-à-vis des professions.

Encourager la libéralisation des échanges et de l'investissement internationaux dans le secteur des services professionnels constitue une composante importante de la réforme de la réglementation. En conséquence, les pays de l'OCDE doivent mettre en œuvre les recommandations formulées à l'intention des pouvoirs publics lors du Troisième Atelier sur les services professionnels qui s'est tenu les 20-21 février 1997: *(a)* les prestataires de services professionnels doivent être libres de choisir leur forme d'établissement, y compris la constitution de sociétés, selon le principe du traitement national, dès lorsqu'il existe des solutions permettant de sauvegarder la responsabilité individuelle, l'obligation de rendre des comptes et l'indépendance des prestataires de services professionnels ; *(b)* les restrictions à l'encontre de l'association de professionnels étrangers avec des professionnels agréés localement doivent être levées, en commençant par autoriser les associations temporaires pour des projets spécifiques ; *(c)* les restrictions à l'encontre de l'accès au marché reposant sur la nationalité et des conditions préalables de résidence doivent être supprimées ; *(d)* les restrictions à l'encontre des participations étrangères dans des entreprises de services professionnels doivent être réexaminées et assouplies ; *(e)* les conditions de présence locale doivent être réexaminées et assouplies sous réserve de l'existence de garanties en matière de responsabilité professionnelle et d'autres mécanismes de protection de la clientèle ; enfin, *(f)* les organismes nationaux de tutelle doivent coopérer pour promouvoir la reconnaissance des qualifications et compétences acquises à l'étranger et définir des mécanismes de respect de normes éthiques.

ANNEXE

1. Caractéristiques économiques des services professionnels

La question du traitement des services professionnels par la réglementation gagne en importance parce que ces services prennent eux-mêmes une importance croissante dans les économies de l'OCDE.

Le gonflement de l'importance économique des SPE ressort des statistiques des pays Membres. En termes de contribution économique globale, les statistiques de la France comme des États-Unis pour l'année 1990 montrent que la contribution des SPE au PIB a doublé en 20 ans. Le développement rapide de l'emploi ressort des tendances observées pour la catégorie plus large des "services immobiliers et services aux entreprises", dont relèvent les SPE[41]. En tout juste dix ans (de 1980 à 1990), l'emploi dans cette catégorie plus large (dans les pays de l'OCDE communiquant ces renseignements) a progressé en moyenne de 55 pour cent, soit six fois plus vite que l'emploi national toutes activités confondues (neuf pour cent). Certes, les structures de l'emploi varient considérablement : près de 10 pour cent de l'emploi aux États-Unis entre dans cette catégorie (plus large), contre un pour cent à peine au Portugal.

L'emploi dans les services professionnels est également important en termes qualitatifs. Les professionnels de ce secteur bénéficient normalement de niveaux de formation, de compétence et de rémunération supérieurs à la moyenne. Ils jouent souvent un rôle de premier plan dans l'innovation et la diffusion des nouvelles technologies de l'information. Ils sont donc bien placés pour apporter une contribution significative à la compétitivité de l'économie nationale.

La structure classique d'entreprise dans les SPE et les autres secteurs des services professionnels est celle du cabinet individuel ou des petites firmes, opérant principalement sur des marchés locaux. Dans quelques pays Membres, notamment les États-Unis et le Royaume-Uni, il existe aussi des entreprises moyennes ou grandes comptant des dizaines, voire des centaines de professionnels. Certaines de ces grandes sociétés peuvent opérer à l'échelle nationale et même internationale.

2. Services juridiques

En 1992, le secteur des services juridiques employait aux États-Unis 952 000 personnes (professions para-judiciaires et autres incluses) pour une production d'environ 95 milliards de dollars. Sur les 777 000 avocats inscrits en 1993, la majorité exerçait dans le secteur des services juridiques[42]. On estime par comparaison qu'en 1992 ce même secteur employait dans les 12 pays de l'Union européenne quelque 500 000 personnes pour une production de près de quatre milliards d'Écus (52 milliards de dollars). Quelque 380 000 personnes étaient membres de professions juridiques en 1993, dont certaines étaient employées dans d'autres secteurs économiques (banque, industrie, etc.) ou dans l'administration. Depuis 1991, le nombre des avocats au Japon a augmenté. Les professionnels du droit étaient plus de 18 000 en 1993 et dépassaient 19 000 en 1996. Une nouvelle progression est envisagée. En outre, un nombre de personnes beaucoup plus considérable -- plusieurs centaines de milliers -- travaillent dans les services juridiques des sociétés commerciales japonaises. Bien qu'ils ne soient techniquement pas des

avocats représentants leurs clients devant les tribunaux, ils font une bonne partie des travaux juridiques qu'effectuent les avocats indépendants pour leur clientèle d'entreprises dans d'autres pays Membres.

L'implantation de succursales dans les pays étrangers a été essentiellement le fait des cabinets les plus importants, les cabinets les plus modestes ayant tardé à faire leur entrée sur les marchés internationaux. En 1988, 43 des 50 premiers cabinets juridiques au monde étaient soit américains, soit britanniques[43]. Les autres cabinets figurant en bonne place parmi ces 50 se trouvaient au Canada et en Australie. Le premier cabinet n'appartenant pas à l'un de ces quatre pays était un cabinet français, classé au 92e rang[44]. C'est récemment seulement que des regroupements encore plus importants de cabinets d'avocats ont étendu leurs activités à des centres industriels et financiers comme Francfort, Bruxelles, Paris ou Hong Kong. La pratique au niveau international de bon nombre des cabinets juridiques américains qui sont en pointe en matière de services juridiques spécialisés, est d'attirer une forte proportion d'avocats non américains dans leur société - en tant qu'employés dans un premier temps puis de plus en plus en tant que partenaires. Le nombre d'avocats américains exerçant à l'étranger à titre permanent (qui ne dépasse probablement pas le millier) demeure en fait très faible par rapport au nombre total des avocats qui exercent aux États-Unis[45].

Une étude statistique sur les premiers cabinets américains et français indique une relation forte entre la rentabilité financière des cabinets, le poids des partenaires et la situation géographique du siège[46]. Plus les avocats employés par un cabinet étaient nombreux, plus le revenu par partenaire était élevé. L'ouverture d'un nouveau bureau augmente les frais généraux, ce qui réduit la productivité, sauf lorsque ce bureau est situé à l'étranger. Il est également démontré que le régime réglementaire (passé et présent) du pays d'origine influe fortement sur les résultats financiers des cabinets. L'intensification de la concurrence et le renforcement des normes sur le marché du pays d'origine ont correspondu à une hausse de la productivité du travail et à une plus grande diversification vers des services non traditionnels.

3. Les services comptables

L'estimation du chiffre d'affaires annuel réalisé par le secteur de la comptabilité et de l'audit aux États-Unis est de 37 milliards de dollars pour 1992 pour près de 560 000 emplois, dont 250 000 comptables[47]. Ce nombre est relativement faible, comparé aux 1 150 000 comptables employés par le secteur privé américain. Le secteur des services comptables de l'UE aurait employé environ 950 000 personnes en 1993, dont 200 000 experts-comptables. Le chiffre d'affaires du secteur était en 1991 de l'ordre de 43 milliards d'Ecus (54 milliards de dollars). Quelque 215 000 autres experts-comptables étaient employés dans l'industrie et l'administration. Les comptables britanniques, qui sont les plus anciens du monde dans la profession, représentaient plus de la moitié de tous les comptables de la CE.

Les variations du nombre de comptables inscrits s'expliquent en partie par les variations de la demande qui résultent des différences dans les dispositions juridiques imposant certaines activités comme les vérifications statutaires des comptes de sociétés. Elles peuvent aussi être imputées aux disparités entre les pays dans ce que l'on désigne sous le terme de comptable. Ainsi, dans un certain nombre de pays européens, comme l'Allemagne et la France, seuls ceux qui exercent dans le secteur de la comptabilité peuvent être agréés en tant que comptables[48]. Comme dans les services juridiques, la plupart des sociétés comptables sont des cabinets moyens ou petits, voire des comptables indépendants, qui se concentrent sur un nombre limité de segments du marché et qui n'ont généralement pas d'affiliation internationale formelle. Cela étant, il existe plusieurs très grands cabinets internationaux, les "Six Grands" (Arthur Andersen, Coopers & Lybrand, Detroit Ross Tohmatsu, Ernst & Young, KPMG, et Price Waterhouse) qui peuvent gagner jusqu'à un tiers des recettes mondiales du secteur.

Le métier de base des cabinets indépendants de comptabilité réside dans la vérification comptable[49] et la comptabilité[50]. Les services fiscaux viennent ensuite dans la liste de leurs activités. De plus en plus, les plus gros cabinets se lancent dans de nouveaux domaines comme le conseil en gestion[51] et les services juridiques -- les Six Grands concurrencent déjà les cabinets juridiques en Espagne, en France, et au Royaume-Uni -- ou l'informatique. Les cabinets comptables comptent parmi les principaux utilisateurs d'informatique de pointe, notamment les systèmes experts, et parmi les plus gros fournisseurs mondiaux de conseil dans ce domaine, notamment pour la conception des systèmes, l'élaboration de logiciels et la gestion des installations.

Les sociétés les plus importantes sont généralement regroupées en "réseaux" internationaux dont la dénomination commerciale est utilisée par les membres soit directement soit en liaison avec leur dénomination commerciale locale. Une vingtaine de cabinets internationaux, dont les revenus mondiaux annuels sont estimés à un montant qui se situe entre un milliard et 100 millions de dollars (1993), sont de plus en plus soumis à une concurrence sévère de la part d'un grand nombre de cabinets plus modestes ainsi que des cabinets de tout premier plan[52].

Une analyse de régression portant sur les 29 premiers cabinets comptables au monde en 1993 montre une forte corrélation entre les résultats financiers et les effectifs, le nombre de bureaux et la composition du portefeuille d'activités[53]. Les coûts liés à l'ouverture de nouveaux bureaux semblent être compensés par les économies d'échelle réalisées au niveau de toute l'entreprise et l'extension des activités à de nouveaux domaines s'est non seulement traduite par une diminution de la dépendance relative par rapport à des services traditionnels mais aussi par un accroissement des bénéfices. L'analyse portant sur les 15 premières firmes comptables de cinq pays de l'OCDE révèle, toutes choses égales par ailleurs, que les sociétés intervenant sur des marchés caractérisés par des normes de qualité supérieures génèrent des revenus plus élevés.

4. Services de conseil en ingénierie et d'architecture

Aux États-Unis, le secteur des services de conseil en ingénierie a employé en 1992 quelque 660 000 personnes pour une production de presque 62 milliards de dollars. Le nombre d'ingénieurs inscrits s'élevait en 1993 à environ 1.7 million aux États-Unis. Comparativement, le nombre des architectes était de 123 000 seulement en 1992, le secteur correspondant employant 124 100 personnes avec une production de 12 milliards de dollars[54]. Dans l'Union européenne (UE), le secteur de l'ingénierie n'employait en 1993 que 200 000 personnes environ, pour un chiffre d'affaires de 15 milliards d'Écus (18 milliards de dollars) alors qu'en 1992 quelque 256 000 architectes exerçaient dans l'UE. Selon les estimations réalisées à partir de données de l'INSEE, dans leur totalité, les services d'architecture employaient 350 000 à 500 000 personnes (sur la base d'un ratio de 0.5 à une personne de soutien) avec un chiffre d'affaires de 30 à 40 milliards de dollars environ.

Les services d'ingénierie sont fortement concentrés dans les pays développés qui représentent ensemble 57 pour cent du marché mondial de ce secteur (Amérique du Nord : 46 pour cent ; Europe de l'Ouest : 8.8 pour cent ; Japon : 2.5 pour cent). Les entreprises des pays développés couvrent en outre plus de 95 pour cent de la demande mondiale résiduelle en services d'ingénierie (entreprises d'Amérique du Nord : 56 pour cent ; entreprises européennes : 32 pour cent ; entreprises japonaises : huit pour cent), par le biais d'opérations internationales de vaste envergure, en particulier avec le Moyen-Orient et les pays d'Europe orientale. Dans ce contexte, il convient de rappeler qu'une majorité de pays membres de l'OCDE a enregistré un excédent commercial dans les secteurs de la "construction, architecture et ingénierie".

Selon une récente étude réalisée en France[55], le nombre des architectes a considérablement augmenté au cours de cette dernière décennie et le nombre de cabinets a connu une progression

impressionnante. Sur la totalité des cabinets français en 1995, 85 pour cent comportaient moins de deux salariés (65 pour cent étant des cabinets individuels) et réalisaient 25 pour cent du chiffre d'affaires annuel du secteur. En revanche, le nombre de cabinets employant plus de 20 personnes est en diminution depuis 1986. Les activités ont également évolué au cours de cette même décennie, les architectes réalisant davantage de projets non résidentiels que des logements individuels. La crise du secteur de la construction a entraîné une diminution de 35 pour cent des revenus de l'architecture depuis le début des années 1990. Ce phénomène a été peu, voire pas du tout, compensé par les exportations étant donné que les entreprises sont trop petites et trop peu capitalisées pour être compétitives sur des projets internationaux[56].

La structure des activités aux États-Unis se caractérise également par la prédominance de petites entités : 12 500 des 25 000 cabinets d'architecte inscrits auprès de l'American Institute of Architects en 1989 étaient des cabinets individuels ; 250 cabinets américains employaient à eux seuls plus de 50 architectes inscrits. Les 12 premiers cabinets représentent environ 30 pour cent des revenus de la profession tout entière[57].

Dans l'ensemble, les services d'architecture demeurent essentiellement locaux ou régionaux. La réussite au niveau international est relativement rare et elle tient soit à une culture artistique et intellectuelle de premier plan au niveau international, soit à un modèle "historique" d'échanges internationaux. Par exemple, les cabinets américains les plus importants, qui se rapprochent le plus du concept de cabinets d'architecte véritablement mondial, demeurent fortement dépendants des activités internationales de leurs clients américains.

TABLEAUX

Tableau 1 : REGLEMENTATIONS CONCERNANT LES ACTIVITES DE BASE DES FOURNISSEURS DE SPE

ACTVITES PRINCIPALES DES:	Australie	Autriche	Belgique	Canada	Rép. Tchèque	Danemark	Finlande	France	Allemagne	Grèce	Hongrie	Islande	Irlande	Italie	Japon	Luxembourg	Mexique	Pays Bas	Nlle Zélande	Norvège	Pologne	Portugal	Espagne	Suède	Suisse	Turquie	Royaume Uni	Etats-Unis
Services juridiques																												
Représentation devant les tribunaux	R/S	R/S	R	R/S		R	F[1]	R	R/S					R/S	R		S	R	R/S	R		R	R/S	F[1]	R	R	R/S	R/S
Représentation devant les administrations	S	S	S	S		F	F[1]	F	S					S/F	R		F	F	F	F		F	F	F[1]	F	F	F	S
Conseils dans des domaines essentiellement régis par les lois	R/S	R	F	R/S		S	F[1]	S	S					F	R		R	F	F	S		R/S	R	F[1]	F	R	F	R/S
Rédactions d'actes (immobiliers, testatments, affaires de famille)	S	S	R	R/S		S	F[1]	R	R					S	R/S		R	R	R/S	S		R	R	F[1]	R	R	R	R/S
Droit de brevets	R/S	R	S	R/S		S	F[1]	R	R/S					S	R/S		S	F	R	S		S	R/S	F[1]	F	S	S	R/S
Services Comptables																												
Vérification légale des comptes	R/S	R/S	R	S		R/S	R/S	R	R/S	R/S*			R*	S	R	R*	R	R/S	R	R/S		R	R	R/S	S	S	R	R
Audit secteur public	F	R/S	R	S		S	F	R	R	R*			F*	S	X	R*	R	R/S	S	R		X	S	F	F	X	S	R
Audit fusions et apports en nature	F	R/S	R	S		F	R/S	R/S	R/S	F*			F*	-	R	R*	R	R/S	R	R/S		R	S	R/S	S	S	R	R
Comptabilité	F	R/S	R	F		F	F	R	F	R*			F*	F	F	R*	F	F	F	S		X	F	F	F	S	F	F
Faillites	S	F	F	S		F	F	X	S	R*			F*	F	S	F*	S	X	F	S		X	R	X	F	S	R	S
Services Ingéniérie																												
Conception et projet	F	S	F	R		F	F	F	F					S	R/S		S	F	S	F		R	R/S	F	F	R	X	R
Représentation pour l'obtention de permis	F	S	X	R		F	F	F	F					F	R		S	F	S	F		R	R/S	F	F	R	F	R
Tests et certification	F	S	F	R		F	F	F	F					S	R/S		S	F	S	F		R	R/S	F	F	R	F	R
Etudes de faisabilité	F	S	F	S		F	F	F	F					F/S	F		F	F	F	F		R	S	F	F	F	S	S
Architectes																												
Elaboration de projets[2]	F	R/S	R	R		F	F	F	F					S**	R		F	F	F	F		F	R	F	F	R	F	R
Demande de permis de construire	F	R/S	F	R		F	F	R	R					R/F*	S		F	F	F	F		R	R	F	F	S	F	S
Suivi de la construction	F	S	R	R		F	F	S	F					S**	R		S	F	F	F		F	S	F	F	R	F	R
Contrôle technique et certification	F	R	F	S		F	F	X	X					S**	R		S	F	F	F		F	S	F	F	R	S	R
Délimitation topographique	F	X	X	X		F	F	X	X					S**	S		S	X	X	X		F	S	F	X	X	X	S

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

* Etude NERA sur le secteur de l'audit et du conseil dans la CE, mai 1991.

1. Seul le titre de la profession est réglementé. Les services ne sont toutefois pas réglémentés et peuvent être fournis par un non-professionel.
2. Activités généralement réservée aux géomètres.

Légende :

R: Activité réglementéé et réservée à un seul type de professionnels
R/S: Activité réglementée et pouvant être exercée par des professionnels d'un même secteur
S: Activité réglementée et pouvant être exercée par des professionnels de secteur différents
F: Activité libre, c'est-à-dire non réglementée
X: Activité non exercée par la profession
* Les soumissions de demande de permis de construction sont gratuites
** Le travail est partagé avec les géomètres pour les projets civils de petite taille.

Tableau 2 : **OBLIGATIONS IMPOSEES AU NIVEAU NATIONAL EN MATIERE DE QUALIFICATIONS**

	Australie	Autriche	Belgique	Canada	Rép. Tchèque	Danemark	Finlande	France	Allemagne	Grèce	Hongrie	Islande	Irlande	Italie	Japon	Luxembourg	Mexique	Pays-Bas	Nlle-Zélande	Norvège	Pologne	Portugal	Espagne	Suède	Suisse	Turquie	Royaume-Uni	Etats-Unis
Universités/diplôme d'enseignement supérieur																												
Avocats	X	4	5	4-7		5	5	5	3.5					4	-AA19		5	4	4	6		X	4-6	4.5	3	4	4-5	7
Comptables	X	4	X	4		3-5	3-5	7	4					**	4		5	4-6	4	3-4.5		3	3*	3-4	4*	2-4	X	4
Ingénieurs	4	5	X	4		3-5	3-5	-	3-5					-	2		5	3-5	3	3-5		5	3-5	2-4.5	3-4	4	X	4
Architectes	7	5	5	6-7		5	3-7	5	3.5-4.5					-	4		5	3	5	5		X	3-5	4.5	3-4	4	5	5
Expérience pratique																												
Avocats	X	5	3	0.5-1		3	4	2	2					-	2		X	3		2		X	X	5	1-2	1	1-2	-
Comptables	2-3	4-5	3	2-2.5		3	5	3	3-5					***	3		X	3	3	2		-	3	3-5	3	2-10	3	2-3
Ingénieurs	3-4	3	-	4		-	-	-	2-5					-	2		X	0-1	3-5	-		-	-	-	X/-	0.3	0-5	4
Architectes	-	3	2	3		-	-	-	2-4					-	2		X	1	3	-		-	-	0.5	X/-	-	2	3
Examens professionnels																												
Avocats	X	X	-	X		-	X	X	X					-	X		X	X	X	-		-		-	X	-		X
Comptables	X	X	-	X		X	X	X	X					**	X		X	X	X	X		X	X	X	X	-	X	X
Ingénieurs	-	X	-	X		-	-	-	-					-	X		X	-	X/-	-		-	-	-	-	****	-	X
Architectes	-	X	-	X		-	-	-	-					-	X		X	-	X	-		-	-	-	-	-	-	X

Source : International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

Légende

Chiffres = nombre d'années de qualification

* = Années de pratique

** = Les professionels enrégistrés (experts-comptables, aides-comptables) et les autres prestataires de services de comptabilité.

*** = Depuis 1995, un stage de trois ans est obligatoire pour les professionels de la comptabilité.

**** = Pour les experts-comptables agréés et les conseillers financiers.

X = obligations en vigueur

- = aucune obligation de qualification

Tableau 3 : **ADHESION OBLIGATOIRE A DES ORGANISATIONS/ASSOCIATIONS PROFESSIONNELLES**

PRINCIPALES PROFESSIONS:	Australie	Auctriche	Belgique	Canada	Rép. Tchèque	Danemark	Finlande	France	Allemagne	Grèce	Hongrie	Islande	Irlande	Italie	Japon	Luxembourg	Mexique	Pays-Bas	Nlle-Zélande	Norvège	Pologne	Portugal	Espagne	Suède	Suisse	Turquie	Royaume-Uni	Etats-Unis
Services juridiques																												
Avocats[1]	Y	Y	Y	Y		Y	Y	Y	Y					Y	Y		n	Y	Y	n		Y	Y	Y	n	Y	Y	n
Notaires	-	-	-	Y		-	-	Y	Y					Y	-		Y	Y	-	-		Y	-	-	n	Y	-	-
Avocats spécialistes du droit des brevets	n	Y	-	-		-	-	-	Y					Y	-		-	-	n	-		n	-	-	-	-	-	n
Conseillers juridiques étrangers	n	-	-	Y		-	-	-	Y					-	Y		-	-	n	-		-	-	-	-	-	-	n
Services comptables																												
Comptables[2]	n	Y	Y	Y		n	n	Y	Y					-	Y		n	Y	n	n		-	n	n	n	Y	Y	n
Vérificateurs des comptes (audit)	-	-	-	-		n	-	Y	Y					Y	-		-	-	-	-		Y	n	-	-	-	Y	-
Conseillers fiscaux	-	Y	-	-		-	-	-	Y					n	Y		Y	n	-	-		-	n	-	n	-	-	n
Conseils en ingénierie	Y	Y	n	Y		n	n	n	Y					n	n		n	n	Y/n	n		Y	Y	n	n	Y[3]	Y	n
Architectes	n	Y	Y	Y		n	n	Y	Y					Y	n		n	n	n	n		Y	Y	n	n	Y[3]	Y	n

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

1. Le term d'avocat recouvre les fonctions les plus diverses possibles, telles que celles d'"Attorney at Law", de "Rechtsanwalt", d'"Avocat", ainsi que de "Barrister/Solicitor".

2. Le terme de "comptable" recouvre les fonctions d'expert-comptable ainsi que celles de vérificateur, si ces fonctions sont exercées simultanément.

3. Toute personnes à l'exception des fonctionnaires

Légende:

Y = Adhésion obligatoire

n = Adhésion non réquise

- = aucune donnée communiquée en ce qui concerne cette fonction.

Tableau 4 : **REGLEMENTATIONS RELATIVES A LA CONSTITUTION DES SOCIETES, AUX ASSOCIATIONS INTRA-PROFESSIONNELLES, A LA FIXATION DES HONORAIRES, A LA COMMERCIALISATION ET A LA PUBLICITE**

	Australie	Autrich	Belgique	Canada	Rép. Tchèque	Danemark	Finlande	France	Allemagne	Grèce	Hongrie	Islande	Irlande	Italie	Japon	Luxembourg	Mexique	Pays-Bas	Nlle-Zélande	Norvège	Pologne	Portugal	Espagne	Suède	Suisse	Turquie	Royaume-Uni	Etats-Unis
Services juridiques																												
Forme juridique	L	N	-	N		L	-	L	N					L	N		L		-	-			N	N	N	N	-	L
Fixation des honoraires	R	R	R	-		-	-	-	R					R	R		-		-	R		R	R	-	R	R	-	-
Commercialisation et publicité	P	P	P	-		P	-	P	P					P	P		P	-	P	P		P	P	-	P	P		-
Services comptables																												
Forme juridique	L	L	L	P/L		L	-	L	L	-		-	N	L	L	L	-	L	N	-		N	L	L	-	L	-	L
Associations intra-professionnelles	X		X	X		X*		X				X		-	X			X*		X				X				
Fixation des honoraires	R	R	-	-		R	-	R	R				-	R	-	-	-	-	-	-			R	-	R	R	R	-
Commercialisation et publicité	-	P	P	-		-	-	P	P				P	P**	P	P	P	P	-	-		P	P	-	-	P	P	-
Services d'ingéniérie																												
Forme juridique	-	L	-	-		-	-	-	-	-		-	-	L	-		-	-	-	-		N	L	-	-	L	-	L
Fixation des honoraires	-	R	-	-		-	-	-	R	R				R	R		-	-	-	-		R	R	-	-	R	-	-
Commercialisation et publicité	-	-	-	-		-	-		P					P	-		P	-	-	-			-	-	-			-
Architectes																												
Forme juridique	-	L	-	N		-	-	L	-	-		-	-	L	-	-	-	-	-	-		N	N	-	-	L	-	L
Fixation des honoraires	-	R	R	-		-	-	-	R					R	R		-	-	-	-			R	-	-	R	-	-
Commercialisation et publicité	-	-	P	-		-	-	-	-					P	-		P	-	-	-			P	-	-			-

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

Légende :

R = Niveaux maximum ou minimum imposés pour la totalité ou certains des services fournis par les professionnels

P = Interdit pour la totalité ou certains des services fournis par les professionels

N = La constitution en société n'est pas autorisée

L = Seules certaines formes de sociétés sont autorisées

X = Restrictions imposées aux activités pluri-disciplinaires (inter-professions)

- = Aucune restriction

* = Soumis à l'autorisation

** = Comptables-experts et comptables ; aucune restriction est imposée aux autres opérateurs

Tableau 5 : **REGLEMENTATIONS AFFECTANT LES TRANSACTIONS INTERNATIONALES REALISEES PAR DES PERSONNES PHYSIQUES ETRANGERES**

	Australie	Autriche	Belgique	Canada	Rép. Tchèque	Danemark	Finlande	France	Allemagne	Grèce	Hongrie	Islande	Irlande	Italie	Japon	Luxembourg	Mexique	Pays-Bas	Nlle-Zélande	Norvège	Pologne	Portugal	Espagne	Suède	Suisse	Turquie	Royaume-Uni	Etats-Unis
Services juridiques																												
Obligations de nationalité	-	X	X	-		-	X	-	-	X		X		X	-		X	-	-	-		-	X	X	X/-	X	-	-
Obligations de résidence	-	na	-	X/-		-	na	-	-	na		X			-		X		-	-		-	X	na	na/X	na	X	X
Obligations de requalification (1)	X/-	na	X	X/-		X	na	X	X	na		na		na	X		na	-	X	X		X	X	na	na/X	na	X	X
Services comptables																												
Obligations de nationalité	-	X	-	-		-	X	-	-	X		-	-	X	-	X	X	-	-	-		-	X	-	-	X	-	-
Obligations de résidence	X	na	-	X/-		X	X	-	-	na		X	-	X	-		X	-	X	X		X	-	X	-	na	-	X/-
Obligations en matière de licence et d'accréditation	X	na	X	X		X	X	X	X	na		X	X	X/-	X	X	X	X	X	X		X	X	X	X	na	X	X
Services d'ingéniérie																												
Obligations de nationalité	-	X	-	-		-	-	-	-	X		-	-	-	-	-	X	-	-	-				-	-	X	-	-
Obligations de résidence	-	X	-	X/-		-	-		-	na				X	-		X	-	X	-		X		-	X/-	-		-
Obligations en matière de licence et d'accréditation	-	X	-	X		-	-		X	na					X		X	-	X	-			X	-	X/-	X		X
Architectes																												
Obligations de nationalité	-	X	-	-		-	-	-	-	X		-	-	-	-	-	X	-	-	-		X	-	-	-	X	-	-
Obligations de résidence	X	na	-	X/-		-	-	-	-	na				X	-		X	-	X	-		na	-	-	X/-	-		X/-
Obligations en matière de licence et d'accréditation	X	na	X	X		-	-	X	X	na					X		X	X	X	-		na	X	-	X/-	X	X	X

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

(1) Obligations de requalification partielle ou complète.

Légende :

X = Restriction(s) applicable(s)

- = Aucune restriction

na = Non applicable

Tableau 6 : REGLEMENTATIONS AFFECTANT LES TRANSACTIONS INTERNATIONALES REALISEES PAR DES ENTREPRISES ETRANGERES

	Australie	Autriche	Belgique	Canada	Rép. Tchèque	Danemark	Finlande	France	Allemagne	Grèce	Hongrie	Islande	Irlande	Italie	Japon	Luxembourg	Mexique	Pays-Bas	Nlle-Zélande	Norvège	Pologne	Portugal	Espagne	Suède	Suisse	Turquie	Royaume-Uni	Etats-Unis
Services juridiques																												
Obligation de présence locale	-	na	X	X/-		-	X	-	X						X		X		X	-		X	X	X	-	-	-	X/-
Restrictions concernant l'investissement/la participation étrangers	X	na		X		X	X	X	X						X		X		X	X		X	X	X	-	X	-	-
Nombre minimum imposé d'effectifs/d'administrateurs locaux	X/-	na		X		X	X	X	-			X			-		-		-	X		-	X	X	X	X	-	-
Restrictions association/soc. de personnes/valid. emploi	X/-	X	-	X		X	X	X	-						X		X	X	X	X		-	-	X	-	X	X/-	-
Restrictions concernant l'engagement de professionnels locaux	X	X		-		-	-	X	-						X		X		-	-		-	-	-	-	X	X	-
Services comptables																												
Obligation de présence locale (1)	X	X	-	X/-		X	X	-	X	X		X	-	X	X	X	X	-	-	X		X	-	X	X	X	-	X/-
Restrictions concernant l'investissement/la participation étrangers	X	X	X	X	X	X	X	X	X	X			X	X	X	X	-	X	X	X		X	-	X	-	X		X
Nombre minimum imposé d'effectifs/d'administrateurs locaux	X	X		X/-		X	X	X	X			X	-	-	X	-	-	X	-	X			-	X	X	X	-	X
Restrictions concernant l'engagement de professionnels locaux	-	na		-		-	-	-							na		-	-	-	-			-	-	-	-	-	-
Services d'ingénierie																												
Obligation de présence locale	-	X	-	X/-		-	X	-	-	X			-	X	X		X	-	X	-		X	X	-	-	X	X/-	-
Restrictions concernant l'investissement/la participation	X	X	-	X		-	X	-	X/-						-		-	-	X	-		X	-	X	-	X		X
Nombre minimum imposé d'effectifs/d'administrateurs locaux	X	X	-	X		X	X	-	X/-			X			X		-	-	-	X			-	X	X	X		X
Restrictions association/soc. de personnes/JV	-	X	-	-		-	-		-						-		-	-	-	-			-	-	-			-
Restrictions concernant l'engagement de professionnels locaux	-	X	-	X/-		-	X		-						X		-	-	-	-			-	X	-	X		-
Architectes																										-		
Obligation de présence locale	-	X	X	X/-		-	X	-	-	X				X	X		X	-	X	-		X	X	-	-	X		X/-
Restrictions concernant l'investissement/la participation étrangers	X	X	-	X/-		-	X	X	-						-		-	-	X	-		X	-	X	-	X		X
Nombre minimum imposé d'effectifs/d'administrateurs locaux	X	X	-	X/-		X	X	X	-			X			X		-	-	-	X			X	X	X	X		X
Restrictions association/soc. de personnes/JV	-	X	-	X/-		-	X	X	-						-		-	-	-	-			-	X	-	X	-	
Restrictions concernant l'engagement de professionnels locaux	-	X	-	-		-	-	-	-						-		-	-	-	-				-	-	-		-

Source: International Trade in Professional Services, Assessing Barriers and Encouraging Reform, OECD 1996.

1. Etablissement de sociétés et résidence requise pour les personnes physiques pour la fourniture de services.

Légende : X = Restriction(s) applicable - = Aucune restriction na = Non applicable

JV = Société en participations dite "joint venture"

NOTES ET BIBLIOGRAPHIE

1 AKERLOF, G. (1970), "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism", *Quarterly Journal of Economics* 84 : 488.

2 Voir notamment Industry Commission (1995), Rapport final, Partie B2, Occupational Regulation and the Professions, Australie.

3 COX, C. et S. FOSTER (1990), "The Costs and Benefits of Occupational Regulation," Bureau of Economics Staff Report to the Federal Trade Commission pp. 26-27. Les études examinées dans cette enquête ne portent pas toutes sur des professions libérales ; certaines traitent d'autres professions qui sont également soumises à des agréments et à d'autres contraintes anticoncurrentielles de la réglementation.

4 MURIS, T. et F. MCCHESNEY (1978), *Advertising, Consumer Welfare and the Quality of Legal S: the Case of Legal Clinics*, Law and Economics Center, University of Miami, Working Paper 78-5.

5 Rapport de l'équipe du Bureau of Economics et des services régionaux de Cleveland de la F.T.C. (1984), "Improving Consumer Access to Legal Services".

6 SCHROETER, J., S. SMITH et S. COX (1987), "Advertising and competition in routine Legal Service M: An Empirical Investigation", *The Journal of Industrial Economics* 36 , p. 49.

7 BOND, R., J. KWOKA, J., PHELAN et I. WHITTEN (1980), *Effects of Restrictions of Advertising and Commercial Practice in the Professions: the Case of Optometry*, Bureau of Economics of the Federal Trade Commission, Washington, D.C.

8 COX & FOSTER, *op. cit*, p. 29.

9 COX & FOSTER, *op. cit*, p. 31.

10 Dans le secteur de la comptabilité, la plupart des membres des organisations régionales sont également membres des instances internationales et des procédures bien établies prévoient des consultations périodiques et la coordination des activités, afin d'éviter les doubles emplois et les chevauchements. Aucune organisation régionale ne se charge de l'élaboration des normes, ceci étant l'apanage des organisations nationales ou internationales.

11 STILLMAN, R.J. (1980), *Public Administration, concepts and cases*, Houghton Mifflin Company, George Mason University, 2è éd., p.76.

12 Voir Arizona c. Maricopa County Medical Society, 578 F. Supp. 1262 (D. Ariz. 1984)

13 Voir, par exemple, TREBILCOCK, TUOHY et WOLFSON (1979), *Professional Regulation*, p. 322. Les auteurs concluent que l'interdiction de la publicité sur les tarifs pour les quatre professions étudiées dans l'Ontario ne se justifiait en aucun cas. Ils considèrent que l'interdiction alors en vigueur dans les professions juridiques avait largement contribué à maintenir les consommateurs dans l'ignorance et la confusion à propos des honoraires et avait porté atteinte aux conditions de concurrence sur certains segments du marché des services juridiques.

14 ANDREWS, LORI (1980), *Birth of a Salesman ; Lawyer Advertising and Solicitation*, ABA Press.

15 TREBILCOCK, TUOHY and WOLFSON, *ibid*.

16 421 US 773 (1975).

17 435 U.S. 679 (1978).

18 476 U.S. 447, 463 (1986).

19 457 U.S. 332 (1982).

20 433 U.S. 350 (1977).

21 Cf. note 16 ci-dessus.

22 464 F. Supp. 400 (W.D. Texas 1978).

23 Commission des monopoles. A Report on the General Effect on the Public Interest of Certains Restrictive Practices so far as they Prevail in the Supply of Professional Services (Rapport sur l'incidence générale sur l'intérêt public de certaines pratiques restrictives dans la mesure où elles ont cours dans la prestation de services professionnels), octobre 1970, Cmnd 4463.

24 94 F.T.C. 701 (1979) confirm. après amend., 638 F.2nd443 (2è circuit 1980), conf. par trib. part., 455 U.S. (1982) (ordonnance modifiée 99 F.T.C. 440 (1982), 100 F.T.C. 572 (1982) et 114 F.T.C. 575 (1991).

25 LIANG, N. and J. OGUR (1987), Restrictions on Dental Auxiliaries.

26 BOND, R. *et al*., (1980), Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry.

27 Les professionnels exerçant fréquemment leurs activités par l'intermédiaire de réseaux, ils ne sont souvent pas en position de bénéficier des engagements pris par les membres du GATS en matière de transferts de personnels entre entreprises.

28 Les Actes des Ateliers de 1994 et de 1995 ont été publiés respectivement dans les Documents OCDE sous les titres: "*Liberalisation of Trade in Professional services*" et "*International Trade in Professional Services , assessing barriers and encouraging reform*".

29 Voir James MURRAY: *Liberalisation and the Consumer* in Documents OCDE (1996): “International Trade in Professional Services, assessing barriers and encouraging reform”.

30 Politique de concurrence dans les secteurs réglementés et plus particulièrement l'énergie, les transports et les banques, Rapport du Comité des experts sur les pratiques commerciales restrictives (OCDE, Paris, 1979).

31 C(79)155(Final).

32 Ces examens ont pour but d'évaluer si la situation continue de justifier leur maintien en vigueur et d'estimer les coûts et les avantages de ce maintien en vigueur. Le rôle des autorités de concurrence en matière de recommandations a été particulièrement mis en avant comme un moyen de favoriser la concurrence.

33 Politique de la concurrence et professions libérales (OCDE, Paris, 1985).

34 Pierre SAUVÉ : *The Long and Winding Road: NAFTA and the Professions.* Liberalisation of Trade in Professional Services, Documents OCDE (1995).

35 Ceci signifie, par exemple, qu'un ressortissant européen employé par une société établie dans un pays de l'ALENA ne peut bénéficier des avantages de l'entrée temporaire lorsqu'il se déplace dans la région. Autrement dit, les sociétés qui satisfont par ailleurs à la règle d'origine sur les investissements prévue par l'Accord - à savoir les investisseurs de bonne foi au sens de l'ALENA- ne peuvent affecter leur personnel qualifié dans les filiales situées dans la région couverte par cet accord.

36 Les opérateurs et les investisseurs, les employés transférés au sein d'une entreprise et les membres des professions libérales sont toujours tenus aux termes de l'Accord de demander un permis de travail ou une autorisation d'occuper un emploi pour entrer dans un autre pays. Les visiteurs pour des raisons professionnelles sont exemptés de cette obligation.

37 Jean-Eric de COCKBORNE (1995), *Professional Services in European Union.* Liberalisation of Trade in Professional Services, Documents OCDE.

38 Dans le cas des professions juridiques, le test d'aptitude peut être rendu obligatoire.

39 La Fédération européenne des Associations nationales d'ingénieurs regroupe 23 organisations professionnelles d'ingénieurs au niveau européen (dont 18 dans des pays de l'OCDE, à savoir l'Autriche, la Belgique, le Danemark, la Finlande, la France, l'Allemagne, la Grèce, l'Islande, l'Irlande, l'Italie, le Luxembourg, les Pays-Bas, la Norvège, le Portugal, l'Espagne, la Suède, la Suisse, le Royaume-Uni). Elle représenterait environ un million d'ingénieurs professionnels.

40 Huit pays sont actuellement signataires de cet accord (dont six pays de l'OCDE, à savoir l'Australie, le Canada, l'Irlande, la Nouvelle-Zélande, le Royaume-Uni et les Etats-Unis).

41 L'emploi dans le secteur immobilier représenterait approximativement dix pour cent des chiffres communiqués. Toutefois le fait que l'immobilier soit inclus dans la catégorie des services aux entreprises rend l'utilisation des données de production annuelle très difficile dans la mesure où elles incluent des montants très importants de loyers imputés pour tous les biens immobiliers (qu'ils soient occupés par leur propriétaire ou donnés en location).

42 *Ibid*, p. 10.

43 La contribution nette positive des services juridiques au solde des échanges extérieurs est la plus forte dans des pays comptant le plus grand nombre d’avocats et les plus gros cabinets juridiques, à savoir les Etats-Unis et le Royaume-Uni.

44 Centre des Nations Unies sur les sociétés transnationales, Directory of the World's Largest Service Corporations (New York: Moody's Investors Service and United Nations Publications, 1990).

45 NELSON, Steven C. (1995), The American Bar Association in Liberalisation of Trade in Professional Services, Documents OCDE.

46 Cf. NOYELLE, *supra*, p. 56.

47 Voir Thierry NOYELLE supra, qui estime le nombre de comptables dans le secteur des services comptables en se fondant sur l'hypothèse d'un expert-comptable pour une personne employée en soutien.

48 Les distinctions pratiquées au regard de l'appellation de ceux qui sont considérés comme membres de la profession comptable ont une incidence importante sur la taille de cette profession. Dans certains pays, l'appellation correspond au niveau d'études, quelles que soient la carrière suivie ou les activités exercées. Dans d'autres cas, l'appellation correspond à un titre fonctionnel auquel le titulaire doit renoncer lorsqu'il cesse d'exercer des activités comptables. Dans les pays où le premier système est appliqué, les comptables professionnels occupent une grande variété de postes dans l'industrie, le commerce, le secteur public, l'enseignement et autres, ainsi que dans l'exercice public de la profession. Dans le cadre du second système, ne sont membres de la profession comptable que ceux qui exercent à titre libéral. Certains pays peuvent en fait appliquer les deux systèmes à la fois (le Royaume-Uni par exemple), mais dans ce cas l'appellation n'est pas réservée aux membres de la profession qui détiennent le titre fonctionnel.

49 Dont rapports financiers (vérification légale des comptes) ; rapports financiers (autre que vérifications légales) ; contrôle des fusions ; audit secteur public ; contrôle des apports en nature ; autres missions spécifiques.

50 Dont comptabilité, comptabilité secteur public, tenue des comptes.

51 Derek RIDYART et Jean de BOLLE, *Study of the EC Audit and Consultancy Sector, A Report to DG IV of the European Commission*, NERA, mai 1991

52 Cf. NOYELLE, *supra*, p. 36.

53 Cf. NOYELLE, *supra*, p. 71.

54 Cf. NOYELLE, *supra*, p. 14.

55 Observatoire de l'économie de l'architecture: Architectes: une décennie de profondes mutations, Bulletin de Conjoncture, numéro 4, décembre 1995.

56 Le commerce extérieur ne représente que deux pour cent du chiffre d'affaires de ce secteur selon Nicolas Nogue, in I*mportation et Exportation des Services d'Architecture*, *Premier Bilan*, Paris ; Observatoire de l'Economie de l'Architecture, mai 1995.

57 Francis DUFFY: Conseil des Architectes d'Europe, Documents OCDE (1995)

AUSTRALIA

In Australia, the professions are subject to a diversity of government and self-regulatory arrangements, which vary considerably between individual professions. In many cases, the regulatory arrangements for particular professions vary between individual States and Territories. The traditional justification for regulation of the professions has been the protection of consumers through measures to maintain the quality of services and the competence and integrity of their providers.

It is being recognised increasingly, however, that such regulation is not without cost to consumers and the community. To the extent that it restricts competition, the service choices available to consumers may be limited, the incentive to innovate and contain costs may be reduced and prices may be inflated as a result.

One of the main aims of competition policy is the promotion of consumer choice, rather than allowing the collective judgement of sellers to determine the range and prices of goods and services that are available. In other words, suppliers should not pre-empt the working of the market by deciding between themselves what their customers need, rather the market should be left to respond to what consumers demand.

1. Background

To put the application of the competition laws to the professions in Australia in proper context, it is important to bear in mind the following brief background.

In October 1992 an Independent Committee of Inquiry was established by the Prime Minister following agreement by all Australian governments on the need for a national competition policy. In August 1993 the Independent Committee of Inquiry reported to the heads of Australian governments ('the Hilmer Report'[1]).

In its submission to the Hilmer Inquiry, the then Trade Practices Commission[2], argued strongly in favour of universal application of Australia's competition law - the *Trade Practices Act 1974* (TPA), and therefore application of the competitive conduct rules of the TPA to the business activities of the professions.

1.1 Universal application of competition laws

In February 1994 the Council of Australian Governments (COAG) meeting in Hobart agreed to enact legislation to achieve the universal application of competition laws to all businesses throughout Australia as recommended in the Hilmer Report. In particular, the aim was to apply the competition laws to unincorporated businesses and government businesses, including all of the professions. Prior to the reforms, Part IV of the TPA only applied to the professions if they were incorporated businesses or if they engaged in interstate or international trade.[3]

The Hilmer Report observed that:

> "… Whatever significance is attributed to the professions generally, it is important to emphasise that their partial exclusion from the [Trade Practices] Act is primarily due to a constitutional limitation which is unrelated to the status of professions. The scope of the exception depends largely on the legal form of the business, which varies widely across professions. … The overall result is patchy and difficult to justify on public policy grounds."[4]

Since then, the Commonwealth, State and Territory Parliaments have passed laws to apply Part IV of the *Trade Practices Act 1974* and the State equivalents — the Competition Code, to achieve universal application of the competition laws to everyone in business in Australia. These changes came into effect on 21 July 1996.

1.2 Legislative review

This series of competition policy reforms also had the effect of tightening the mechanisms by which governments can grant future legislative exceptions from Part IV of the TPA and to undertake a review of all legislation that restricts competition. The purpose of the legislative review is to remove such restrictions unless it can be demonstrated that each such restriction is in the public interest and that there is no less restrictive way of achieving the same outcome.

There has been some concern that such legislative reviews will lead to the erosion of professional standards in areas with important social implications, such as medicine and law. Many of the reviews relevant to the professions have not yet been completed and some have not yet commenced. Without seeking to pre-empt their findings, it is useful to clarify the objectives of the review process as it relates to the professions. The application of competition policy to the professions, as in other areas of the economy, is not about introducing unfettered competition or the erosion of professional standards. It is concerned with examining the existing legislative restrictions, regulations and codes governing these areas and determining whether they serve the public interest or simply exist for the benefit of the profession concerned.

In many cases, poor information and the inability of consumers to accurately assess the capability of practitioners suggest a need to regulate standards of accreditation and the use of professional titles. Consumers are then able to purchase services with some confidence in the practitioner's ability and professional standing.

On the other hand, excessively high accreditation standards may serve to unnecessarily prevent suitably qualified people from providing a competent service. For example, in most States conveyancing services, once the preserve of lawyers, are now also performed, at significantly less cost, by non-lawyers, with no appreciable drop in standards. Advertising restrictions may unduly hamper the flow of information to consumers concerning prices and the range of services on offer. Similarly, prescribed fee scales may restrict price competition to the detriment of consumers.

The ACCC does not have a direct or ongoing role to play in the national legislative review program, although it has been asked to provide comments to a number of individual reviews that have commenced in the legal and medical professions.

2. Application of the TPA to the professions

2.1 Restrictive trade practices

The result of the competition policy reforms is that all business activities of the professions are now covered by the restrictive trade practices provisions (Part IV) of the TPA, which prohibits:

- anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts and price-fixing;
- misuse of market power;
- exclusive dealing;
- resale price maintenance; and
- mergers which would have the effect, or likely effect, of substantially lessening competition in a substantial market.

2.2 Consumer protection

Part V of the TPA contains a range of provisions aimed at protecting consumers. It includes prohibitions on advertising that is false or misleading or makes false representations.

Up until recently, many of the professions were prevented or restricted from engaging in advertising for their services under self-imposed regulatory rules. Many of these restrictions on professions' advertising have now been removed. Therefore as professionals begin to engage in the advertising and promotion of their services they must be concerned to ensure that their conduct does not contravene Part V of the TPA.

2.3 Penalties and remedies

2.3.1 Restrictive trade practices

The following sanctions are available in the Federal Court for contraventions of the restrictive trade practices provisions of the TPA:

- monetary penalties of up to $A10 million for corporations and $A500 000 for individuals, per offence;
- injunctions;
- damages;
- divestiture of illegally acquired shares or assets;

- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct (including specific performance and rescission and variation of contracts).

Pecuniary penalties for contraventions of the restrictive trade practices provisions of the TPA have applied to the professions since 21 July 1997. All other remedies have applied since 21 July 1996.

2.3.2 Consumer protection

The following sanctions are available in the Federal Court for contraventions of the consumer protection provisions of the TPA:

- monetary penalties of up to $A200 000 for corporations and $A40 000 for individuals, per offence;
- injunctions;
- damages;
- corrective advertising;
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct (including specific performance and rescission and variation of contracts).

2.4 Authorisation

The ACCC also has a relevant adjudicative function. Recognising that, in some instances, anti-competitive practice do deliver offsetting public benefits which can outweigh the anti-competitive detriments, the TPA empowers the ACCC to authorise some forms of anti-competitive conduct (with the exception of the misuse of market power) that would otherwise be at risk of contravening Part IV of the TPA. If the ACCC authorises such conduct, it is immune from legal action by the ACCC or by private parties.

3. Professional conduct of concern

The ACCC has identified several forms of regulation of professional markets that are likely to inhibit competition and therefore raise concerns under the TPA. These forms of regulation impact competition in two broad ways: through their effects on the structure of the relevant professional market; and on the market conduct of professional practitioners.

Structural regulations of professional markets include those which:

- regulate entry into the market (including the imposition of educational and competency standards, licensing and certification requirements, and restrictions on entry by foreign professionals and para-professionals);
- define the field of activity reserved for licensed or certified professional practitioners;

- separate the market functionally into discrete professional activities (including those performed by accredited specialists such as insolvency practitioners, barristers and medical specialists); and

- impose restrictions on the ownership and organisation of professional practices.

Conduct regulations include those which:

- limit the fees professionals may charge, or require the application of fee scales, for particular professional activities;

- prohibit certain kinds of advertising, promotion or solicitation of business by professional practitioners; and

- specify professional and ethical standards to be observed by, and disciplinary procedures to apply to, professional practitioners.

In this respect, it is considered that the ACCC's approach is consistent with the views set out in Chapter 3 of the 1997 OECD Report on Regulatory Reform relating to Professional Business Services.

4. Overview of the effect of these changes on the professions in Australia

The establishment of universal application of the TPA to all forms of business in Australia has been felt more strongly in some professions than in others, primarily because of the way various professions have historically conducted themselves. For example, barristers regularly tend to negotiate individually the fees they charge on a case by case basis where as historically, many medical / health professionals have often relied on charging fees determined on a collective basis.

4.1 Accountancy

In a study conducted by the Trade Practices Commission (TPC), in July 1992[5], it was considered that the accountancy profession in Australia was not subject to the same degree of regulation as other professions. The report concluded that, on the whole, regulation of the accountancy profession did not overly impede competitive activity within the various markets in which accountants operate.

Since that time, various restrictions on the ability of accountants to advertise their services have been lifted. Further, the Institute of Chartered Accountants abolished its residence requirement in 1995 for membership, enabling Australian accountants to work overseas and foreign accountants to become members of the Australian Institute.

The ACCC has not taken any enforcement action in this area, although two investigations have been conducted into mergers in the industry.

4.1.1 Professional accounting associations

During 1998 the ACCC conducted an investigation into a merger between the two primary accounting professional bodies in Australia (the Institute of Chartered Accountants and the Australian Society of Certified Practising Accountants), to which the ACCC raised no objections. In coming to its

decision, the ACCC considered the fact that there is no restriction on the use of the term 'accountant' in the selling of accountancy services and the fact that accountants face increasing competition from a range of other service providers including lawyers, book keepers, management consultants and from the sale and use of accounting software packages.

The merger also resulted in the unification of accreditation procedures for membership to the peak professional body in Australia. This was seen as having the effect of lowering any barriers to entry.

4.1.2 Price Waterhouse / Coopers & Lybrand

The ACCC decided on 13 March 1998 not to oppose the international merger between two of the world's 'Big Six' accounting firms – Price Waterhouse and Coopers & Lybrand. It was considered that effective competition from the remaining 'Big Five', second tier firms and suburban tax accountants; significant countervailing power by large corporate clients; and the threat of tendering processes, all combined to ensure the likelihood that competition would not be substantially lessened in Australia as a result of the merger.

4.2 Architecture

In a report by the then TPC on the architectural industry in September 1992[6], it was considered that the market for building design services in Australia was generally competitive. It was discovered that the share of the market traditionally serviced by architects had been eroded through competition from other service providers. The competitive nature of the market was particularly evident under the economic conditions prevailing at the time that severely depressed building activity.

Reviews of legislation in the architectural profession, as part of the national competition policy reforms, are still under way at both the state and national level.

4.3 Engineering

Activity in this sector dates back quite some time. In one of its earliest decisions, the Trade Practices Tribunal[7] refused to authorise the Code of Ethics of the Association of Consulting Engineers of Australia[8]. The code contained minimum fee scales, restrictions on advertising and a ban on price competition. The test applied by the TPC was whether, in all the circumstances, the public benefit outweighed the public detriment constituted by the reduction of competition resulting from giving effect to the Code of Ethics. The Tribunal, in this case and in later authorisations, was prepared to give some consideration to social and other non-economic benefits, but ultimately regarded the impact on competition as paramount.

Various branches of the engineering profession later submitted acceptable drafts of their rules or codes of ethics to the TPC. These new rules eliminated offending provisions controlling advertising, disciplinary procedures and prescribing minimum fees.

4.4 Legal

The TPC released a report on the legal profession in March 1994[9]. This report found the Australian legal profession to be heavily over-regulated and in urgent need of comprehensive reform. The

legal profession was considered to be highly regulated compared to other sectors of the economy and those regulations combined to impose substantial restrictions on the commercial conduct of lawyers and on the extent to which lawyers were free to compete with each other for business. It was considered that in the 1994 environment, the regulatory regime had adverse effects on the cost and efficiency of legal services and their prices to business and final consumers.

The report identified certain structural aspect of the profession, which had the potential to foreclose entry and competition. These were:

- restrictions on entry, including licensing and the imposition of educational and competency standards;
- definition of the field of activity (*i.e.* legal work) reserved to qualified, licensed practitioners;
- functional separation of the markets into the discrete occupations of solicitor and barrister; and
- controls over the ownership and organisation of legal practices.

The report also identified certain rules on conduct, which had the potential to restrict competition:

- rules which prohibited certain types of advertising (including fee advertising) and other ways of attracting business;
- the use of fee scales to set fees and charges for various legal services and rules which limited the types of fees that could be charged;
- rules covering professional and ethical standards and disciplinary procedures; and
- regulation of professional indemnity insurance, trust accounts and fidelity funds.

The report called for radical changes in the regulation of the profession, including applying the TPA to the profession, reducing or eliminating the lawyer monopoly in many areas, ending the division between barristers and solicitors, removing restrictive bar practices, ending anti-competitive restrictions on advertising and introducing new fee arrangements.

The then TPC examined the public interest arguments advanced in support of regulations which constrained the commercial behaviour of the legal profession against the public costs they impose by inhibiting competition and efficient service provision, and reached the overall conclusion that many of the regulations could not be justified on public interest grounds.

Some changes that have already taken place in the legal profession include a lifting of restrictions on advertising, and the removal of restrictions on whom can perform conveyancing services. With the exception of Queensland and Tasmania, all other states in Australia no longer limit the performance of conveyancing to lawyers.

An Industry Commission report in 1995 suggested that on the evidence available, cost savings of up to 50 percent could be achieved by allowing non-lawyers access to the conveyancing market[10]. While no formal studies have been conducted in this respect, it is considered that this change has resulted in a drop in the cost of conveyancing services with no offsetting drop in standards.

Legislation reviews have commenced in the states of NSW and Queensland. In its submissions to these reviews, the ACCC has made the following assertions:

- The removal of the functional separation of the legal profession between barristers and solicitors, with the introduction of common admission and practising certificates across Australia, would enhance the commercial choices available to legal practitioners and their clients in relation to advocacy services, reduce barriers to entry to the advocacy services market, and increase competition between advocates.

- Any remaining state based restrictions on conveyancing services should be removed. Adequately qualified and/or experienced non-lawyers should be permitted to supply conveyancing services.

- There should be no restriction on legal practitioners' participation in multi-disciplinary practices (MDPs). MDPs should be allowed to practice under the commercial framework that the participants desire. The legal profession rules should not apply to non-lawyer members of MDPs.

- Legal practices and MDPs should have the right to incorporate under the Corporations Law with full limited liability.

- Restrictions vary between the states, but the ACCC has generally recommended the removal of any remaining restrictions on advertising. However, there may be a legitimate role for a code of conduct to provide guidance standards on advertising that the members of the legal profession should maintain if there is evidence of misleading advertising by legal practitioners.

- Appropriate complaints handling and dispute resolution mechanisms are essential to ensure adequate consumer protection in the legal services market. Such mechanisms must provide adequate redress for consumers, as an alternative to civil action.

- While professional indemnity insurance should remain compulsory, individual lawyers should be given the freedom to choose the insurer which best meets their needs as long as it complies with set minimum requirements.

However, competition policy reform in this sector has not been generally welcomed and considerable resistance to change has been evident in negotiations and discussions that have taken place so far in the legislation review process.

The following statement by Justice Roddy Meagher of the NSW Court of Appeal highlights the mixed reactions of the legal profession to competition policy reform in Australia:

> "… the 19th and 20th centuries steadily built up the barriers to entry; and on purpose: in order to keep the unworthy out and to preserve the citadel."[11]

Not unlike the accountancy profession, the legal profession too is feeling competing pressure from other service providers.

> "In addition to competition from within the legal profession, we have increased competition from other legal services providers. Accountants advise on tax, business consultants advise on legal structures, bankers provide security documentation, legal publishers deliver customised research

summaries on any area of law, licensed conveyancers act on the sale of businesses and one can buy software to write a will, to manage your trade mark applications or to help run your litigation."[12]

4.4.1 Legal profession matters currently in court

The ACCC is also currently involved in the following litigation:

- Federal Court proceedings against the Real Estate Institute of Western Australia (REIWA) and others including its executive director and its legal adviser. The ACCC has alleged that REIWA entered into agreements with two educational colleges not to provide a training course on property services to students at a fee less than $A780. The ACCC also alleges that certain of the REIWA rules and rules of practice for member real estate agents are anti-competitive in that they have the effect of:

  – requiring that, where any member of a franchise group wishes to become a REIWA member, all franchisees of that group must also be members;

  – preventing members from approaching vendors who are dealing exclusively with another agent; and

  – preventing members from offering certain incentives or inducements to consumers.

  The ACCC has joined REIWA's solicitor in an accessorial capacity as having been knowingly concerned in REIWA's alleged contravention.

- Federal Court proceedings against a lawyer from Perth, Western Australia. The ACCC is alleging the lawyer aided, abetted, counselled or procured or was knowingly concerned in or party to conduct by a company which promoted a system whereby vendors of property had to obtain the legal services of that lawyer's firm for settlement services and the services of one of four nominated values for valuation services in contravention of the exclusive dealing provisions of the TPA.

- Also under investigation are the rules, procedures and arrangements of a particular State Bar Association by which senior counsel are appointed in that State and the "conduct rules" of another Bar Association.

- The ACCC has instituted proceedings in the Federal Court against the lessors of a lunch bar and an associated company, Samton Holdings Pty Limited. The ACCC alleges that Samton Holdings dealt with the tenant of the lunch bar in an unconscionable manner in contravention of s 51AA of the TPA[13]. The legal adviser to the landlords and the company has also been joined in the proceedings.

4.5 Medical

There has been a long history of anti-competitive regulation in the medical services sector, which has tended to work against the wider public interest. For example, in the past, regulations have unduly restricted entry to the profession, have introduced anti-competitive practices through advertising and price caps, and have unduly restricted practice in the sector. Such regulations impose public costs by restricting

competition between medical practitioners and alternative health professionals. This can raise the price of health services and reduce the choice of service providers available to consumers.

Legislation reviews have commenced in the states of NSW and Western Australia. The ACCC's submissions to these reviews have addressed these and various other issues including models of regulation, complaints handling, disciplinary procedures, codes of conduct, professional indemnity insurance, controls and ownership and barriers to entry, including licensing and the use of titles.

Since the TPA was proclaimed in 1974, the ACCC has been involved in numerous investigations and litigation relating to health service providers to the extent that the law has covered health services.

One of the Commission's earliest investigations involved refusal to authorise a boycott of Canberra hospitals by Canberra doctors[14]. A few years ago the Commission took action against five of Tasmania's six health funds for an alleged anti-competitive arrangement to attempt to stop the State's private hospitals from discounting their fees for Commonwealth repatriation patients. This matter was settled with the health funds involved giving undertakings in the Federal Court not to continue the conduct.

In November 1995 the ACCC produced *A Guide to the Trade Practices Act for the Health Sector*. This publication gives guidance to individual professionals, private hospitals, health funds and associations on specific issues and problems that are particularly relevant to each of these groups that may put them at risk of contravening the TPA. It includes issues such as collective negotiations, arrangements with other professionals, fee setting, restrictions on advertising, and restrictions on entry and on membership to professional associations.

The debate in Australia about applying competition laws and competition policy to the health sector continues to rage. The following extract from a submission to a Productivity Commission Inquiry is indicative:

> "The Australian Doctors' Fund has been an outspoken critic of the application of National Competition Policy primarily, but not solely, on the delivery of health care."[15]

However, by way of contrast:

> "… providers would have to please patients rather than governments or insurance companies. A market-driven system would develop in which providers competed for patients in the ways providers have always competed: higher quality and lower costs. There are two possible scenarios for the future of healthcare in Australia. We can continue more of what we are doing now: increasing controls, decreasing choice, limiting access, lengthening waiting lists and increasing costs. Or, we can organise a system in which health services are provided for profit and purchased by consumers. We have tried government controls, and they have failed. It is time to make the market save the health system."[16]

In support of claims to exempt the health sector from competition laws, it has also been argued that quality of service, ethical matters and the doctor / patient relationship is peculiarly important to the health sector. It has been suggested that there may be possible economic distortions in the market for health services – caused by things like supplier induced demand (*i.e.* doctors creating additional work for themselves by encouraging patients to seek additional treatment) and distortions caused by the existence of health insurance.

The ACCC has responded to these claims by stating that these types of arguments do not have an impact on the matters considered by the ACCC. The ACCC's work in the health sector does not raise

these high level considerations. In response to claims that competition will result in a decline in the quality of service, it is considered that any well functioning market will provide consumers with what they want. In the medical market, it is considered fair to say that consumers will want a quality service first and a good price second. As a consequence, increased competition in the health sector will manifest itself in competition over the quality of the service being provided.

In any event, the quality of medical care provided under in any regulatory environment is a matter for governments, health departments, health boards, hospitals and individual practitioners themselves – not the competition authority.

4.5.1 Cosmetic Surgery – Parliamentary Inquiry

By way of an interesting case study, an Inquiry into Cosmetic Surgery[17] is currently being conducted by the Health Care Complaints Commission in NSW. The inquiry was prompted by complaints from consumers and health professionals regarding the way cosmetic surgery procedures are promoted and the quality and safety of those procedures. In particular, concerns have been raised that advertising and "news" stories about cosmetic surgery procedures provide incorrect and misleading information to consumers and unduly play on people's vulnerabilities about inadequacies of their appearance.

The ACCC's submission to this Inquiry has argued strongly against the re-imposition of advertising restrictions in this area. The ACCC has argued that many of the problems that have been associated with advertising in this sector could have been avoided if the companies involved had complied with the consumer protection provisions of the TPA which restrict misleading and deceptive conduct and the making of false or misleading representations, particularly in this case as to the benefits of, and risks associated with, various surgical cosmetic procedures.

With the receipt of many complaints about conduct in this area, this has certainly become a priority area for the Commission. For example, in 1996, the ACCC instituted proceedings against three impotence clinics[18] in Australia in relation to alleged misrepresentations made in advertising as to the efficiency, cost, advantages of treatment and advice offered by the clinics to men suffering from impotence. Injunctions were granted preventing the conduct and the Court ordered corrective advertising.

In addition to diligent enforcement of the TPA, the ACCC has also offered a number of suggestions to deal with problems in this industry, such as greater education for practitioners and consumers, the introduction of a seven day cooling off period and the publication of guidelines for professional advertising.

4.5.2 Anaesthetists – Enforcement Action

On 17 December 1998 the ACCC settled injunction proceedings instituted in the Federal Court against the Australian Society of Anaesthetists (ASA) and four individual anaesthetists operating in the state of NSW.

4.6 The conduct

The ACCC alleged that unlawful agreements were reached by anaesthetists at three private hospitals to charge $A25 per hour for 'on-call' services, which ensured an anaesthetist, although not on site, was available for emergency and after hour's anaesthetic services at the hospitals.

The ACCC also alleged that on 3 April 1996 certain anaesthetists reached an unlawful agreement to tell the administrators at one of the private hospitals that unless the hospital agreed to pay for the supply of on-call services from 1 May 1996, those anaesthetists would not supply such services (constituting a "boycott agreement").

The ACCC alleged that in late 1994, the ASA (NSW section) formed a sub-committee to formulate guidelines for the provision of on-call services in private hospitals. A sub-committee report was circulated to members in 1995. It said the ASA should 'recommend' and set an appropriate on-call fee to be paid by private hospitals to on-call anaesthetists and that this fee should be $A25 per hour.

It was further alleged that the anaesthetists, through their medical practice companies, arrived at agreements with other anaesthetists to charge an A$25 per hour on-call services fee. It was alleged that the ASA and its NSW chairman induced or attempted to induce and were knowingly concerned in, or a party to one or more of the agreements.

4.7 The outcome

The anaesthetists and the ASA gave undertakings to the Federal Court that they would not engage in fixing, controlling or maintaining prices offered or charged by them for the supply of on-call services, and that they would not enter into any agreement having the purpose, effect or likely effect of substantially preventing, hindering or lessening competition in the market for the supply of on-call services.

The ASA also undertook to the Federal Court to develop and implement, at its own expense, a trade practices compliance program. The Court ordered that the respondents pay $A60 000 toward the ACCC's costs.

The ACCC did not seek penalties in this case, as it was the first enforcement action against medical professionals following the competition policy reforms. However, a breach of the undertakings to the Federal Court would put the specialists of their association at risk of contempt of court.

4.7.1 Specialist Medical Colleges – Investigations continuing

The ACCC is also investigating whether the arrangements and conduct of a specialist medical college which determine the number of specialists being trained and may impinge recognition of international qualifications or experience may be a contravention of the TPA.

The focus of the ACCC's investigations in this area is on the specialist colleges who limit training places and engage in trainee selection processes where such conduct has an anti-competitive purpose or effect. The ACCC considers that if a college makes decisions about entry in order to protect the privileged positions of its members, then such colleges may be at risk of contravening the competitive conduct provisions of the TPA.

4.7.2 Medical Associations - Authorisation

On 31 July 1998 the ACCC issued a final determination granting authorisation until 30 June 1999 to the Federal and South Australian branches of the Australian Medical Association (AMA) to enter into

understandings between themselves and their members and to collectively negotiate fees for doctors in rural South Australia with the South Australian Health Commission[19].

The state of South Australia has 65 rural hospitals ranging from some with only one doctor to others with 25-50. There are very few resident specialists in rural South Australia and hospitals arrange periodic visits by particular specialists to cover their needs. Emergency support for complicated matters is arranged by flying 'recovery' teams from Adelaide or by airlifting patients to Adelaide, the state capital.

A major issue in the South Australian rural medical system is trying to attract doctors. It was estimated at the time that the system was short by 30-40 doctors.

In its draft determination on 3 April 1998 the ACCC indicated that it considered that the Fee for Service Agreement had anti-competitive effects because it acted as a price floor for all hospitals in South Australia. Hospitals in regions that have little trouble attracting doctors have to pay the same rate for medical services as those in regions that have difficulty. Sometimes negotiations are conducted to provide doctors with a package over and above that provided by the Fee for Service Agreement, but negotiations never result in a discount to the hospitals.

The draft determination stated that while the ACCC agreed that the provision of medical services provides many public benefits, it was not convinced that the Fee for Service Agreement was the only method that would produce them. The ACCC did, however, recognise that the South Australian Health Commission and the AMA and its members have established collective negotiation techniques. In light of the fact that doctors carrying on their professional businesses in South Australia without incorporating were not subject to the TPA until July 1996, the ACCC indicated that it recognised some public benefit in allowing the parties to phase in a less regulated system.

The AMA requested authorisation for five years, claiming a range of public benefits. The draft determination proposed that authorisation be granted until expiry of the current contract on 30 June 1999, a period which reflected the transitional nature of the public benefits.

A pre-decision conference was held on 19 May and 11 June 1998. The AMA indicated that it was unhappy with the decision but amended its application, requesting authorisation only until the end of the current agreement. The ACCC issued a final determination on the matter on 31 July 1998 reaffirming its decision to grant authorisation only until 30 June 1999.

5. Conclusion

The ACCC sees the professions as a priority area of activity, primarily because the sector has not been subject to the TPA for particularly long. The ACCC uses both education and enforcement to secure compliance with the TPA, and vigorously investigates any allegations of contravention's of the TPA in this sector as well as participating in numerous conferences and seminars with groups of professionals to educate them about their rights and responsibilities under the TPA. It will also be important to maintain enforcement activities in both the competition and consumer protection fields because as competition is introduced into professional sectors and they become more competitive, incentives very often arise for firms to gain an advantage over their competitors by engaging in misleading, deceptive and unfair practices.

Until the process of legislative review is complete, i.e. by the year 2000, and changes have been fully implemented, we will not see the full effect that the competition policy reforms in Australia have had on the professions. Change is certainly seen as inevitable in the professions, even by those who

disapprove. Therefore the ACCC's role in education, compliance and obviously enforcement in this sector will need to remain a priority.

NOTES

1 *National Competition Policy*. Report by the Independent Committee of Inquiry, the "Hilmer Report", August 1993.

2 *Trade Practices Commission – Submission to the National Competition Policy Review*, p 111. April 1993. NB. The Trade Practices Commission merged with the Prices Surveillance Authority in November 1995 to form the Australian Competition & Consumer Commission (ACCC).

3 Due to constitutional limitations on the legislative power of the Federal Government.

4 *Hilmer Report*, op.cit., p 135.

5 *Trade Practices Commission, Study of the professions – Accountancy*. Final report – July 1992.

6 *Trade Practices Commission, Study of the professions – Architects*. Final report – September 1992.

7 Renamed the Australian Competition Tribunal in November 1995.

8 *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-202.

9 *Trade Practices Commission, Study of the professions – Legal*. Final report – March 1994.

10 *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*. Industry Commission, March 1995, p 122.

11 *How high the barriers?* The Australian Law Journal 72(10) October 1998, pp 746 – 747.

12 *Responding to competition in practice – President's address at Opening of Law Term*. Patrick Fair, President, Law Society of NSW. Law Society Journal 35(2) March 1997, p 78.

13 Section 51AA of the TPA prohibits unconscionable conduct in commercial transactions.

14 *Re Australian Medical Association (1974-75)* ATPR Comm 13-840.

15 Australian Doctors' Fund Submission to the Productivity Commission Inquiry into the Impact of Competition Policy Reforms on Rural and Regional Australia – P.C. Submission No. 105 – 20, November 1998 at p 1.

16 Professor Steven Schwartz, Vice Chancellor, Murdoch University. *Cough up for a better quality of mercy – Want a cure for the health system? Try the market.* The Australian. 14 January 1999, p 9.

17 The Inquiry covers a wide range of cosmetic surgery procedures, including breast enlargement, breast reduction, liposuction, collagen injections, hair replacement, tattoos, body piercing and laser eye surgery. It excludes reconstructive surgery, being surgery performed on abnormal structures of the body caused by congenital defects, development abnormalities, trauma, infection, tumours or diseases.

18 *Australian Competition & Consumer Commission v On Clinic Australia Pty Limited & Ors* (1996) ATPR 41-517.

19 *Australian Medical Association Limited & Anor (1998)* ATPR (Com) 50-264.

FINLAND

1. Legislation

In Finland, competition restraints created by practitioners of so-called professional services fall, without exception, within the scope of the Act on Competition Restrictions (No. 480/1992).

Prohibitions on cartels and the abuse of dominant position became effective in 1992. Prior to that, competition restraints were primarily assessed according to the abuse principle (rule of reason) where the Finnish Competition Authority sought to remove the harmful effects of the restraints by negotiating with the parties. If this proved unsuccessful, the FCA was able to make a proposal to the Competition Council who likewise intervened with the restriction through negotiations. However, the Council was able to ban a restraint as a final recourse and impose a conditional fine.

2. Activities of the competition authorities on the price recommendations and marketing instructions of trade associations and the views expressed by the parties concerned

In 1988, the Finnish Competition Authority initiated a project whose aim was to intervene with the price recommendations then commonly provided by trade associations to their members. The FCA negotiated about the dissolving of the price recommendations with the Finnish Medical Association, Finnish Dental Association, Finnish Bar Association and the Finnish Association of Architects and Interior Architects and the Finnish Association of Consultants. All the associations mentioned cancelled their recommendations.

The Finnish Medical Association did not agree to dissolve its recommendations in the discussions conducted with the FCA but gave up price co-operation on the basis of a decision issued by the Competition Council in 1992.

The Finnish Dental Association applied for an exemption under the 1992 Act on Competition Restrictions but the FCA and the Competition Council dismissed the application. After this, it has not come to the attention of the FCA that trade associations would have conducted price-co-operation forbidden under the law. The associations have also changed their marketing instructions into a more competitive direction.

The Finnish Medical Association defended the recommendations on the grounds that, as clear maximum recommendations, they were useful to the clients and safeguarded the position of the patients. The recommendations also assisted young doctors in defining their fees. The Finnish Medical Association had monitored the following of the recommendations and, according to it, their abolishment would be certain to raise the level of the fees. Additionally, in the Association's view, the recommended fees and the ethical instructions and marketing instructions given by the Medical Association had a considerable health policy effect.

The Finnish Bar Association found that the recommended fees and marketing instructions sought to protect the position of the clients. It was the duty of the Association to monitor that the attorneys' fees collected were reasonable. The attorney's service is not a ready-made product; instead, it is produced during an assignment. The content, amount and level of difficulty of the work required cannot usually be known in advance. The client's possibilities to predict the level of the attorney's services are limited. The aim of the Association's marketing instructions to guarantee that the client would not receive a distorted view of the attorneys and their professionalism. Informing about other than objectively verifiable facts is not allowed.

The Finnish Association of Architects held that following the recommended prices improved the quality of the architects' work. If the recommendations were abandoned, the price competition, which would follow, would lead to an impaired quality of planning. On the other hand, the recommendations acted as a guide to young professionals defining their fees.

3. Situation after the abolishment of the competition restraints

The abolishment of the above-mentioned competition restraints seems to have led to increase price competition at least in certain fields. According to the investigations conducted by the Finnish Association of Architects, the architects' fees have considerably decreased after the recommendation was abolished. However, the main reason is evidently the recession in building following the 1990's downward turn in the economy.

The range within the attorneys' fees is wide. Previously, the recommendations included a percentage fee for the handling of death estates and bankruptcies. In many cases, this was found to lead to unreasonable compensations.

The fees collected by doctors and dentists also vary considerably and there appear clear "price offers" in the marketing.

After the recommended fees of the Finnish Bar Association were abolished, the Ombudsman for bankruptcy cases monitoring bankruptcies has, in co-operation with the claimants' representatives, issued recommended fees for the handling of bankruptcy estates. These are currently under review at the FCA. The Central Chamber of Commerce of Finland serving the interests of the business community nation-wide has issued instructions on arbitrators' fees. The objective of the price recommendations is curbing the level of the fees and increasing the transparency of the grounds for determining thereof.

The FCA found that the recommended fees of the Central Chamber of Commerce Arbitration Board cannot be considered cartel collaboration forbidden by the Act on Competition Restrictions, because neither the Central Chamber of Commerce nor its Arbitration Board is formed by arbitrators or an association operating on the same production or distribution level. Neither could the Arbitration Board be considered an association of business undertakings participating in arbitration proceedings. When the FCA estimated the harmful effects of the arbitrators' fee instructions for workable competition, it found that the fees collected by the arbitrators are mainly secret and no published information is available on them. In this respect, the fee tables of the Central Chamber of Commerce may improve the parties' possibilities to estimate whether the arbitration fee ordered to be paid is reasonable. A law proposal is under preparation, which would prescribe on the publicity of the information on arbitrators' fees and the amount of work conducted by them. This would, in itself, increase the transparency of the market. Additionally, the FCA paid attention to recommended fees becoming the minimum price level of the field, which increases the fees and decreases economic efficiency.

In 1997, the FCA made inspections into dentists' premises with the aim of investigating the activities of the Finnish Dental Association after its recommendations had been abolished. It transpired that the Association informed its members of the price developments of the field by calculating, on the basis of the pricing components used in their previous recommendations, the average rise in the cost level in an ordinary reception employing one dental nurse. The Dental Association had also offered its members price lists for general dental care where the cost changes has been observed as different sized changes in percentages. There have been several alternatives and it has been possible to order the price list counted with the percentage announced by the members themselves.

The FCA found that the Association's activities might be a way to circumvent the ban on price collaboration contained in the Act on Competition Restrictions. According to investigations, 40 percent of those ordering the price list had used the percentage figure corresponding to the average raise in cost level as the percentage of change. The pricing service may thus have had a uniforming effect. However, the FCA had not gained clear evidence for the activities of the Finnish Dental Association amounting to forbidden price collaboration based on an understanding of the business undertakings. The price comparisons of the field also showed that the prices of dental services had differentiated in various parts of Finland and the price level in itself did not indicate a uniform behaviour typical of cartels. Hence, the FCA closed the case.

GERMANY

1. The competition law framework

Today it is acknowledged in the jurisdiction and practice in Germany that the German Act against Restraints of Competition, which was adopted in 1958 (and amended in 1998), basically also applies to the professions. This sector of economic activity comprises in particular doctors, lawyers, tax advisers, accountants, architects and freelance engineers. The protective aim of this Act, *i.e*. guaranteeing functioning competition in the interest of all market participants including consumers, basically has the same importance in the field of the professions as in trade and industry.

Exceptions from the principle of competition exist only where the legislator has adopted provisions that restrict or regulate competition, which is partly the case in particular in the conduct rules of the professions. These rules are primarily based on federal laws and statutes that were adopted by the self-managing corporations of the professions (chambers) on the basis of legal authorisation. In practice, fees and rules on advertising are particularly important (cf. numbers 2 and 3 below).

In the last few years, the conduct rules of the professions, which used to be relatively strict, have increasingly been liberalised. The administrative courts and the Federal Constitutional Court have complained about the restrictions of the conduct rules wherever they inadmissible restrict the basic right to the free choice of one's profession, which is laid down in the German constitution (Article 12 of the Basic Law). This jurisdiction has created a new competitive scope, within the framework of which the general principles of the cartel law will in future apply.

2. Scales of fees

Scales of fees in the field of the professions exist for lawyers, for services rendered by architects and engineers and for medical services.

Fees and expenses for lawyers are based on the Federal Code of Lawyers' Fees. The fees are calculated on the basis of the relevant value in dispute. This is to prevent declining quality due to the prices. Basically, fees must not be lower, unless exceptions are permitted by law. The Act concerning the reorganisation of the professional rules regarding lawyers and patent lawyers of 2 September 1994 created the possibility that in individual cases lawyers may take account of the special situation of the respective client, especially his or her neediness, by reducing or waiving the fees after the relevant case has been completed. At the same time, it has been laid down that in extra-judicial matters, lump sum fees may be agreed upon that are lower than the statutory fees. Fees may be higher, but this must be laid down in writing.

Fees for architects and engineers are calculated on the basis of the Code of Architects' and Engineers' Fees, insofar as the relevant services are covered by this Code. The Code comprises guidelines for fees, *i.e*. ranges with minimum and maximum fees for individual services. The fee of the contractor depends on the written arrangement made within the framework of the relevant range. The fees may be

lower or higher than stipulated in the guidelines only in exceptional cases. In these cases, a written arrangement between the contracting parties is necessary. The fee may be lower than the minimum fee in the case of relatives or when the contractor needs only very little time. Higher fees are justified only in the case of extraordinary or extraordinarily lengthy services.

The Code of Fees creates market transparency. However, the Federal Ministry of Economics and Technology presently examines whether it is necessary in order to guarantee the required quality or whether more competition results in better services for clients. Until now it has been assumed that the Code of Architects' and Engineers' Fees guarantees high quality services by architects and engineers.

The Code of Doctors' Fees stipulates minimum and maximum fees for medical services. The individual fees must take account of both the justified interests of doctors in adequate remuneration of their services and the financial protection of the person or body bearing the cost of the relevant treatment against too great financial burdens. The Code of Fees guarantees the predictability, reviewability and transparency of fees for services rendered by doctors. The same applies to dentists. Pursuant to the Code of Dentists' Fees, dentists may charge fees only for services that are necessary from a dental point of view.

3. Advertising rules

In the last few years, changes in the legislation and a liberal jurisdiction have resulted in the fact that objective, informative advertising by the professions has been permitted in Germany without restrictions. The strict advertising bans that used to exist are thus no longer valid.

Pursuant to the third amendment of the Ordinance regarding accountants of 15 July 1994, the advertising possibilities of accountants have been expanded. In accordance with this amendment, accountants may advertise provided that the advertising gives objective information and does not refer to the award of individual contracts. A similar provision was introduced for lawyers in the Act concerning the reorganisation of the professional rules regarding lawyers and patent lawyers of 2 September 1994. The principle of admissible informative advertising has been specified in the professional rules of the self-managing corporations (chambers). The professional statutes of the accountants' chamber has been liberalised with effect of 12 February 1998 by abolishing the general ban to make use of the advertising means that are generally used by trade and industry.

As regards the technical professions, the possibilities of permitted advertising are laid down in the professional statutes of the architects' and engineers' regional chambers. In this area, jurisdiction has also resulted in the fact that objective, informative advertising by these professions is permitted without restrictions. The following is meanwhile recognised as admissible: signs at construction sites and on finished buildings, notifications in daily papers which are neither insistent nor extolling with regard to contents and form, the naming of activity priorities, participation in a search service etc.

In the medical sector, advertising by doctors is not permitted pursuant to the professional rules of the doctors' regional chambers. Jurisdiction, however, has in the meantime doubtlessly made clear that the term advertising does not include activities that correspond to the justified interest of the public to be informed and are thus regarded as necessary information (practice signs, announcements in papers regarding changes in the address or in consulting hours etc.).

The jurisdiction of the Federal Constitutional Court remains decisive for the implementation of the advertising rules for the professions. Since these rules as part of the professional rules are supposed to contribute to the fact that the relevant profession fulfils its task properly and thus to strengthen both the sense of responsibility of the relevant profession and the public's confidence in the profession, they are

sufficiently justified by the public interest. But they may be neither compared with the traditional profession, nor must they aim at protection against competitors. In the last few years, this liberalisation requirement called for by the Federal Constitutional Court has been met by the professions.

4. Entry control

Changes in the provisions governing access to the professions have not been observed for about ten years.

Access to the accountant profession has continued to be open not only to academics, but also too qualified men/women of practice. Moreover, not only graduates in economics and law, but also in other study courses with an economic orientation are deemed qualified for the profession. Entry requirements are aimed at ensuring high quality practice of the profession representing a response to the requirements of the 8th EC auditing Directive as well.

Access to the profession of lawyer is subject to success in the second state examination in law. The Law of 13 December 1989 amending the legal regulations pertaining to the rules of practice of lawyers permits professionals from the EU member states and from other signatory states of the Agreement on the European Economic Area to establish in Germany as legal consultants for foreign and international law provided they indicate the country from which they come. This applies, mutatis mutandis, to advocacy by professionals from WTO member countries in their home state and in international law; professionals of other countries are free to establish as expert consultants for the law of their home states. At present, preparations are under way for transposing the EC Directive on establishment of lawyers which will permit a member of this profession from an EU country, provided he/she duly indicates this, to establish in any of the EU member states for giving business advice on law matters on a comprehensive scale as well as to being fully integrated under easier conditions in the respective host state's professional organisation.

Access to the technical professions is not subject to regulation. However, the legislation of the German federal states makes the right to use the titles of architect and engineering consultant dependant on applicants having received specific training (university education or many years of practical activity as a rule) plus having done practical work for two or three years.

5. Forms of co-operation

The possibilities for setting up professional or inter-professional associations have expanded considerably in recent years. The Law on partnerships of 25 July 1994 has created a specific form of incorporation for the professions, which allows also inter-professional co-operation among other things provided that the respective specialised rules on the professions so permit. The attractiveness of partnerships has been further enhanced in the opinion of the members of the professions by the provision, effective 1 August 1998, legally restricting the liability of the partner who deals with the respective project.

The third amendment of the Ordinance regarding accountants of 15 July 1994 relaxes certain professional-law regulations. The scope for local and regional co-operation with members of other professions has been extended. Professional practice together with foreign accountants as well as foreign lawyers, patent lawyers and tax consultants has become possible as a result. Not only accounting firms, but also independent accountants, either practising alone or in association with others, are henceforth permitted to set up several branch offices. The fourth amendment of the Ordinance regarding accountants who is currently being prepared is expected to result in further facilitation's in this regard.

A ruling of the Federal Constitutional Court dated 8 April 1998 contests the ban, hitherto applicable, on accountants and lawyers / notary publics to join hands for purposes of professional practice. This has been deemed illicit so far in view of the special position of notary publics. The Court has made it clear that, with reference to the professional practice of lawyers, it is permissible for accountants and tax consultants to join hands for purposes of professional practice.

The Law of 31 August 1998 includes legal framework conditions for setting up limited-liability companies by lawyers. The Bavarian Supreme Court ruled in 1994 that lawyers are basically permitted to join hands for practising their profession through a limited-liability company. The legislators have thus responded to this Court ruling by creating dependable regulatory conditions.

Through their legislation on engineering chambers, the federal states have enabled engineering consultants to practice their profession jointly. For the time being, the legislation on the professional practice of architects is also being amended at the federal state level, so that there will be possibilities for practising the architectural profession through limited liability companies soon.

6. Cartel-authority practices

It would be fair to say in general that the scope of the cartel authorities' investigative activities and decision-making practices in the field of the professions is limited compared with the scope that exists in the field of other businesses. This applies to the activities of the medical professions as well as to those of others such as engineering consultants and legal advisers. There are mainly two reasons for this:

Important areas of the cartel law in which legislation ties in with dominant positions, either existing or emerging or in the process of being strengthened (abuse of dominant positions, bans on discrimination, merger control), have hardly played a role so far, because representatives of the professions have rarely been able to obtain dominant positions. This holds also true for local markets.

And in the area of legal bans on cartel formation applicable to all market participants irrespective of their market strength, the number of decisions by cartel authorities is rather small as well, by comparison. The fact that the legislative authorities have subjected service providing by the professions to fee scales to a large extent (cf. 2 above) makes itself felt in this area as well. Illicit pricing arrangements, *i.e*. one of the most important cases of cartel-law bans, are thus only of limited importance for the professions. Isolated decision-making can be observed for arrangements and recommendations referring to other parameters of competition, e.g. advertising.

However, more recent developments, especially in legal and industrial consultancy, indicate that the cartel legislation will increase in importance. Accountants and tax consultants combine more and more often for practising together, some even on a cross-border scale. This may result in large market shares that are atypical of the professions. The Federal Cartel Office decided upon such a merger case in 1998 (C+L Deutsche Revision AG -Wibera, okay). In 1998, the European Commission okayed the amalgamation of Coopers & Lybrand with Price Waterhouse. This new development which goes hand in hand with the internationalisation of markets has still not been concluded and might spill over into other professions as well.

HUNGARY

In Hungary deregulation of professional services began after the social-economic changes of 1989. The motivation of this process had rather general political than competition policy character, in so far as the limitation of the state's role and in the framework of this limitation the strengthening of civil organisations was the declared target and possible economic effects and consequences were taken into consideration only partially.

This effort motivated the repeated amendments from 1994 of the Civil Code. These amendments resulted in the creation of framework rules and in the incorporation of public body as separate legal entity. In the Hungarian law chambers with the legal status of public bodies have strong public law authorisations: public body the establishment of which is provided for by statute is an organisation having self-government and registered members. These organisations fulfils public tasks linked to their members or to their members' activities. Statutes may define public tasks to be fulfilled by public bodies. A public body has all the powers, which are defined by statute, and which are necessary to fulfil its public tasks and it enforces these rights through its self-government. Act may stipulate that some public tasks can be fulfilled exclusively by public bodies or, that certain activities can be pursued only by members of public bodies. Chambers and professional organisations are the most important public bodies. In the case of professional organisations the requirement that certain professions can be pursued only by members of public bodies is a general regulatory solution.

Since the change of the social-economic regime numerous statutes have been adopted for the regulation or deregulation of certain professional services:

- to pursue legal or partially legal services
  - Chamber of Hungarian Advocates (Act XI/1998)
  - Chamber of Hungarian Court Bailiffs (Act LIII/1994)
  - Chamber of Hungarian Judicial Experts (Act CXIV/1995)
  - Hungarian Notaries Chamber (Act XLI/1991)
  - Hungarian Chamber of Patent Attorneys (Act XXXII/1995)
- to pursue auditing activities
  - Chamber of Hungarian Auditors (Act LV/1997)
- to pursue engineering and architectural activities
  - Hungarian Chamber of Engineers (Act LVIII/1996)
  - Hungarian Chamber of Architects (Act LVIII/1996)

- to pursue sanitary activities
  - Hungarian Medical Chamber (Act XXVIII/1994)
  - Hungarian Chamber of Chemists (Act LI/1994)
- other activities which can be pursued exclusively with membership of chambers
  - Hungarian Veterinary Chamber(Act XCIV/1995)
  - National Chamber of Hunters (Act XLVI/1997)
  - Professional Chamber of Private Detectives (Act IV/1998)

The basic general characteristics of the different statutes on professional chambers from a competition policy point of view are as follows:

- chamber membership is obligatory, consequently certain activities can be pursued only by members, membership being a precondition for pursuing them;
- different further normative conditions of market entry are defined (citizenship, residence, office, insurance, qualification, practice, etc.);
- in the case of certain chambers special exclusions relate to certain activities which may or may not be pursued parallel with the original professional activities;
- the chambers have wide varieties of authorisations (e.g. professional/ethical rules, postgraduate studies, rules of examinations;
- the chambers have different kinds of authorisations (e.g. they may establish professional/ethical norms, rules relating to training, examinations, sites or the equipment of premises/offices, they may publish recommended fees of services or recommended minimum fees, etc.);
- the chambers may impose different kinds of sanctions in the case of violation of the professional/ethical rules (up to suspension or exclusion) etc.

Among these authorisations it is worthwhile to mention those price-related ones which have special importance from a competition policy point of view: there are altogether five statutes on chambers/professions containing expresses provisions on prices, there are two out of these five (Act on Advocates and Act on Patent Attorneys) to which objection cannot be made since they contain declaration on free prices in so far as they stipulate that fees of advocates / patent attorneys can be freely contracted.

There are four professional organisations (physicians, veterinarians, engineers and architects) which are authorised by statutes to publish recommendations of restrictive character. Out of these four, in the case of services of physicians and veterinarians, the chamber may publish recommendations on the minimum fees. In the case of engineers and architects the chambers may issue minimum recommended prices on condition that content requirements of services belonging to the given prices have to be defined also at the same time. The elaboration of recommended prices or the issuance of these prices cannot be subjected to competition law enforcement in the case of these chambers.

After their set up the factual operation of the chambers, the crystallisation and taking shape of their restrictive endeavours needed some time.

1. Enforcement practice

Until 1997 restrictive practices of professional organisations and chambers could not be challenged under the Competition Act since its scope did not cover these entities. It was possible to challenge restrictive agreements of practitioners of the same profession, however no proceedings of this kind were commenced in the practice of the Hungarian Competition Office.

An amendment of the Competition Act entered into force on 1 January 1997 making possible direct actions of the competition authority against professional organisations. Nevertheless the amendment contained a twelve months grace period for parties to agreements which became prohibited by virtue of the amended provisions of the Competition Act in order to allow them to modify unlawful provisions of their agreements or to apply for individual exemption arguing that even if they contained anticompetitive provisions, the advantages of them outweighed their disadvantages. This possibility also applied to earlier self-regulations of the professional organisations.

Since the entry into force of these new provisions of the Competition Act individual exemptions have not been requested by professional organisations, two proceedings however, have already been brought resulting in condemning decisions against chambers (Chamber of Hungarian Auditors, Hungarian Veterinary Chamber).

1.1 Cases

1.1.1 Chamber of Hungarian Auditors (Vj-148/1998/18.)

The Competition Office launched proceedings against the Chamber of Hungarian Auditors (CHA) to find out whether certain points of its Ethical Code breach the prohibitions of the Competition Act. After a thorough investigation the Competition Council considered the following facts in its decision:

At the time of the investigation CHA had some 5 000 members 30 percent of which are auditor companies and as much as 60 percent of the income of CHA originates from only five large international auditor companies. Other members are accountants. The relevant market is the accountancy servicing activity on the territory of Hungary which is characterised by a four times oversupply.

The Competition Council considered the Ethical Code at two points: Firstly, under the provision relating to the indirect setting of fees the members may not apply lower prices than the minimal prices defined by the Ethical Code. Until the time of investigation CHA has not published the minimal prices yet and this part of the Ethical Code has been in effect for a few weeks only. The Competition Council considered the definition of minimal prices as restrictive since it deprives the small and unknown auditors from the application of their sole instrument, the price competition.

Secondly, the Competition Council investigated the prohibition on advertising, that CHA applied in its Ethical Code, including advertising in connection with persuasion to order services, making comparison with activities of other auditors, praising the rapidity and quality of services etc. The Ethical Code also prohibited advertising own auditory before professional audience and organising programs to

recruit clients. The Competition Council considered the effect of prohibition on advertising, which is suitable to restrict competition by hindering market entry and limiting the possibility of purchasing service.

The Competition Council pointed out that the Ethical Code restricts the members of CHA in their advertising campaigns, preventing them from taking part in competition in this particular way and it applies stricter conditions concerning comparative advertising than it is permitted under the Competition Act.

Since the Competition Council considered both restrictions as concerted practices, prohibited by the Competition Act, CHA requested exemption from the prohibition although the Competition Council could not find any justification for the conditions of an exemption. Furthermore CHA referred to the fact that it's Ethical Code is based on the Ethical Code of the International Federation of Accountants, which organisation CHA belongs to, as well. In the view of the Competition Council, however, the relevant parts of the Ethical Code of CHA did not follow, in several respects, the international rules.

Summarising all these circumstances the Competition Council imposed a fine, amounting to HUF 5 million (about Euro 20 000, USD 21 500), on CHA and ordered it to terminate its restrictive conditions within 30 days of receipt of the decision.

1.1.2 Hungarian Veterinary Chamber (VJ-1/1999/25)

The Competition Office launched proceedings against the Hungarian Veterinary Chamber to reveal whether some points of its Ethical Code were not against the Competition Act. The prohibition of advertising activity, the obligatory application of minimal prices as well as universal application of payment of date and obligatory denial of future service if the client was in delay with its payment were considered by the Competition Council as anti-competitive which violated the prohibition of restriction of competition.

Although the Hungarian Veterinary Chamber argued that these stipulations of the Ethical Code served the interest of consumers, the Competition Council has not found its defence well founded.

Advertising activities by vets are prohibited, under neither the Advertising Act nor the Competition Act. In the view of the Competition Council (*1*) the prohibition of the Ethical Code deprives vets to improve their market positions by the legally applied means of advertising, and (*2*) the binding minimal price hinders the market entry and maintains the given relationships among competitors. The binding price cannot be a real condition of the qualified service but recommended price is acceptable to inform consumers and servicing undertakings. In cases when servicing undertakings set lower price than the recommended price at a poorer quality of their services, the Chamber may impose sanctions for quality imperfections. Finally, (*3*) the Ethical Code limited the members' market activities in gathering new customers by stipulating universal maximum deadlines for payment.

The Competition Council ordered to terminate the restrictive conditions of the Hungarian Veterinary Chamber within 30 days of receipt of the decision, and imposed a fine, amounting to HUF one million (about Euro 4 000, USD 4 300) on it.

2. Legislative activity and competition advocacy

The entry into force of the new Competition Act making possible the direct and legally regulated challenge of anticompetitive activities of professional organisations can be qualified as the most important development concerning the enforcement activity of the competition authority.

Furthermore the competition authority exercises advocacy functions in the process of legislation. This activity could not be fully successful since several times the ministries submitting their draft bills did not made competition advocacy possible. During the legislature work aiming at the establishment of status rules the competition authority had the possibility to express its views only in the case of acts on advocates, engineers, architects, auditors and patent attorneys and even in these cases only limited result has been achieved. Some of these results are as follows:

- the Hungarian citizenship as a condition for membership of the Chamber of Auditors ceased to exist;

- the range of activities which can be pursued parallel with auditing were not limited to the extent as it was intended by the original conception;

- the fees of advocates and of patent attorneys can be freely agreed; and

- the chambers of engineers and architects are not allowed to set minimum prices.

Recently representatives of certain professions (e.g. tax advisors, plant protection engineers, drivers' schools, etc.) try to influence legislators increasingly - presumably stemming from the inherent restrictive possibilities of professional organisations - in order not to grant further legal authorisations for new professional organisations. The competition authority has made several steps in order to push the legislation to resist these temptations.

The competition authority does not have the right to comment on self-regulations of professional organisations, so available information about these organisations is partial only and efforts which have been made so far are limited to formal competition law proceedings.

The Constitutional Court had also several proceedings in connection with provisions stipulating obligatory membership in chambers and with other rules (e.g. citizenship) violating the Constitution potentially. As a result of the decisions of the Constitutional Court made in the years of 1997-1998 many adjustment of these rules has happened and happens taking into account that the right of free choice of profession is declared by the Hungarian Constitution as a basic human right. Consequently subjecting membership in chambers to the condition of Hungarian citizenship making this at the same time to condition of exercising the given profession violates the Constitution. Owing also to the decisions of the Constitutional Court in respect of limitation of law on associations the governmental approach has also changed and it assists endeavours aiming at the establishment of new professional organisations to a more limited extent.

3. Studies, reports

There are no studies and reports about professional services in question. However, there are phenomena showing that practitioners of professions or business associations employing these practitioners evade the restrictive prohibitions of self-regulations relating to members of chambers.

Example*:* Most of the members of professional organisations are natural persons exercising the given profession. However, these natural persons (e.g. physicians, chemist's etc.) pursue their professional activities in different business associations. Ethic codes of given professional organisations and chambers restrict their members in respect of advertising their activities, nevertheless those are powerless against business associations and their advertisements which business associations are not members of the professional organisations or chambers and as a result of which they may advertise their health care, physician or medicine distributing activities without being influenced by any special restriction.

4. Other developments affecting competition in the professions

Some phenomena can be mentioned in this field, which show that market interests makes way for itself - even if the method for doing so can be questioned sometimes.

Example*:* Practitioners of the profession - customers of medicines -are under strong pressure of producers and distributors (e.g. through the latter financing their participation in conferences, by gifts, offers of free extra products, honoraria for participation in testing, etc.) in order to get the practitioners' orders for their products.

Similar phenomena can be observed in the case of architects, when the producer or distributor offers "commission of planning" if the planned construction envisages use of its products.

IRELAND

1. Introduction

This note outlines some of the actions taken by the Irish Competition Authority in the area of professional services. It deals both with enforcement actions and with decisions taken by the Authority in respect of notified agreements.

2. Investigations / Enforcement

2.1 Irish Veterinary Union (IVU)

Following the passage of the 1996 Act, the Minister referred to the Director of Enforcement a complaint from the ICMSA (a farmer's organisation) alleging that the Irish Veterinary Union (IVU) and its members were engaged in price fixing in respect of fees charged to farmers for carrying out compulsory tuberculosis (TB) tests on cattle. In April 1997 the Authority received a complaint from an individual farmer alleging that, when they had gone to a vet who was prepared to carry out TB testing for a lower rate than that charged by IVU members, local vets had refused to supply any other services.

Authority officers conducted an investigation into the allegations during the course of which they interviewed a number of individual farmers as well as representatives of the IFA and ICMSA. In February authorised officers from the Authority carried out a search of the IVU offices on foot of a warrant issued under Section 21 of the 1991 Act, as amended. During the course of the search they copied a number of documents. These included a newsletter issued to IVU members dated 29 March 1996 which included a list of recommended minimum fees and stated that it was vital to strictly adhere to these. In a subsequent newsletter dated 24 March 1997 reference was made to recommend minimum fees for other clinical services.

The Authority brought court proceedings against the IVU under Section 6 of the 1991 Act, as amended. The proceedings were settled in October 1998 after the IVU gave undertakings to the court that it would not recommend minimum fees to be charged by its members for carrying out annual testing for TB and Brucellosis and/or for providing clinical veterinary services. It further undertook to inform its members that:

1. any agreement regarding the charging of such minimum fees;

2. the operation of any recommended minimum fee system; and

3. the refusal to provide clinical services to farmers who refuse to pay such recommended fees were contrary to Section 4 of the Competition Act, 1991. The IVU also agreed to pay the Authority's costs.

2.2 Association of Consulting Engineers in Ireland (ACEI)

In February 1997 the Authority received a complaint alleging that the Association of Consulting Engineers in Ireland had written to Aer Rianta informing it that it would urge its members not to take part in a competitive tendering process in respect of a proposed terminal extension being undertaken by Aer Rianta in Dublin Airport. When contacted by the Authority the ACEI claimed that they felt that the competitive tendering process was in breach of Department of Finance guidelines. Following an investigation it appeared that, in fact, a number of firms had tendered for the project. The Authority was nevertheless concerned that the ACEI should have threatened such action. The Authority wrote to the ACEI In January 1998 informing it that, in the Authority's view, such actions were in breach of the Competition Act and that it would bring proceedings in the event of any repetition.

2.3 Pharmaceutical Society of Ireland (PSI) and Trinity College Dublin

This case involves a complaint made by University College Cork (UCC) regarding an agreement between TCD and the Pharmaceutical Society of Ireland, whereby the PSI has agreed to recognise TCD as the only institution within the State providing a recognised course and qualification in pharmacy. The PSI has certain statutory powers in terms of approving courses and qualifications necessary to operate as a pharmacist. UCC essentially has sought to establish its own school of pharmacy but has been refused recognition by the PSI.

The PSI previously confirmed that in order to qualify for admission to the register of pharmaceutical chemists, an individual must complete the course provided by TCD. This is established in regulations drawn up by the PSI and approved by the Minister for Health. In a newsletter issued to members in April 1998 it states:

> "Under the current Pharmacy Regulations made by the Minister for Health, the Society is only entitled to recognise the B.Sc. (Pharm.) degree currently offered by Trinity College Dublin for the purposes of registration in the Register of Pharmaceutical Chemists for Ireland. It was decided that the Council will not seek to have these regulations changed".

This wording is somewhat misleading in that it implies that the regulations are made by the Minister. In fact, under the relevant legislation, the PSI makes regulations, which the Minister approves. The Newsletter goes on to state in reference to a new School of Pharmacy, which was opened in Trinity that:

> "The Council will issue a carefully worded Policy Statement on the education of pharmacists in the State. The text of this Statement is to be discussed with the Society's legal adviser and presented to Council for approval at the April Council Meeting. The Statement will welcome the new School of Pharmacy in Trinity, refer to the Council's new Accreditation Procedure and it will refer to the need for the Society to negotiate on the numbers of pharmacists being educated at present".

TCD have stated that they entered into an agreement with the PSI in 1977 which gave TCD exclusive responsibility for Pharmacy and Dentistry education. This was stated to be part of a government re-organisation of professional schools in universities in Dublin and a quid pro quo was that TCD was precluded from having a Veterinary School, its responsibilities in this regard transferring to UCD.

The Authority wrote to TCD and the PSI stating that the exclusive agreement was, in its view, contrary to Section 4(1) and that the provisions in the PSI rules are in breach of Section 5 and indicated

that unless these practices cease, the Authority would bring proceedings against them under Section 6. It subsequently emerged that another institution the Royal College of Surgeons in Ireland (RCSI) has instituted proceedings alleging that the arrangements are in breach of the Competition Acts. This action has yet to be heard by the Courts.

3. Authority decisions in respect of agreements notified

3.1 Association of Optometrists

This decision concerned the Memorandum, Articles of Association and Code of Ethics of the Association of Optometrists, Ireland. It was the first decision in respect of the rules or decisions of an association of undertakings, and the first, which was concerned, with the activities of a professional association. The Association's members are optometrists, or ophthalmic opticians.

The Authority considered that the Association of Optometrists was an association of undertakings, and that the arrangements constituted decisions of an association. It considered, however, that the restrictions on opticians in the Opticians Act did not come within the scope of the Competition Act, since they were enshrined in separate legislation.

The Authority concluded that a number of features of the notified decisions did not offend against section 4(1), though it expressed a concern that some of them might be applied in a manner, which was anti-competitive. A number of provisions in the Code of Ethics, however, were considered to offend against section 4(1), such as:

(a) guidelines related to premises;

(b) restrictions on advertising, including the content, type and size of advertisements, and requirements to observe rules of the Opticians Board prohibiting advertising in media other than newspapers and forbidding the quoting of prices in advertisements; and

(c) the requirement to determine fees in a particular manner and restrictions on the offering of discounts.

Following discussions with the Authority, however, the Association advised its members that he offending provisions had been suspended, and it informed the Authority that members suspended for breaching these provisions were free to resume full membership. In the circumstances, the Authority considered that the notified decisions no longer offended against section 4(1), and issued a certificate in respect of them. (Decision No. 16).

Under the Opticians Act, 1956, the Opticians Board may draw up rules governing the behaviour of registered opticians. Rule 31 of the Board precluded opticians from (*a*) advertising in media other than newspapers and (*b*) quoting prices in media advertisements. This rule was designated as a penal rule. In practice it appears not to have been enforced by the Board as certain firms had claimed that it was in breach of Articles 85 and 86 of the Treaty of Rome. The Authority considered that Rule 31 restricted competition in particular by restricting advertising, especially advertising of prices. While the Authority's decision was not directly concerned with the Rules of the Opticians Board per se, it welcomes the decision by the Board to amend Rule 31, thereby permitting opticians to advertise in other media in addition to newspapers and to quote prices in such advertisements.

3.2 Institute of Chartered Accountants

This decision concerned the ByeLaws, or internal organisation rules, of the Institute.

The Institute's members are accountants, both employed and self-employed, and are engaged in a variety of fields normally associated with the accountancy profession, e.g. statutory audit of accounts, and general work of a financial nature carried out on behalf of industry, financial services, the public sector or other sectors, which work draws considerably on the professional training and expertise of chartered accountants but which is not necessarily confined by statute or regulation to any one professional discipline. The Authority considered that the Institute was an association of undertakings, and that the ByeLaws constituted a decision by an association.

The ByeLaws set out in detail the internal rules of the Institute. These relate to such matters as conditions for membership, the status and rules for elections to the Institute's Council, the conduct of Council proceedings and of general meetings, the setting and conduct of Institute examinations, discipline etc.

While the ByeLaws do regulate entry into the Institute, the Authority was satisfied that the effect of the restrictions concerned was not to control artificially the numbers entering the profession.

The intrinsic link between the willingness of firms to take on trainees and entry into the profession is a standard feature of most professional and trade training. The Authority believed that restrictions on the number of times that a student may change training firms increased the incentive for firms to take on trainees, and did not contravene competition law. As regards examinations, the Authority considered it imperative that pass rates, for all Institute examinations, did not regulate the numbers of candidates entering the profession, and was satisfied that they did not do so. The Authority particularly welcomed public statements by the Institute that it opposed utilisation of the examination system as a mechanism to control growth in numbers in the profession.

The Authority therefore gave its opinion that the Institute's ByeLaws did not contravene section 4(1) of the Competition Act, 1991, and certified accordingly. (Decision No. 520).

The Authority is currently considering two other elements of the Institute's governance arrangements, which have been notified to it, viz. its Rules of Professional Conduct of the Institute and the Ethical Guide for Members, and expects to take a decision on these shortly.

3.3 Association of Consulting Engineers of Ireland/ the Institution of Engineers of Ireland

The Authority was notified of the Conditions of Engagement and Recommended Scale of Fees and Charges of these two bodies. Both bodies represent engineers in professional practice, and the notification concerned a set of standard terms on which their members in consulting practice would accept engagement by clients, including the question of fees.

However, the bodies withdrew their notification to the Authority before the Authority came to a final decision on the arrangements involved.

ITALY

1. Introduction

In Italy, liberal professions are subject to pervasive public regulation, covering many aspects of professional activities, among which exclusive exercise of certain functions, entry requirements and access mechanisms, minimum price determination, provision of information to the public through advertising, business structure.

Given the extent and the nature of state regulation, room for enforcement of competition law in this sector is rather limited compared to other industries, whereas there is greater scope for advocacy concerning a less extensive and restrictive regulatory framework.

Since 1997, the Italian Antitrust Authority (hereafter the Authority) has addressed to the Parliament and the Prime Minister opinions on legislation of liberal professions, advocating the elimination of unjustified restraints to competition. An outline of the most important issued opinions is provided in the first section of this paper.

Moreover, in 1998, the Authority carried out an investigation on anti-competitive forms of self-regulation of prices by the main accountants' associations, establishing the infringement of the competition law. A second investigation, concerning an alleged boycott of a software house by another professional association, has recently been opened. Illustration of such proceedings is contained in the second section of this paper.

2. Advocacy and legislation

2.1 1997 - the Authority's opinions on current professional regulation and on attempts to extend it to other activities

In October 1997, the Authority concluded a general fact-finding investigation on regulation of liberal professions in the fields of law, accounting, health and engineering / architecture.

The investigation identified a series of legislative measures creating distortions to competition, without being justified by requirements of general interest and reported the Authority's opinion on the measures needed to remove such distortions. The Parliament and the Prime Minister were notified of the results of the investigation and invited to revise restrictive regulation accordingly.

The table below summarises the contents of the investigation.

Regulatory features of professional services	**The Authority's suggestions for action**
Entry and Access	
Only licensed professionals can provide certain services	The number of exclusive exercise of functions should be rigorously limited to cases in which the quality of professional services can not be ascertained by consumers
Supervised training + pass examinations are generally required to obtain a licence to practice. In some cases the number of new-entrants is pre-determined by state regulation. Professional associations play a major role in the determination of quantitative restrictions and in the implementation of all entry provisions.	Supervised training should be made equivalent to the attendance of specific courses. Quantitative restrictions on entry should be eliminated. The role of professional associations should be reduced.
Licensed professionals must be registered at the professional association	Licensed professionals should register only if they want exercise exclusive functions
Practice	
Determination by law of minimum fees and charges	should be removed
Restrictions on advertising Limitations on business structure(1) *(in place until August 1997)*	should be removed should be removed

(1) Professional services can be provided only by individuals or professional joint partnerships, whereas corporations are not allowed.

Apart from the various, specific suggestions for action contained in the investigation and summarised above, the Authority stated that current regulation of liberal professions should be re-designed according to criteria of necessity and proportionality. In other words, regulation should be maintained only when substantial market failures make it indispensable, that is when: *a*) consumers seem totally unable to evaluate the quality of professional services; *b*) the effects of acquiring a service of inadequate quality are particularly severe; *c*) provision of professional services is related to central values of the society.

Even in these cases, however, the extent of regulation should not exceed what is strictly required to cure the identified market imperfection.

As a consequence, the number of publicly regulated professions (currently amounting to about 19 as shown by the attached list) should be reduced, together with the number of existing regulative measures.

On the same line, in December 1997, the Authority issued an opinion on various law proposals, scheduled for discussion in Parliament, concerning new licensed professions.

The Authority ascertained that the majority of such proposals did not concern activities related to the provision of intellectual services and were not connected in any way to central values of the society.

In spite of that, all the proposals were centred on the institution of a publicly recognised professional body (Ordine), in charge of keeping the list of licensed professionals, the access to which was subject to passing an examination, sometimes managed by the Ordine itself. Moreover, almost all the proposals featured the determination by the Ordine of minimum fees level, to be subsequently approved by a minister decree.

Under these circumstances, the Authority expressed the opinion - notified to the Parliament - that any further extension of services regulation should have been definitely avoided. The opinion stressed the absence of significant market failures in the activities interested by the examined law proposals and in particular that such activities did not involve the provision of complex and delicate services, the quality of which was difficult to evaluate. Therefore there was no need for public intervention in order to protect consumers and improve market performance.

The Authority's approach to regulation of professions and other activities has been only partially followed. No new licensed profession has been recently added to the existing ones, but public regulation of the latter has not been modified yet. Worse than that, attempts have been made to change legislation concerning liberal professions in such a way to increase, rather than reduce, the role of professional bodies.

2.2 1999 - the Authority's opinions on proposed reforms of legislation

Following the conclusion of the Authority's general investigation, a committee was set up by the minister of Justice, in order to elaborate a draft law to re-design the regulatory framework of liberal professions. The commission was formed, to a large majority, by representatives of national professional associations, together with representatives of the ministries of justice and health.

After nine months, the commission produced a draft, which was submitted to local professional associations for comments, before being forwarded to the Prime Minister who, in turn, transmitted the law proposal to the Parliament for approval.

The main stated objectives of the so-called "reform of liberal professions" were: *a*) elimination of any obstacle to competition among professionals, *b*) elimination of unjustified forms of monopoly rent, *c*) protection of consumers.

The content of the draft, however, far from being consistent with such objectives, was inadequate to cope with the need to change the regulation of the sector. In particular, the draft: *a*) did not contain clear criteria to ascertain the conditions under which regulation is needed and, consequently, the professional activities which should be publicly regulated; *b*) did not substantially change regulation of entry; *c*) did not rule out the possibility of creating new licensed activities; *d*) gave to existing professional bodies the power to express an opinion on new professions; *e*) made only minor improvements with regard to determination of fees and advertising, eliminating the prohibition concerning the latter and making fees non compulsory.

In February 1999, before the parliamentary discussion on the "reform of liberal professions" started, the Authority issued an opinion on the draft law, remarking its inadequacy in terms of reducing the extent and the degree of regulation.

In particular, the Authority, after restating the indications for action contained in the 1997 investigation, emphasised the importance of providing consumers with more information about

characteristics of professionals services. Statistics on past market prices of services, for example, (which should replace current minimum fees), could enable consumers to better evaluate the economic terms of professionals' offer. Analogously, regular and updated information about the compliance with predetermined quality standards of professional activities could reduce consumers' searching costs as well as risks of being harmed by poor quality services.

Finally, the Authority suggested that in the markets for some professional services, the existing publicly recognised professional body should be replaced by one or more not exclusive private associations, which could be given the function of certifying the quality of their associates.

The Authority's opinion on the draft law seems to have produced more effects than the general investigation. The prime minister has recently met the representatives of professional bodies to communicate that the draft law will be revised according to the Authority's suggestions and that the government could submit a new proposal for a reform of liberal professions to the Parliament.

Professions' reaction to that does not seem to have gone so far much beyond political threats, aimed to substantially maintain the present level of regulation. In particular, the perspective of a reduction in the number of licensed professions and of exclusive functions exercised by each profession seem to produce the most vigorous opposition, whereas the abolition of tariffs, although formally refused, does not appear to be equally far from being accepted.

The Parliament should start discussing the reform of liberal professions in the near future.

3. Enforcement of competition law

3.1 Anti-competitive behaviours related to collective determination of fees

As noted above, a limited degree of competition among professionals is the result of a pervasive regulation of the sector, particularly as far as the determination of fees and charges is concerned. According to the law, in many professional areas, minimum fees are set by a minister decree, after hearing the professional association. In practice, however, very often the minister decree reproduces fee proposals made by professional associations. This implies, among other things, that such fees may be suggested for application to associates, before being approved by the minister.

The Authority thinks that such activities can not be subtracted to the application of competition law. In relation to that, the behaviours of the two main accounting professional associations (Ordine dei Commercialisti e Ordine dei Ragionieri) were subject to an investigation concluded in October 1998. In particular, the investigated behaviours consisted of:

- an agreement between the two associations to propose to the minister identical fee schedules;
- identification of structure and level of fees;
- suggestion to the associates to apply the proposed fees although they were not approved by the minister yet.

The defence of the professional bodies under investigation was centred on the following main points:

a) professionals are exempted from the application of competition law since the latter applies to undertakings, to which professionals can not be assimilated;

b) even if professionals were treated as undertakings, professional associations should be exempted from the application of competition law since they are publicly recognised bodies, which exercise public functions;

c) even allowing for professional associations to be subject to competition law, the investigated behaviours should be regarded as a mere application of law provisions and therefore should not fall under the Authority's scrutiny. In other words, professional bodies did not take any autonomous decision on fees schedule but, rather, co-operated with public administration as required by the law. After all, fees were approved by the minister who took the final decision on the matter. Therefore, professional associations can not have the responsibility of any anti-competitive agreement;

d) finally, it was argued that agreements about minimum fees between the two associations and within each of them did not alter competition and did not hamper consumers. On the contrary, these agreements were simply aimed to identify a more transparent and efficient tariff structure, together with a price level consistent with the provision of services of good quality.

None of these arguments was shared by the Authority.

On the basis of the European Commission and Court of Justice well known decisions, the defence according to which both individual professionals and their associations should be exempted from competition law was dismissed. The Authority affirmed that to the specific end of applying competition law, professionals are assimilated to undertakings and that the public nature of professional bodies does not prevent the scrutiny of their actions when the latter lead to the co-ordination of associates' economic behaviours.

Moreover, the Authority considered that the involvement of professional bodies in the determination of fees was gone well beyond the boundaries set by the law. Although the final decision on fee level and structure had formally been taken by the Minister, professional association had autonomously worked for a long time on a tariff proposal and had been able to "impose" its approval to the public administration. The iper-active and independent role played by professional associations in the determinations of fees was also proved by the indication given to associates to apply the proposed tariff structure before its formal approval.

Finally, as far as the anticompetitive object of the agreements under investigation was concerned, the Authority stated that their restrictive nature was rather self-evident given that the agreements were aimed to set prices of services to be uniformly applied by associates.

On this basis, the Authority concluded that the considered professional bodies had infringed competition law and that in the future they should refrain from making agreements to determine structure and level of fees.

The Authority's decision has been appealed and it should be discussed in the next months.

However, in the meantime, the Ordine dei Commercialisti has taken a formal decision and made public statements regarding the elimination of any form of self-regulation on the compulsory application of minimum professional fees.

Nevertheless, the decision of the appeal court maintains the greatest importance, first of all to definitely confirm the applicability of competition law to professionals and to their associations.

3.2 Other anti-competitive behaviours

In February 1999, the Authority started another investigation about the behaviour of a third association of accountants (Associazione Nazionale dei Consulenti del Lavoro), specialised in the provision of services regarding industrial relations, for alleged boycott of a software house (Inaz Paghe) which has started to offer competing services. In particular, the association would have invited professionals to stop buying software from Inaz Paghe since the latter had started to exercise functions, which were thought to be of exclusive competence of such specialised accountants.

Although at this early stage of the investigation it is not possible to go into great detail about the features of the case, some consideration can be put forward about the context of this investigation. It concerns a market in which technological development allows for increasing standardisation of services and where demand comes from business clients rather than individual consumers. Since standardisation of service and demand characteristics are progressively reducing the need for a personal, fiduciary, relationship with the provider of services, the exclusive exercise of certain function by professionals become increasingly difficult to sustain, especially if undertakings with a bigger size and a more structured organisation can offer better conditions than an individual accountants.

Within this context, the professional's association reaction, rather than being centred on the promotion of more efficient business structures enabling accountant to adequately face competition, seems to merely focus on the defence of the exclusivity area through anti-competitive behaviour.

This investigation should end in October 1999. It could provide the opportunity for the Authority to issue a further opinion on the need to limit the exclusive exercise of functions to a very restricted number of professions.

4. Conclusion

This note has shown that the most important competition issues in the liberal professions sector in Italy arise from the existence of a pervasive and restrictive regulation. Under these circumstances, great effort has been put by the Authority to advocate a drastic reform of current legislation.

Unfortunately, professional bodies have not shown so far an actual interest in making the regulation of the sector more consistent with the evolution of market characteristics and economic context. This has certainly slowed down the reform process.

However, the present government seems to be aware of the urgency of a reform and appears to share the Authority's suggestions. In the next few months a more adequate regulation of liberal professions could be introduced.

ATTACHMENT

Publicly regulated professions

Legal services

1) Notary
2) Lawyer

Accounting services

3) Commercialista (university degree is required)
4) Ragioniere (university degree is not required)
5) Consulente del Lavoro (specialized in industrial relations)

Technical services

6) Architect
7) Engineer
8) Geometrer (university degree is not required)
9) Geologist
10) Agronomist
11-12) other professions related to agronomy for which university degree is not required (Agrotecnici, Periti Agrari)
13) Chemist
14) Biologist

Health services

15) Doctor of Medicine
16) Psychologist
17) Pharmacist
18) Veterinary

Others

19) Journalists

JAPAN

1. Professional Services and Competition Policy

Professional Services such as those provided by physicians, attorneys, certified public accountants and architects generally have a unique character which mandates (*1*) advanced knowledge, techniques, skills, etc., and (*2*) high standards of conduct, including integrity and ethics, due to the heavy social responsibilities of these occupations. Qualification systems accompanied by business monopolies are therefore established in these services.

Many professional services have set up trade associations, which have applied self-regulations on remuneration standards and advertising standards. Moreover, some associations have compulsory membership, and adherence to the set advertising and remuneration standards is often required by law (see attached).

In Japan, there are no professional services, which are exempted from application of the Anti-Monopoly Act (AMA). The AMA is applied to these fields in the same way as to other industries.

The Japan Fair Trade Commission (FTC) has taken measures to eliminate anti-competitive conduct by these professional service organisations, as violations of the AMA by trade associations. This is based on the theory that organisations of attorneys, judicial and administrative scriveners, certified public accountants, physicians and dentists, as mentioned in the attached, fall into the category of trade associations. As outlined below, the FTC continually endeavours to enforce competition policy appropriately in the professional service sector.

2. Measures taken by the FTC

2.1 Dealing with AMA violations

The first action taken against AMA violations in the professional service sector was the case against the Foundation of Japan Architects (a juridical foundation) in 1979.

Since that time and up until the end of September 1998, the FTC has taken legal measures against trade associations of professional services in nine cases (one of these cases is currently in hearing procedure). An additional nine warnings have also been issued. Of these 18 cases, seven concern physicians, five concern dentists, two concern veterinarians, two concern pharmacists, one concerns architects, and one concerns real estate surveyors.

2.1.1 Cases by services

In the cases of physicians' and dentists' associations, AMA violation was substantiated or suspected in terms of unfairly restricting the number of businesses and the functions and activities of member businesses, specifically enforcing a system of prior approval concerning the opening or moving of medical institutions and additions or changes in the treatment carried out by members and non-members, and in deciding approval, restricting the number of businesses according to distances from incumbent medical institutions and to the opinions of incumbent businesses in the area.

In the cases involving veterinarians' associations, AMA violation was suspected in terms of restraining the number of veterinarians allowed to administer rabies inoculations and fixing treatment fees for dogs, cats and other animals.

In the cases involving pharmacists' associations, they were suspected of unfairly restraining business activities by prohibiting the display of drug prices in advertising and placing restrictions on distances between hospitals and pharmacies when issuing authorisations for standard pharmaceutical offices by prefectural pharmacists' associations.

In the case of the Japan Institute of Architects, the AMA was violated by predetermining the design administration fees for members, the remuneration in competitive bidding for design projects and restriction on participation in competitive bidding for design projects.

In the case of real estate surveyors, the Japan Federation of Land and House Surveyors' Association was suspected of encouraging each real estate surveyor to use standards for remuneration of real estate surveyors based on the Land and House Surveyors Law as fixed remuneration.

2.2 Prevention of violations

2.2.1 Anti-monopoly Act Guidelines Concerning Activities of the Trade Associations (Trade Association Guidelines)

The FTC issued Guidelines in 1979, which clearly specified the way of thinking in the AMA concerning the activities of trade associations (these guidelines were completely revised in October 1995). The Guidelines also applies to organisations for professional services.

The Guidelines classify acts committed by trade associations in terms of action taken to restrain prices, volumes and entry; unfair trade practices; conduct concerning types of sales, contents, or methods of business, and information activities: These acts are either: (*1*) in principle constituting a violation, (*2*) suspected a violation, or (*3*) in principle not constituting a violation respectively, and the Guidelines citing precedents, and outline the way of thinking in the AMA.

2.2.2 Anti-monopoly Act Guidelines Concerning the Activities of Medical Associations (Medical Association Guidelines)

On August 7, 1981, The FTC, issued the Medical Association Guidelines, which clearly outlines the way of thinking concerning application of the AMA to the activities of medical associations.

The Medical Association Guidelines classify acts in terms of restrictions on the opening of new medical institutions; unfair interference of the business activities of medical institutions; establishment of tables on non-mandatory or mandatory medical fees, and action concerning treatment hours and advertising, These acts are either; (*1*) in principle constituting a violation, (*2*) suspected violation, or (*3*) in principle not constituting a violations respectively; and the Guidelines cite precedents, and outline the way of thinking in the AMA.

2.2.3 Fact-finding surveys

Activities of Trade Associations and Problems with the AMA (March 1993 Report of the Study Group on Trade Associations).

While trade associations play many beneficial roles in the development of Japan (economy, they are also involved in a considerable proportion of AMA violations. The FTC therefore conducted surveys targeting national trade association, formed by industries. Additionally, the Study Group on Trade Associations (chaired by Professor Akira Kaneko, the Keio University) was set up, bringing together academics and authorities in order to examine trade association activities, which cause potential violation of the AMA. The study group's report was published in March 1993. Bearing in mind a negative effect of restraining competition through the self-regulation of professional services associations, the study group examined self regulations of professional service associations in terms of standards of remuneration, restrictions on advertising and publicity, use of titles, and other issues. Although it is necessary to take into account self-regulation that is permitted by laws, the way of thinking of the AMA is outlined from the perspective of not unduly restricting business activities.

Fact-finding survey of advertising restrictions for professional services (judicial scriveners and administrative scriveners) (published in September 1998).

The FTC conducted a fact-finding survey on advertising restrictions for professional services (judicial scriveners and administrative scriveners) and published its report in September 1998.

3. Advertising restrictions

The judicial scriveners associations and the administrative scriveners associations engage in self-regulation of members' advertising and publicity activities, based mainly on the fact that standards must be maintained according to the Judicial Scriveners Business Law and Administrative Scriveners Business Law.

Some judicial scrivener associations and administrative scrivener associations apply excessive restrictions on members' advertising and publicity activities, in terms of advertising media, the number of advertisements, and the advertising content, in a way that cannot possibly be justified from a perspective of maintaining dignity. These types of restrictions are deemed likely to be possible violations of the AMA.

As a result, the FTC requested that the national-level association of judicial scriveners and administrative scriveners ask the local associations to revise their self-regulation so that abolish or limit excessive voluntary standards to the minimum level required to maintain which have no concerns from the perspective of competition policy.

4. Remuneration standards

With regard to remuneration for judicial scriveners and administrative scriveners, the Judicial Scriveners Business Law and the Administrative Scriveners Business Law provides that the provisions concerning remuneration shall be prescribed in the bylaws of the associations of judicial and administrative scriveners respectively, under the approval of the relevant ministers.

Although the amounts which serve as standards for remuneration to be received by individual judicial or administrative scriveners are specified in these bylaws, these amounts are not fixed but solely for reference purposes. The FTC therefore requested that the national organisations make sure that they would not use the standards as fixed, and that they make this point known to their local associations.

Additionally, some associations of judicial scriveners and administrative scriveners have decided not only remuneration amounts approved by their bylaws, but also standard remuneration amounts for ancillary services. The FTC indicated to the national organisations that these types of acts would be problematic from the viewpoint of the AMA, and requested that information dissemination activities concerning prices be conducted properly within the framework of the AMA.

4.1 Administrative co-ordination

The FTC has requested that any anti-competitive administrative guidance, if detected during AMA investigations or fact-finding surveys, be reviewed by the relevant government ministry or agency. The FTC also has requested reviews of anti-competitive administrative guidance by the relevant government ministry or agency in the professional service sector when detected in fact-finding surveys.

Sample case -training facilities for *judo* chiropractors

This case concerns a qualification for *judo* chiropractors, which is awarded to individuals who have completed a course in training facilities designated by the Ministry of Health and Welfare based on Article 12 of the *judo* chiropractors Act. However, in this designation of training facilities by the Ministry of Health and Welfare, the new entrant required the written consent of the *judo* chiropractors Association and other related organisations. Furthermore, regulation of supply and demand balancing had been carried out with no legal basis. The FTC stated that this type of administration by the Ministry of Health and Welfare unfairly restricted new entry to training facilities and was problematic from the viewpoint of competition policy. The FTC therefore requested in July 1997 that the Ministry of Health and Welfare refrain from this type of administration in the future.

The administration of the Ministry of Health and Welfare concerning this case has been improved since then.

Regulation of Activities in Main Professional services through Legal and Other Measures

Occupation	Legally Designated Organisation	Advertising Regulation	Remuneration Regulation
Attorney	Bar Association Japan Federation of Bar Association	Article 29-2of the bylaw of the Japan Federation of Bar Association A practising attorney shall not advertise for his own practice: provided that this shall not apply if the advertisement is made in such a manner as provided by the Federation.	The Attorneys-at -Law Act Article 33-2 A bar association shall formulate its bylaw with the approval of the Japan federation of Bar Associations. (the bylaw contains rules pertaining to standard fees to be paid to practising attorneys.)
Judicial Scrivener	Judicial Scriveners Association Japan Federation of *Shihoshoshi* Lawyers Association	Article 76 of the bylaws and standards of the Japan Federation of *Shihoshoshi* Lawyers Associations Members shall not engage in sales calls or provide monetary favours for the purpose of obtaining clients. Additionally, entertainment, deception, or exaggeration shall not be used in publicity and advertising.	Judicial Scriveners Business Law Article 15 Items to be specified in the bylaws of the Judicial Scriveners Association (6. Provisions concerning remuneration received by judicial scriveners)
Administrative Scrivener	Administrative Scrivener Association Japan Federation of *Gyoseishoshi* Lawyers Associations		dministrative Scriveners business aw Article 16 Items to be specified in the bylaws of the Administrative Scriveners Association (6. Provisions concerning remuneration received by administrative scriveners)
Certified Public Accountant	Japan Institute of Certified Public Accountants	CPA Service Law Article 34-13 A member of an Audit Corporation shall not conduct work on his own behalf and /or on behalf of a third party, and shall not become a simultaneous member of another Audit Corporation	CPA Service Law Article 44 Items to be included in the bylaw of the Japanese Institute of CPAS (10; provisions setting forth the standard of remuneration)
Physician		Medical Service Law Article 69 No one shall advertise any fact concerning medical treatment, business hours, etc. which contravenes the Standard Law of the Ministry of Health and Welfare	(Remuneration regulation under Medical Insurance system)
Architect	*Kenchikushi* Association		The Building Standard Law of Japan Article 25 The Minister of Construction shall establish standards for remuneration and recommend the standards with consent of the Central Review Council for *Kenchikushi*

KOREA

1. Introduction

The remuneration for lawyers in Korea has been set forth by the rules of the Korea Bar Association and endorsed by the Ministry of Justice. This practice was originated for the purpose of protecting clients from arbitrary fees charged by lawyers.

The remuneration-setting by the Bar Association, though conceived as price-fixing by the trade association, has been exempt from application of the Monopoly Regulation and Fair Trade Act (MRFTA) since the practice was acknowledged as legitimate action taken pursuant to Acts under the Article 58 of the MRFTA.

Upon the practice, the Korea Fair Trade Commission (KFTC) enacted the Act on Package Dissolution of Cartels on February 5, 1999, which prohibits the Bar association from setting remuneration, and no longer grants exemption to such practice.

2. Previous regulations and rules regarding the remuneration setting for lawyers.

According to the Article 19 and 63 of the Lawyers Act, the remuneration for lawyers was set forth by the Korea Bar Association in line with the Guidelines of Remuneration for lawyers and endorsed by the Ministry of Justice. If a violation was found, the case was brought to the Disciplinary Committee. In such case, if the case was proven guilty as charged, up to two years of suspension from legal practice, and maximum of five million Won of negligence fines, or reprimand would be imposed.

The guidelines state the remuneration for lawyers is comprised of three types of compensation; for office work, case work, and actual expenses, which are calculated based on the total amount of money to be claimed and the time spent for the particular suit. There was also a ceiling on the remuneration so that no lawyers were to receive their compensation beyond that ceiling. However, their compensations have been decided around the ceiling, making it hard to differentiate the service quality by the prices they charge and to entice lawyers into providing better legal service.

The advertising activities of the lawyers have been under tight restraints pursuant to the guidelines provided by the Korea Bar Association. They were not allowed to spend on advertising more than 30 percent of their annual revenue, or 30 million Won a year. TV ads should not be longer than 30 seconds and the ads on papers and magazines were limited in size less than 39 by 39 inches. Lawyers were restricted in providing information to clients as well. They, only when requested by clients, were able to inform them of the performances or winning rates in the courtroom, financial state, and customer relationship. The guidelines also stipulated that legal service providers could not advertise more than two areas of their major business concern.

3. Enactment of the Act on Package Dissolution of Cartels and other Institutional Reforms

With the enactment of the Act on Package Dissolution of Cartels, Article 19 and Article 63, Subparagraph 2 of the Lawyers Act have been deleted. Thus, the price-fixing by lawyers is no longer exempt from application of the MRFTA as it used to be pursuant to Article 58 of the MRFTA.

The efforts to enact the Act faced strong oppositions from the initial stage. Some critics noted that introducing price competition in the legal service market would deteriorate the service quality and that such services demanding highly professional knowledge or expertise should be competitive in terms of the quality not the price. Other critics pointed out the fact that the market is not appropriate for a free competition because clients face limitations in their choice due to the difficulties in telling the quality differences. Such ignorance or lack of information on the demanders' side is likely to lessen their negotiation power, making it harder to establish a fair price competition in the market. Moreover, critics claimed if a price competition was introduced to the market where qualified attorneys were limited or scarce in number, this might drive commissions to go up, damaging the interests of clients.

The KFTC, however, successfully weathered through such criticisms under the firm belief that markets with multiple service-providers shall decide the price based on the supply-demand principle. To address the potential problems that may possibly be generated from the introduction of price competition, the KFTC came up with various counter-measures such as abolition of entry-barriers, free flow of price-related information.

The limitations in the choices, knowledge, and negotiation power on the consumer's side may be taken into account in contriving counter-measures but they can never be the justifications to allow the price-fixing by lawyers.

The Korea Bar Association's regulatory restrictions on advertisements by lawyers are not legally justifiable and more worse, clearly go against the provisions of the MRFTA regarding activities of Trade Associations. They also are violative of the Fair Labelling and Advertising Act (FLAA) which is slated to come into force in July, this year. Article 6 (Prohibition of Restrictions on Labelling and Advertising by Trade Associations) of the FLAA reads "Trade Associations, unless provided otherwise by law, must not restrict labelling or advertising activities of the enterprises belonging to the association."

With the price-fixing by lawyers abolished under the recently enacted Cartel Act, the KFTC came up with counter-measures to tackle problems that may arise from the free price competition in the legal service market. First, it makes sure that clients are well informed of the market prices of the services they want to receive. The Korea Chamber of Commerce, the Korea Trade Association, and consumer groups will survey and make a notification of the market prices. Second, the restrictions placed upon the advertising activities of lawyers have been softened and the remuneration of legal practitioners is made to be put on a public notice. Third, the entry barriers have been lowered as the number of those who pass the Judicial Examination (Bar Exam in Korea) was upwardly adjusted.

MEXICO

1. Introduction

As in other OECD countries, in Mexico professional services are subject to various kinds of regulation basically intended to make sure that the services be provided by qualified persons, to guarantee the quality of the service provision and to make consumer redress possible in case of notorious underperformance .

These regulations can broadly be classified into two categories: *i*) regulations with respect to the qualifications required to practise and standards of professional competence and *ii*) regulations affecting the competitive conditions in the professions, such as restrictions on price, entry, advertising and forms of organisation. Whereas the first type of regulations, particularly those regarding the qualifications required to practise a profession, are explicitly contained in federal and state legislation on professional services of a general character, the second type of regulation is more disperse and often forms part of sector-specific legislation or of the statutes or ethical codes of professional associations. In the latter case their general applicability depends upon whether membership to such associations is mandatory.

Although the proclaimed purpose of both kinds of regulations is to protect the consumers, they also have anti-competitive effects and may lead to higher prices and a narrower supply of services than what would have been possible in a more competitive environment. Thus, in the end the consumer might be worse off than in the absence of regulation, particularly in cases where the consumers themselves have sufficient elements to assess the quality of the services and to protect themselves against mal-performance. Therefore, it may be desirable to review existing legislation and rules, and to propose modifications in order to achieve a more appropriate balance between the purposes served by the regulations and the need to ensure competition.

2. Legislation

According to Article 5 of the Mexican Constitution,[1] nobody can be impeded to exercise a profession but it is the legislation of each state that will determine the professional activities for which a title is required and how such a title can be obtained. Although there may be minor differences from one state to another, generally speaking the obligation to have a professional title to practise is broad; *i.e.* it is not confined to the provision of medical, legal, accounting, engineering and architectural services which are the subject of the present mini-roundtable.

Most states have their own Law of Professions but it is not only the individual Laws of Professions that determine the professional activities subject to regulation. There are numerous other laws and regulations both at the federal and the state level that regulate in some way the practice of certain professions. To give a few examples, the Law of Health regulates medical services, the Fiscal Code of the Federation contains several provisions concerning accounting and auditing services, etc. Moreover, international agreements of which Mexico forms part, such as NAFTA, contain provisions lifting certain

restrictions on the practice by professionals of one Party in the territory of the other Party (ies). Usually such provisions have a list of reservations, which may be state-specific.

Altogether, the legislative framework that regulates the professional services is extremely extensive and disperses. Occasionally there are also incompatibilities between dispositions from one piece of legislation to another so that the need may arise to establish which prevails over the other. This makes the task to chart the regulations applicable to the different professional services a very complex one, which goes beyond the purpose of the present note. Therefore, in the following we confine ourselves to general tendencies allowing for departures in the details.

To give an idea of the competition provisions contained in the Laws of Professions we consider the Law of Professions in the Federal District (LPFD)[2] which applies to the Federal District but also covers matters of a federal nature[3]. The main provisions regulating the boundaries of applicability, entry in the professions, professional associations' etc. are the following:

1. The Federal Executive through the Directorate General of Professions (DGP) of the Ministry of Public Education (MPE) after hearing the professional associations and the technical committees defines the fields of action of each profession and its boundaries.

2. To practise a profession in one of those fields it is necessary to obtain a corresponding title, which must be registered before DGP. Titles obtained from institutions not belonging to the national education system must be revalidated by MPE. Since the amendments of 1994 there is no nationality requirement and titles obtained abroad can be registered under certain conditions. It should be noticed that nationality requirements derived from other legislation remain applicable. Depending upon the terms of international agreements of which Mexico forms part foreigners may be allowed to practise their profession in Mexico.

3. Professionals may freely agree with their clients on the tariffs they charge for the services they provide. Still, one of the purposes of professional associations is to propose professional tariffs. However, in practice only few professional associations propose the tariffs to be charged by their members. Professions where tariffs were proposed by associations are notaries and customs agents.

4. Professionals may constitute firms to practise their professions, in accordance with the relevant legislation, but their accountability always remains individual.

5. Advertising and announcements may not go beyond the ethical standards to be established by professional associations. To give an example the Ethical Code of the Mexican Bar Association of lawyers establishes that simple announcement of names in directories or specialised publications is allowed but offering special services not based on previous personal relations with clients is not. Profit-seeking or self-praising advertisements are supposed to be incompatible with the dignity of the profession.

6. In the Federal District up to five professional associations may be formed for each profession. The LPDF does not establish the obligation to be a member of such a professional association in order to practise and generally speaking membership of professional associations is voluntary in Mexico. The general purpose of the associations is to guarantee the quality of service, to co-ordinate with the relevant authorities, to organise consumer redress, etc. One of the specific purposes is to propose professional tariffs. In practice, only few professional associations propose tariffs to be charged by its members.

3. Title and registration requirements

3.1 Coverage of title requirements

As mentioned before, it is the DGP of MPE, which has to delimit, after hearing the professional associations and the corresponding technical committees, the fields of action of each profession. This is under process. A number of technical committees have been formed. In the meantime, there is a transitory list of professions, which require a title. The list is presented in the table below.

Table 1.: Professions that require a title to be practised

1	Actuary	13	Marine
2	Architect	14	Medical doctor
3	Bacteriologist	15	Veterinarian
4	Biologist	16	Metallurgist
5	Surgeon Dentist	17	Notary
6	Accountant	18	Pilot
7	Public broker	19	Pre-school teachers
8	Nurse	20	Primary school teachers
9	Nurse and midwife	21	Secondary school teachers
10	Engineer	22	Chemist
11	Lawyer	23	Social worker
12	Economist		

Source: Ley Reglamentaria del artículo 5º. constitucional, relativo al ejercicio de las profesiones en el D.F., second transitory article of the reforms published on January 2, 1974 in the Official Gazette of the Federal Government (Diario Oficial de la Federación).

3.2 Registration of titles

To practise one of the above listed professions it is not only necessary to obtain a professional title from an accredited education institution. Such titles must also be registered before the DGP, which extends a professional license ("cedula professional").

For educational institutions to be entitled to extend professional titles they must among others, submit their study programs annually to DGP. One of the requirements to obtain a professional title which

must necessarily be fulfilled is that of "social service", *i.e*. to perform unpaid work in the field for a minimum period of half a year.

3.3 Registration of foreign titles

The LPDF was amended in 1994 so as to allow foreigners to practise a profession in the Federal District. Previously, professional services were legally reserved to Mexican nationals. In practice however, many foreigners were providing professional services under an "amparo" asking for an exemption from the respective law on Constitutional grounds. The exemptions were usually granted. Still, nationality requirements remain in force for specific sub-professions. For example, notaries, public brokers and customs agents must be Mexicans.

However, to practise foreigners must register titles obtained abroad before the DGP to get the respective license. The LPDF establishes that the registration of foreign titles will be done in accordance with international treaties of which Mexico forms part or on the basis of reciprocity. In the absence of such treaties the principle of reciprocity implies that foreigners applying for a license in Mexico must demonstrate that their home countries also grant licenses to title holders from Mexico. In any case foreigners must comply with the social service requirement.

3.4 Compliance with title requirements

In practice, compliance with title and registration requirements is far from complete. This is due to several factors. In the first place, the fields of action of each of the professions are not yet sharply defined for all cases so that it is not always clear whether or not a title is required. In the second place, private clients contract professional services according to their own needs not always paying attention to the compliance of their service providers with the title requirements. Third, employers of professionals cannot always find appropriate supply in the professional labour market or are not willing to pay the higher salaries. Particularly in private primary and secondary education institutions compliance is low. The Federal Government is now implementing a program to increase the compliance of public officials with title requirements. Fourth, there is a certain convergence in the professional services market. *I.e*. fiscal advice may be given by both tax lawyers and accountants, engineering and architectural service flow together in many cases, etc. Finally, as mentioned before there are many foreigners practising a profession in Mexico protected by an "amparo".

4. Competition aspects

4.1 Membership to professional organisations

There are a great number of professional associations in Mexico and in principle there may be more than one for each profession. Generally speaking there is no obligation to be a member of a professional association to practise. There is even a Supreme Court decision, which held that the principle of free association established in Article 9 of the Constitution excludes the possibility to make membership mandatory.

This does not imply that private clients or the government cannot demand membership for certain tasks. For example, the Fiscal Code of the Federation (Article 52) establishes that certain facts affirmed by accountants before tax authorities will be presumed true provided that those accountants be members of an

association recognised by the Ministry of Finance (among other conditions). Likewise, the Construction Regulations of the Federal District (Article 42) establish that to be registered as a "responsible director of works" one has to be a member of the corresponding association.

There is no general obligation, however, to be a member of a professional association. Non-members can also practise the profession. Evidently, this has important consequences for the codes of conduct imposed by the associations upon its members. In fact, those rules are not binding as long as professionals can resign to be a member.

4.2 Price fixing

Although the LPDF establishes that one of the objectives of the professional associations is to propose tariffs, only in few cases it is the association, which determines the fees. On one hand, this is due to the fact that the services are not sufficiently standardisable so those fees have to be determined anyway on a case-by-case basis. On the other, since 1993 there is the Federal Law of Economic Competition, which prohibits such horizontal price fixing agreements even when proposed by associations. See below.

Two examples of fees that were proposed by professional associations are those charged by notaries for conveyancing titles of real estate and wills and those charged by customs agents which used to charge a fixed percentage of the value of the imported / exported merchandise for their services. More than half a century ago the Civil Code established tariffs for certain professional services but these were never enforced nor updated.

4.3 Advertising

There is no legal prohibition of advertising professional services in Mexico. The only restrictions derive from Codes of Ethics of professional associations to which membership is not compulsory. To give an example, Article 13 of the Code of Ethics of the Mexican Bar Association of lawyers establishes that the lawyers should avoid to seek clients through publicity or excessive actions. The mere announcement of names through business cards, professional directories or specialised publications is not objected but seeking clients by pamphlets or interviews not based upon previous personal contacts is supposed to go against the ethics of the profession. Profit-seeking and self-praising propaganda is also considered incompatible with the dignity of the profession. A recent blueprint for a Code of Ethics for professional associations elaborated by DGP in co-operation with 19 professional associations is less restrictive with respect to advertising. Article 10 only establishes that a professional should offer his services in accordance with his scientific and technical capabilities. This should be observed in the publicity he uses to promote his services.

In light of the non-compulsory character of these recommendations it is not surprising that there is a fair amount of publicity going on in professional services sectors in Mexico. Although this advertising is not especially aggressive it definitely goes beyond the mere announcement of names. This confirms that restrictions on advertising are not overly binding and that there is room for pro-competitive publicity.

4.4 Forms of establishment

There are no legal restrictions on forms of establishment. In principle professionals may freely associate themselves with other professionals or with non-professionals responsibilities remain individual, however. There are only limitations on the share of foreign participation in certain fields. In this respect the

Foreign Investment Law[4] establishes that other legislation may define activities reserved to Mexicans or to national firms (Article 6). Such is the case for notaries, public brokers and customs agents. For legal services there is a limit of a 49 percent share for foreign investment. This limitation may be waived, however.

Still, the Codes of Conduct of professional associations impose some restrictions upon its members. To give an example, Article 49 of the Code of Ethics of the Mexican Bar Association establishes that their lawyers, for purposes of practising the profession, may only associate themselves with other lawyers. Similarly, the aforementioned blueprint for a Code of Ethics affirms that professionals should not associate themselves with any person which has no license to practise nor allow that any other person use his goodwill to attract cases.

In practice there are many examples of professionals associating themselves with other professionals of another (sub) profession or with non-professionals. Also professionals may work under wage contracts with firms. This is particularly common in the medical sector, accountants, lawyers and schoolteachers directly employed by firms, etc.

5. Competition Law Enforcement

5.1 Applicability of the Law

The Federal Law of Economic Competition (FLEC) enacted in 1993 is fully applicable to the professional services, *i.e*. there are no exemptions. Therefore, price fixing agreements promoted by professional associations can be challenged as absolute monopolistic practices, and in fact were. Likewise, attempts to unduly displace competitors from the market or to impede their access thereto may fall under the category of relative monopolistic practices prohibited by the Law. Additionally, mergers between firms providing professional services must be pre-notified to the Competition Commission if certain thresholds are met. To be carried through the Commission must not object those mergers.

Until now the Commission has dealt only few cases in the professional services. One case refers to notaries. Some others to customs agents. Moreover, a number of mergers between professional services firms have been dealt with. These mergers were in sectors such as accounting (international firms), hospitals and engineering. In the following a brief description of some of these cases is presented.

5.2 Enforcement

5.2.1 Notaries

In October 1995, the Competition Commission received a complaint by the Association of Public Brokers[5] of the Federal District (Mexico City) against the College of Notaries of the Federal District, the Assistant Secretary of Legal Affairs of the Department of the Federal District and the Director General of the Register of Public Property and Commerce of the Federal District.

In Mexico, mercantile acts related to real estate property have to be certified by an authorised entity and then introduced into the Register of Public Property. Traditionally, acts of certifying real estate transactions have been performed both by public brokers and by notaries. However, due to a problem of

interpretation of the "Public Brokerage Act", officials of the Register of Public Property *of the Federal District* were admitting only transactions certified by notaries to be Registered.

The investigation found that the notaries, the College and the Register of Public Property had worked together to hinder the process of competition and free access in this market: The notaries through absolute monopolistic practices; the College through relative monopolistic practices and the Register, by applying administrative restrictions.

Despite the interpretation by the Ministry of Trade and Industrial Promotion (SECOFI) of the "Public Brokerage Act", to the effect that public brokers may certify mercantile acts related to real estate the notaries took joint actions to reserve the market for their own profession. However, the success of this strategy was made possible thanks to the refusal by the Public Register officials to register acts certified by public brokers.

The Commission ruled that such actions constituted absolute practices prohibited by Article 8 of the Law. To correct this situation, apart from applying sanctions to the offenders (notaries), the Commission recommended the Public Register to allow for the registration of acts certified by public brokers, in accordance with the Ministry's interpretation of the Act.

5.2.2 Customs agents

In August 1995 the Competition Commission initiated an ex-officio investigation into alleged absolute monopolistic practices by the members of the Customs Agents Association of Cancun. The Commission had been informed previously that the Association's members had agreed on fixing the prices for the services they provide.

In recent years the legal framework applicable to customs brokerage services has undergone major deregulation. In fact, clear and non-discriminatory rules were established for granting licenses to act as a customs agent[6]. Furthermore, in July 1993, immediately after the entry into force of the Competition law, the official rates set by the Ministry of Finance were abolished. Thus, customs agents could freely negotiate their fees with clients.

Nevertheless, customs agents kept sticking to traditional behaviour and on a meeting of the above mentioned association it was agreed to establish a minimum charge of one percent of the customs value of the merchandise plus a 300 pesos charge for complementary services. The agreement also established penalties for non-compliance although those penalties were never made effective even where certain customs agent did not follow the rules.

The Commission resolved to *i*) impose a fine upon the Association for incurring in absolute monopolistic practices, *ii*) to order the Association to refrain from the practice, to revoke the agreement and to inform their members and *iii*) to give notice of its resolution to the Confederation of Customs Agents Association of Mexico.

5.2.3 Mergers

5.2.3.1 Halliburton Company / Dresser Industries, Inc.

In June 1998, the Commission received the notification of the intent to merge by two engineering firms. The transaction originated from the merger of two American firms, whose subsidiaries in Mexico had to notify the Commission in accordance to Article 20 of the FLEC.

Competing firms in the market for the provision of civil engineering services are usually large, because substantial investments are required in research and development for new technologies for the exploration and drilling of oilfields. Such investments constitute the main barrier to entry into this market. Furthermore, the national Oil Company PEMEX is the only buyer in Mexico and acquiring goods and services destined for use in drilling activities involves a bidding procedure.

In this merger case, the Competition Commission observed that the market for the provision of engineering services is highly competitive, both in Mexico and at the international level, so that the effect of the merger would be marginal. Therefore, the decision was not to object or condition the proposed merger.

5.2.3.2 Price Waterhouse (PW) / Coopers Lybrand (CL).

In October 1998, the Competition Commission received the notification of the intent to merge of the Mexican subsidiaries of two international firms providing accounting services, including auditing, tax and management consulting services. The notification resulted from the global merger of PW and CL. The Commission found that there are a large number of competitors in the market for the provision of accounting services and that barriers to entry are low, so that the transaction should not lead to market power for PWC. The Commission decided not to object or condition the proposed merger.

5.2.3.3 A.T. Kearney Inc. (ATK) / Electronic Data Systems Corporation (EDS**)**

In 1995, the Commission evaluated the intended merger between ATK and EDS, both consultancy firms, in which ATK would acquire EDS stock. The case involved the merger of two US firms, whose subsidiaries in Mexico had to notify the Commission. The relevant market of the merger was defined as all the consultancy services in Mexico, in which a wide number of firms compete in the Mexican market. The Commission determined that the relevant market is contestable and there are no important barriers to entry, so the merger was not to object.

5.2.3.4 General Motors Corporation (GMC) / Electronic Data Systems Corporation (EDS)

In 1996, the Commission analysed the divestiture of EDS from GMC and Electronic Data Systems Holding Corporation in which GMC would sell off its shares in EDS as the result of a corporate reorganisation. The Commission determined that the transaction would not alter the operation and structure of EDS and would have no adverse effect in the market because the firms participate in different relevant markets: GMC in the automotive industry market and EDS in the consultancy services market. Therefore, the Commission decided not to object the transaction.

5.2.3.5 Grupo Empresarial Angeles (GEA) /Asociación de Gineco-obstetricia (AGO)

In November 1998, the Commission received a notification for a proposed acquisition by GEA of a certain part of AGO stock. GEA is an association engaged in a number of businesses, which include the ownership of three hospitals in Mexico City. AGO is an association who owns another hospital located in Mexico City, whose acquisition by GEA was the intention of the notification. Both GEA and AGO provide health services through different health care facilities. The provision of these services is of a private nature and intended for people who do not make use of the State's health care facilities. This kind of private health care is also provided by other important private health care facilities in Mexico City, which led the Commission to decide that this market is sufficiently competitive and the effect of the acquisition would be marginal. The transaction was not objected or conditioned.

5.2.3.6 Conjunto Administrativo Integral (CAI) / CMS del Sur (CMS)

In March 1998, the Competition Commission received the notification of a proposed merger between CAI and CMS, where CAI consists of a group of firms in different lines of business, which include the provision of architectural/engineering services for hospital design and a participation in one of the country's largest insurance companies and CMS provides several health services, including a hospital in Mexico City and a firm that sells prepaid health services (medical insurance). The proposed merger would result in CAI becoming a partner of CMS, involving two separate relevant markets: the provision of health services (hospitals) in Mexico City and the sale of medical insurance. The first relevant market is sufficiently competitive where CAI did not have any participation, so that the Commission decided that the merger would not have negative effects. On the other hand, both companies concur in the market for the provision of medical insurance, but this is also a highly competitive one, so that the relevant market would not suffer from the proposed merger. Thus, the Commission decided not to object or condition the proposed merger.

6. Conclusions

Although professional services are subject to a variety of different regulations, some of a general character, others field- or sector-specific, some of them stemming from laws and official regulations others based on codes of conduct of professional associations, in comparison with many other countries the provision of professional services is relatively free in Mexico.

One competition issue that remains controversial from a competition point of view is that of entry. For all professions an academic title is required and titles must be registered before the Directorate General of Professions of the Ministry of Public Education. Since 1994 there is no general nationality requirement, but a number of field-specific nationality requirements remain in force. There is the possibility to register foreign titles. Procedures may be cumbersome, however. Some flexibility was introduced with recent free-trade agreements (NAFTA and Mexico-Chile) but much remains to be done in terms of mutual recognition and easing procedures.

In most professions fees are freely negotiated between the service providers and their clients. Only in a few cases of standardisable services tariffs are proposed by professional associations, but as long as membership to such associations is voluntary, which is usually the case, and more than a single association may be constituted for each profession, such tariff fixing is of relatively little concern. Moreover, competition law is fully applicable to the professional services sectors so that, in principle, price fixing agreements can be challenged as absolute monopolistic practices under the Federal Law of Economic Competition. For certain medical services fees are limited by insurance companies but to the

extent that consumers are free to choose their own insurance, doctors and hospitals are free to adhere to the insurance plan, and the insurance market is sufficiently contestable, there is no competition concern either.

There may be several professional associations for each profession and membership is voluntary as a rule. Exceptions are notaries and tax advisors for the performance of certain tasks. Thus the anti-competitive elements contained in the codes of conduct of such associations are much less restrictive than what would have been the case should membership be mandatory.

As far as advertising is concerned, codes of conduct of professional associations contain some limitations upon propaganda and publicity, but as membership of such associations is voluntary as a rule, the dispositions are not binding. In practice there is a fair amount of advertising going on in the professional services sectors that goes beyond the mere announcement of names. Even though such advertising is not comparable with that in other sectors, a low level of advertising can also be a result of market forces.

Regarding restrictions on forms of organisation, professionals may associate themselves with other persons but liabilities remain individual. There are also many examples of professionals hired by firms, not exclusively owned by professionals of the same field working as wage earners. This is particularly the case in the medical sector, e.g. hospitals and laboratories, but it is also found in other fields of professional services.

One area of professional services of special concern to the competition authorities is that of notaries. There, membership of the association is not completely free and the Colleges of Notaries prescribe tariffs for standardised services. It should be realised, however, that the potential for anti-competitive behaviour in this field does not derive so much from the professional character of their services but rather from the fact that they receive powers delegated by authorities, (in Mexico state authorities) such as conveyancing real estate etc., and that the authorities delegate such powers only to a limited number of persons. In principle, the easiest way to increase competition in those fields would be by lowering entry barriers, *i.e.* granting more concessions.

Competition law is fully applicable to the professional services sector, *i.e.* there are no exemptions. Until now only few cases have been brought before the Competition Commission, however. One refers to notaries trying to impede public brokers from conveyancing real estate and a few cases of various kinds, concerning customs agents. Also a number of mergers in the professional services sectors were notified to the Competition Commission. None of these mergers was objected.

NOTES

1 Constitucion Politica de los Estados Unidos Mexicanos

2 Ley Reglamentaria del Articulo 50 Constitucional Relativo al Ejercicio de las Profesiones en el Distrito Federal

3 The LPFD applies at a federal level where service provision is to federal authorities or where it concerns activities regulated by a federal law

4 Ley de Inversion Extranjera

5 Public brokers are a kind of notaries for commercial transactions

6 By law all foreign merchandise transactions must be channeled through customs agents

NEW ZEALAND

The New Zealand Ministry of Commerce as the policy body responsible for competition policy has been promoting reviews of professional regulation across Government.

Our conclusion from previous work was that while improving the quality of regulation is widely supported, it does not often get translated into practice.

The sticking points in the process are:

- at the government policy level where administrators may not be willing or able to consider whether regulation is really needed;
- at the political level where improving the quality of regulation may be less urgent than other issues;
- at the level of professional organisations where there may be vested interests in keeping existing structures and processes.

1. Mandatory policy framework

The Ministry of Commerce, working with other government departments, with a special interest in policy on regulating occupations, has developed a mandatory policy framework aimed at the first level – the government agencies that regulate occupations. The policy framework was formally approved by the Government in August 1998. It requires agencies that are regulating occupations for the first time, or changing the way in which occupations are regulated, to go through a series of steps. These cover:

- defining the problem (measured in terms of the risk to consumers through the reckless or incompetent practice of an occupation);
- considering whether intervention by the Government is necessary to solve the problem; and if so;
- identifying the most effective form of Government intervention.

Agencies are required either to follow the framework or formally account for any deviation from it. Agencies proposing new regulation or changes to the regulation of occupations are required to seek the comments of the Ministry of Commerce before proposals are submitted to Cabinet. This provides a check on whether the framework is being followed and a consistency of approach.

2. Resource document containing model provisions

Much of the legislation on occupations is out of date and contains provisions with no clear purpose. Administering departments have dealt with practical administrative problems by patching up bits of legislation rather than reconsidering the whole regulatory regime. The effect in many cases has been to complicate regulation rather than improve it.

The Ministry of Commerce and an interdepartmental working party has put together examples of sets of legislative provisions for the different types of occupational regulation through statute. The examples are designed to show the level and amount of regulation necessary to ensure fair process and consumer protection. This document is intended as a guide and is available to departments on request. It has no official status.

3. Current State of Regulation for Architecture, Law, Accountancy, Engineering

3.1 Professional engineering

Current Situation: National Building Acts and Codes regulate building and construction work undertaken by professional engineers. It is also regulated by the Engineers Registration Act 1924, which restricts to a limited degree the work professional engineers can undertake unless they are registered engineers.

There are no constraints on price competition and it is vigorous.

There are no competition policy concerns about entry controls by the profession. Entry requirements to become a registered engineer are straightforward. A four-year degree and personal competencies, which usually equate to three to four years' practical experience, are required. Competencies are assessed by peer review.

Proposed changes: The Engineers Registration Act is being reviewed at present. It is likely that it will be replaced with a new Act that will encompass the New Zealand principal professional engineering body, the Institution of Professional Engineers of New Zealand. The new body will administer the register of professional engineers and will generally decide its own rules that govern its activities. However, it will be possible for engineers to get on the register without being a member of the new body.

3.2 Law

Current situation: The current regulatory regime involves the profession regulating itself on the Government's behalf. The professional body (The New Zealand Law Society) has wide ranging powers to make rules for the regulation of the profession and as membership is compulsory, these rules form most of the regulatory frameworks applying to the practice of law. The Law Society has a federated structure with 14 regions and each district is responsible for the discipline of its own members. The Law Practitioners Act imposes restrictions on the structure of legal businesses (they may only be partnerships or sole practitioners). It also prevents barristers from being engaged directly by clients and prevents non-lawyers from providing conveyancing services.

People who are not registered as lawyers are not legally prevented from providing some legal services.

Proposed changes: Officials are currently proposing substantial reform, which would have its main focus on protecting the public interest rather than on regulating the conduct of law practitioners. The proposed new Act would create a regulatory body independent of the professional society, make membership of any professional body voluntary, reduce compliance costs for lawyers by removing the requirement for a fidelity fund and remove restrictions on business form. It would also allow paralegal to provide conveyancing services.

The proposals are in line with suggestions for reform from the professional body but have not received any official backing from Ministers yet.

3.3 Accountancy

The Institute of Chartered Accountants Act 1996 provides a self-regulatory regime that protects certain titles. All people with accountancy qualifications are entitled to call themselves accountants but only those who are members of the Institute of Chartered Accountants are able to call themselves chartered accountants or auditors. The legislation requires the Institute to have rules governing entry to membership and discipline of members. The rules are lodged with the Registrar of Companies. Current requirements for membership of the Institute include qualifications and character requirements. The Institute has other roles including promoting training and quality. It aligns its standards with those of other countries.

3.4 Architecture

Architects are regulated through a statutory registration board that controls entry to the profession, as well as setting and recognising training courses, setting a code of conduct and maintaining a disciplinary system. The statutory board has 16 members appointed on the nominations of the architects' professional body and of related trades and occupations. Representatives of three Government Ministries including the Ministry of Consumer Affairs are also on the Board.

The Architects Act 1963 makes it an offence for a person to use the term "architect" if they are not registered. Entry criteria for registration include age, a recognised architecture qualification plus practical experience and an assessment by the board as to whether the applicant is "…a fit and proper person" or not.

Persons who are not registered are able to provide architectural services under titles such as "architectural draftsman" or "building designer."

There is strong price competition.

4. Issues raised in the draft agenda

4.1 Price competition

Professions and trades are not exempt from New Zealand competition law and price fixing, including fixed scales of fees, is specifically prohibited under the Commerce Act.

In the case of lawyers where there once were rigid fee scales, customer surveys have shown that lawyers now compete on price, particularly on conveyancing transactions. The Law Society still retains

the power to revise prices on complaint from a client. This provision is seen as unnecessary and would be removed in the current review of the Act.

There are no formal restraints on price competition. Some professionals are reluctant to distinguish themselves publicly on price. However in other cases, particularly in the case of small dentistry and legal businesses, advertisements include the prices of services, and discounts and free or very cheap first appointments may also be offered.

4.2 Truthful advertising

The Fair Trading Act prohibits misleading and deceptive conduct, false representation and unfair practices.

Advertising is allowed for all professional groups. Typically, professional bodies prohibit misleading advertising and also impose standards on advertising. For example the Law Society rules require advertising to be "…consistent with the maintenance of proper professional standards…" They also impose restrictions on what may be advertised. For example, solicitors are allowed to advertise fees, but not barristers.

4.3 Entry constraints: possible conflicts between entry control and the quality assurance role of professional regulation

There is a concern that a "closed shop" may operate when the industry sets its own standards of entry, as industry members rarely have an interest in increasing competition. Defences to accusations of running a closed shop are usually couched in terms of ensuring quality and protecting consumers. We believe that the way to reach the right balance between entry control and quality assurance is to ensure that the regulatory substructure contains checks and balances. For instance a licensing board can be accountable to the relevant Minister and required to table a report in Parliament. It should also be subject to official information legislation so that its decisions can be exposed to the public. There should also be strong consumer representation on the bodies setting entry standards and running disciplinary procedures to counteract any tendencies by professionals to protect their own patch.

When the regulatory regime or legislation is set up, administrators should ensure that each piece of regulation has a defined purpose and that the possibility of subjective judgements that may be discriminatory is eliminated as far as possible. (As an example, the licensing body should not be asked to make a judgement on whether an applicant is a "fit and proper person" to enter the occupation but pre-defined objective criteria should be used.)

4.4 Relationships with other kinds of businesses

Financial relationships outside the profession may have a significant effect on regulation and/or on competition. Some relationships serve as de facto regulation e.g. financial institutions may only fund property transactions that go through a licensed law practitioner and health funding agencies will subsidise treatments only from practitioners who meet particular criteria they set. These arrangements tend to penalise new entrants and non-traditional providers. On the other hand they are directed at achieving quality of service.

At present lawyers are prevented from operating as multi-disciplinary partnerships. This restriction is seen as necessary to ensure professional accountability by its supporters, and as an unreasonable imposition and an additional cost to business by its opponents.

4.4.1 Enforcement action

New Zealand's competition authority, the Commerce Commission, has taken enforcement action against price fixing involving groups of both midwives and lawyers, and against exclusionary behaviour in some trade groups. The enforcement action has ranged from formal warnings to settlements to fines.

There is a case currently before the High Court that involves anti-competitive collusion by eye surgeons. A regional health authority had contracted an Australian eye surgeon to carry out 225 cataract operations to reduce the waiting lists for eye surgery in the region. One of the local eye surgeons is accused of using his dominant position in the market to prevent the Australian surgeon from operating.

Enforcement action and the threat of it appear to have been successful in changing behaviour, as professional groups are usually very responsive to public criticism.

4.5 Advocacy

The Commerce Commission focuses on informing professional associations of the requirements of the Commerce Act as these associations are forums where people may agree on ways of conducting business that might be anti-competitive in nature. Speaking at professional conferences and issuing guidelines directed at particular groups or sectors are other forms of advocacy the Commission follows.

4.6 Differences in competition policy approaches

New Zealand doesn't distinguish in its regulation between services for businesses and services for individuals**.** However if there is enforcement action, the Courts will set penalties taking the different circumstances into account.

A distinction between services provided to businesses and individuals would be logical on the grounds that the risk to the individual client is greater in practice than to the informed business client.

Officials are currently proposing an approach to the licensing of electrical workers, which distinguish between levels of risk. Under this proposal an electrical worker who operates within a company where safety structures are in place and there are explicit duties on the company to ensure safety, need not be individually licensed. Workers, who provide services to the home or small business consumer in circumstances where their individual competency is the only protection against danger, will be required to have their skills formally recognised through individual licensing.

4.7 Differences in competition policy approach and experience among different professions

There are differences between the business services and the health occupations. These are related to the degree of risk and the nature of the risk posed by the occupation. Health services require more comprehensive and more rigorous regulation including pre-market interventions such as entry controls

whereas the business services can operate effectively with self-regulation and redress after the event if something goes wrong.

5. Other issues

5.1 Blurring of boundaries

An area of potential savings for consumers may lie in blurring the boundaries between occupational groups, particularly in the health professions. There is a range of work carried out by highly educated and expensive professionals that could be done competently by people with a lower level of training at a lower cost to consumers. People with a lower level of training are also more likely to be available to provide services in isolated rural areas. This statement applies to dentists and dental nurses; medical practitioners and nurses; lawyers and legal clerks. The Government has put forward a proposal to allow nurses to prescribe medicines as a first step in this process. This is being resisted by doctors' professional groups.

5.2 Professional regulation is a web of controls

Regulation of professional behaviour should be viewed as a web of controls including legislation regulating the occupation, general consumer protection legislation, competition policy legislation and the effects, intended and unintended, of other regulation. There are also other non-regulatory factors such as personal integrity, public opinion and the influence of colleagues. These influences reinforce or counterbalance each other and need to be borne in mind when changes to regulation are made.

An example of this interdependence is the link between barriers to entry in medical occupations and New Zealand's accident compensation system, which prevents patients from suing for medical misadventure or malpractice. The lack of post-event remedies makes entry control more necessary than it might be otherwise.

UNITED KINGDOM

1. Introduction

Competition in markets for goods and services is essential for economic efficiency. The Director General of Fair Trading (DGFT) considers that the principles of competition policy and law should be applied to the business and market activities of all professions as they apply to other business activities. The last few years in the United Kingdom (UK) have been a period of change in UK competition law. However, important exclusions remain in place for professional rules. Nonetheless Government policy is to increase competition and some of the professions have themselves, in this period, embarked on reforms designed to foster competition in their various business activities. As the Secretariat's background paper recognises (pp128-9) freedom to advertise and to set prices competitively is widely accepted in the professions in the UK.

2. The Competition Act 1998

The Competition Act 1998 will, when fully implemented in March 2000, replace the Restrictive Trade Practices Act 1976 and the Resale Prices Act 1976 and the majority of the Competition Act 1980. The Fair Trading Act 1973 will be retained. Of particular importance in the case of the professions are the latter's "complex monopoly" provisions, under which several persons which are not connected, but which together account for at least one quarter of the supply or acquisition of any particular goods or services in all or part of the UK, can be examined by the Competition Commission if they are engaged in conduct which has or is likely to have the effect of restricting, distorting or preventing competition.

The Restrictive Trade Practices Act 1976 was unduly technical and did not contain sufficient sanctions against genuinely harmful anti-competitive conduct, while unnecessarily catching many innocuous agreements. The Competition Act 1998 introduces two prohibitions: one ("Chapter I") of agreements (whether written or not) which prevent, restrict or distort competition and which may affect trade within the UK; the other ("Chapter II") of conduct of undertakings which amounts to an abuse of a dominant position and which may affect trade within the UK. Section 60 sets out principles, which provide for UK authorities to handle cases in such a way as to ensure so far as possible consistency with Community law. The full weight of the Competition Act 1998 will not come into force until 1 March 2000. In the meantime, the Office of Fair Trading (OFT) will continue to act to influence improvements to the competitive structure of the professional services sector under the DGFT's existing competition powers under the Fair Trading Act 1973, and using the advisory role given him in relation to lawyers under the Courts and Legal Services Act 1990, and its territorial equivalents, and in relation to accountants under the Companies Act 1989.

The Chapter I prohibition covers agreements between undertakings that have the object or effect of preventing, restricting or distorting competition in the UK. The Chapter I prohibition will apply in principle to the rules and decisions of professional bodies in the same way as it does to those of other associations of undertakings, subject however to certain important exclusions. In particular it will not apply to the extent to which an agreement constitutes a designated professional rule; imposes obligations

arising from such designated professional rules; or constitutes an agreement to act in accordance with such rules. Professional rules are defined as the rules regulating a professional service or the persons providing, or wishing to provide, that service.

The exclusion from the Chapter I prohibition only applies in relation to professional services which are designated. A list of designated professions is in Schedule 4 of the Competition Act 1998. This covers the same professions as were excluded from the Restrictive Trade Practices Act 1976. There are 18 categories. In the case of a profession not designated under Schedule 4, a rule or decision of which has an appreciable effect on competition, an individual exemption from the Chapter I prohibition may be applied if suitable. Exclusion under Schedule 4 does not preclude any action by the European Commission should the professional rules in question breach Article 85 of the Treaty of Rome. Schedule 4 is amendable by secondary legislation.

3. Advocacy

The OFT has pressed for competition reform in the professions through advocacy. For instance, in the OFT's dealings with the Law Society (the solicitors' professional association) the OFT has pressed the case for the removal of potentially restrictive rules, working with the Law Society to formulate alternatives through the advocacy role conferred on the DGFT by the Courts and Legal Services Act 1990. The Government is unwilling to extend competition law to cover the rules of the legal professional bodies. However, the Lord Chancellor's Access to Justice Bill currently before Parliament will give the Lord Chancellor powers to call in legal professions' rules and refer them to the DGFT.

In some cases, the professions themselves have taken the initiative to address unnecessary restrictive practices. The Law Society, for instance, issued a consultation paper to its membership on Multi-Disciplinary Practices in October 1998[1]. The OFT has taken opportunities to encourage more competition through speeches and informal discussions with the professions.

4. Fee scales

Even if only "recommended", fee scales are a mechanism by which professionals' incomes can be maintained at consumers' expense. Against that, some professions argue that a recommended fee directed to potential clients, some of whom may never have used the professions' services before, gives them useful information about what a reasonable quality service should cost.

Fee scales for architects, a wide range of surveying professions, and medical consultants, have all been referred to the Monopolies and Mergers Commission (MMC) under the complex monopoly provisions of the Fair Trading Act 1973. The MMC has always concluded that mandatory fees operated against the public interest, and has generally also taken the same view of recommended fee scales.

In 1994 the MMC published a report[2] relating to charges for the supply of private medical services (PMS). The MMC considered that the guidelines issued by the British Medical Association, which recommended rates for consultants' fees, were against the public interest and were consequently prohibited (the British Medical Association is a trade union and the professional body of the UK medical profession: it is the sole recognised negotiating body on terms and conditions of service for medical practitioners employed in the National Health Service). However, the benefit maxima set by a leading private medical insurer, the British United Provident Association Limited, were deemed to be acceptable as they acted as a constraint on consultants' charges. PMS and private medical insurance continue to be sources of complaint. The OFT is keeping this market under close review.

Recently, the OFT has successfully negotiated away fee scales that have been drawn to its attention by whistleblowers - for example, a local Law Society's attempts to fix conveyancing charges within the area that its members operated. As a result of successful action against fee scales, and the associated publicity, there is often a beneficial knock-on effect leading to other whistleblowers stepping forward.

5. Advertising

In 1988 references were made to the MMC leading to reports on Civil Engineering Consultancy Services[3], Services of Medical Practitioners[4] and Services of Professionally Regulated Osteopaths[5]. The MMC concluded that advertising rules should be liberalised, subject to the requirements that advertisements should not bring the profession into disrepute or abuses the trust of potential clients or exploit their lack of knowledge. In 1996, it was estimated that sixty percent of solicitors in England advertise their services and the figure is likely to be higher today. The OFT has found no evidence to suggest that there has been any drop in standards as a consequence.

6. Multi-Disciplinary Practices

Some progress towards Multi-Disciplinary Practices (MDPs) has been made in recent years. Proponents of MDPs argue that there are benefits in terms of "one-stop shopping" with specialists from a range of professions represented under one roof. In addition, MDPs would lead to economies of scope and scale. Opponents argue that the professions have to retain their independence to safeguard their impartiality and to avoid potential conflicts of interest. Another perceived danger is that MDPs might reduce consumers' choice of independent experts. As mentioned, the Law Society issued a consultation paper on MDPs last October in response to the debate within its own profession. The accountancy profession is keen to see MDPs develop and some already have associated legal firms. The OFT has been pressing for such changes since the Entities Report[6] was published in 1986. The Entities Report recommended that the way is cleared for the formation of MDPs, and, in particular, suggested that statutory bars preventing solicitors from forming mixed partnerships with members of other professions should be removed. The DGFT considers that MDPs would increase competition and stimulate innovation. While the Courts and Legal Services Act 1990 effectively removed the statutory bar on MDPs in relation to lawyers, neither the General Council of the Bar (the barristers' professional body) nor the Law Society has yet taken advantage of the changes. The OFT hopes that the professions will take advantage of the opportunities that MDPs will offer both in their own interests commercially and those of consumers. The indications from recent articles in the professional press suggest that the tide has now turned decisively in favour of MDPs.

7. Entry qualifications

Restraints on entry are usually based on educational qualifications and experience. In the professions entry criteria are often higher to ensure that those recruited into the profession meet a minimum required competence or have obtained some form of technical specialism. Once a member, there may be annual membership fees, subscriptions, and further educational qualifications that might be required. There is a danger that if the standards for entry are set too high, or membership limited in some way, this may result ultimately in higher prices being charged to the end consumer.

The DGFT takes the view that education requirements for entry to the profession could have a detrimental impact on the effectiveness of competition. For example, qualification and training regulations could have a significant impact on equality of opportunity and on ensuring that there be a wider choice of

persons providing legal services. This type of issue has been raised with the professional bodies in the course of the OFT's assessment of the bodies' rules of conduct aimed at their respective membership. For example, in an application from the General Council of the Bar, in 1992, the DGFT commented adversely on proposals to govern entry to the Bar's Vocational Course (the proposal was to artificially limit the number of candidates able to enter vocational training for the Bar).

8. Barriers to entry

The OFT has noted in recent years that the professions have begun to take a less parochial view. Some professional bodies, such as the Royal Institute of British Architects, have, for instance, been making membership benefits more available to overseas members and have been active in seeking to attract overseas membership. The Institution of Civil Engineers (ICE) has also been reviewing its entry standards. As a consequence, ICE has focused to a greater extent on services to its overseas members too and developing links with overseas universities.

In the legal profession, the number of candidates has continued to outstrip the number of vacancies. The usual route into the profession is through a law degree supplemented by additional training requirements (which will differ depending on what part of the legal profession the candidate is applying for). There is many more law students than there are vacancies. It is estimated that in 1994 more than 6 000 students passed a law degree but that only 3 500 training places were available in solicitors' firms. In times of recession, many firms cut down on the number of training places that they offer. The level of law firms' intake is largely determined by their ability to generate fees.

In the health sector, the Medical Workforce Standing Advisory Committee published a report in 1997 which concluded that, in order to ensure a supply of doctors sufficient to meet the needs of the UK in the long term, the intake of students to medical schools would need to be increased by about 1 000 places (which would represent an increase of about 20 percent in the number of existing places). The Government has subsequently announced that the intake of medical students will be increased from 5 000 (1997) to 6 000 places by 2005. In addition, more flexible working arrangements and recruiting campaigns are intended to attract more people into nursing and to encourage qualified nurses and midwives to return to the profession.

9. Summary

Many of the professions are presently going through a period of change that even ten years ago might have been inconceivable to some. The discipline of market forces is being felt throughout the entire range of professions. Through the period, the OFT has offered encouragement and advice, and will continue to do so, to encourage more competition where it can. In addition, the OFT will continue to attack the more pernicious manifestations of competition ills, such as fee scales, at every opportunity.

NOTES

1 *Multi disciplinary Practices - Why? Why not?* The Law Society, published October 1998

2 *Private Medical Services: a report on agreements and practices relating to charges for the supply of private medical services by NHS consultants* Monopolies and Mergers Commission Cm 2452, published February 1994

3 *Civil Engineering Consultancy Services: a report on the supply of civil engineering consultancy services in relation to restrictions on advertising* Monopolies and Mergers Commission Cm 564, published 16 March 1989

4 *Services of Medical Practitioners: a report on the supply of the services of registered medical practitioners in relation to restrictions on advertising* Monopolies and Mergers Commission Cm 582, published 16 March 1989

5 *Services of Professionally Regulated Osteopaths: a report on the supply of the services of professionally regulated osteopaths in relation to restrictions on advertising* Monopolies and Mergers Commission Cm 583, published 16 March 1989

6 *Restrictions on the Kind of Organisation through which Members of Professions may offer their Services.* A report by the Director General of Fair Trading, published August 1986

UNITED STATES

Regulation of professions in the US occurs at the State governmental level in the form of occupational licensing laws and related business practice regulations. In addition, self-regulating professional associations promulgate recommended standards of practice or codes of ethics. Governmental and private regulations can serve the public interest by ensuring an acceptable standard of competence and integrity of professional services, which in turn promotes the health, safety and well being of consumers. This is particularly beneficial when it would be difficult for consumers to evaluate the quality of professional services, and factors such as litigation, reputation and guarantees are inadequate to enable consumers to make an informed purchase decision. However, regulations may also restrict professionals' ability to compete effectively, resulting in consumer injury, without providing benefits that outweigh the harm to competition.[1]

The turning point for active application of the antitrust laws to the professions was the 1975 US Supreme Court decision in *Goldfarb v. Virginia State Bar*.[2] Since then the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the Department of Justice ("DOJ") have undertaken a broad enforcement program designed to eliminate private restrictions on business practices of state-licensed professions that may adversely affect the competitive process and raise the prices or decrease the quality of professional services.[3] In addition, the agencies have submitted numerous comments on the benefits and costs of occupational regulation to state legislatures, regulatory commissions and others, filed *amicus curiae* briefs in private cases, issued advisory opinions concerning proposed ethical restrictions by professional associations and other agreements among professionals, adopted enforcement policy statements on certain co-operative activities of health care providers, and issued an industry-wide rule covering certain opthamalic services.[4]

The first section of this paper provides an overview of the agencies' enforcement actions; the second section sets out the principles articulated in our advocacies in regulatory and legislative proceedings and discusses a few recent advocacies.

1. Enforcement actions

The agencies have challenged successfully anticompetitive restrictions imposed by private self-regulatory associations or state boards, where the state board regulation extended beyond protected "state action"[5] and other agreements among competitors, including restraints on advertising and solicitation, price competition, and contract or commercial practice.

1.1 Restraints on advertising and solicitation

Private professional associations and State boards traditionally imposed restrictions on advertising and solicitation by professionals, claiming this was necessary to protect consumers from false or deceptive advertising or marketing practices. The agencies have examined whether these restrictions are so broad that they also unnecessarily restrict the provision of truthful information to consumers that could enhance competition.

Some of the most important cases that the Commission has brought challenging restrictions on the dissemination of truthful advertising of professional services have been in the health care area. In the seminal case of *American Medical Association* ("*AMA*"),[6] the Commission found, among other things, that the AMA, through its ethical guidelines, had illegally suppressed virtually all forms of truthful, non-deceptive advertising and similar means of solicitation by doctors and health care delivery organisations. The Commission ordered the AMA to cease and desist from prohibiting such advertising. However, it allowed the AMA to continue its use of ethical guidelines to prevent false or deceptive advertisements or oppressive forms of solicitation.

In the decade since the final decision in the AMA case, the Commission has challenged private dental,[7] medical,[8] and other professional associations [9] for various restrictions on the dissemination of truthful information, usually imposed through provisions in codes of ethics. In addition, the Commission has challenged and banned similar restrictive rules adopted by State boards responsible for regulating health care professionals that were not shielded from antitrust liability by the state action doctrine.[10]

In 1990, the Commission charged the American Institute of Certified Public Accountants, the dominant professional association in the accounting field, with restricting truthful, non-deceptive advertising by prohibiting members from making truthful claims in self-laudatory or comparative advertisements, or using truthful testimonials. It also alleged that the association restricted members' efforts to solicit clients directly and by referrals. The consent order bars the association from prohibiting its members from engaging in these practices.[11] Similarly, the Commission recently brought cases involving advertising of engineering services. For example, in 1993, the Commission entered a consent order with the National Society of Professional Engineers (NSPE) settling charges that the NSPE, through its ethics code, restricted truthful or nondeceptive advertising by its members.[12]

In 1996, the Commission found that the *California Dental Association* ("*CDA*")[13] applied ethical guidelines -- purportedly adopted to prevent deceptive advertising -- in a way that restricted its member dentists from engaging in a variety of truthful and nondeceptive advertising. CDA's restrictions covered advertising of prices, discounts, quality, superiority, guarantees, and availability of dental services. For example, CDA barred its members from representing that their prices were "low," "reasonable," and "affordable," prohibited money-back guarantees as misleading, and prohibited dentists from reporting the results of free dental screenings of school children on forms bearing the dentists' names and addresses (a means of soliciting new patients). The Commission condemned the horizontal restrictions on price advertising as *per se* illegal and also held these restrictions and other nonprice advertising restraint illegal under an abbreviated rule of reason analysis.[14]

CDA claimed that its "ethical" requirements resulted in more information to consumers, that its ban on quality claims was necessary to avoid deception, and that its actions were lawful because California imposed similar restrictions on advertising. The Commission rejected the claim as without any factual basis, and found that CDA did not have the power to interpret and enforce the state law itself.[15]

The Ninth Circuit Court of Appeals sustained the Commission's holding that CDA's price and nonprice restraints on advertising and solicitation were unlawful under an abbreviated rule of reason analysis.[16] The US Supreme Court is reviewing this decision during its current term.

In acting to eliminate anti-competitive restraints on professional advertising, the Commission has emphasised the important role of professional associations in regulating deceptive advertising and in-person solicitation of "vulnerable" persons. The Commission's orders in the AMA case and all subsequent cases contain a proviso allowing a professional association to act against advertising claims that it "reasonably believes would be false and deceptive within the meaning of Section 5 of the Federal Trade Commission Act." The Commission's CDA decision stated that the "complaint did not challenge

the right ... to suppress advertising that was misleading or deceptive or otherwise caused unavoidable and unreasonable harm to consumers."[17] The CDA order also permits the CDA to restrict solicitation of patients who may be particularly vulnerable to undue influence.[18]

1.2 Restraints on price competition

An early DOJ case, *National Society of Professional Engineers v. US.*,[19] challenged a professional society's prohibition in its canon of ethics of competitive bidding by its members. In that case the Supreme Court held that the trial court was justified in refusing to consider the defense that the canon was justified "because it was adopted by members of a learned profession for the purpose of minimising the risk that competition would produce inferior engineering work endangering the public safety." The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," and that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

The Commission has challenged various forms of price restraints by medical and other professional societies including the proscription of: *i*) underbidding for a contract or agreeing to accept compensation that was "inadequate" in light of the usual fees in the community;[20] *ii*) offering services at "discounted fees";[21] *iii*) low pricing and granting favourable credit terms;[22] and *iv*) requiring members to uphold the principle of "appropriate and adequate compensation."[23] Recently the FTC sued the International Association of Conference Interpreters ("AIIC") and its US affiliate members, charging that the association published lists of fees that its members were required to charge. The complaint also challenged certain work rules facilitated price fixing and restrained price competition among AIIC members by requiring, among other things, that all interpreters on a team be paid the same rate, that fees be paid in day-long increments, that certain standards of lodging and transportation be provided, that payment be made for travel, rest and study days, and that services not be provided free of charge. The Commission's order requires AIIC to eliminate these rules and by laws regarding these challenged practices.[24]

Some cases have involved price-fixing agreements in the context of a joint arrangement. An important issue in these cases has been whether the agreement on price should be considered *per se* unlawful or ancillary to a legitimate joint venture and therefore analysed under the rule of reason. In 1998, the Commission settled charges that three companies and two doctors illegally fixed prices for professional services for lithotripsy procedures -- a non-surgical treatment for kidney stones. The urologist-owners of the facilities in which the procedures were performed financially integrated by jointly investing in the purchase and operation of the machines used to perform the procedure. The complaint alleged, among other things, that the collective setting of fees for lithotripsy professional services was not reasonably necessary to achieve efficiencies from the legitimate joint ownership and operation of the lithotripsy machines nor were the urologists sufficiently integrated to justify the agreement to fix prices for lithotripsy services. There was a legitimate basis for establishing a set fee for use of the lithotripter but not for insisting that all doctors charge the same professional fee. The consent order prohibited the respondents from fixing prices and required them to terminate third-party payor contracts that include the challenged fees at contract-renewal time or upon request of the payor.

The FTC has also challenged less explicit price-related agreements that have an impact on prices. In *ASFE, Association of Engineering Firms Practising in the Geosciences*,[25] the Commission issued a consent order settling charges that an association of engineers conspired with some of its members to restrain competitive bidding and to induce its members, through insurance and peer review programs, not to bid or give favourable prices or credit terms for civil engineering services. The consent order bars the association from using a peer review process to evaluate its members' fees, pricing, or bidding practices,

disseminating materials concerning any engineering professional's intention not to bid, disclosing to an insurer any information about a member's fees, pricing, bidding, or advertising, and stating that competitive bidding, low prices, or liberal credit terms affect any engineer's ability to obtain or keep insurance.

Collaboration by competing health care providers to thwart cost containment efforts also raises price fixing concerns. The Commission has brought numerous cases challenging health care providers' collective efforts to increase reimbursement levels through boycotts and other agreements to fix prices. In 1997, the Commission charged the College of Physicians and Surgeons of Puerto Rico and related medical groups with taking collective action to attempt to raise their reimbursement level under a program developed by the Commonwealth government to provide health care coverage for the 30 percent of the Puerto Rican population that is uninsured. The College called an eight-day strike, pursuant to which members closed their offices and, in some cases, cancelled elective surgery without notice. With the co-operation of the Commonwealth government, the FTC reached a settlement that resulted in an injunction and a $300 000 payment to a catastrophic fund to be administered by the Puerto Rico Department of Health.[26]

The FTC has challenged concerted action to impede private, as well as government, cost-containment efforts. In 1997, the Commission charged a physicians group consisting of 85 percent of all physicians and 90 percent of all primary care physicians in Mesa County, Colorado with fixing prices in dealing with health plans and excluding health plans from entering the area by collectively refusing to deal.[27] The agreement allegedly resulted in higher prices for physician services and hindered the development of alternative health care financing and delivery systems. The case has been withdrawn from adjudication so that the Commission can consider a proposed consent order.

In recent years, the DOJ has challenged three anticompetitive physician hospital organisations ("PHOs"). PHOs usually include one or more hospitals and most of the physicians who have privileges at those hospitals' PHOs. In all three cases, there was no financial or other substantial integration among the competing physicians; thus, their joint-pricing activities were challenged as *per se* violations. All three suits were settled with consent decrees. In one such case, the Division alleged that the only women's hospital in Baton Rouge, Louisiana, had joined with 90 percent of the obstetrical/gynecological practitioners in that area both to protect the hospital from the development of competing inpatient services and to maintain or increase prices for both physician and hospital services above competitive levels. The parties entered into a consent decree enjoining the hospital and a corporation formed by the physicians from negotiating on behalf of competing physicians and from engaging in various other anticompetitive activities.[28]

The antitrust laws have long exempted collective bargaining between employees and employers. However, this exemption does not cover independent economic actors such as self-employed physicians in independent practice. Recently, an increasing number of physicians have been joining unions and other such organisations to increase their bargaining leverage with health plans. Although such organisations may lawfully collectively bargain for employed physicians, antitrust issues are implicated when they attempt to negotiate on behalf of otherwise competing, non-employee physicians.

On August 12, 1998, the DOJ filed a civil suit against the Federation of Physicians and Dentists, a physicians union, for orchestrating a boycott to extract artificially high fees for competing independent orthopedic surgeons in Delaware. The complaint alleged that in 1996 and 1997, nearly all of the orthopedic surgeons in Delaware joined the Federation and thereafter acted in concert through the Federation to resist the efforts of Blue Cross of Delaware to reduce the fees Blue Cross paid to them. The Federation purported to be operating as a third-party messenger on behalf of the orthopedic surgeons. A properly implemented third-party messenger system, with adequate safeguards against collusion, should

not lead to a messenger's negotiating on behalf of competing independent physicians or enhance the bargaining leverage of such physicians. Such arrangements may facilitate the contracting process, reduce transaction costs, and thus ultimately benefit consumers. In this case, however, the Federation's messenger system facilitated, rather than safeguarded against, collusion. The Federation encouraged the physicians to refuse to negotiate with Blue Cross except through the Federation. By the end of 1997, nearly all of the members of the Federation had rejected a Blue Cross fee proposal and terminated their contracts with Blue Cross. The case is currently in litigation.[29]

1.3 Exclusion of competitors

The Commission has a long record of challenging concerted efforts to exclude new competitors and forms of competition in the health care sector. The cases have addressed obstruction of entry by HMOs,[30] non-physician providers,[31] hospital-sponsored clinics,[32] and other "alternative" arrangements.[33]

In the early 1990s the Commission issued a series of orders against alleged threatened boycotts by physicians to prevent local hospitals from pursuing an affiliation with the Cleveland Clinic, a nationally-known provider of comprehensive health care services.[34] The Clinic, which operated as a multi-specialty group medical practice, offered a pre-determined "global fee" or "unit price" covering all aspects of many services, such as surgery. The Commission's complaints alleged that when the Clinic sought to establish a facility in Florida, local physicians sought to prevent its physicians from gaining hospital privileges by threatening to boycott the hospitals. The Commission's orders prevent such conduct from recurring.

In 1994, the Commission settled charges that the medical staff of Good Samaritan Regional Medical Center conspired to boycott the hospital in order to force it to end its dealings with a potentially cost-containing multi-specialty physician's clinic that would have competed with the staff.[35] The consent order prohibits the respondents from agreeing, or attempting to agree, to restrict services offered by the hospital, clinic, or any other health care provider by refusing to deal with others offering health care services or by withholding patient referrals.

In June 1995, the DOJ sued the American Bar Association ("ABA"), alleging that the ABA, in its accreditation of law schools, restrained competition among professional personnel at ABA-approved law schools, by fixing their compensation levels and working conditions. The complaint also alleged that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather than setting minimum standards for law school quality and thus providing valuable information to consumers, which are legitimate purposes of accreditation, the ABA at times acted as a guild that protected the interests of professional law school personnel. ABA approval was a valuable asset to law schools as over 40 states required graduation from an ABA-approved school to qualify to take the state bar exam, and the ABA is the only agency the US Department of Education recognises as a law school-accrediting agency. In 1996, the US District Court entered a modified consent decree, which prohibits the ABA from misusing its powers as the law school-accrediting agency to restrain competition among professional personnel at ABA-approved law schools. The decree bars the ABA from fixing faculty salaries, refusing to accredit schools simply because they are for-profit, and refusing to allow ABA-approved law schools to accept credits from schools that are state-accredited but not ABA-approved.

Claims of exclusion from professional associations, provider-sponsored health plans, and the like or denial of accreditation or certification require careful analysis. Membership organisations perform valuable functions and cannot exist without membership rules, which can be procompetitive.[36] But exclusion can harm competition if excluded professionals are unable to compete effectively without access to the group.[37]

1.4 Restrictions on contract and commercial practice

In a number of cases the Commission successfully challenged ethical guidelines and membership requirements of professional associations that restricted their members' contractual or commercial practices. In the AMA case, the Commission found that the AMA's "contract practice" rules adversely affected competition by preventing the development of potentially more efficient forms of business format or practice. Under these rules, it was unethical for a physician, among other things, to provide medical services to patients under a salaried contract with a hospital or health maintenance organisation that was not controlled by doctors or to enter into any partnership or other arrangement that involved sharing fees with non-physicians.

The Commission also has issued consent orders requiring professional societies to cease restricting their members from rendering services on a basis other than the traditional fee-for-service, such as becoming a salaried employee of a hospital or physician-owned physical therapy service, or practising in other "non-traditional" ways, such as in a franchise arrangement or in "commercial settings."[38] For example, the FTC challenged the American Academy of Optometry's requirement that its members "practice in locations consistent with the majority of other health professions in the area."[39] The Commission charged that it restricted the choice of practice location to the traditional private office and prevented optometrists from practising in shopping centers and other locations customarily considered "commercial" in nature. As a result, the Commission alleged, consumers were "deprived of the potential cost savings, convenience, and efficiency benefits of optometric practice locations in commercial settings in their purchases of optometric services and optical products." The case was settled with a consent order that prohibited the Academy from restricting the types of practice locations of its members or prospective members.

Another restraint on contracting in the health care sector with potentially anticompetitive results is the "Most Favoured Nation" ("MFN") clause, which essentially requires a health care provider to charge an insurance company no more than the lowest prices the provider charges any other insurer or, in some cases, individual patients. Some MFNs go even further and explicitly or implicitly ensure that the MFN payer gets a distinct advantage over its rivals by, for example, specifically requiring the provider to charge rival payers a percentage greater than the rate the provider charges the MFN payer for the same services. This creates a "price buffer" between the services protected by the MFN and the services of competing plans. Under certain market conditions, MFNs discourage provider discounting, deter innovation, and reduce meaningful consumer choices in health plans, either by facilitating collusive pricing among competing providers or by discouraging providers from offering lower rates or more cost-effective care to rival plans.

The DOJ sued to stop Delta Dental of Rhode Island ("Delta") and unnamed co-conspirators from engaging in unlawful agreements that discouraged dentists from offering fees lower than those paid by Delta patients to patients covered by other insurance companies and to uninsured patients. Delta was the largest dental insurer in Rhode Island and had contracts with approximately 90 percent of the dentists in the State. Fees from dental services provided to Delta enrolees represented a substantial portion of most dentists' income. Almost all of the Delta dentists agreed to comply with the MFN clause and refused to contract at prices below Delta's with limited-panel dental insurance plans that were trying to enter the Rhode Island market. The case was settled with a consent decree. The Court rejected Delta's argument that most MFN clauses are *per se* legal and agreed with the Division that, under certain conditions, MFNs may have substantial anticompetitive effects and are properly analysed under the rule of reason.[40]

2. Advocacies

The goal of the agencies' competition advocacy programs is to prevent or reduce possible consumer injury caused by federal, state or local laws and regulations, or self-regulatory standards that interfere with the proper functioning of the marketplace. The Commission and DOJ pursue this goal by advising governmental and self-regulatory entities of the potential effects of proposed legislation or regulation on competition and consumers. Since the late 1970s, the Commission staff has submitted over 400 comments or amicus curiae briefs to state and self-regulatory entities on antitrust issues relating to such professionals as accountants, lawyers, dentists, physicians, optometrists, chiropractors, podiatrists, architects, paralegals, and veterinarians.[41]

The staff comments note that occupational regulation has both benefits and costs that must be weighed. Regulation may promote or assure a standard of service quality to consumers, especially when judging quality is more difficult for consumers than for providers. However, consumers can obtain information about service quality by other means including experience, advertising, and reputation as well as from the assurances provided by regulation.

Restrictions on business aspects of professional practice do not always benefit consumers, a conclusion that is supported by economic studies that have found little relationship between such restrictions and the quality of care provided.[42] Also, restrictions can limit professionals' ability to compete effectively with each other. Further, restrictions on professions can make it more difficult and costly for professionals to provide their services, and these higher costs may be passed on to consumers in the form of increased prices and reduced services.

Comments also have recommended removal of regulations that prohibit the location of professional offices in commercial locations. Staff contends that such location restrictions serve no apparent purpose other than to inhibit the formation of more convenient and higher-volume commercial practices that can take advantage of volume purchase discounts and other economies of scale that may be passed on to consumers as lower prices.

In the area of legal services, in 1996 and 1997, FTC and DOJ staff submitted comments in opposition to the Virginia State Bar's proposal to prevent non-lawyers and title company attorneys from competing with lawyers in performing closings of real estate transactions and refinancing. The comments argued that the proposal would increase costs to consumers who would not otherwise hire an attorney and was not justified on consumer protection grounds. Moreover, the proposal likely would lead to higher prices for lawyers' settlement services by eliminating competition from lay services. After the DOJ and FTC submitted joint comments to the Virginia Supreme Court, copies of the letter were forwarded to the Virginia legislature. Virginia then adopted a statute allowing lay services to continue to compete with law firms in providing closings. The Justice Department successfully challenged a similar effort in Kentucky.[43]

In 1997, FTC staff opposed a proposed rule by the Washington legislature that would require candidates for Certified Public Accountant status to earn at least 150 semester hours of undergraduate academic credit. Economic analysis indicated that such a rule would raise the educational entry requirements for CPA licensure and in turn would likely increase costs of entry and raise prices to consumers of CPA services. The comments also noted there was no persuasive evidence that the net effect of the proposal would be beneficial to consumers.

The Commission has also commented on proposed federal legislation to exempt health care professionals from the antitrust laws. In July 1998, FTC Chairman Pitofsky testified before the House Committee on the Judiciary opposing proposed legislation that would create an exemption from the antitrust laws to enable health care professionals to negotiate collectively with health plans over fees and

other terms of dealing. He testified that in addition to potentially harming consumers and raising health care costs, the immunity is unnecessary to protect legitimate collaboration among competing health care providers, would immunise anticompetitive activities that could diminish the effective functioning of health care markets, and would likely encourage those in other industries to seek similar exemptions.[44] He also noted that the proposed exemption would be a radical departure from existing labour law standards that protect the right to bargain collectively only in the employer-employee context but not to independent contractors like self-employed physicians. The bill did not pass, but a similar bill has been introduced in the current Congress.

3. Conclusion

In the twenty-four years since the US Supreme Court paved the way for the application of antitrust law to professional services, the Federal Trade Commission and the Department of Justice have pursued an active policy, through law enforcement actions and advocacy, of opposing anti-competitive restraints on the provision of such services. Although neither the FTC nor the DOJ has conducted a formal empirical study of the effects of their efforts, we note that the markets for the provision of many professional services have been substantially liberalised and deregulated during this period. We believe that the elimination of restraints on conduct, such as advertising, discount pricing, and contractual and commercial practices, has resulted in increased competition, providing substantial welfare gains for consumers.

NOTES

1 A 1990 report by Federal Trade Commission economists concluded that occupational regulations frequently increase prices and impose substantial costs on consumers without increasing the quality of professional services. Cox and Foster, The Costs and Benefits of Occupational Regulation, Federal Trade Commission Bureau of Economics Staff Report, October 1990. The report recommended that the costs and benefits of any regulatory proposal be weighed on a case-by-case basis.

421 US 773 (1975). In this case, the Supreme Court struck down a minimum fee schedule adopted and enforced through disciplinary action by a state bar association, finding that the conduct was essentially private anticompetitive activity not shielded by the state action doctrine. Prior to this case, some courts believed that the "learned professions" should be treated differently, reasoning that because their goal is to provide services necessary to the community rather than to generate profits, their activities did not fall within the terms "trade and commerce" in Section 1 of the Sherman Act. The *Goldfarb* case also established that professional activities have a sufficient effect on interstate commerce to support Sherman Act jurisdiction.

3 Press releases and information about FTC and DOJ enforcement actions and competition advocacies are available on the FTC (http://www.ftc.gov) and DOJ (http://www.usdoj.gov/atr) home pages. There is a separate description of enforcement actions in the health care sector since the 1970s under "FTC Antitrust Actions in Health Care Services and Products." Summaries of 54 DOJ business review letters since the 1993 issuance of the DOJ/FTC Health Care Antitrust Statements of Enforcement Policy and of 32 DOJ health care cases since August 25, 1983 are available at http://www.usdoj.gov/atr/public/health_care/health_care.htm.

4 Advisory opinions and amicus briefs filed in health care cases can be found on the FTC home page, *id.* US Department of Justice and Federal Trade Commission, Statements of Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (August 18, 1996). The Opthamalic Practice Rule, 16 C.F.R. § 456 (1996), issued under the FTC's consumer protection authority, requires opthamalic service providers to provide consumers without charge a copy of their prescriptions and prohibits conditioning the availability of an eye examination on a requirement that the patient agree to purchase any opthamalic goods.

5 This judicial doctrine provides generally that the antitrust laws do not apply to action by a state in its sovereign capacity or to private conduct directed or compelled by the state. Direct action by a state legislature or court is automatically exempt, without further inquiry. *See*, *e.g.*, Hoover v. Ronwin, 466 US 558 (1984); Bates v. State Bar, 433 US 350 (1977); Parker v. Brown, 317 US 341 (1943). Where the challenged conduct is undertaken by a state agency, local government, or private party, further inquiry is required into whether the conduct followed "clearly articulated and affirmatively expressed state policy" to displace competition and, in the case of a private party, the restraint is subject to "active state supervision." *See*, *e.g.*, FTC v. Ticor Title Insurance Co., 544 US 621 (1992); Southern Motor Carriers Rate Conference, Inc. v. US, 471 US 48 (1985).

6 94 F.T.C. 701 (1979). The Commission's decision was affirmed and modified by the Court of Appeals, 638 F.2d 443 (2d Cir. 1980), and affirmed in a 4-4 vote by the Supreme Court, 455 US 676 (1982).

7 *See, e.g.,* Association of Independent Dentists, 100 F.T.C. 518 (1982)(general restriction on truthful advertising without Board of Director's prior approval).

8 See, e.g., American Psychological Association, 115 F.T.C. 993 (1992)(restrictions on truthful advertising, comparative statements on services, testimonials, direct solicitation, and participation in patient referral services); Connecticut Chiropractors Association, 114 F.T.C. 708 (1991)(restriction on truthful advertising of free or discounted services, including use of coupons, or ads deemed by the association to be "undignified or not in good taste" or implying "unusual expertise."); American Academy of Optometry, Inc. 108 F.T.C. 25 (1986)(restriction on all truthful advertising and solicitation).

9 *See, e.g.,* National Association of Social Workers, 116 F.T.C. 140 (1993)(restrictions on use of testimonials and other forms of truthful advertising or solicitation); Structural Engineers Association of Northern California, 112 F.T.C. 530 (1989)(restriction on solicitation).

10 *See, e.g.,* Texas Board of Chiropractic Examiners, 115 F.T.C. 470 (1992); Massachusetts Board of Registry in Optometry, 100 F.T.C. 549 (1988).

11 American Institute of Certified Public Accountants, 113 F.T.C. 698 (1990).

12 National Society of Professional Engineers, 116 F.T.C. 787 (1993). *See also* AFSE, the Association of Engineering Firms Practising in the Geosciences, 116 F.T.C. 399 (1993)(restrictions on self-laudatory advertising); Structural Engineers Association of Northern California, 112 F.T.C. 530 (1989) (code of ethics prohibited advertising work or merit in a self-laudatory manner).

13 121 F.T.C. 190 (1996), *aff'd* 128 F.2d 720 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 29 (1998).

14 The abbreviated rule of reason analysis is designed for restraints that are not *per se* unlawful but are sufficiently anti-competitive that they do not require a full rule of reason inquiry. *See* NCAA v. Board of Regents of University of Oklahoma, 468 US 85, 106-10 & n.39 (1984)("The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.")(internal citations omitted). In *CDA*, the Commission found that there were substantial anti-competitive effects because the advertising restraints likely reduced output and deprived consumers of valuable information and competition among dentists, that CDA had sufficient market power to enforce the restrictions, and that the restraints did not yield any countervailing consumer benefits to justify the restrictions.

15 CDA also challenged the legal standard for analysing the advertising restrictions as well as the substantiality of the evidence supporting the findings that there was an agreement in restraint of trade, that CDA bans truthful, non-deceptive advertising and that it had sufficient market power for its regulations to harm competition.

16 California Dental Association v. FTC, 128 F.2d 720 (9th Cir. 1997).

17 California Dental Association, 121 F.T.C. 190, 285.

18 *Id.* at 373; *see also* American Psychological Association, *supra* note 8; National Association of Social Workers, 116 F.T.C. 140 (1993).

19 435 US 679 (1978).

20 *E.g.*, AMA, *supra* note 6.

21 *E.g.*, Connecticut Chiropractor Association, *supra* note 8.

22 *E.g.*, AFSE, The Association of Engineering Firms Practising in the Geosciences, *supra* note 12.

23 *E.g.*, Structural Engineers Association of Northern California, 112 F.T.C. 530 (1989).

24 International Association of Conference Interpreters, 123 F.T.C. 465 (1997).

25 *Supra* note 12.

26 FTC and Commonwealth of Puerto Rico v. College of Physicians and Surgeons, CV No. 972466 (D.P.R. 1997).

27 Mesa County Physicians Independent Practice Association, Dkt. 9284, 63 Fed. Reg. 9549 (Feb. 25, 1998).

28 US v. Women's Hospital Foundation and Women's Physician Health Organisation, 1996-2 Trade Cas. (CCH) ¶ 71,561 (M.D. La. 1996).

29 US v. Federation of Physicians and Dentists, Inc., 98-475 (D. Del. 8/12/98).

30 Forbes Health System Medical Staff, 94 F.T.C. 1042 (1978).

31 State Volunteer Mutual Insurance Corp., 102 F.T.C. 1232 (1983).

32 *See* Medical Staff of Dickinson County Memorial Hospital, 112 F.T.C. 33 (1989); Medical Staff of John C. Lincoln Hospital & Health Center, 106 F.T.C. 291 (1985).

33 *See, e.g.*, Iowa Chapter of American Physical Therapy Association, 111 F.T.C. 199 (1988); Michigan Optometric Association, 106 F.T.C. 342 (1985); Sherman A. Hope, M.D., 98 F.T.C. 58 (1981).

34 Dirian Seropian, M.D., 115 F.T.C. 891 (1992); Medical Staff of Holy Cross Hospital, 114 F.T.C. 555 (1991); Medical Staff of Broward General Medical Center, 114 F.T.C. 542 (1991).

35 Medical Staff of Good Samaritan Regional Medical Center, 119 F.T.C. 106 (1994).

36 Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 US 284 (1985).

37 *Id.*

38 *E.g.*, Iowa Chapter of American Physical Therapy Association, 111 F.T.C. 199 (1988); Michigan Optometric Association, 106 F.T.C. 342 (1985).

39 American Academy of Optometry, 108 F.T.C. 25, 27 (1986).

40 US v. Delta Dental of Rhode Island, 943 F. Supp. 172 (D.R.I. 1996), consent decree, 1997-2 Trade Cas. (CCH) ¶ 71,860 (D.R.I. July 2, 1997).

41 A summary of these advocacies is available in the United States' annual reports on developments in competition policy and enforcement to the Committee on Competition Law and Policy.

42 *See, e.g.,* Cox and Foster, *supra* note 1.

43 *See* DOJ press release at http://www.usdoj.gov/atr/public/press releases/1997/1210.htm.

44 Chairman Pitofsky's testimony is available on the FTC home page at http://www.ftc.gov/os/1998/9807/camptest.htm.

COMMISSION EUROPEENNE

1. Introduction

Les professions libérales bénéficient dans tous les Etats membres de l'Union européenne d'un statut particulier par rapport à d'autres secteurs de l'économie. Elles sont assujetties à la fois à des réglementations étatiques et privées dont la proportion et leur portée divergent non seulement d'un État membre à l'autre mais aussi selon la profession en cause.

L'action de la Commission en matière d'application des règles de concurrence aux professions libérales est encore à ses débuts. L'une des raisons en est que dans la plupart des professions libérales les prestations des services conservent encore un caractère national, voire local, et que de ce fait la condition d'affectation sensible du commerce interétatique nécessaire pour appliquer les règles de concurrence du Traité n'est pas remplie dans la plupart des cas qui se présentent à la Commission. Par ailleurs, même lorsque le commerce interétatique est affecté de manière sensible, l'effet des pratiques restrictives peut ne se faire sentir qu'à l'intérieur d'un seul Etat membre et la Commission considère alors qu'il n'y a pas un intérêt communautaire à les poursuivre. Dans ce cas l'initiative des poursuites est laissée aux Etats membres.

En tout état de cause pour les cas qui présentent une dimension communautaire la Commission considère que le cadre législatif ou réglementaire au niveau national est sans incidence sur l'application des règles de concurrence communautaires. La Cour de Justice a d'ailleurs confirmé ce principe à plusieurs reprises[1].

2. Décisions adoptées par la commission et publiées au Journal Officiel

2.1 Fixation collective de prix

Ce n'est qu'en juin 1993 que la Commission a adopté sa première décision en matière d'application de l'Article 85 du Traité CE aux pratiques d'un ordre professionnel. Cette décision a enjoint au Conseil national des expéditeurs en douane en Italie (CNSD) de mettre fin à l'établissement d'un tarif minimal et maximal fixe pour chaque opération effectuée par ses membres (tarif approuvé ensuite par les pouvoirs publics). La Commission a également enjoint à l'ordre professionnel des agents de la propriété industrielle en Espagne (COAPI) de mettre fin à l'établissement annuel des tarifs minimaux applicables aux clients étrangers et des tarifs minimaux applicables aux clients résidant en Espagne dans la mesure où ces derniers tarifs concernaient des services transfrontaliers. Les tarifs établis par le COAPI n'étaient pas approuvés par les pouvoirs publics mais une législation nationale accordait au COAPI le pouvoir de fixer de tels tarifs. Ces deux décisions[2] ont donc condamné la fixation collective de prix indépendamment du cadre réglementaire national.

La décision de 1993 a fait l'objet d'un appel devant le Tribunal de première instance, qui ne s'est pas encore prononcé. La Commission a par ailleurs ouvert une procédure d'infraction contre l'Italie qui a

donné lieu à l'arrêt de la Cour de Justice du 18 juin 1998. La Cour a estimé que la République italienne a manqué aux obligations qui lui incombent en vertu des Articles 5 et 85 du Traité CE, en adoptant et en maintenant en vigueur une loi qui impose au Conseil national des expéditeurs en douane – CNSD, par l'attribution du pouvoir de décision correspondant, l'adoption d'une décision d'association d'entreprises contraire à l'Article 85 du Traité CE, consistant à fixer un tarif obligatoire pour tous les expéditeurs en douane.

2.2 Restrictions de publicité

Le 7 avril 1999, la Commission a adopté sa première décision portant sur des restrictions à la publicité et à l'offre de services dans le secteur des professions libérales[3]. Dans cette décision la Commission apprécie, en effet, la compatibilité des dispositions du code de conduite de l'Institut des mandataires agréés (l'IMA) - un ordre professionnel qui regroupe, au niveau européen, tous les mandataires agréés auprès de l'Office européen des brevets (l'OEB) - à l'égard de l'Article 85 du Traité et de l'Article 53 de l'accord EEE.

La décision établit une distinction, dans le cadre de la profession en cause, entre règles de nature déontologique et règles restrictives de la concurrence entre les membres de la profession. Font partie de la première catégorie les règles nécessaires notamment pour assurer l'impartialité, la compétence, l'intégrité et la responsabilité des mandataires, pour éviter les conflits d'intérêts et la publicité trompeuse ou encore pour garantir le fonctionnement efficace de l'OEB. Ces règles ne sont pas considérées comme restrictives de la concurrence dans le contexte spécifique de cette profession. De plus, la décision accorde une exemption jusqu'au 23 avril 2000, donc pour une période transitoire de très courte durée, aux dispositions du code de conduite restrictives de la concurrence qui interdisent les membres de l'IMA de faire de la publicité comparative et d'offrir activement des services aux utilisateurs qui ont déjà été clients d'un autre mandataire. L'expiration de l'exemption coïncide avec la date limite accordée aux Etats membres pour adopter les dispositions nécessaires pour se conformer à la Directive 97/55/CE[4].

Le marché en cause a été défini comme le marché des services liés aux demandes de brevets européens auprès de l'OEB qui constitue un marché distinct du marché des prestations liées aux demandes de brevets nationaux.

3. Principes établis ou réaffirmés dans les décisions adoptées par la Commission

Les principes établis ou réaffirmés dans les décisions de 1993 et de 1995 ont aussi été retenus dans la décision de 1999. Ils peuvent se résumer ainsi :

1) les membres des professions libérales sont des entreprises au sens de l'Article 85 du Traité CE lorsqu'ils exercent leur profession en tant qu'indépendants et leurs organisations professionnelles (ordres professionnels), qui regroupent tous les membres de la profession, sont des associations d'entreprises au sens de la même disposition du traité ;

2) la fixation collective de prix et les interdictions de publicité (y inclus la publicité comparative) par un ordre professionnel constituent des violations de l'Article 85 du Traité CE ;

3) les règles nécessaires, dans le cadre spécifique à chaque profession libérale, pour assurer l'impartialité, la compétence, l'intégrité et la responsabilité des membres des professions libérales, ou pour éviter les conflits d'intérêts et la publicité trompeuse ne sont pas considérées comme restrictives de la concurrence au sens de l'Article 85 paragraphe 1 du Traité;

4) le cadre juridique dans lequel s'effectue la conclusion d'accords ainsi que la qualification juridique donnée à ce cadre par les différents ordres juridiques nationaux est sans incidence sur l'application des règles communautaires de la concurrence;

5) même lorsque l'Etat délègue à une organisation professionnelle le pouvoir de fixer les prix à pratiquer par ses membres et se met de ce fait en infraction aux règles du Traité, la mise en oeuvre de ce pouvoir par l'association n'est pas soustraite à l'application de l'Article 85 du Traité.

Les trois décisions en cause concernent respectivement les expéditeurs en douane en Italie, les agents de brevets en Espagne et les mandataires agréés auprès de l'OEB mais les principes qu'elles ont établis s'appliquent également aux professions qui font l'objet de la table ronde.

4. Conclusion

La mise en oeuvre de la politique de la concurrence dans le domaine des professions libérales a pour objectif de mettre fin aux pratiques restrictives des professions libérales qui violent les règles de concurrence communautaires. Elle a aussi pour objet de promouvoir les formes de coopération qui facilitent l'accès à d'autres marchés géographiques, permettant aux membres des professions libérales d'opérer à un échelon communautaire ou international si elles n'ont pas pour effet de réserver les marchés nationaux aux professionnels ressortissants. Graduellement, la Commission essayera de tracer une ligne de démarcation entre d'une part les règles vraiment déontologiques qui échappent au champ d'application des règles de concurrence et d'autre part les règles ou pratiques interdites. En même temps, la Commission donnera des signes claires, dans le cadre de chaque profession, sur les pratiques qui pourront être exemptées lorsqu'elles ont été notifiées et remplissent les conditions prévues à l'Article 85 paragraphe 3 du Traité.

NOTES

1 *Inter alia*, l'arrêt du 17 janvier 1984, affaires jointes 43/82 et 63/82, « VBVB/VBBB », Rec. 1984, p.19, l'arrêt du 30 janvier 1985, affaires 123/83, « BNIC/Clair, Rec. 1985, p.391 et l'arrêt du 18.6.1998, affaire C-35/96 Commission c. Italie, Rec. 1998, p. I-3851

2 Décision de la Commission du 30 juin 1993 (JO N°L 203, 13.8.93, p.27) et Décision de la Commission du 30 janvier 1995 (JO N°L 122, 2.6.1995, p.37)

3 Décision de la Commission du 7 avril 1999 dans l'affaire IV/36.147, non-encore publiée.

4 Directive du Parlement Européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative, JOCE n°L 290 du 23/10/1997, p.18.

AIDE MEMOIRE OF THE DISCUSSION

1. Introduction

The Chairman noted that the regulations governing the professions could be divided into structural and behavioural regulations. By structural regulation, it is meant that the activity can only be carried out by people with certain qualifications subject to entry control by regulatory bodies, public or private. Behavioural regulation refers to regulations affecting economic activities of professions such as fee co-ordination and bans on advertisements.

The Chairman proposed that the first part of the discussion be devoted to structural issues such as the importance of regulated professions in the economy and the reforms that have taken place, and the advocacy role played by the competition authorities while the second part be on the enforcement activities of competition authorities and behavioural regulations.

2. Structural regulation

The Italian Delegate reported that about twenty publicly recognised professional categories exist in Italy, some of which coexist within the same sector, providing slightly different services. A striking example is provided by the accounting sector with three professional groups characterised by similar entry requirements and providing analogous services. Each professional group enjoys the exclusive right to provide specific services; markets are artificially segmented and competition is reduced well below its potential level.

As far as entry requirements are concerned, almost all professions are required to do a period of supervised training and all are required to pass an examination. After passing the examination, professionals are required to register at the professional association. In addition, the association issues code of conducts and exerts disciplinary power when such codes of conduct are infringed. Codes of conducts generally contain restrictions on business behaviour, mainly prohibitions on the use of advertising and minimum fee levels.

The Italian anti-trust authority has made various advocacy interventions in favour of a less pervasive and extensive regulation. In 1997, the antitrust authority concluded a general investigation on liberal professions, suggesting to the Prime Minister that regulation of the liberal profession sector should be limited in cases where important market failures occur, and even in these cases, regulation should consist of a minimum of measures to address the identified market failures. Similarly, in December 1997, the authority issued an opinion on various law proposals discussed in Parliament concerning new licensed professions. The authority reiterated that regulation of the liberal professions should not be increased.

The German Delegate provided an overview of entry control in professional service markets in Germany. In the case of accountants, an university qualification is needed, but in some cases long practical experience is sufficient. Lawyers' need the second state exam in law, because lawyers have to have the same qualifications as judges. But, in technical professions, Germany does not have any central laws or

federal laws. For decades, this has been settled at the länder level. The rationale for these qualifications is to provide a guarantee to customers. For each profession there is a control system; for lawyers, for example, the president of the Oberlanddesgericht has to accept every new lawyer who has passed the exam; he or she cannot be denied entry. In conclusion, he stated that the Bundeskartellamt has not been aware of any entry control problem as far as professions are concerned.

The Chairman referred to the United Kingdom submission which mentions that 18 categories of professions are exempted from the competition Act and that the OFT tried, unsuccessfully, to eliminate through advocacy the restrictive provisions governing the law society.

The United Kingdom Delegate described the entry requirements for professions in his country, which are based on educational background and experience. In the case of accountants, conduct audits is reserved to either certified accountants or chartered accountants. However, other accountancy functions can be carried out, without necessarily belonging to one of these bodies. The legal profession is required to have a degree level qualification - not necessarily a degree in law. In the UK, the legal profession is split into two branches, solicitors and barristers. The division between the two has broken down in more recent years with the introduction of the Courts and Legal Services Act in 1990, which widened the rights of audiences for solicitors, enabling them to appear in front of courts.

The UK Delegate explained why the Director General of Fair Trading has not eliminated through advocacy the restrictive provisions governing the Law Society. The Lord Chancellor's Department is responsible for administering new rules. He will clear with the Director General of Fair-Trading those rules where he considers there is a competition element. But it is at the discretion of the Lord Chancellor as to whether he submits them. Where he does do that, the OFT will put its case very strongly that competition should be made as liberal as possible. The OFT prefers to do that through advocacy rather than to invoke any of the formal paths of the Director General and over the years, it has had a great success with this approach.

The UK Delegate mentioned the fact that the United Kingdom has abolished the restriction on advertising through advocacy in a majority of professions, since the middle of 1980's. Price fixing schemes have also been attacked whenever it is brought to the attention of the OFT or discovered through investigation. The United Kingdom prefers to employ advocacy rather than enforcing stringent approach, because the professions are aware of the wider debate on competition in the open market and on the globalised economy and a lot of them will be taking steps to liberalise competition.

The Competition Act of 1998 merely carries over the list of the 18 exempt professions listed in the previous legislation. The Director General still has a wide range of discretion when it comes to examining competition problems brought up in these professions.

The Chairman introduced the contribution of New Zealand by noting that the Ministry of Commerce promoted a thorough review of regulation in the professions. In the legal profession an independent regulator has been proposed to address the issue of entry. Since this regulator has to be someone from the professions, to be able to check the qualifications of the professionals, the Chairman raised the question of his independence from the profession itself. He also pointed out an interesting justification for barriers to entry in the medical profession, where they are justified by the fact that in New Zealand doctors can never be sued for malpractice. Therefore, entry requirements become more important.

The New Zealand Delegate explained that the Ministry of Commerce has conducted a review of all professions, these reviews being carried out by the sectoral departments. To influence the thinking of officials who are sometimes regulation-minded, New Zealand have established a set of mandatory guidelines. These guidelines were based on questionnaire assembled by sectoral department, which, for

instance, asked what is the problem to solve? Is it the appropriate way to solve it? Does the government have to be involved? Is the law essential? Are there other changes possible?

On the independence of lawyers, officials are proposing a separate regulatory body. That proposal has not received an official backing from ministers.

The Australian delegate noted that the professions have been ruled by the competition law since 1995. In the early 1990s, the ACCC's predecessor instituted a review of the professions, with a focus on legal services. It carried out a comprehensive study, which identified the numerous anti-competitive restrictions and concluded that most of them were unjustified or if justified could be achieved in far less anti-competitive fashion. This resulted in fairly considerable changes in the regulation of the legal profession.

The Australian Delegate acknowledged that the culture surrounding the legal profession and some of the restrictions have not changed as much as they had hoped. There are still some areas (such as advocacy in court) which is reserved for the legal profession and some other areas where there is still a reservation; also some other arrangements for professional indemnity appear rather anti-competitive, but are hard to eliminate. From 1995, the Trade Practices Act has applied to the professions, including the legal profession. The ACCC is trying to conduct test cases with the medical profession and establish some precedents.

On conveyancing services, prices came down very sharply after the removal of the monopoly by lawyers. Entry into this profession is not open -- some qualification is required--, but there is a much lower level of qualification than a law degree. On the medical profession, ACCC deferred its decision to do a general report on the medical profession -- it involves complicated questions due to the role of government health policy in setting up highly anti-competitive arrangements. Instead the ACCC waited until the Act applies to the medical profession and it has been recently prosecuting cases on the medical profession: price fixing and boycotts were attacked, with considerable success in the courts; now the ACCC is seriously reviewing entry restrictions into medical specialities to see if in effect they should be freed up.

The Chairman highlighted other barriers to entry that were listed in most submissions, such as citizenship and residence requirements, the need for training and evaluation whether the person is "fit and proper". He noted that Hungary was successful in eliminating through advocacy a citizenship requirement.

The Hungarian Delegate acknowledged that the Hungarian competition office has been successful in removing citizenship requirement in some cases. At the same time he stressed the importance of the role played by the Hungarian constitutional court in contributing to the elimination of citizenship requirement on the reasoning that those requirements are potentially contrary to the Hungarian constitution (such an requirement infringes on human right).

The United Kingdom Delegate clarified that there are no formal limitations on the number of positions available in the legal profession. The level of vacancies is primarily determined by the state of the economy. If there is a lot of business for solicitors at any one time, they will be recruiting more than in years when the business is not so good. In terms of the training that is available, entry into the legal profession is normally *via* a legal degree. Once the person has his law degree, he will normally follow an additional training period. There is, however, an exception for the barrister profession. The General Council of the Bar did try to erect an artificial limitation on entry into the profession back in 1992. This was successfully attacked by the Office. Barristers still, though, have to do what is known as "pupillage": they get associated to a particular Inns of Court where they have to do twelve months training. Traditionally the first six months of this training was unpaid. However, the General Council of the Bar has

recognised that this was a potential discriminatory problem and has introduced "sponsorships" to ensure that it is more open.

The Chairman noted that the Irish submission is the only one where the issue of entry into the profession is addressed through an enforcement action by the competition authority. The Pharmaceutical Society of Ireland and the Trinity College of Dublin cases raise important issues both with respect to entry into the profession and with respect to competition between universities.

The Irish Delegate acknowledged that the Irish competition authority has attacked a government-endorsed exclusive deal between one university and a profession, which excludes competitors in the provision of training. Another college appealed the exclusive deal on the basis of the Irish competition law. The Irish authority has not yet decided whether to pursue its own case to the courts or to allow the private sector to do that. There are other areas of professions to be dealt with by a mixture of enforcement and advocacy. The Irish authority does not limit itself to the so-called liberal professions in considering enforcement actions. For example, there are many areas of economic activities that are subject to licensing regimes of one kind or another, even in a common law jurisdiction such as Ireland; for example, for taxi driver or opening a public bar.

3. General discussion

The Chairman opened the general discussion on structural issues and invited the Delegates to keep in mind the Secretariat background paper, and comment on it if need be.

The French Delegate said that he was uncomfortable with the tenor of the discussions, which stressed the distortions that regulation could introduce as regards entry and assumed that competition would lead to economic efficiency. Could we really be so sure that competition was feasible or useful in the field of professional services? In many professions, the problem was not just uncertainty as regards service quality, but also the consumer's uncertainty as regards the degree of service required. For instance, in a situation where services are not standardised there was little chance that a customer who did not know what degree of service was required and had only a vague notion of the quality to expect would have a reasonable idea of the transaction he wanted to enter into or of a fair price for it? In a situation such as this, what guarantee do we have that competition, assuming that it was introduced, would give us an economic outcome that would be at all efficient? The literature suggests that one way of solving the problem is to establish an exclusive relationship between the service provider and the customer. That would eliminate some of the potential distortions of a competitive market, one of which is that service providers may have an incentive to defraud the customer by providing more services than necessary. From this standpoint, it is by no means certain that a system that applies competition law to professional services is necessarily any better than a regulatory system, inefficient though it may well be

To illustrate this point, the French Delegate took the example of garages. Generally, there are two questions that the customer asks: "What is wrong with my car?" and, "How much is it going to cost to repair it?" As a general rule, the garage sells both services (diagnosis and repair) as one package, not as separate services, precisely so that it will not lose business to competitors. Leasing is one way of avoiding this pitfall, as the owner of the vehicle is then responsible for repairs. But there is also another way and that was a quasi-contract with the garage owner, to whom the customer would take his business on the understanding that he would not be overcharged every time. An exclusive quasi-contractual relationship, which always operates under the implied threat that it could be broken if necessary, could therefore minimise risks.

The Belgian Delegate pointed out that in Belgium there was no restriction on the numbers entering the medical profession: any medical graduate could become a registered doctor. However, there were too many graduates and quality was suffering as young doctors facing stiff competition no longer had enough patients to acquire the necessary experience. Consideration was now being given to restricting the numbers admitted to study medicine (by limiting the number of students enrolled each year). The approach would be to put pressure on medical faculties so that they would voluntarily restrict their intake of students each year. A similar measure was under consideration for the legal profession.

The United States Delegate had questions about proposition that consumers are better off when entry is limited as notably suggested by the Belgium Delegate. According to the US Delegate, the natural response would be for doctors to charge less for their services with the net result that more health care, may be useful preventive health care would be consumed in the economy as a whole. He had, also a different view from the French delegation: limiting the number of garage mechanics would be higher prices with fewer mechanics service performed. Further, if consumers were not able to judge the extent to which they need particular services or the quality of services being performed, more competition would cure such a problem.

The French Delegate clarified that he did not suggest that the restriction in the number of garage mechanics or medical doctors was a good thing; in contrast, he wondered if competition was a good thing. In other words, are we comparing two worlds in a second best kind of setting, where neither competition or regulation is quite satisfactory? Or, if we think that competition is more satisfactory than regulation why is that? Is competition an ideal solution in a world where one does not have a good appraisal of where demand curves are where one can’t compare prices and where one does not necessarily have a good appraisal of what the quality is? What are the features of competition in such a world?

The Chairman noted that it is hard to compare competition versus regulation, and in the profession, one does not advocate full competition with no regulation. This is true notably for the medical profession or hospitals where some minimum standards of regulation are needed. However, the discussion seems to imply that in general more competition with less regulation should prevail.

The BIAC Representative felt that the question of regulation versus competition needs to be addressed in the context of the specific regulation or the specific restraint involved. He agreed with the delegate from the United States that it is very difficult to address on regulatory basis what is the appropriate numbers of aspirants for positions compared to the number of vacancies that might exist in a field; even though there are more aspirants than designated positions in the professions, it does not mean that there is a need for some regulation or limitation on those who wish to enter those professions.

The BIAC Representative also raised the issue of multidisciplinary practices. He referred to the current debate in the American Bar Association on the employment by organisations of lawyers of other organisations such as accounting firms. There have been some very vocal and outspoken advocates among the leaders of the ABA, saying that they would oppose such multi-disciplinary organisations. However, as far as international business is concerned, the BIAC's position is that multi-disciplinary practices would be a very great benefit to business.

The Chairman pointed out that the denial of multi-disciplinary practices and the fact that professions are not allowed to organise themselves as corporations, are impediments to efficiency and to the growth of those services.

The Australian Delegate acknowledged that multi-disciplinary practices provide customers with obvious advantages such as integrated provision of services, one-stop shopping, and other forms of efficiency. The removal of the barriers to multi-disciplinary practices doesn’t mean the end of specialised

practices; they would certainly remain as a significant force in the market unless they do not stand the test of competition.

On the points raised by France, Australia pointed out that the asymmetry of information on services might cause higher rate of services, and unnecessary service, which would be provided at an additional charge to consumers. There are, however, a lot of incentives to provide information; if there is a true competition, some information on price and various other services will be supplied by advertising.

4. Behavioural regulation and enforcement activities

The Chairman noted that most countries have dealt with price fixing agreements and bans on advertising. He singled out the submission from Australia where the ban on advertisement has recently been lifted and asked Australia if the professions require specific rules for advertising.

The Australian Delegate explained that the general provisions in the Trade Practices Act and State Acts on prohibiting misleading and deceptive conduct apply and that Australia doesn't have special rules for professions. Misleading and deceptive advertising and conduct in the professions are punished with fines. Although the restrictions on advertising have been lifted, there has been no outburst of misleading advertising in the professions because the sector has been rather slow to advertise. But as times change in the professions, more waves of misleading advertising may arise.

Concerning eye laser surgery, ACCC has issued some warnings against some of the advertising, which has been false and exaggerated. In the case of cosmetic surgery, where there are a lot of complaints about very misleading advertisement, ACCC intends to take a case or two to court.

Upon the chairman's request, the United States Delegate explained the reason why the California Dental Association was prosecuted. The case concerned advertisements that compared standard procedures and gave consumers information that allowed them to compare among different service providers. The Association, which comprised 75 percent of the practising dentists in California, maintained a code of ethics prohibiting advertisements that are false or misleading in any respect. On its face, there doesn't seem to be anything anti-competitive about that, but the way that the association implemented that ethical restriction was done in an illegal, anti-competitive manner. There were three specific types of problems.

The first is that the association interpreted the ethical rule to prohibit all types of relative price advertisements. The second concerned discounting. The regulations purported to allow discounting, but only if accompanied by a variety of disclosures, such as the amount of the non-discounted fees, the amount or percentage of the discount, the length of the offer, a list of verifiable fees, and the groups that would qualify for the discount. The third category involved quality claims, which were also prohibited across-the-board on the grounds that these representations were not objectively verifiable. The Commission challenged all these restrictions claiming that they interfered with the free operation of the market, that they deprived consumers of information that allows them to make an informed choice.

The United States Delegate explained that the FTC applies a standard of *per se* illegality to the restraints that affect price. The Commission also performs a rule of reason analysis, but it's what is called an abbreviated rule of reason, where if you find market power and anti-competitive effects, you then look to see if there are any efficiencies advanced to support the restraints. Here, the only efficiencies claimed were increased information for consumers coming from the disclosures and the restriction on quality claims which prevented misleading information. That was deemed so overbroad as to be invalid, because you can regulate deceptive advertising in other ways. So, the efficiency justifications were quickly rejected and the price restraints were struck down. As to the quality claims, the Commission engaged in a full rule

of reason analysis and again found the restraints to be unlawful--that is to say their anti-competitive effects outweighed any pro-competitive justifications that were offered for them[1].

In the case of California Dental Association, the only efficiencies claimed were increased information for consumers from the disclosures.

The Chairman asked the European Commission to explain its decision on a recent case on comparative advertising by a European patent office.

The European Commission Representative explained that it was still, about five years ago, a profession with a tradition of total ban on advertising. However, in the course of the proceedings with the Commission, the parties agreed to ban only comparative advertising. At the same time, there has been a move in the Commission towards allowing comparative advertising, with new directives coming into force in April 2000.

The Irish Delegate raised an issue concerning comparative advertising. The ethical guide of the Institute of Chartered Accountants in Ireland has a ban on such advertising by their members. The Irish Competition Authority wants to reject that clause, but the Institute claims that the EU directive concerned allows such a ban on comparative advertising, where a profession is self-regulated in a member state, and where such a self-regulation system exists. The Irish delegate asked the EU Commission whether there is any substance in this accountants' case in claiming that the EU member states don't have a choice in this matter and must allow such a ban.

According to the European Commission representative**,** even after the entry into force of the new directive, a member country would be free to act under its competition laws against such restrictions if they are imposed by the professional body concerned.

The Chairman moved to price fixing agreements, mentioning that trade associations of different professions set up some guidelines for tariffs or prices. The chairman mentioned the Finnish competition law, which apparently requires some burden of proof that such a price fixing agreement exists. The chairman wondered whether this burden of proof is not too strong on the part of the authority and whether this procedure is necessary.

The Finnish Delegate answered to the chairman's question, by explaining its legal basis as well as the historical background for the dental association case. Fee recommendations of professional associations fall under Article 6.1 of the Competition Act, which provides for a *per se* prohibition of price fixing and price recommendations (as was also the case under the previous Competition Act). The dental association applied for an exemption for its new system of recommended fees in 1992. That exemption was denied by the Finnish Competition Authority and the Competition Council. In 1996 when the Finnish Competition Authority obtained evidence that there still might be some recommendations by the Finnish Dental Association, it made on-the-spot investigations of the Association and the dentists' premises. The association informed its members of price developments by calculating the average rates in the cost level. It also offered price lists where the cost changes were taken into account as different-sized changes in percentage. Although this system could have been a way to circumvent the ban on price collaboration, no clear evidence was found. There was price differentiation on the market, which didn't seem to be a typical cartel market. The Finnish competition authority stated that the agreement of the dental association didn't fall under the *per se* prohibition of the Article 6.1 in the Finnish law, but could rather fall under a rule of

1. That case is now before the US Supreme Court and a decision is awaited this term.

reason provision of Article 9 in that law. The Finnish competition authority only warned the Association that it should not engage in any kind of price recommendations in the future.

The United States Delegate commented, as requested by the Chairman, on the Mesa county case saying that this was a good example of how the FTC has used anti-trust policy to thwart efforts by physicians to stop innovative forms of health care delivery and financing that are emerging to keep health care costs down. The case involved 180 doctors in Mesa County, Colorado. The association set fee standards that were significantly higher than those that the individual doctors had been able to negotiate, and they were able to impose those on some of the third-party payers and refused to deal collectively with those who didn't agree to their rates. The result was higher prices and the exclusion of third–party payers, such as preferred provider organisations, health maintenance organisations, and employer purchasing co-operatives.

According to the US competition authorities, the Mesa county case was not found to be a case where physicians could be collectively trying to counteract monopsony power because, although the medical association had 50 percent market share, there were several other market players and a variety of other potential new entrants who were discouraged. According to the US competition authorities, joint action by medical care providers is not *per se* illegal; rather they look at it under a rule of reason, where any pro-competitive justifications would be fully evaluated and weighed against any anti-competitive effects. The FTC and the US Department of Justice have issued guidelines that try to make clear when joint physician arrangements will be considered as pro-competitive. These guidelines provide for safe harbours and since they have come out, numerous requests for advisory opinions and issuance and business review letters have been looked at by the US competition authorities.

The United States Delegate continued in explaining that in recent years, there have been a lot of initiatives to control healthcare costs in the US with a variety of innovative delivery and financing arrangements, that have made many markets for health care significantly more competitive. In response health care providers got together collectively to try to thwart those efforts, and in this case, since they had often been unsuccessful in the courts, they went to the Congress to see if they could get an exemption from the anti-trust laws to allow health care providers to negotiate collectively over fees and terms. Their justification was ostensibly one of patient care with adequate levels of care especially by managed care plans; but the US Competition Authority's view was that an exemption is not the proper way to get there. First of all, the United States Delegate said, we are generally opposed to exemptions from the anti-trust laws because we believe that competition in health care, as well as in other markets, is the best way to serve consumers and encourage innovation. We already have an exemption that applies to collective bargaining agreements, including those involving physician employees, but there is no demonstrated need to expand that to cover non-integrated providers of health care services.

The Chairman mentioned that in Korea the introduction of the Act on the Dissolution of Cartels led to the deletion of the provisions that allowed lawyers to set prices. A number of counter-measures were introduced in order to provide full information on pricing to clients. The chairman wondered if this was not a way to reintroduce the price control that was lifted and to introduce again some sort of uniformity in price behaviour by lawyers.

The Korean Delegate provided, first, some explanation of measures taken by the Korean competition authority in order to tackle problems that may arise from free competition in price in legal service markets. The Korea Chamber of Commerce, the Korea Trade Association, and consumer groups will survey and publicise market prices. The restrictions placed upon the advertising activities of lawyers have been softened, and the remuneration of legal practitioners can be publicised. Finally, the entry barriers have been lowered, as the number of those who passed the judicial examination was upwardly adjusted.

Korea pointed out that the purpose of providing information on pricing was to cure the problems arising from information asymmetry. The KFTC expects that independent organisations including consumer organisation will periodically survey the information on legal fees and make it available for the clients so that they can make a reasonable choice.

The Chairman mentioned that Japan is one of the countries that have intervened actively in the professions; it has taken actions against 18 cases of anti-competitive activities by professions. However, none of these cases were price fixing cases. While the JFTC has issued guidelines to the professional associations, the Chairman wondered if it would not have been more efficient just to enforce the law.

The Japanese Delegate answered in clarifying that in Japan no professional services are exempted from application of the Anti-Monopoly Act. Japan also explained that the absence of price fixing cases resulted from the low level of prices in the Japanese health care system, at least as far as physicians' and dentists' associations are concerned.

On the issuance of guidelines by the JFTC, instead of enforcing the law directly, the Japanese Delegate explained that the purpose has been to make public the JFTC's interpretation concerning the application of the Anti-Monopoly Act in the field of professional services. However, this has not prevented direct enforcement of the law.

The Chairman turned to the EU Commission Representative. The EU has become active in the professions after many years of silence, because activities of the profession fall under the jurisdiction of member states. He noted that the case of the European Patent Office was an important case because the tariff was later approved by the Ministry, although it was decided by the association. He observed that the European Commission intervened against the association with Article 85, together with other articles of the Treaty.

To explain the Commission's long silence, the European Commission Representative said that the Commission may lack competence when it comes to restrictions that are purely national in character. In order to have the Treaty articles on competition to apply, it is necessary that the restrictions have an effect on interstate trade; another reason for being silent in the competition sector is that in the last few years, the Commission has tried to pursue a policy of decentralisation in the application of competition law.

Referring to the European Patent Office agents' case, he pointed out that it is a Europe-wide profession, which is appropriate for the Commission to tackle. In the case of the Italian Customs Agents, the reason why it fell under the EU Commission's competence was the sort of cross-border type of activity of the profession.

5. General discussion

According to the Secretariat**,** the important question is "what is the minimum level of regulation that we need in this sector?"

From a theoretical perspective, the regulation should target the market failure, which is related to the information asymmetry: consumers don't know the quality or even the quantity of services that they are purchasing. From a regulatory perspective, the approach to information asymmetries is to require disclosure of training, qualification etc…. But, as the Secretariat pointed it out, if a lot of importance goes on the quality assurance role, the question of who will provide it remains, and the market for quality assurance might not be very competitive.

The Chairman emphasised that what is needed is something more than just disclosure of objective criteria; some performance indicators are also needed. However, for many professions it is not easy to find the right indicators.

The United States Delegate commented that one shouldn't allow regulation of quality of service to be promulgated as a disguise for what is an economic regulation and one should also be very careful to avoid a paternalistic excess of quality regulation. According to the United States Delegate, professional 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.

The Canadian Delegate noted the potential linkage of this CLP roundtable discussion with on-going work in other forums such as WTO, GATT and APEC as well as in other areas of OECD.

The Swiss Delegate supported the French views on the limits of competition. He added that the Swiss position was, in fact, more competition and a bit less regulation, which does not mean no regulation at all. He did not share the view that all the profession should obey a market law. In this respect, health care services with its specific constraints, must deserve a special attention as far as regulation is concerned

The Chairman summed up the discussion by pointing out to the similarities that the different experiences brought up: enforcement activities by competition authorities are very much along the same lines; price agreements are being considered restrictive by the profession themselves; bans on advertising are considered as a restriction of competition. There are certainly, also, a lot of differences in the rules and regulations of the professions around the OECD, especially with respect to structural regulations: how extensively does the state intervene into the professions in order to maintain exclusivities? How vast are those exclusivities? How many of the professions are involved? The chairman felt that some rule has to be found in order to control the increase in exclusivities among the professions.

According to the chairman, for many professions, some protection should be lifted while for those like lawyers, doctors or engineers, some sort of exclusivity is probably important; it all depends on how this exclusivity is managed. In this context the training issue is important: How is it supplied? Who offers it? The issue of exclusivity is not so much related to the professions themselves, but is much wider and it indeed revolves around the whole system of behaviour and provisions related to the entry into the market for professions.

Concerning behavioural regulations, the chairman mentioned the importance of the role of the anti-trust authority. In this respect, the Japanese cases referring to some sort of boycott on the part of members of a trade association are important cases; they can occur in other sectors like in retail trade, where members of a trade association try to protect themselves from the competition of others, not only by impeding price competition but by impeding organisational transformation. Whenever we touch the profession with the competition law, either through advocacy or through enforcement, we see the importance that competition might have as a means to eliminate rents in those professions because the reaction by trade association is extremely strong.

AIDE MEMOIRE DE LA DISCUSSION

1. Introduction

Le Président note que, dans les réglementations concernant les services professionnels, on peut distinguer les réglementations structurelles et les réglementations comportementales. Les premières visent à assurer que seuls des individus ayant certaines qualifications exercent l'activité considérée, au moyen de contrôles à l'entrée effectués par des organismes réglementés, publics ou privés. Par réglementations comportementales on entend celles qui intéressent les activités économiques des professions, notamment la coordination des rémunérations et les interdictions en matière de publicité.

Le Président propose que la première partie du débat soit consacrée à des questions structurelles comme l'importance des professions réglementées dans l'économie et les réformes qui ont eu lieu, ainsi que le rôle de sensibilisation joué par les autorités de la concurrence. La deuxième partie permettra d'examiner les activités de mise en œuvre des autorités de la concurrence et les réglementations comportementales.

2. Réglementations structurelles

Le délégué de l'Italie signale que dans son pays, vingt catégories professionnelles reconnues, dont certaines coexistent dans le même secteur, fournissent des services légèrement différents. Un exemple frappant est celui du secteur de la comptabilité où l'on trouve trois groupes professionnels caractérisés par des conditions d'entrée similaires et fournissant des services analogues. Chaque groupe jouit du droit exclusif de fournir des services spécifiques ; les marchés sont segmentés artificiellement et la concurrence est considérablement réduite par rapport à son niveau potentiel.

Pour ce qui est des conditions d'entrée, presque toutes les professions exigent une période de formation supervisée et toutes exigent la possession d'un diplôme. Après avoir passé l'examen, les professionnels doivent s'enregistrer auprès de l'association compétente. En outre, l'association publie des codes de conduite et exerce un pouvoir disciplinaire lorsque ces codes sont violés. Les codes de conduite contiennent généralement des restrictions sur le comportement des entreprises, essentiellement des interdictions concernant l'utilisation de la publicité et les niveaux minimums de rémunération.

L'autorité italienne de la concurrence est intervenue à diverses reprises en faveur d'une réglementation moins généralisée et moins étendue. En 1997 elle a achevé une enquête générale sur les professions libérales, suggérant au Premier ministre que la réglementation du secteur des professions libérales devrait être limitée aux cas où il y a d'importants dysfonctionnements du marché et que, même dans ces cas, la réglementation devrait comprendre un minimum de mesures visant à remédier à ces dysfonctionnements. De même, en décembre 1997, l'autorité a publié un avis sur les divers projets de loi examinés au Parlement concernant les nouvelles professions agréées. Elle a rappelé que la réglementation des professions libérales ne devait pas être alourdie.

Le délégué de l'Allemagne présente une vue d'ensemble des contrôles à l'entrée sur les marchés des services professionnels dans son pays. Pour ce qui est des comptables, un diplôme universitaire est requis, mais, dans certains cas, une longue expérience pratique est suffisante. Les avocats doivent avoir passé le deuxième examen d'État en droit, car ils doivent avoir les mêmes qualifications que les juges. Dans certaines professions techniques, toutefois, l'Allemagne n'a pas adopté de lois centrales ou de lois fédérales. Depuis des décennies, ces questions ont été réglées au niveau des Länder. Le bien-fondé de ces qualifications est d'assurer une garantie aux clients. Pour chaque profession, il y a un système de contrôle ; pour les avocats, par exemple, le Président de l'Oberlanddesgericht doit agréer chaque nouvel avocat qui a passé l'examen, celui-ci ne pouvant se voir refuser l'entrée dans la profession. En conclusion, le délégué de l'Allemagne précise que le Bundeskartellamt n'a pas connaissance de problèmes de contrôle à l'entrée pour ce qui est des professions libérales.

Le Président fait référence à la présentation du Royaume-Uni qui mentionne que 18 catégories de professions sont exemptées de la loi sur la concurrence et que l'Office of Fair Trading (OFT) a essayé, sans succès, d'éliminer dans le cadre d'une campagne de sensibilisation les dispositions restrictives protégeant les membres de l'ordre des avocats.

Le délégué du Royaume-Uni décrit les conditions imposées dans son pays à l'entrée dans certaines professions libérales, conditions qui sont fondées sur le niveau d'études et l'expérience. Dans le cas des comptables, la fonction de commissaire aux comptes est réservée aux comptables agréés ou aux experts-comptables. En revanche, les autres fonctions peuvent être exécutées par des comptables qui n'appartiennent pas nécessairement à l'un de ces groupes. Les avocats doivent avoir un diplôme de l'enseignement supérieur – pas nécessairement en droit. Au Royaume-Uni, la profession d'avocat est divisée en deux branches, les « solicitors » et les « barristers ». La distinction entre les deux est moins nette depuis l'adoption en 1990 de la Courts and Legal Services Act, qui a élargi le droit de plaidoirie des solicitors.

Le délégué du Royaume-Uni explique pourquoi le Directeur général de l'OFT n'a pas pu éliminer par la persuasion les dispositions restrictives protégeant les membres de l'ordre des avocats. Le Lord Chancellor's Department est responsable de l'administration de nouvelles règles. Il examinera avec le Directeur général de l'OFT les règles qui ont à son avis des effets sur la concurrence. Cependant, c'est au Lord Chancellor qu'il appartient de déterminer s'il souhaite les soumettre à cet examen. Lorsque des règles seront feront l'objet d'un examen, l'OFT insistera très fortement sur le fait que les conditions de concurrence doivent devenir aussi libérales que possible. L'OFT préfère agir par la persuasion plutôt que d'invoquer les moyens de recours dont dispose le Directeur général et, au fil des ans, cette approche s'est révélée très efficace.

Le délégué du Royaume-Uni mentionne que son pays a supprimé par la persuasion les restrictions à la publicité dans une majorité de professions depuis le milieu des années 80. Les dispositifs de fixation des prix sont aussi attaqués chaque fois qu'ils sont portés à l'attention de l'OFT ou découverts à l'occasion d'une enquête. Le Royaume-Uni préfère utiliser la persuasion plutôt que d'appliquer une approche contraignante, car les professions libérales sont conscientes des questions plus générales de concurrence qui se posent avec l'ouverture des marchés et la mondialisation de l'économie et un grand nombre d'entre elles prendront des mesures pour faciliter la concurrence.

La Competition Act de 1998 reprend simplement la liste des 18 professions exemptées qui étaient énumérées dans la législation précédente. Le Directeur général dispose encore d'une large marge de manœuvre pour ce qui est de l'examen des problèmes de concurrence soulevés dans ces professions.

Le Président présente la contribution de la Nouvelle-Zélande en notant que le ministère du Commerce a encouragé un examen approfondi de la réglementation dans les professions libérales. Pour ce

qui est de la profession d'avocat, il a été proposé de confier à une autorité de régulation indépendante l'examen des conditions d'entrée. Étant donné que ce régulateur doit être quelqu'un de la profession pour être en mesure de pouvoir vérifier les qualifications, le Président soulève la question de l'indépendance par rapport à la profession elle-même. Il appelle aussi l'attention sur le fait qu'en Nouvelle-Zélande, les obstacles à l'entrée dans la profession médicale sont justifiés par le fait que les médecins ne peuvent pas être poursuivis en cas de faute professionnelle. En conséquence, les conditions d'entrée deviennent plus importantes.

Le délégué de la Nouvelle-Zélande explique que le ministère du Commerce a procédé à des examens de toutes les professions, examens qui ont été réalisés par les départements sectoriels. Pour influencer la réflexion des agents publics qui sont parfois trop prompts à réglementer, la Nouvelle-Zélande a établi une série de principes directeurs. Ces principes sont fondés sur les réponses aux questions suivantes, posées par chaque département sectoriel : Quel est le problème à résoudre ? Est-ce le bon moyen de le résoudre ? L'État doit-il intervenir ? La législation est-elle indispensable ? D'autres changements sont-ils possibles ?

A propos de l'indépendance des avocats, les agents publics proposent un organisme de réglementation distinct. Cette proposition n'a pas été appuyée officiellement par les ministères.

Le délégué de l'Australie note que les professions libérales sont réglementées par le droit de la concurrence depuis 1995. Au début des années 90, l'institution qui a précédé l'ACCC a entrepris un examen des professions libérales, plus particulièrement axé sur les services juridiques. Elle a réalisé une étude d'ensemble, qui a mis en évidence les nombreuses restrictions anti-concurrentielles et a conclu que la plupart d'entre elles étaient injustifiées ou, si elles étaient justifiées, aboutissaient à des résultats qui pourraient être atteints de manière beaucoup moins anticoncurrentielle. A la suite de cette étude, la réglementation de la profession juridique a été assez considérablement modifiée.

Le délégué de l'Australie reconnaît que la culture de la profession juridique et certaines restrictions n'ont pas changé autant que cela était souhaité. Il y a encore certains domaines (comme les plaidoiries devant les tribunaux) qui sont réservés à la profession ; en outre, certains modes de rémunération semblent assez anticoncurrentiels mais sont difficiles à éliminer. Depuis 1995, la loi sur les pratiques commerciales s'applique aux professions libérales, y compris la profession juridique. L'ACCC préfère tester cette possibilité dans la profession médicale et établir certains précédents.

S'agissant des services liés aux mutations immobilières, les prix ont baissé très fortement après la suppression du monopole des avocats. L'entrée dans cette profession n'est pas libre – certaines qualifications sont requises --, mais le niveau de qualification demandé est bien moindre. Pour ce qui est de la profession médicale, l'ACCC a différé sa décision sur l'établissement d'un rapport général : des questions complexes se posent en raison du rôle de la politique de santé publique dans la mise en place de dispositifs très anticoncurrentiels. L'ACCC a préféré attendre que la loi s'applique à la profession médicale et a récemment engagé des poursuites à ce niveau : des pratiques de fixation des prix et des boycotts ont été attaqués avec beaucoup de succès devant les tribunaux ; aujourd'hui, l'ACCC réexamine attentivement les restrictions à l'entrée dans les spécialités médicales pour déterminer si celles-ci ne pourraient pas en fait être assouplies.

Le Président évoque d'autres obstacles à l'entrée énumérés dans la plupart des soumissions, comme les conditions de nationalité et de résidence, la formation requise et la détermination de la capacité et de l'aptitude de la personne considérée. Il note que la Hongrie a réussi à éliminer, grâce à une campagne de sensibilisation, une condition de nationalité.

Le délégué de la Hongrie confirme que le bureau de la concurrence de son pays a réussi à supprimer la condition de nationalité dans certains cas. En outre, il souligne l'importance du rôle joué par la cour constitutionnelle hongroise dans l'élimination de la condition de nationalité, celle-ci ayant estimé que ce type de règle est contraire à la Constitution hongroise (car il s'agit d'une violation des droits de l'homme).

Le délégué du Royaume-Uni précise qu'il n'y a pas de limitation formelle du nombre de postes dans la profession juridique. Le nombre de vacances d'emploi est essentiellement déterminé par la situation de l'économie. Si à un moment donné il y a beaucoup à faire pour les « solicitors », les recrutements seront plus nombreux que les années où les affaires ne sont pas aussi bonnes. Pour ce qui est de la formation, l'entrée dans la profession juridique se fait normalement sur la base d'un diplôme en droit. L'obtention du diplôme est normalement suivie d'une période de stage. Il existe toutefois une exception pour les « barristers ». Le General Council of the Bar a bien essayé de limiter artificiellement l'entrée dans cette profession en 1992. Cette tentative a été contrée avec succès par le bureau de la concurrence. Cependant, les « barristers » doivent encore se soumettre à la pratique du « pupillage » : ils doivent être associés à un Inns of Court où ils doivent suivre une formation de douze mois. Traditionnellement, les premiers six mois de cette formation ne sont pas rémunérés. Cependant, le General Council of the Bar a reconnu que c'était là un problème pouvant donner lieu à discrimination et a mis en place un système de financement par parrainage pour assurer une plus grande ouverture.

Le Président note que le rapport irlandais est le seul à indiquer que l'autorité de la concurrence s'est saisie de la question de l'entrée dans la profession. La Pharmaceutical Society of Ireland et le Trinity College of Dublin sont des exemples qui soulèvent des problèmes importants à la fois sur le plan de l'entrée dans la profession et sur celui de la concurrence entre universités.

Le délégué de l'Irlande confirme que l'autorité irlandaise de la concurrence a attaqué un accord d'exclusivité entre une université et une profession libérale qui excluait les concurrents de la formation. Un autre collège a fait appel de cet accord d'exclusivité sur la base du droit de la concurrence irlandais. L'autorité irlandaise n'a pas encore décidé si elle souhaite porter elle-même cette affaire devant les tribunaux ou si elle laisse le secteur privé le faire. D'autres questions intéressant les professions libérales doivent être traitées par des mesures d'application et un effort de sensibilisation. L'autorité irlandaise ne se limite pas aux professions libérales lorsqu'elle envisage des mesures d'application. Par exemple, de nombreux secteurs de l'activité économique sont assujettis à des régimes de licence d'un type ou d'un autre, même dans un pays de *common law* comme l'Irlande ; une licence est nécessaire, par exemple, pour conduire un taxi ou ouvrir un débit de boissons.

3. Discussion générale

Le Président ouvre la discussion générale sur les problèmes structurels et invite les délégués à avoir à l'esprit le document de synthèse du Secrétariat, ainsi qu'au besoin les commentaires dont il a fait l'objet.

Le délégué de la France fait part de son embarras à propos de la tonalité de la discussion qui souligne certains biais que la réglementation, en ce qui concerne l'entrée, peut introduire et qui suppose *a contrario* qu'un régime de concurrence conduirait à l'efficacité économique. Est-on aussi sûr que la concurrence est réalisable et utile dans le domaine des services professionnels ? Dans beaucoup de professions, le problème n'est pas uniquement celui d'une incertitude quant à la qualité mais plutôt d'une incertitude de la part du demandeur quant à la quantité de prestations qu'il doit avoir. Ainsi, si l'on se trouve dans une situation où les transactions ne sont pas standardisées, si le demandeur ne sait pas quelle est la quantité de services requis et qu'il n'a qu'une médiocre notion de la qualité, ce demandeur a peu de

chances de se faire une idée juste de la transaction dans laquelle il souhaite entrer et du prix correct. Dans ces conditions, quelles garanties offriraient la concurrence, à supposer qu'elle soit réalisée et que l'on soit dans un système économique qui conduirait à une certaine efficacité ? La littérature suggère qu'une manière de résoudre ce problème est d'établir une relation exclusive entre le fournisseur de services et celui qui va en bénéficier. Cela élimine certains biais possibles d'un fonctionnement concurrentiel des marchés, l'un d'eux étant que les fournisseurs de services peuvent avoir intérêt à frauder en offrant plus de services que nécessaire. Dans cette logique, il n'est pas évident qu'un système d'application du droit de la concurrence aux professions soit nécessairement supérieur à un système, sans doute peu efficace, de réglementation.

Pour illustrer son propos, le délégué de la France prend l'exemple du garagiste à qui on demande en général deux choses : qu'est-ce qu'a ma voiture ? et combien cela va me coûter ? Le garagiste en général vend les deux ensemble, et non séparément, justement pour se protéger de la concurrence. L'une des façons d'éviter cet écueil est le leasing, où celui qui répare est celui qui possède la voiture. Mais il y a une autre réponse qui est le quasi-contrat avec le garagiste que l'on retourne voir fréquemment à condition qu'il n'exagère pas à chaque fois. Donc, la relation exclusive quasi-contractuelle, toujours menacée par le fait qu'on peut le cas échéant s'en échapper, permet de minimiser le risque.

Le délégué de la Belgique indique qu'il n'existe pas dans son pays de *numerus clausus* pour les médecins : tout diplômé en médecine peut s'inscrire à l'ordre des médecins. Cependant, le trop grand nombre de diplômés conduit à une baisse de la qualité car le jeune médecin, confronté à une forte concurrence, n'a plus assez de patients pour acquérir l'expérience voulue. Il est donc envisagé d'instaurer un *numerus clausus* au niveau des études médicales (en limitant le nombre d'étudiants admis chaque année). L'instauration de ce *numerus clausus* se ferait par suite de pressions exercées sur les facultés concernées, qui réduiraient d'elles-mêmes le nombre d'étudiants admis chaque année. Une réflexion analogue est en cours pour la profession d'avocat.

Le délégué des États-Unis se demande si les consommateurs ont effectivement intérêt à ce que l'entrée soit limitée, comme l'a suggéré notamment le délégué de la Belgique. D'après le délégué des États-Unis, la réponse naturelle serait que les médecins abaissent le prix de leurs services, de manière à permettre un accroissement de la consommation de soins de santé, éventuellement de soins de santé préventifs utiles. Contrairement à la délégation française, il pense que limiter le nombre de mécaniciens dans les garages conduirait à une hausse des prix et à une diminution du nombre de services fournis. En outre, si les clients ne sont pas en mesure de juger de l'importance des services dont ils ont besoin ou de la qualité des services rendus, un renforcement de la concurrence résoudrait ce problème.

Le délégué de la France précise qu'il n'a pas laissé entendre que la limitation du nombre de mécaniciens ou de médecins était une bonne chose ; en revanche, il se demande si la concurrence est une bonne chose. Autrement dit, s'agit-il de comparer deux mondes caractérisés par un optimum de second rang, où ni la concurrence ni la réglementation ne sont tout à fait satisfaisantes ? Ou bien, si la concurrence est jugée plus satisfaisante que la réglementation, quelles sont les raisons de ce jugement ? La concurrence est-elle une solution idéale dans un monde où l'on ne peut pas bien déterminer où se situent les courbes de la demande, où l'on ne peut pas comparer les prix et où l'on n'a pas nécessairement une bonne idée de ce qu'est la qualité ? Quelles sont les caractéristiques de la concurrence dans un tel monde ?

Le Président note qu'il est difficile de comparer la concurrence et la réglementation et, dans les services professionnels, personne ne prône une totale concurrence sans réglementation. C'est vrai notamment pour la profession médicale ou les hôpitaux, où des réglementations minimales sont nécessaires. Cependant, il ressort semble-t-il de la discussion qu'en général, davantage de concurrence et moins de réglementation sont souhaitables.

Le représentant du BIAC estime que la question du choix entre la réglementation et la concurrence doit être examinée dans le contexte des réglementations ou restrictions spécifiques en cause. Il reconnaît avec le délégué des États-Unis qu'il est très difficile de déterminer par le biais de la réglementation quel est le nombre approprié de candidats à des postes par rapport au nombre de vacances d'emploi qui pourraient exister dans un domaine ; même s'il y a davantage de candidats que de postes à pourvoir dans une profession, cela ne signifie pas que l'on doit réglementer ou limiter le nombre de personnes qui souhaitent y entrer.

Le représentant du BIAC soulève aussi la question des cabinets multidisciplinaires. Il fait référence au débat qui a lieu actuellement dans le cadre de l'American Bar Association concernant l'utilisation par les cabinets d'avocats de membres d'autres groupes, comme des experts-comptables. Certains responsables de l'ABA se sont élevés très fermement contre cette pratique, se disant prêts à s'opposer à ces cabinets multidisciplinaires. Toutefois, au niveau international, le BIAC considère que la multidisciplinarité serait très souhaitable.

Le Président estime que le refus de la multidisciplinarité est le fait que certaines professions libérales ne soient pas autorisées à s'organiser elles-mêmes en sociétés sont des obstacles à l'efficience et au développement de ces services.

De l'avis du délégué de l'Australie, la multidisciplinarité présente des avantages évidents pour les utilisateurs, notamment la fourniture intégrée de services et le guichet unique. La suppression des obstacles à la multidisciplinarité n'implique pas la fin des cabinets spécialisés ; ceux-ci ne sont certainement pas près de disparaître, à moins qu'ils ne puissent pas soutenir la concurrence.

Pour ce qui est des points soulevés par la France, l'Autriche souligne que l'asymétrie d'information concernant les services peut entraîner un relèvement des tarifs et la fourniture de services inutiles, qui sont alors payés en plus par les consommateurs. Pourtant, les incitations ne manquent pas en ce qui concerne la fourniture d'informations ; si la concurrence peut véritablement s'exercer, des informations sur les prix et divers autres services seront fournis par la publicité.

4. Réglementations comportementales et application des règles

Le Président note que la plupart des pays ont pris des mesures concernant les ententes sur les prix et l'interdiction de la publicité. Il signale à cet égard la communication de l'Australie, pays dans lequel l'interdiction de la publicité a récemment été levée, et demande à l'Australie si les professions libérales doivent respecter certaines règles pour faire de la publicité.

Le délégué de l'Australie explique que les dispositions générales de la loi sur les pratiques commerciales et des lois adoptées par les États en ce qui concerne l'interdiction des comportements trompeurs ou mensongers sont applicables en pareil cas et que l'Australie n'applique pas de règles particulières aux professions libérales. La publicité et les comportements trompeurs et mensongers dans les professions libérales sont punis d'amendes. Bien que les restrictions concernant la publicité aient été levées, il n'y a pas eu de multiplication des cas de publicité trompeuse dans les professions libérales, car la publicité s'y est développée assez lentement. Cependant, au fil des ans, les cas de publicité trompeuse pourraient devenir plus nombreux.

En ce qui concerne la chirurgie oculaire par laser, l'ACCC a émis des mises en garde contre certaines publicités, jugées trompeuses et exagérées. Dans le cas de la chirurgie plastique, domaine dans lequel on dénombre beaucoup de plaintes concernant des publicités très trompeuses, l'ACCC a l'intention d'engager une ou deux poursuites devant les tribunaux.

A la demande du Président, le délégué des États-Unis explique les raisons pour lesquelles l'Association dentaire de Californie a fait l'objet de poursuites. Celles-ci concernent des publicités comparant des soins normaux et donnant aux consommateurs des informations qui leur permettent de faire des comparaisons entre différents prestataires. L'Association, qui regroupe 75 pour cent des dentistes exerçant en Californie, a établi un code de déontologie interdisant la publicité mensongère ou trompeuse à quelque égard que ce soit. A première vue, cette attitude ne semble pas avoir le moindre caractère anticoncurrentiel, mais l'Association a appliqué ces règles de déontologie de façon illégale et anticoncurrentielle. Trois problèmes spécifiques se posent.

Le premier est que l'Association a donné une interprétation du code de déontologie qui interdit toute publicité comparative sur les prix. Le deuxième concerne les rabais. La réglementation était censée autoriser les rabais, mais seulement à condition que le prestataire communique un certain nombre d'informations, comme le montant des honoraires avant application du rabais, le montant ou le pourcentage représenté par le rabais, la durée de validité de l'offre, une liste de tarifs vérifiables, et les groupes de personnes pouvant bénéficier du rabais. La troisième catégorie de problème concerne les revendications de qualité, elles aussi interdites d'une manière générale au motif que ce type d'argument n'est pas vérifiable objectivement. La Commission s'est donc opposée à toutes ces restrictions, faisant valoir qu'elles faisaient obstacle au libre fonctionnement du marché et qu'elles privaient les consommateurs d'informations leur permettant de faire leur choix en toute connaissance de cause.

Le délégué des États-Unis explique que la FTC considère les restrictions affectant les prix comme étant en soit illégales. La Commission applique aussi la règle de raison sous une forme simplifiée, c'est-à-dire que si elle constate une position dominante et des effets anticoncurrentiels, elle cherche aussi à voir si des gains d'efficience ne permettent pas de justifier les restrictions. Dans l'affaire évoquée ici, les seuls gains d'efficience revendiqués étaient une meilleure information des consommateurs du fait de la fourniture des informations mentionnées plus haut, ainsi que la restriction concernant les revendications de qualité, empêchant la diffusion d'informations trompeuses. Ces gains d'efficience ont été jugés trop généraux pour être valables, car d'autres moyens peuvent être utilisés pour empêcher la publicité mensongère. Par conséquent, les justifications fondées sur des critères d'efficience ont été rapidement rejetées, et les restrictions concernant les prix ont été attaquées. S'agissant des revendications de qualité, la Commission a entrepris une analyse de tous les critères pertinents et est là aussi arrivée à la conclusion que les restrictions étaient illégales, c'est-à-dire que leurs effets anticoncurrentiels l'emportaient sur les motifs proconcurrentiels avancés pour les justifier.[1]

Dans le cas de l'Association dentaire de Californie, les seuls gains d'efficience revendiqués étaient une meilleure information des consommateurs, grâce à la divulgation des informations mentionnées plus haut.

Le Président demande à la Commission européenne d'expliquer sa décision concernant un cas récent de publicité comparative effectué par un office européen de brevets.

Le représentant de la Commission européenne explique qu'il y a encore cinq ans, la publicité était totalement interdite dans cette profession. Cependant, dans le cadre des débats qui ont eu lieu avec la Commission, les parties en présence sont convenues de n'interdire que la publicité comparative. Simultanément, la Commission s'est engagée à envisager d'autoriser la publicité comparative, de nouvelles directives devant entrer en vigueur en avril 2000.

1. L'affaire a été portée devant la Cour suprême des Etats-Unis, et une décision est attendue d'ici à la fin de la session actuelle.

Le délégué de l'Irlande soulève une question concernant la publicité comparative. Dans son guide de déontologie, l'Institut irlandais des experts-comptables interdit à ses membres de recourir à ce type de publicité. L'autorité irlandaise de la concurrence souhaiterait annuler cette clause, mais l'Institut fait valoir que la directive pertinente de l'Union européenne autorise l'interdiction de la publicité comparative lorsqu'une profession est autorégulée dans un État membre et lorsqu'il existe un système d'autorégulation. Le délégué de l'Irlande demande à la Commission européenne si, dans ce cas concernant les comptables, il est justifié de considérer que les États membres de l'Union européenne n'ont pas d'autre choix que d'autoriser ce type d'interdiction.

D'après le représentant de la Commission européenne, même après l'entrée en vigueur de la nouvelle directive, tout État membre sera libre de prendre des mesures contre de telles restrictions, en vertu de sa propre législation en matière de concurrence, si celles-ci sont imposées par l'organisme professionnel concerné.

Le Président passe ensuite aux accords de fixation des prix, indiquant que diverses associations professionnelles ont établi des lignes directrices en matière de tarifs ou de prix. Il mentionne à cet égard le droit finlandais de la concurrence, qui exige apparemment que la preuve de l'existence de telles ententes soit apportée. Le Président se demande si cette obligation n'est pas trop lourde de la part de l'autorité et si cette procédure est nécessaire.

La déléguée de la Finlande explique les aspects juridiques et le contexte historique de cette affaire, qui concerne l'Association dentaire. Les recommandations des associations professionnelles en matière d'honoraires tombent sous le coup de l'article 6.1 de la loi sur la concurrence, qui interdit à priori les ententes sur les prix et les recommandations en matière de prix (ce qui était déjà le cas en vertu de la précédente loi sur la concurrence). L'Association dentaire a demandé en 1992 que son nouveau système d'honoraires recommandés fasse l'objet d'une exemption. Cette exemption a été refusée par l'Autorité finlandaise de la concurrence et le Conseil de la concurrence. En 1996, lorsque l'Autorité finlandaise de la concurrence a obtenu des informations selon lesquelles l'Association dentaire finlandaise formulait peut-être encore des recommandations à l'intention de ses membres, elle a procédé à une enquête dans les locaux de l'Association et dans des cabinets dentaires. L'Association informait ses membres de l'évolution des prix en calculant les taux de variation moyens du niveau des coûts. Elle leur communiquait également des listes de prix dans lesquelles les variations des coûts étaient prises en compte sous la forme de différents pourcentages de variations. Ce système aurait pu avoir pour objet de contourner l'interdiction visant toute collaboration en matière de prix, mais la preuve n'a pas pu en être apportée. Une différenciation par les prix existait sur le marché, ce qui ne semblait pas témoigner de l'existence d'une entente. L'Autorité finlandaise de la concurrence a déclaré que les pratiques de l'Association dentaire ne tombaient pas sous le coup de l'interdiction à priori prévue par l'article 6.1 de la loi finlandaise, mais qu'elles pourraient relever d'une disposition de l'article 9 de cette loi concernant la règle de raison. En conséquence, l'Autorité finlandaise de la concurrence s'est bornée à indiquer à l'Association qu'elle ne devrait formuler aucune recommandation en matière de prix à l'avenir.

A la demande du Président, le délégué des États-Unis évoque le cas du comté de Mesa, qui illustre bien, à ses yeux, la manière dont la FTC a utilisé la politique antitrust pour contrer les tentatives faites par certains médecins pour empêcher la mise en place de systèmes novateurs de fourniture et de financement des soins de santé, destinés à freiner la progression des coûts des soins de santé. Cette affaire a concerné 180 médecins du comté de Mesa, dans le Colorado. L'Association avait fixé des normes d'honoraires sensiblement supérieures aux honoraires que les médecins avaient pu négocier individuellement, et elle a pu imposer ces normes à certains organismes tiers payants, refusant de traiter collectivement avec ceux qui n'acceptaient pas les normes imposées. Cette situation s'est soldée par des prix plus élevés et par l'exclusion de certains tiers payants comme les producteurs de soins privilégiés, les réseaux de soins coordonnés et les groupements d'achat mis en place par les employeurs.

D'après les autorités américaines de la concurrence, l'affaire du comté de Mesa ne peut pas être assimilée à une situation dans laquelle les médecins auraient essayé collectivement de contrebalancer un pouvoir de monopsone car, bien que l'Association médicale ait une part de marché de 50 pour cent, plusieurs autres acteurs et d'autres nouveaux venus potentiels ont été découragés. Toujours d'après les autorités de la concurrence, l'action conjointe des prestataires de soins médicaux n'est pas illégale en soi ; en revanche, il faut appliquer le critère de la règle de raison, en évaluant pleinement tout effet pro-concurrentiel qui pourrait contrebalancer les effets anticoncurrentiels. La FTC et le Ministère de la justice des États-Unis ont publié des principes directeurs précisant dans quels cas les arrangements collectifs entre médecins seront considérés comme pro-concurrentiels. Ces principes prévoient des possibilités de dérogation et, depuis leur publication, les autorités américaines de la concurrence ont été saisies de nombreuses demandes d'avis consultatifs et d'autorisations vue de la reproduction de ceux-ci dans des revues professionnelles.

Le délégué des États-Unis explique en outre que depuis quelques années, de nombreuses initiatives ont été prises afin de maîtriser les coûts des soins de santé aux États-Unis, en ayant recours à toute une panoplie de dispositifs novateurs en matière de prestations et de financement, qui ont rendu nettement plus concurrentiels de nombreux marchés de soins de santé. Face à cette situation, les prestataires de soins de santé se sont regroupés pour essayer de se défendre et, dans le cas présent, comme ils avaient rarement obtenu gain de cause devant les tribunaux, ils ont décidé de s'adresser au Congrès pour voir s'ils pouvaient obtenir une dérogation à la législation antitrust leur permettant de négocier collectivement leurs honoraires et autres conditions de prestation. Pour se justifier, ils ont fait valoir qu'ils voulaient garantir un niveau de soins suffisant, en particulier dans le cadre des réseaux de soins coordonnés ; cependant, l'Autorité américaine de la concurrence a estimé qu'une dérogation n'était pas le meilleur moyen de garantir ce niveau de soins. Premièrement, les autorités américaines sont généralement opposées aux dérogations à la législation antitrust parce qu'elles estiment que la concurrence sur le marché des soins de santé, ainsi que sur les autres marchés, est le meilleur moyen de répondre aux besoins des consommateurs et d'encourager l'innovation. Une dérogation a déjà été accordée pour les conventions collectives, y compris celle qui couvre le personnel médical, mais il n'apparaît pas nécessaire de l'étendre aux prestataires de services de soins de santé non intégrés.

Le Président indique qu'en Corée, l'adoption de la loi sur la dissolution des ententes a entraîné la suppression des dispositions qui autorisaient les avocats à fixer collectivement leurs honoraires. Un certain nombre de contre-mesures ont été prises pour donner des informations complètes aux clients sur les honoraires. Le Président se demande si cela n'a pas été un moyen de rétablir le contrôle des prix qui avait été aboli et d'instituer à nouveau une certaine uniformité dans les honoraires des avocats.

Le délégué de la Corée donne tout d'abord quelques explications sur les mesures prises par l'Autorité coréenne de la concurrence face aux problèmes que peut soulever la libre concurrence en matière d'honoraires sur le marché des services juridiques. La Chambre de commerce de Corée, l'Association commerciale de Corée et des groupes de consommateurs seront chargés de surveiller l'évolution des prix du marché et de publier des informations à leur sujet. Les restrictions imposées aux avocats en matière de publicité ont été assouplies et la rémunération des membres de la profession juridique peut faire l'objet d'une publicité. Enfin, les barrières à l'entrée ont été abaissées et le nombre d'avocats inscrits au barreau a été révisé en hausse.

La Corée fait observer que les informations sur les honoraires avaient pour objet de remédier aux problèmes dus à l'asymétrie des informations. La Commission de la concurrence compte que des organismes indépendants, y compris des organisations de consommateurs, examinent périodiquement les informations concernant les honoraires des professions juridiques et les portent à la connaissance des clients, afin de permettre à ces derniers de faire leur choix entre toute connaissance de cause.

Le Président signale que le Japon est l'un des pays qui sont intervenus activement dans les professions libérales ; ce pays a engagé 18 actions contre les activités anticoncurrentielles de certaines professions libérales. Cependant, aucune de ces poursuites ne concernait des ententes sur les prix. La Commission japonaise de la concurrence a publié des principes directeurs à l'intention des associations professionnelles, mais le Président se demande s'il n'aurait pas été simplement plus efficace de faire appliquer la loi.

Le délégué du Japon précise qu'aucun service professionnel japonais n'est exempté des dispositions de la loi antimonopole. Il explique par ailleurs que l'absence d'entente sur les prix s'explique par le bas niveau des prix dans le système de soins de santé japonais, du moins en ce qui concerne les associations de médecins et de dentistes.

S'agissant de la publication de principes directeurs par la Commission de la concurrence, au lieu de l'application directe de la loi, le délégué du Japon explique que ces principes avaient pour objet de rendre publique l'interprétation de la Commission de la concurrence concernant l'application de la loi antimonopole dans le domaine des services professionnels. Cependant, cela n'a pas empêché l'application directe de la loi.

Le Président se tourne ensuite vers le représentant de la Commission européenne. L'Union européenne a commencé à prendre des mesures concernant les professions libérales après de nombreuses années de silence, car les activités de ces professions relèvent de la compétence des États membres. Le Président note que le cas de l'Office européen des brevets est important car les tarifs ont été ultérieurement approuvés par le ministère de tutelle, alors qu'ils avaient été fixés par l'Association. Il fait observer que la Commission européenne a engagé des poursuites à l'encontre de l'Association en s'appuyant sur l'article 85, ainsi que d'autres articles du Traité.

Pour expliquer le long silence de la Commission, le représentant de la Commission européenne indique que celle-ci manque sans doute de compétence lorsqu'il s'agit de restrictions qui ont un caractère purement national. Pour que les articles du Traité concernant la concurrence puissent s'appliquer, il faut que les restrictions affectent le commerce interétatique ; en outre, si la Commission n'est pas intervenue dans ce secteur, c'est parce qu'elle essaie depuis quelques années de mener une politique de décentralisation dans l'application du droit de la concurrence.

S'agissant des agents de l'Office européen des brevets, il fait observer qu'il s'agit en l'occurrence d'une profession existant à l'échelle européenne, et qu'il est donc normal que la Commission intervienne. Dans le cas des expéditeurs en douane italiens, la Commission avait été jugée compétente parce qu'il s'agissait d'une activité à caractère transfrontières.

5. Discussion générale

Le Secrétariat estime que la question importante est de savoir quel est le niveau minimum de réglementation nécessaire dans ce secteur.

D'un point de vue théorique, la réglementation devrait viser à pallier les dysfonctionnements du marché dus à une asymétrie d'information : les consommateurs ne connaissent pas la qualité, ni même la quantité, des services qu'ils achètent. D'un point de vue réglementaire, la solution au problème de l'asymétrie d'information consiste à imposer la divulgation d'informations sur la formation, les diplômes, etc. Cependant, comme le fait observer le Secrétariat, si la question de l'assurance de la qualité revêt une grande importance, il reste à déterminer qui doit en être chargé, d'autant que le marché de l'assurance de qualité n'est peut-être pas très concurrentiel.

Le Président considère qu'il faudrait viser un objectif allant au-delà de la simple divulgation d'informations sur des critères objectifs ; certains indicateurs de performance seraient également nécessaires. Or, dans beaucoup de professions, il est difficile de trouver les bons indicateurs.

Le délégué des États-Unis fait observer qu'il faut se garder d'autoriser la promulgation de règlements sur la qualité des services, qui seraient en fait une réglementation économique déguisée, et qu'il importe aussi d'éviter un excès « paternaliste » de contrôle de qualité. Pour lui, les marchés des services professionnels sont comparables aux autres marchés de biens et services, et ils réagissent fort bien aux incitations normales destinées à assurer un niveau approprié de prix et de qualité et un équilibre adéquat entre ces deux critères. Dans les domaines où les effets de l'élimination de la réglementation sur la qualité ont fait l'objet d'analyses économétriques, on a constaté que les prix du marché ont baissé sans que le niveau de qualité des services ait diminué. Quant à l'incapacité des marchés à donner les informations sur la qualité, on pourrait y remédier sans avoir recours à la réglementation.

Le délégué du Canada fait observer qu'il existe des liens potentiels entre cette table ronde sur le droit et la politique de la concurrence et les travaux menés dans d'autres instances, comme l'OMC, le GATT et l'APEC, ainsi que dans d'autres secteurs de l'OCDE.

Le délégué de la Suisse estime, comme le délégué de la France, que la concurrence a des limites. La Suisse est en fait favorable à une intensification de la concurrence et à une légère déréglementation, ce qui ne signifie pas qu'il faut supprimer totalement la réglementation. A son avis, les professions libérales ne doivent pas toutes être soumises à la loi du marché. A cet égard, les services de soins de santé, avec leurs contraintes spécifiques, méritent un traitement spécial en termes de réglementation.

Le Président résume les débats en mettant en évidence les similitudes qui existent entre les différentes expériences des pays : les mesures d'application prises par les autorités de la concurrence sont très semblables, les ententes sur les prix sont jugées restrictives par les membres des professions libérales eux-mêmes, et l'interdiction de la publicité est considérée comme une restriction à la concurrence. Il y a certainement aussi de nombreuses différences entre les règles et règlements applicables aux professions libérales dans les pays de l'OCDE, notamment les réglementations à caractère structurel. Dans quelle mesure les autorités interviennent-elles dans les professions libérales pour maintenir l'exclusivité ? Quelle est la portée de cette exclusivité ? Quelle proportion des effectifs est concernée ? Le Président pense qu'il faudrait établir certaines règles pour limiter le développement de l'exclusivité dans les professions libérales.

D'après le Président, dans beaucoup de cas, la protection devrait être supprimée, tandis qu'en ce qui concerne les avocats, les médecins ou les ingénieurs, par exemple, une certaine exclusivité est probablement importante ; tout dépend de la manière dont elle est gérée. A cet égard, la question de la formation est importante : comment cette formation est-elle assurée ? Par qui est-elle offerte ? La question de l'exclusivité n'est pas liée aux professions libérales en tant que telles, mais elle a une portée beaucoup plus vaste et s'articule en fait avec l'ensemble du système de comportements et de dispositions concernant l'accès aux professions libérales.

En ce qui concerne les réglementations comportementales, le Président souligne le rôle de l'autorité de la concurrence. A cet égard, les boycotts décrétés par les membres de certaines associations professionnelles japonaises sont jugés importants ; des situations similaires peuvent se présenter dans d'autres secteurs comme le commerce de détail, dans lequel les membres d'une association professionnelle pourraient essayer de se protéger contre leurs concurrents, non seulement en faisant obstacle à la concurrence par les prix, mais en s'opposant à toute transformation sur le plan organisationnel. Dès qu'une profession libérale est visée par des mesures de sensibilisation ou par des mesures d'application, on constate que la concurrence risque fort d'éliminer des rentes de situation, car les réactions des associations professionnelles sont extrêmement virulentes.