

REPORT ON REGULATION AND PRODUCTIVITY IN EUROPE'S PROFESSIONAL SERVICES MARKETS

Introduction – Europe's Productivity Problem and Professional Services

Europe has had a persistent low growth problem over much of the past decade, exacerbated by the severe economic contraction triggered by the financial crisis, when EU GDP fell by 4.5% in 2009 alone. Since then, the European economy has been characterised by low growth rates, stubborn unemployment and stagnant productivity. According to European Commission forecasts¹, the EU's annual GDP growth rate is expected to flat line around 1.6% in the period 2014-2020, compared to previous growth rates averaging 2.3% over 2001-2007. Total unemployment is falling gradually but remains at historically high levels across the EU, at an average of 9.5%, with particularly worrying pockets of youth and regional unemployment.

One factor contributing to this unpromising picture is Europe's productivity performance, which has lagged behind that of other developed economies for much of the last thirty years. There are many dimensions to productivity underperformance and the Commission proposed a range of different actions to address some of these in its 2014 strategic communication to the European Council and Parliament "*Taking Stock of the Europe 2020 strategy for smart, sustainable and inclusive growth*". However, given that services represented just under 74% of European Union GDP in 2013, any structural improvements in the sectors that make up this area of economic activity would have a disproportionately positive impact on longer term growth prospects. This report will therefore focus on one of the key pillars of the productivity strategy that the Commission has proposed for the remainder of the decade, the creation of better integrated and competitive product and services markets and it will, in particular, look at the role that professional services markets can play in this.

The blanket term 'productivity' encompasses the concepts of labour productivity and total factor productivity (TFP). Labour productivity measures the value of output per number of hours worked and is relatively straightforward to measure. It can be improved by capital investment or through other mechanisms to increase per capita efficiency (e.g. reorganisation or process improvements). TFP, on the other hand, measures productivity gains independent of factor inputs and has no easily calculable units of measurement. At a sectoral level, it represents structural improvements in competitiveness and in the allocation of resources between businesses, as well as innovation and technological progress. It has been suggested (Easterly and Levine (2001))² that TFP can account for up to 60% of an economy's growth over the long term.

The professional services sector is an important part of this picture, even if the professional, scientific and technical services sector makes a markedly lower contribution to the overall economy in Europe than it does in other developed economies, as shown by Box 1. Professional services not only constitute a significant share of gross value added within the services sector directly in most developed economies, but also have an influence on the competitiveness of other goods and services, whether traded domestically or internationally.

Box 1: Share of professional scientific and technical services in Total GVA, 2014

	% Total GVA
Australia	6.6%
US	7.5%
New Zealand	8.3%
EU 28	4.6%

Source: OECD

The analytical framework around this has been growing in sophistication in recent years through the compilation of Product Market Regulation indices (PMRs) and

¹ Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth, Brussels, 19.3.2014 COM(2014) 130 final/2

² Easterly, W.; Levine, R. (2001). "*It's Not Factor Accumulation: Stylized Facts and Growth Models*

Services Trade Restrictiveness Indices (STRIs) by both the World Bank and OECD, and estimates of Trade in Value Added calculated by the OECD and WTO³. These tools help to illustrate the wider significance of professional services. Recent OECD research⁴ has, for example, showed that a lower level of regulatory restrictions in the legal sector would result in lower import prices for clothing – although, as the authors of this paper acknowledge, the causality underlying this is not entirely clear, contract negotiations may well play a part in the ability of manufacturers and retailers to improve the competitiveness of their supply chain purchasing arrangements. Table 1, below, attempts to explain some of the underlying effects of professional services on output and export, both directly and indirectly.

Table 1: Examples of the Role of Professional Services in overall economic activity

Professional Services Sub-Sector	Role as an Intermediate Input	Role in final consumption	Intermediate role in other exports	Direct Export
Architecture	Architectural services as % of costs of total business accommodation costs	Architectural input into new residential, office or government buildings, or in refurbishment.	Architectural design input into e.g. ready-to-assemble buildings, vessels (e.g. ships/yachts) and materials for use in construction.	Architectural practices engaging in construction and design projects in other countries through cross border services or establishment of offices (e.g. Foster & Partners, Rogers Stirk Harbour + Partners)
Audit and Accountancy services	Audit and accounting services as % of total business costs (e.g. preparation of accounting, payroll and tax compliance)	Accountancy and audit services sold directly to businesses/ government and consumers	Accountancy component in supply chain of all exporting businesses	Cross border supply of services from accounting firms (e.g. Deloitte, PWC, KPMG, EY)
Engineering	Engineering services embodied in total business costs especially in manufactures, transport, construction, agriculture etc..	Engineering services consumed by businesses, governments and occasionally individuals.	Engineering input in exports (e.g. manufactures, aviation, transport etc.)	Engineering firms bidding to manage projects in other countries (e.g. Altran technologies, WS Atkins, Arcadis Group)
Law	Legal services as % of total business costs (e.g. contract drafting, risk management, dispute resolution)	Legal services consumed by businesses, individuals and government.	Legal component in supply chain of all exports	Law firms providing advice to clients in other countries or establishing offices to provide services in other countries (e.g. DLA Piper, Clifford Chance, Freshfields etc.)

Source: Author

Improving the productivity of Europe's professional services sectors is therefore going to play an important role in improving Europe's long term growth and employment prospects. This has been recognised by the European Commission for some time⁵ but despite more than a decade of policy advocacy and action at a European level, the results remain mixed.

³ TIVA reference

⁴ Nordas, H.K. and D.Rouzet (2015), "The Impact of Services Trade Restrictiveness on Trade Flows: First Estimates". OECD Trade Policy Papers, No. 178, OECD Publishing and

⁵ See for example speech by Commissioner Marion Monti, 2003, http://ec.europa.eu/competition/speeches/text/sp2003_070_en.pdf

This report first gives an overview of Europe's professional services markets, in terms of their internal structure and their wider contribution to the European economy. It then goes on to examine the role of regulation in determining the key characteristics of these markets and most importantly, in influencing their ability to contribute to European productivity. It then summarises past efforts to improve their functioning, notably through the Services Directive and recent activity at a European level to complete the Internal Market in professional services. Finally, before drawing some policy recommendations from this analysis, the paper looks at lessons that might be gleaned from other parts of the world and other sectors of the economy.

A Portrait of Europe's Professional Services Markets

In order to examine the underlying productivity issues in Europe's professional services markets, we first need to look at some of the key structural characteristics of these markets.

Professional services sit within the NACE Rev.2 statistical classification alongside other scientific and technical services, official data is therefore often difficult to obtain on the professions alone at a sufficiently detailed level. However, it is possible to construct a picture of the role that regulated professional services play in the European economy from a combination of aggregate sectoral statistics and data that has been collected on a bottom-up basis from within the professional sub-sectors themselves.

The contribution of total professional, scientific and technical services to European GVA in 2013 was €625 billion. Within this total engineering is the largest of the professional services industries with a market worth an estimated €117 billion in 2013, accountancy and legal services markets are of a roughly similar size, with turnover recorded at €91 billion and €89 billion respectively in 2013. The architectural services market is much smaller and was estimated to be worth €22 billion in 2013. These markets are, however, not always easy to define and top down data produced by statistical agencies is not always easy to reconcile with bottom up data from the professions themselves.

Table 2 sets out statistics on the contribution that professional and related services make to total GVA, exports and employment in each of the 28 Members of the European Union. Unfortunately the data is not available at sufficiently detailed level to show a picture of professional services alone, so some account must be taken of the inclusion in these figures of other services grouped under this statistical heading⁶. This table shows that for the EU as a whole, the share of professional services in total GVA is around 3%, about 3% in total services exports and around 0.5% in total employment. The wide distribution of figures for individual Member States around the European mean value suggest that there is a fairly wide disparity in the role these sectors play within their respective economies. For example, Germany has the largest architectural market by size, worth an estimated €5 billion, followed by the United Kingdom (€2.0 billion) and Italy, (€1.9 billion). No other countries have markets estimated to be larger than €1 billion. In legal services, the United Kingdom's market is the largest at €29 billion, followed by Germany (€15 billion) and France (€14.5 billion).

The European Commission has increasingly highlighted the fact that Europe's professional services markets are not only important to overall economic performance but that they are not working as effectively and efficiently as they should. In October 2015, the Commission services reported⁷ that wage-adjusted labour productivity ratio for the EU-28's professional, scientific and technical services sector was 118% in 2012, well below the non-financial business economy average of 142.7 % and the second lowest ratio within the non-financial business economy. These problems appear to be

⁶ The following seven divisions make up this sector: Legal and accounting activities (Division 69); activities of head offices and management consultancy activities (Division 70); architectural, engineering and technical consultancy services (Division 71); scientific research and development (Division 72); advertising (including direct mailing) and market research (Division 73); other professional, scientific and technical services such as design, photography, translation and interpretation services (Division 74); veterinary services for farm animals and pets (Division 75).

⁷ http://ec.europa.eu/eurostat/statistics-explained/index.php/Professional,_scientific_and_technical_activity_statistics_-_NACE_Rev._2

widespread across Europe and persistent. On 19 April 2015, for example, the *Financial Times* reported that “Lawyers, accountants and management consultants lie at the heart of the UK’s productivity problem, explaining almost a quarter of the shortfall since 2008”.

Table 2: The Contribution of Professional Services to the European Economy

	Share of professional, scientific and technical services in total GVA, % (2014)	Share of professional, scientific and technical services in total services exports, % (2012)	Share of professional, scientific and technical services in total employment, % (2015)
Austria	4.2%	1.9%	0.25%
Belgium	8.5%	N/A	0.54%
Bulgaria	N/A	1.8%	0.32%
Croatia	N/A	0.7%	0.46%
Cyprus	N/A	N/A	0.34%
Czech Rep	3.2%	2.6%	0.28%
Denmark	3.9%	0.9%	0.13%
Estonia	3.1%	N/A	0.72%
Finland	3.4%	1.5%	0.29%
France	4.9%	3.9%	0.72%
Germany	4.2%	1.8%	0.25%
Greece	2.5%	0.8%	0.11%
Hungary	3.7%	3.1%	0.18%
Ireland	4.0%	3.4%	0.47%
Italy	4.5%	4.8%	0.08%
Latvia	N/A	6.0%	0.77%
Lithuania	N/A	1.4%	0.56%
Luxembourg	7.0%	0.3%	0.24%
Malta	N/A	9.9%	0.71%
Netherlands	6.4%	0.8%	0.61%
Poland	3.5%	3.7%	0.20%
Portugal	2.6%	N/A	0.17%
Romania	N/A	2.3%	0.11%
Slovak Rep	3.7%	2.3%	0.20%
Slovenia	4.2%	9.9%	0.73%
Spain	3.1%	N/A	0.26%
Sweden	4.6%	3.1%	0.61%
UK	5.4%	N/A	0.92%
EU 28	3.2%	3.2%	0.41%

(Source: Eurostat)

Looking beneath this high level data, there are some characteristics of Europe’s professional services markets which would appear to be contributing to its poor performance in terms of productivity.

a) Fragmentation

Firstly, professional services markets are highly fragmented which makes it more likely that misallocation of resources may take place.

The proportion of businesses in the professional services sector which can be defined as micro-businesses is very high; more than 90% of professional, scientific and technical service businesses in all EU Member States have fewer than 10 employees.

This level of fragmentation means that businesses in the professional services sector are rarely able to achieve the size that would enable them to take advantage of economies of scale within their domestic markets, let alone across the European Union as a whole, even if they experienced no mobility problems. There are a few noteworthy exceptions to this general size condition and a few large industry players in each professional sub-sector have grown up to serve large company and government requirements at the top end of the market: The ‘Big Four’ accounting firms, the UK ‘Magic Circle’ law firms, some large consulting engineering firms, and a handful of large architectural practices that have grown up around a ‘big name’ principal, such as Foster and Partners, which has just under 500 architectural and design professionals working for it in fourteen offices worldwide. The existence of these exceptions demonstrates that the creation of businesses of different sizes is

possible within the professional services market. However, these are exceptions and this report will later consider the barriers that exist within the sector which tend to discourage the growth of larger businesses.

**Table 3: Size of Enterprises in the Professional, Scientific and Technical Services Industry
% of all businesses in the industry, 2014**

	<i>0 to 9 Employees</i>	<i>10 to 49 Employees</i>	<i>50 to 249 Employees</i>	<i>More than 250 Employees</i>
<i>Austria</i>	94.2	5.3	0.5	0.0
<i>Belgium</i>	97.9	1.8	0.3	0.1
<i>Bulgaria</i>	96.6	3.1	0.3	0.0
<i>Cyprus</i>	92.6	6.6	0.8	0.1
<i>Czech Republic</i>	98.3	1.5	0.2	0.0
<i>Denmark</i>	93.9	5.0	0.9	0.2
<i>Estonia</i>	95.7	3.9	0.4	0.0
<i>Finland</i>	95.5	3.9	0.5	0.1
<i>France</i>	96.2	3.3	0.4	0.1
<i>Germany</i>	90.2	8.9	0.8	0.1
<i>Hungary</i>	98.4	1.5	0.1	0.0
<i>Ireland</i>	93.9	5.3	0.6	0.1
<i>Italy</i>	98.9	1.0	0.1	0.0
<i>Latvia</i>	96.5	3.2	0.3	0.0
<i>Lithuania</i>	94.7	4.8	0.4	0.0
<i>Luxembourg</i>	94.4	4.7	0.7	0.1
<i>Netherlands</i>	97.2	2.4	0.4	0.1
<i>Poland</i>	98.2	1.4	0.3	0.1
<i>Portugal</i>	98.2	1.6	0.2	0.0
<i>Romania</i>	95.7	3.7	0.6	0.1
<i>Slovakia</i>	97.6	2.2	0.2	0.0
<i>Slovenia</i>	97.3	2.4	0.2	0.0
<i>Spain</i>	97.0	2.7	0.3	0.1
<i>Sweden</i>	97.9	1.8	0.3	0.0
<i>United Kingdom</i>	93.1	5.8	0.9	0.2
<i>European Union - 27</i>	96.5	3.1	0.4	0.1

(Source: Eurostat, 2016)

b) Inefficient Labour Markets

Secondly, European labour markets for professional services do not appear to be operating as effectively as they might, and the distribution of professionals within the EU is very uneven. There are, for example, an estimated 565 000 architects across the EEA, but 153,000 of these, or 27 percent, come from Italy alone. This gives Italy a density of 25 architects per 10,000 members of the population, compared to less than 3 per 10,000 in Poland. A study by the Institut der deutschen Wirtschaft Köln⁸ in 2009 showed a similar pattern for the engineering profession, with engineers making up over 3% of the working population in Finland and Germany and less than 1% in Slovakia.

⁸ European Engineering Report for FEANI by Institut der deutschen Wirtschaft Köln, 26 October 2009

Table 4: Number and Distribution of Professionals across the EU⁹

	Accountants		Architects		Engineers		Lawyers	
	Total number	Per 10000 population	Total number	Per 10000 population	Total number	Per 10000 population	Total number	Per 10000 population
<i>Austria</i>	6900	8.1	4600	5.4	5000	5.9	5940	7.0
<i>Belgium</i>	7548	6.7	15000	13.4	54000	48.2	17943	16.0
<i>Bulgaria</i>	708	1.0	3400	4.7	15000	20.7	12288	17.0
<i>Croatia</i>	1197	2.8	2200	5.2	35000	82.4	4483	10.6
<i>Cyprus</i>	3200	37.3	950	11.1	2200	25.6	2994	34.9
<i>Czech Rep</i>	9000	8.6	8200	7.8	50000	47.6	11394	10.8
<i>Denmark</i>	6000	10.7	10000	17.8	83000	147.5	5989	10.6
<i>Estonia</i>	350	2.7	800	6.1	911	6.9	879	6.7
<i>Finland</i>	760	1.4	3300	6.1	78589	144.2	2005	3.7
<i>France</i>	38500	5.8	29800	4.5	160000	24.3	58224	8.8
<i>Germany</i>	21416	2.7	107200	13.3	250000	30.9	163690	20.3
<i>Greece</i>	3500	3.2	17600	16.0	85000	77.3	21624	19.7
<i>Hungary</i>	5000	5.1	4100	4.2	7200	7.3	12481	12.6
<i>Ireland</i>	22000	47.8	2600	5.6	17801	38.7	2284	5.0
<i>Italy</i>	168000	27.6	153000	25.2	220000	36.2	246786	40.6
<i>Latvia</i>	498	2.5	900	4.5	700	3.5	1338	6.7
<i>Lithuania</i>	1440	4.9	1350	4.6	1400	4.8	2014	6.8
<i>Luxembourg</i>	980	17.8	900	16.4	1100	20.0	2000	36.4
<i>Malta</i>	2300	54.1	650	15.3	700	16.5	1222	28.7
<i>Netherlands</i>	20000	11.9	10900	6.5	22100	13.1	17486	10.4
<i>Poland</i>	N/A	N/A	10484	2.7	51000	13.2	49624	12.9
<i>Portugal</i>	1000	1.0	21200	20.3	31000	29.7	28852	27.7
<i>Romania</i>	5468	2.7	7400	3.7	12500	6.3	23784	11.9
<i>Slovak Rep</i>	860	1.6	1750	3.2	19000	35.1	5695	10.5
<i>Slovenia</i>	1020	4.9	1450	7.0	1046	5.1	1548	7.5
<i>Spain</i>	20654	4.4	51700	11.1	65000	14.0	144159	31.0
<i>Sweden</i>	5518	5.7	6150	6.4	130000	134.8	5456	5.7
<i>UK</i>	327000	50.8	34300	5.3	235000	36.5	168160	26.1
Total	680,817	13.4	511,884	10.1	1,634,247	32.2	1,020,342	20.1

(Sources: ACE, CCBE, FEANI, IFAC, 2016)

Although efforts have been made over many decades to improve the conditions governing the mobility of professionals within the European Union, the number of mobile professionals as a proportion of overall numbers working within the industry are low and the share of professional migration within overall EU 28 skilled worker migration is well below the share of the regulated professional services within total skilled employment.

The regulated professions are subject to a variety of different regimes designed to promote mobility between Member States. The engineering and accounting (excluding audit) professions are subject to the general system for mobility, as set out in the Professional Qualifications Directive (2005/36/EC). This system allows individuals who wish to work as professionals in other Member States and who can only do so under a locally regulated title, to apply for recognition of the qualifications and experience they have gained elsewhere in the European Union. Competent authorities in the host Member State are then required to assess applicants and determine whether they may be licensed

⁹ These statistics are drawn from reports made to European level professional associations on numbers of regulated professionals, they may not be fully comprehensive and therefore may underestimate the true number of professionals in Europe.

without further requirements, have to undertake additional tests, period of study or work experience, or some combination of these 'compensatory' measures.

Architects and lawyers in contrast, are governed by their own specific sectoral regimes. The sectoral regime for architects has now been incorporated into the Professional Qualifications Directive. This regime sets out a system of automatic recognition for architectural professionals holding certain qualifications which removes the need for any separate approval procedures to be undergone by architects wishing to move between Member States. The mobility of lawyers is enshrined in the Lawyers' Establishment Directive (98/5/EC) which sets out various lawyer titles that are regulated around the European Union and which allows any individual holding one of those titles to register with a host competent authority and practise under that home title. After three years of 'continuous and effective' practise whilst registered in another Member State, a European Union lawyer may apply for automatic admission. There are also arrangements which allow for temporary practice by architects and lawyers across the European Union.

The results of these various mobility arrangements have been limited. The European Commission's regulated professions database, for example, suggests that in 2014, only 12,001 accountants applied to establish or worked temporarily across borders within the EU, out of an estimated total population of 680,000 accountancy professionals in the EU as a whole. Although these numbers may well underreport the numbers of accountants actually moving, given that temporary movement is often unreported, a similar pattern exists in the other main regulated professions. For example, the percentage of the total population of European lawyers and architects moving cross border to establish elsewhere in the EU in 2014 was around 0.04% and 0.2% respectively.

Further evidence of the inability of Europe's professional labour markets to reallocate labour exists in the variability of unemployment rates for different professions across the EU. There is reportedly a surplus of engineers in Italy, Finland, Spain and Portugal but significant shortages in Germany and Benelux. There is some evidence of South to North movement of engineering professionals but not enough to fill all the advertised positions in Germany where there are more than 60,000 vacant engineering jobs at any one time.

c) Constraints on investment

Although high levels of fragmentation contribute to low levels of investment, Europe's professional services markets contain other barriers to innovation and technological change. In particular, in the form of ownership structures. As table 5, below, shows, sole ownership and partnership are the most widely used vehicles for professional services businesses in many Member States. This is a good proxy indicator for low levels of investment, since the differential tax treatment on profit distributions in partnerships compared to company structures discourages retention of profits.

The statistics shown in table 5, however, may disguise the fact that sole practice is the main means of practice in most of Europe's professions, since many of Europe's unlisted limited liability companies are also run as sole principal businesses. For example, nearly one third (29 percent)¹⁰ of Europe's architects describe themselves as sole principals and in the engineering sector, most of the estimated 90,000 engineering firms registered in Germany and the 80,600 registered in France, are individual enterprises according to industry studies¹¹.

¹⁰ Architects Council of Europe Survey 2014, http://www.ace-cae.eu/fileadmin/New_Upload/7_Publications/Sector_Study/2014/EN/2014_EN_FULLL.pdf

¹¹ Source: European Industry Review – The Consulting Engineering Sector in Europe, ING Bank (2008)

Table 5: Ownership structures in professional, scientific and technical services industry, 2014
Percentage of total

	<i>Individual Enterprise</i>	<i>Partnership</i>	<i>Unlisted Limited Liability Company</i>	<i>Listed Limited Liability Company</i>	<i>Other</i>
<i>Belgium</i>	1.9	27.2	68.9	2.0	0.0
<i>Bulgaria</i>	0.6	19.2	75.1	0.6	4.4
<i>Denmark</i>	3.9	15.2	79.7	0.9	0.3
<i>Germany</i>	20.7	0.7	27.3	7.6	43.8
<i>Ireland</i>	6.0	50.4	40.8	1.4	1.4
<i>Greece</i>	5.3	0.0	89.5	5.3	0.0
<i>Spain</i>	13.8	3.9	75.2	0.1	7.0
<i>France</i>	5.5	25.7	68.6	0.1	0.2
<i>Italy</i>	9.1	12.5	41.9	0.0	36.5
<i>Cyprus</i>	0.0	22.2	55.6	22.2	0.0
<i>Latvia</i>	0.0	0.0	100.0	0.0	0.0
<i>Lithuania</i>	0.0	0.0	92.2	0.4	7.5
<i>Luxembourg</i>	12.3	8.2	78.7	0.8	0.0
<i>Malta</i>	13.3	26.7	60.0	0.0	0.0
<i>Netherlands</i>	1.9	14.7	77.0	0.6	5.7
<i>Poland</i>	6.8	4.2	51.1	0.1	37.8
<i>Slovakia</i>	9.4	25.7	64.9	0.0	0.0
<i>Finland</i>	0.0	0.0	99.8	0.2	0.0
<i>Sweden</i>	0.0	6.2	81.7	4.9	7.2
<i>United Kingdom</i>	3.8	39.6	43.4	6.4	6.8

Source: Eurostat

d) Geographical Isolation

The internal fragmentation of European professional services markets is not assisted by their relative isolation from external competition from outside the EU. The EU's multilateral commitments, as set out in the schedule of commitments appended to the GATS Treaty are summarised in Box 2. This suggests that it is the accountancy, notably audit, and legal services markets within the professional sub-sector which are most isolated from international competition.

Nonetheless, although discriminatory restrictions do persist in many parts of Europe, non-discriminatory regulatory restrictions which require, for example, particular forms of ownership or adherence to locally imposed regulatory obligations are far more common. This suggests that the removal of trade barriers in professional services sectors would not necessarily be sufficient to unlock the real potential of Europe's professional services markets. Action to tackle underlying regulatory barriers would be more helpful because it could help to address both external barriers to competition and barriers to competition that persist within the European single market.

In summary, therefore, professional services markets make a reasonably significant contribution to the overall European Union economy, both in their own right and as part of wider supply chains. When compared to other OECD economies there would appear to be scope for them to play an even bigger role but they are constrained by structural factors, such as the ability of the market to allocate skilled labour effectively and the organisational makeup of the sector, which also impact on productivity.

Box 2: EU-15 commitments in GATS

Mode of Supply : 1) Cross-border supply 2) Consumption Abroad 3) Commercial presence
4) Presence of natural persons

Sector	Commitments
Accountancy, audit and tax advice	<p>Mode 1: All except France, Greece and Italy; unbound in all for audit</p> <p>Mode 2: All</p> <p>Mode 3: Services restricted to natural persons in Italy and particular corporate form required in France, Germany and Portugal; For audit – services may only be provided through particular corporate form in Belgium, Germany, France, Portugal, Ireland and Italy</p> <p>Mode 4: Unbound except for Austria, Germany, Luxembourg, Netherlands, UK and Sweden; For audit – nationality conditions for Denmark, Spain, Greece, Italy and Portugal</p>
Architectural services	<p>Mode 1: All except Belgium, Greece, Italy and Portugal</p> <p>Mode 2: All</p> <p>Mode 3: Services restricted to natural persons in Spain, Italy and Portugal and particular corporate form required in France</p> <p>Mode 4: Unbound except for Denmark, Spain, Luxembourg, Netherlands, UK and Sweden</p>
Engineering services (CPC)	<p>Mode 1: All except Belgium, Greece, Portugal</p> <p>Mode 2: All</p> <p>Mode 3: Services restricted to natural persons in Spain, Italy and Portugal</p> <p>Mode 4: Unbound except for Denmark, Spain, Netherlands, Sweden and the UK subject to satisfactory qualifications</p>
Legal services (CPC 861)	<p>Mode 1: All except France and Portugal</p> <p>Mode 2: All</p> <p>Mode 3: Subject to conditions on form of practice in Germany and France. Other limitations in Denmark and Luxembourg</p> <p>Mode 4: Unbound except for Germany and the UK</p>

(Source: WTO)

The next section of this report will go on to examine the influence that regulation of the sector has on this wider picture.

Regulation and the competitiveness of Europe's professional services markets

The case for regulation in professional services markets is usually based on justifications that include information asymmetries, and/or specific public policy and public interest grounds. However, the direct linkage between these justifications and the regulations adopted under cover of them have rarely, if ever, been challenged. For example, many, if not all, European legal professions require regulated lawyers to act independently. This is a reasonable requirement, since clients want to know that their lawyers are working on their behalf and are not, for example, being influenced by the State or by financial considerations which might dictate how they conduct a case. Whether such reasonable considerations then lead inevitably to the raft of regulations that are often justified under this principle is something that has never been tested, and for which no analytical framework yet exists.

Box 3: GATS Treaty Article VI.4

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

- a) *Based on objective and transparent criteria, such as competence and the ability to supply the service;*
- b) *Not more burdensome than necessary to ensure the quality of the service;*
- c) *In the case of licensing procedures, not in themselves a restriction of the supply of the service.*

Although Article VI of the GATS Treaty recognises that regulation might act as a barrier to trade and seeks to put in place a mechanism for dealing with it (see Box 3), WTO member states have not yet successfully managed to agree to any binding disciplines that have had a real impact on professional services. The Council for Trade in Services did adopt *the Disciplines on Domestic Regulation in the Accountancy Sector* on 14 December 1998 but these have not had a significant effect on market access for foreign accounting services since they continue to permit Member States to justify restrictions in almost any area ‘*in fulfilment of a legitimate objective*’¹². The extent to which restrictions of different types are genuinely related to ‘*legitimate objectives*’ or whether there are more effective ways of achieving those objectives, other than through regulatory restrictions, has never been challenged at a multilateral level. The discipline on accountancy services was agreed by WTO Member States with relative ease, given support from the industry and the fact that the sector is relatively free of restrictions. It was expected at the time that further disciplines would follow in other areas of professional services, which might have more of an impact, however, this has yet to happen.

The European Union Treaty also acknowledges that Member States have the right to regulate professional services within some clearly defined parameters. The Union is limited to action within the competences that have explicitly been granted to it under Article 5 of the Treaty on Economic Union. Given that no framework is defined in the Treaties for regulating professional services markets, this responsibility remains a national competence, despite the importance of these markets to the overall European economy. The European market for professional services therefore operates at a highly decentralised level.

It is left to Member States for example, to determine what activities or titles they regulate, and as a result an estimated 5,500 different professions are regulated across the European Union. Even the definition of a single profession can vary significantly in different European countries, in terms of the scope of the work that is permitted to licensees.

The number of different regulators is equally large, because regulatory tasks are often delegated to the local level. There are, for example, over 1500 bodies involved in the regulation of the legal profession across the twenty-eight Member States of the EU¹³.

¹² See Accountancy Disciplines - https://www.wto.org/english/news_e/pres98_e/pr118_e.htm

¹³ Source: Directory of Legal Regulators, International Bar Association 2016

An overview of regulation in the main professional services markets

a) *Accountancy*

There are seventy-six different recognized professional titles relating to accountancy across the Member States, which all have a slightly different scope of practice, educational requirements and competent authorities.¹⁴ Ireland, for example has notified the following regulated titles in the field of accounting and tax advice: Certified accountant, certified public accountant, chartered accountant, incorporated public accountant, tax advisor, and technician accountant.

Generally speaking, however, accountancy is not heavily regulated except in the field of audit, where all Member States have implemented the Eighth Company Law Directive (84/253/EEC) which lays down minimum qualification requirements for auditors. The most common regulatory model across the European Union is for professional accounting bodies and Ministries of Finance or other statutory oversight bodies to work in partnership to regulate professionals providing accountancy and audit services.

b) *Architecture*

The regulation of architects is relatively uniform across the European Union, based on a broadly similar scope of reserved practice and title, and a list of accepted courses of study. This is the result of harmonisation brought about by the Architects' Directive (85/384/EEC), and even earlier efforts to harmonize educational requirements for European architects dating back to the 1960s. Nevertheless important differences in regulatory approaches still exist between the Member States.

Across the European Union there tend to be two predominant models for regulation: The first is a self-governing chamber model which has both regulatory and representational responsibilities, the second is a split model in which licensing is undertaken by an independent regulatory body, or government department, and membership support activities are provided by a professional association.

c) *Engineering*

The European engineering profession is extremely heterogeneous. There are, for example, one hundred and thirty four professional titles for engineers identified under the Recognition of Professional Qualifications Directive (2005/36/EC)¹⁵, and an estimated ninety-nine distinct categories of civil engineering qualification alone in existence across Europe. This illustrates that the profession of 'engineer' covers various disciplines which are not identically defined, nor organized in the same way from one Member State to another, which makes comparability extremely difficult across the European Union. Competent authorities for the regulation of engineering activities may be traditional self-governing chambers, sometimes jointly regulating engineering and architecture, or they may be purely registration bodies, run out of government departments.

d) *Legal Services*

The shape of the legal profession is heavily influenced by national legal systems and local court procedures. The civil law jurisdictions of the European Union mostly maintain a notarial system, in which certain functions are carried out by the notarial profession. Notaries are not included in the definition of legal service providers used throughout this report because they are generally counted as public officials and therefore outside the purview of most single market actions. In contrast, in the United Kingdom, Ireland, Cyprus and Malta, as well as Denmark, Finland and Sweden, the practice of law by 'lawyers' is wider and encompasses land and property transfers as well as succession issues that would be handled by a notary elsewhere in Europe. In general, across the European Union, the regulation of lawyers is conducted via protected titles linked to a scope of practice, which may be broad but vague (e.g. the 'practice of domestic law') or limited and specific, as in the United Kingdom and Ireland. Lawyer titles are generally policed by independent and self-regulating Bar Associations,

¹⁴ [Annex II: List of Titles of Key Regulated Professions in the EU](#)

¹⁵ Ibid.

often operating at a local level in accordance with court districts. More recently some Member States have introduced reforms which have separated representational or trade union functions, from regulatory functions.

There are three ways in which regulation might have an impact on the productivity and competitiveness of professional services markets:

- Firstly, by affecting entry conditions, regulation will reduce the supply of professionals compared to an uncontrolled market. This might be expected to lead to higher prices to the users of professional services and affect resource allocation.
- Secondly, conduct requirements can influence the extent to which professional services markets can reduce information asymmetries by sharing ex-ante information about service content and quality; for example through advertising, use of websites and information that may be shared about service providers by past clients. These rules can also influence the form in which professionals are permitted to practice, the extent to which they can collaborate with others outside the profession or share ownership, and even the prices that they can charge. This kind of barrier reduces innovation and investment and can impact on both labour and Total Factor Productivity.
- Thirdly, regulation can discriminate directly and indirectly against foreign service suppliers and reduce their ability to supply services across borders, or to have a temporary or permanent presence in a host jurisdiction. This makes it easier for resource misallocation to occur.

It is, of course, entirely possible that regulation in any of these three areas may be justifiable on the basis of market failure or public interest tests. However, where there are wide disparities in the way in which regulation is handled by different Member States the question must be raised of whether the public interest is equally different across the Member States or whether some professional sectors are simply excessively regulated. The following tables and accompanying commentary therefore concentrate on areas where there are major variations between Member States.

Table 7, below, focuses on the restrictions which have the largest impact on the ability of new entrants to provide professional services. These are: Exclusive, or monopoly rights to provide certain services, education and training requirements, compulsory membership of an association and quotas on entry.

Of these possible restrictions on entry, quotas are obviously a particular distortion and, as shown in table 7, have now been largely removed for professional services in the European Union. However, although it is now widely recognised amongst those determining the entry conditions for the professions that a '*numerus clausus*' or quota is anti-competitive, it is striking how often the argument for the need to restrict numbers of new entrants to the profession in order to raise standards, or earnings amongst incumbents is still raised. See, for example, comments made by a recent Batonnier of the Marseilles Bar and an Italian judge on this question.¹⁶

The tendency amongst professional bodies to seek to address low incomes and unemployment affecting their members through quotas on entry, matters. Even if these sort of restrictions are no longer permitted under European law, the fact that professional bodies play a role in regulating n many professional sectors is an indication of the kind of approach which is often brought to bear in making regulatory decisions and one that is far removed from any possible public interest justification.

It is also worth bearing in mind that education and training systems leading to entry into the professions can also act as disguised forms of quotas, by for example restricting the numbers of training places available via other means. This leads to the problem of part qualification, in which individuals have been able to begin the training process but are unable to access all of the stages required to fully qualify. The legal profession is particularly prone to this kind of distortion and this has

¹⁶ <http://www.thelys-avocats.fr/numerus-clausus-dans-la-profession-davocat-solution-ou-illusion/>
http://www.coe.int/t/dghl/cooperation/cepej/cooperation/Support_Jordania/Oberto_Challenges_Case_Processing.asp

provoked governments in Poland and Romania to introduce reforms which have created new paralegal professions, regulated directly by government and sitting alongside the traditional Bar regulated legal professions.

Not surprisingly, education and training requirements are the most prevalent restriction on entry. These requirements are not necessarily negative, since the point of a regulated profession is to ensure that individuals providing certain highly skilled services are appropriately qualified. The question is, what is the appropriate level of qualification and what might be considered to be excessive and thus act as an unjustified barrier to entry? For example, some countries, notably Ireland and the UK, have a more flexible approach for those wishing to enter the accountancy profession, since pathways are provided for individuals who do not necessarily have degrees but who can still reach the required standard through study and examinations undertaken whilst in employment. In the engineering sector, many Member States leave it to the market to determine the level of qualification required and impose no formal requirements.

a) Restrictions on Entry

Table 7: Entry Restrictions, 2014

	<i>Exclusive Rights</i>	<i>Education Requirements</i>	<i>Compulsory 'membership'</i>	<i>Quotas or economic needs tests</i>
Accountancy	Some in all EU Member States but much more limited in Ireland and Netherlands	Fairly similar level across EU Members but more accessible and flexible qualification routes in UK and Ireland	Professional membership required in all Member States apart from Sweden, Spain, Finland and Denmark	None reported
Architecture	All except Finland and Sweden and very limited reservations in the UK and Ireland	Some Member States only require tertiary level of education, others require practical experience in addition and in Greece, Ireland, Malta, Romania, Slovakia, Czech Republic, Italy and Lithuania an examination is required	Professional membership optional in Denmark, Estonia, Finland, Ireland, Latvia, Netherlands, Sweden, UK, Lithuania and Malta – otherwise compulsory.	None reported
Engineering	Activities reserved to qualified engineers in Croatia, Cyprus, Italy, Malta and Portugal and many specific activities regulated differently in different Member States	No formal requirement in France, Netherlands, Denmark or Sweden.	Required in Bulgaria, Germany (consulting engineers), Greece, Ireland (chartered engineers), Italy, Luxembourg, Malta, Austria, Poland (civil engineers), Portugal, Slovakia (only civil engineers), Slovenia, Spain, the Czech Republic (certified engineers), Hungary, the United Kingdom (Chartered Engineers or incorporated engineers), Cyprus.	None reported
Legal Services	All, to varying degrees, except Finland and Sweden	Similar levels of education required but wide variance in practical experience requirements.	Required everywhere other than Malta	None reported

Source: OECD, European Commission, ACE, CCBE, FEANI, FEE

The variability in exclusive or reserved rights for the professions across the European Union is also significant. In Belgium, for example, an expert-comptable or accountant, is entitled to perform the following reserved activities: The issuance and review of financial statements, valuation, forensic accounting, and special assignments stated in company law or other specific laws. In Ireland, the only reserved activity for chartered accountants is audit. In law, reserved rights vary widely. In Finland, regulated lawyers have no reserved rights, whereas in Croatia lawyers have exclusive rights over the giving of legal advice, drafting of documents, the drawing up of claims, complaints, motions, requests, extraordinary legal remedies and other pleadings, and the representation of clients. Although it is perfectly understandable that educational requirements may vary across the European Union, some professions have additional requirements that are difficult to justify. Lawyers must be in good health to be admitted in Croatia and must be over twenty five years old in Finland.

Finally, there is the issue of compulsory membership of a professional association which remains a requirement for entry into most professions, with a few exceptions in individual Member States for law and accountancy and more generally in engineering. Compulsory membership can create additional costs for professionals over and above formal regulatory requirements, due to the unwanted bundling of additional representative services.

b) Practice Restrictions

Table 8 shows a number of common restrictions on practice for professionals. Again there are wide variances in the extent to which any practice restrictions applying in different Member States

i) Fee Scales

The regulation of prices and fees has been reduced in recent years in all professional sectors.

Following various European Court cases, such as C-565/08 Commission v Italy, 29 March 2011, fee scales have now largely been abolished in the legal sector, except in relation to government regulated work (e.g. legal aid rates). There are however ongoing restrictions in many markets on certain types of fee arrangements. Contingency, or success fees, for example, are prohibited for lawyers to accept in Belgium, Greece, Portugal, Luxembourg, France and Romania.

Fee regulations for auditors are largely governed by the Directives governing audit practice. However a number of European ethical codes contain provisions require audit fees to be proportional to audit work, ostensibly in order to prevent uneconomic fees being used to win clients.

Fee scales for architects have largely been abolished in recent years but a handful of countries, including Poland and the Czech Republic, maintain guidance designed to assist consumers.

ii) Geographical limits

Some professions, notably audit and legal, require professionals to have a physical business address within the EEA in order to be able to conduct business. As in the case of fee scales, geographical restrictions have been progressively liberalised over the past decade. The European Court case 107/83 (Ordre des avocats au Barreau de Paris v. Onno Klopp, 12 July 1984) led, for example, to the removal of restrictions on the maintenance of offices in more than one location. More recently, under pressure from the Troika, Greece has removed geographical limitations on lawyers practice within Greece.

iii) Advertising

Restrictions on advertising and publicity arrangements are particularly important for a sector in which asymmetry of information and significant one-off purchases of services play a major role. Over recent years many of the historical restrictions on publicity by professionals have been replaced by more general prohibitions on misleading and unfair advertising, as set out in the Unfair Commercial Practice Directive (2005/29/EC). Nonetheless, some restrictions on advertising remain in place for lawyers in Estonia, France, Ireland, Latvia, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia, the Czech Republic and Cyprus. References to previous clients are widely prohibited except under in certain cases where the client has consented to be named, as in Austria, Scotland and Ireland. In over half of Member States lawyers are not permitted to solicit for work by approaching individual clients, as opposed to promoting themselves through more general publicity measures, such as the maintenance

of websites. However, even where publicity arrangements are formally permitted, the application of local codes of conduct can have a chilling effect. In Croatia, for example, lawyers must obtain the prior approval of the Croatian Bar Association for any text that appears on their websites.

In contrast, auditors face few restrictions on advertising. Slovakia is the only EU member state to prohibit all forms of advertising, although many other jurisdictions have provisions in their codes of conduct which have implications for auditors seeking to publicise their services. France, Italy, the Netherlands and Portugal all maintain measures affecting auditors, which range from the requirement that all advertising should be 'factual' through to a prohibition on mentioning clients.

In most EU member states, there are few restrictions on advertising in the architectural sector. However in Portugal architects are subject to additional conditions on comparative advertising which prohibit comparisons to other professionals. In Malta, architects are prevented from advertising except when searching for new employees or notifying clients of a change of address, whilst in Cyprus there is an absolute ban on advertising by architects.

Table 8: Practice Restrictions, 2012

	<i>Prices and Fees</i>	<i>Physical and geographical limitations on location</i>	<i>Marketing /advertising restrictions</i>	<i>Form of practice and shareholding/ ownership</i>	<i>Multidisciplinary practice</i>
<i>Audit/ Accountancy</i>	Few restrictions exist	Local residency required for auditors in Austria, Croatia, Denmark, Finland, Italy, Portugal, Slovenia and Sweden	An absolute ban only exists in Slovakia	Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, Sweden	Widely prohibited for auditors
<i>Architecture</i>	Mandatory fee scales in Germany and Malta. Minimum fees in Greece.	Residency required in Belgium, Hungary, Italy and Slovakia	Prohibitions only in Cyprus and Malta	Non-architects only allowed minority ownership share in Belgium, France, Italy, Austria and the Czech Republic. Restrictions on ability to limit liability in Spain and Malta. Other limitations in Luxembourg, Croatia, Hungary and Slovakia	Collaboration limited to engineering or other compatible professions in Czech Republic, Cyprus, Germany, Italy and Spain, Luxembourg or to the exclusion of commercial entrepreneurs, in Austria.
<i>Engineering</i>	No reported restrictions	No reported restrictions	No reported restrictions	Shareholding restrictions in Austria, Spain, Malta and Cyprus. Other limitations in Croatia, Hungary, Italy, Slovakia	Restrictions exist in Austria, Bulgaria, Denmark and Luxembourg
<i>Legal Services</i>	Various Member States maintain guidance only. Some controls on type of fee arrangements more common (e.g. ban on contingency fees)	In Croatia sole practitioners may only have one office. Only one office permitted in Slovenia Address for service may be required in many MS	Czech Republic, Cyprus, Estonia, France, Croatia, Ireland, Lithuania, Luxembourg, Latvia, Malta, Portugal, Romania, Slovakia and Slovenia	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, UK	All except – Netherlands, Germany, UK, Italy, Spain, Austria, Denmark

Source: OECD, European Commission, ACE, CCBE, FEANI, FEE

iv) Forms of Practice and Multi-Disciplinary Practice

There are also obstacles placed on the form that professional services businesses can take in many different European countries. As table 8 shows, legal services is the most restrictive sector when it comes to the forms that may be chosen for practice, with restrictions in accounting/audit also featuring in many countries.

However there are significant differences between the severity of the restrictions imposed in legal and audit. In the case of audit/accounting, limitations are mostly reserved to residency, with audit firms fairly commonly required to have a local commercial presence. In the case of legal services, on the other hand, the choice of particular vehicle is frequently restricted to certain models, and in 23¹⁷ Member States, lawyers are prohibited from sharing ownership with non-lawyers, effectively restricting their business to the provision of legal services.

Although formal barriers to multi-disciplinary practice do not exist in all professions, history and traditional practices mean that many professionals end up working in businesses that are restricted to the practice of their professional qualification. For example, almost two out of three European architects describe themselves as 'independent architects'¹⁸ and in Italy and Greece these proportions rise to over 90%.

c) Discriminatory Barriers to foreign competition

Table 9 sets out the discriminatory barriers to foreign professionals which continue to exist in the European Union alongside non-discriminatory requirements on entry and practice. This shows that a surprising number of restrictions persist across many countries, particularly in legal services and audit. Economic needs tests applying to individuals and to contractual service suppliers are a very common tool across the board and undoubtedly have a chilling effect on mobility.

Table 9: Discriminatory Treatment, 2015

	Nationality Restrictions	Residency Requirements	Legal Form and Foreign Equity Restrictions	Economic Needs Tests
Accountancy /Audit	Greece, Spain	Austria, Croatia, Denmark, Finland, Italy, Portugal, Slovenia, Spain	Austria and Bulgaria -25% limit, Cyprus - partnerships only, Latvia, Poland and Slovakia not permitted	For accountancy only ENT needed for: Bulgaria, Czech Republic, Denmark, Greece, Finland, France, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia, Cyprus
Architecture	Bulgaria	Bulgaria, Hungary, Italy, Slovakia	Bulgaria	Austria, Belgium, Bulgaria, Czech Republic, Denmark, Spain, Hungary, Italy, Latvia, Romania, Slovakia
Engineering	None	None	None	Belgium, Bulgaria, Czech Republic, Denmark, Spain, Italy, Latvia, Romania, Slovakia
Legal Services	Austria, Belgium, Greece, Croatia, Bulgaria, Cyprus, Estonia, Germany, Hungary, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Spain	Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Spain	Austria and Denmark – 10% limit, France and Portugal -25% limit	Belgium, Bulgaria, Czech Republic, Denmark, Finland, Greece, Spain, Hungary, Italy, Latvia, Lithuania, Malta, Romania, Slovenia, Slovakia

Source: Canada-EU Free Trade Agreement

¹⁷ Global Crossborder Legal Services Report, International Bar Association, 2014 http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/The_Regulation_of_International_Legal_Services.aspx

¹⁸ Architects Council of Europe 2014 survey, *ibid.*

Overall, these examples of regulatory restrictions that are likely to impact negatively on productivity illustrate two things: Firstly, that progress has been made in reforming professional regulation over recent years and many of the most egregious barriers to effective and competitive practice have been removed. But these examples also show that there is still a high level of variability in regulatory practice within similar or identical professions.

The rationale for these wide disparities is difficult to explain on the basis of any difference in interpretation of the public interest alone. The persistence of barriers to productivity improvements has prompted the European Commission to devote increasing attention to this issue in recent years and to recognise the need for more concerted action. The result of these efforts led in 2005 to the proposal for a framework directive on services which was intended to deal with ongoing barriers in professional services markets in a proactive way.

The Impact of the Services Directive

The preamble to Directive 2006/123/EC on Services in the Internal Market (“the Services Directive”) states that this legislative measure is intended to improve the competitiveness of services markets and in particular to enable greater exploitation of the European single market by SMEs. The ultimate goal, however, was to require Member States themselves to complete the single market for services by eliminating remaining restrictions on the cross border supply of services, whilst also increasing transparency and the availability of information for consumers.

The European Commission had prepared for the directive by publishing a report on the State of the Internal Market for Services, which showed that despite more than a decade of action to create a seamless European market for services, significant barriers remained. In putting forward this directive the Commission acknowledged that although it could continue to take action on a case by case basis to address barriers to trade in services in the single market, this was an extremely lengthy process. It was therefore attempting through the services directive to push the onus for completing the single market back onto the Member States themselves and through the directive provide a framework that would enable them to do so in a proactive and coordinated way. The focus of the Services Directive was therefore on measures that would fill the gaps left between existing Internal Market measures, and in the case of professional services, add to the mutual recognition arrangements set out in the *Recognition of Professional Qualifications Directive (2005/36/EC)*.

The main measures proposed by the Services Directive

The Services Directive contains an extremely long set of recitals, consisting of over one hundred paragraphs setting out some of the thinking underlying the proposal. Although it does not have any direct legislative impact, the material contained in the recitals will nonetheless be important should the European Court of Justice ever be required to interpret the directive, since it provides very detailed guidance on the purpose underlying the directive.

The directive recalls the fact that Treaty Articles 49 and 56¹⁹ prohibit barriers to the freedom of establishment and the freedom to supply services. The main body of the directive then sets out specific regulatory requirements which are not permitted, such as nationality or residence requirements, and restrictions on the form of establishment through which a provider could provide services. Recital 40 also helpfully summarises the interpretation of the Court of Justice on the ‘overriding reasons relating to the public interest’ which may be used to justify the maintenance of barriers to the free supply of professional services. It notes that public policy, consumer protection, the prevention of fraud, the protection of the environment and urban environment, the protection of creditors, safeguarding the sound administration of justice, road safety, the protection of intellectual property and the preservation of national historical and artistic heritage are all valid public interest concerns. These have all been used as justifications that have been used for regulating various professional services.

The directive also sets out a process of ‘mutual evaluation’ for testing whether the requirements justified by such public interest considerations comply with basic principles of European law and good

¹⁹ Ex Art. 43 and 49 under previous version of the Treaty

regulatory practice. Article 15 of the directive outlines the regulatory requirements which Member States should evaluate, including quantitative of territorial restrictions, obligations to take a particular legal form, shareholding requirements and price restrictions. Article 16 of the directive then sets out the principles that should be used in conducting this evaluation: Non-discrimination, necessity and proportionality.

The body of the directive expands on how the evaluation of regulatory barriers should work in practice and the following are the most noteworthy provisions:

- Under Article 24, Member States are required to remove all ‘total prohibitions’ on commercial communication by the regulated professions. Some restrictions are, nonetheless, permitted provided that these are *‘justified by an overriding reason relating to the public interest and proportionate’*.
- Article 25 sets out a general presumption that providers of services should not be restricted in creating multidisciplinary arrangements but does again allow for some limitations to be imposed on professional service providers, in so far as these are ‘necessary in order to ensure their independence and impartiality’. It also highlights the particular areas of difficulty that are perceived to exist in multidisciplinary activities, such as conflicts of interest and conflicting rules of professional ethics and which might justify continued restrictions.

Member States were required by the directive to provide a report to the Commission within three years of its entry into force, confirming the removal of all discriminatory restrictions. In addition this report needed to provide an evaluation of and justification for the continuation of non-discriminatory restrictions.

The directive also attempted to build a mutually supportive environment for Member States to take the required action to free up professional and other services, by providing tools such as alert mechanisms, exchange of information and training programmes.

It is worth noting that the version of the services directive that was finally approved by the European Parliament in December 2006 looked very different to the original 2004 European Commission proposal. The passage of the directive was highly controversial and had provoked an unprecedented political backlash from opponents of liberalisation, NGOs, labour unions and public sector workers, resulting in some considerable watering down of the Commission’s original proposals. This is relevant today because the difficulties of passing the Services Directive have made the Commission extremely wary of any legislative action. Furthermore political support in post-financial crisis Europe for harmonising measures is significantly reduced and this reduces the scope of action available to the European Union for improving the functioning of professional services markets.

What difference has the Services Directive made?

Table 10 below, shows how the different Member States have implemented the services directive. The various approaches adopted, ranging from simply adopting a horizontal implementing law through to the adoption of sector specific action to ensure compliance, illustrate the varying extent to which Member States have engaged with the underlying intent of the Directive. This second column of this table shows the measures relating to professional services which Member States have assessed under Article 15 and regard as justified. The last column shows any significant reforms that have been undertaken in professional services since the Services Directive entered into force.

There are a number of notable things about the information in this table:

- Firstly, the information that has been supplied under the mutual evaluation exercise would not appear to be wholly comprehensive when compared to the known state of affairs in the different professional sectors.
- Secondly, not all Member States would appear to have accorded equal energy, either to the process of transposing the Services Directive or to the mutual evaluation exercise.
- Reforms, where they have occurred, appear to have painstaking and hard to achieve, often requiring pressure from third parties. They have been very unevenly pursued across the Union.

- Legal form and shareholding requirements are perhaps the most common continuing barrier to practice. Given the impact that such requirements can have on firm and sector-wide productivity levels, as shown earlier in this report, the persistence of these barriers is a particular concern.

Reviews by the European Commission, in concert with the Member States in the period after the transposition of the Services Directive, found that, whilst some Member States had removed barriers at a legislative level, these had not always been reflected at an operational level. There have even been challenges made to the reform process by the professions themselves.²⁰ For example, a number of regional Bars in Italy failed to give effect to legislative reforms on pricing and advertising for the legal profession. And, as Pagliero (2015) notes²¹

“ The lobby of lawyers even managed to pressure parliament into discussing a new draft law to restore the minimum prices abolished in 2006, and to re-introduce the ban on contingent fees and commercial advertising ... In the end, however, the proposed law failed to gain the support of both chambers and was never approved. In conclusion, while the timing of the policy change is well defined, some of its effects have been delayed or weakened by opposition from professional associations”.

This example, throws into sharp relief the challenges for reform in the professional services sector. Even if national authorities are persuaded to bring forward the required legislative amendments, the fact that professional services regulation is in many cases still carried out by self-regulating professional associations that combine regulatory and representational responsibilities, means that the implementation of reforms is often distinctly sub-optimal.

²⁰ ‘Commission Staff Working Document on the outcome of the peer review on legal firm, shareholding and tariff requirements under the Services Directive, *European Commission*, 2 October 2013.
<http://ec.europa.eu/DocsRoom/documents/14964/attachments/1/translations/en/renditions/native>

²¹ “The effects of recent reforms liberalizing regulated professions in Italy”, Mario Pagliero, Università di Torino (2015)

Table 10: Implementation of the Services Framework Directive

<i>Country</i>	<i>Implementation of the Directive</i>	<i>Measures reported for professional services under the mutual evaluation exercise²²</i>	<i>Major reforms to professional services sectors since 2006</i>
<i>Austria</i>	Horizontal law adopted for the implementation of the Services Directive – but only partial implementation of the provisions in the Directive		Fee scales for architects in 2006 abolished as part of implementation of the Services Directive
<i>Belgium</i>	Horizontal Law and amendments to specific legislation.	Shareholding requirements exist for accountants and tax advisors. Architects are subject to tariff requirements. Multidisciplinary restrictions exist for architects, accountants and tax advisors.	
<i>Bulgaria</i>	Horizontal Law and amendments to specific legislation.	Multidisciplinary restrictions on architects and engineers whose employees cannot exercise any business activities related to construction	
<i>Cyprus</i>	Horizontal law and planned modifications to sectoral legislation	Only natural persons can supply the services of architects and engineers. Minimum tariffs exist for lawyers. Prohibition on lawyers entering multidisciplinary practices.	
<i>Czech Republic</i>	Horizontal measure and sector specific legislation	None reported	
<i>Denmark</i>	Horizontal law transposing Services Directive plus amendments to several sectoral laws,	Quantitative or territorial restrictions and shareholding requirements apply to lawyers. Restrictions on multidisciplinary activities for lawyers.	
<i>Estonia</i>	Horizontal law	Shareholding requirements are imposed on public accountants.	
<i>Finland</i>	Horizontal law	None reported	
<i>France</i>	Implementation through amendments in existing legislation	Accountants cannot use commercial company legal form. Shareholding requirements are applicable to accountants, architects and legal professions.	Law on the Modernisation of the Economy No 2008-776 of 4 August 2008 opens up shareholding requirements in professional companies. Loi

²² NB. these are only the restrictions that have been notified under the Directive, restrictions in practice are more extensive.

<i>Country</i>	<i>Implementation of the Directive</i>	<i>Measures reported for professional services under the mutual evaluation exercise²²</i>	<i>Major reforms to professional services sectors since 2006</i>
			Macron of 2015 further liberalised the legal profession.
<i>Germany</i>	Amendments made to sector-specific legislation only.	Shareholding requirements exist for lawyers and patent attorneys. Minimum/maximum tariffs notified for lawyers (representation in courts), architects and engineers. Restrictions on multidisciplinary activities for lawyers, patent agents and auditors.	Germany modified fee schedules for architects
<i>Greece</i>	Horizontal framework law adopted. Indication of intention to adopt changes to sector specific legislation	Minimum tariffs applicable to lawyers, architects and engineers. Prohibitions on lawyers having more than one office in Greece and on multidisciplinary practice.	Law 3919/2.3.2011 on the 'principle of freedom of profession, repeal of unwarranted restrictions on the access to and exercise of professions'. Removal of quotas, limitations on legal forms and location. Removal of licensing requirement for accountants. Prohibition on MDPs for lawyers remains.
<i>Hungary</i>	Horizontal law	Lawyers restricted in multidisciplinary activities	
<i>Ireland</i>	Horizontal law	Legal form requirement for the profession of barrister. Restrictions on ownership (exclusivity) required for solicitors and barristers.	Legal Services Regulation Act 2015 liberalised legal form and MDP requirements for lawyers
<i>Italy</i>	Legislative Decree adopted which includes both the general provisions of the Services Directive and sector specific amendments to existing legislation.	Architecture, engineering, accountancy and law can be exercised only by natural persons or by partnerships fully owned by members of the respective profession. Maximum tariffs apply to services provided by lawyers. Multidisciplinary partnerships not permitted between lawyers and accountants.	Bersani reform of 2006 lifted the ban on commercial advertising and contingent fees Minimum and fixed tariffs abolished for regulated professions in 2012
<i>Latvia</i>	Horizontal law	No Article 15 restrictions identified	
<i>Lithuania</i>	Horizontal law	Shareholding and ownership restrictions on lawyers. Lawyers obliged to restrict their activity to legal services only.	

<i>Country</i>	<i>Implementation of the Directive</i>	<i>Measures reported for professional services under the mutual evaluation exercise²²</i>	<i>Major reforms to professional services sectors since 2006</i>
<i>Luxembourg</i>	Horizontal law	Multidisciplinary restrictions on certified accountants, architects and consulting engineers.	
<i>Malta</i>	Horizontal framework Law adopted together with another sixteen pieces of primary legislation dealing with specific service sectors.	Legal form requirement for architects and engineers. Shareholding requirements apply to accountancy profession, lawyers and engineers. Engineers can only enter into a partnership with another professional of the same type and the partnership must have as its exclusive object the exercise of the profession. Lawyers can only form a limited number of types of association and strictly with other lawyers.	Fees scales for lawyers and periti (architects/civil engineers) made optional in 2010 (though still in legislation)
<i>Netherlands</i>	Horizontal law	There are majority shareholding requirements for accountants. A restriction also exists on multidisciplinary activities for accountants to ensure their independence and objectivity.	
<i>Poland</i>	Horizontal law	Prohibition on provision of services by advocates, legal advisors and foreign lawyers in the form of limited liability company or joint stock company. Tax advisors, advocates, legal advisors and patent agents can form joint stock limited partnerships instead.	Restrictions removed on joint exercise between advocates, legal advisors, tax advisors, foreign lawyers and patent agents. Some restrictions still apply on composition of partners or shareholding
<i>Portugal</i>	Horizontal law	Restrictions on multidisciplinary activities are applicable to some regulated professions, for example to lawyers, "solicitadores", legal consultants, and accountants.	
<i>Romania</i>	Horizontal law	Some regulated professions are subject to restrictions on multidisciplinary activities, such as: lawyers.	
<i>Slovakia</i>	Horizontal law	Specific legal form and shareholding requirements required for tax consulting, patent advisors, auditors and attorneys	

<i>Country</i>	<i>Implementation of the Directive</i>	<i>Measures reported for professional services under the mutual evaluation exercise²²</i>	<i>Major reforms to professional services sectors since 2006</i>
<i>Slovenia</i>	Horizontal law	Regulated tariffs for lawyers; Restrictions on multidisciplinary activities for lawyers	
<i>Spain</i>	Horizontal law	Restriction on MDP between prosecutors and advocates, lawyers and auditors.	Shareholding requirements for regulated professionals, reduced from 75% to 51% when operating as a 'professional company'. Recommended tariffs by the different professional bodies have been abolished.
<i>Sweden</i>	Horizontal law and implementing ordinance	A shareholding restriction applies to an important part of the legal profession (only advocates may be part-owners of or partners in a lawyers' business run as a company unless the Swedish Bar Association grants an exemption).	
<i>United Kingdom</i>	Horizontal regulations		Legal Services Act 2007 permits 100% non-lawyer ownership of law firms and removes most obstacles to legal form and MDPs in England and Wales. Scottish legal reforms of 2010 on law firm ownership permit up to 49% non-lawyer ownership but not yet implemented.

Source: European Commission

The European Commission has continued to work with Member States and other stakeholders in the period since the Services Directive entered into force, in order to raise awareness of the wider significance of barriers in the professional services sector and to promote reform. It has done so, notably in the context of its Annual Growth Survey, and used tools such as its country specific recommendations, published annually, to urge the Member States to take necessary action to improve the functioning of professional services markets.

In 2015, the Commission reported that, of the three hundred and seventy four non-discriminatory barriers to the provision of professional services that had been notified as existing within the European Union prior to the passage of the Services Directive, thirty nine percent of these were applicable to lawyers, twenty four percent to architects, twenty percent to accounts and seventeen percent to engineers.

Table 11: Summary of reforms stimulated by the Services Directive

	Number of reported restrictions	Abolished	Partially abolished	Unchanged
Legal services	146	17	85	44
Architects	90	14	50	26
Accountants	75	6	40	29
Engineers	63	16	39	8

Source: European Commission, 2015

As table 11 shows, the reforms stimulated by the Services Directive led to the abolition of a total of fifty three restrictive regulatory measures in the professional services sector and to the partial abolition of two hundred and fourteen measures, or fifty seven percent of the total. Whilst on the one hand this is very positive, on the other, it must be noted that there is great variability in the performance across sectors, with only seven percent of notified restrictions remaining in the engineering sector, compared to forty-one percent in the legal sector. It is also important to note that these numbers only cover restrictions that were notified, and as noted earlier, many Member States made very partial declarations of the restrictions that existed in their professional services sectors.

Not surprisingly, the European Commission has not been satisfied with these results and has continued to raise the issue with Member States. On 18 May 2016, the Commission published its latest European Semester Report which contained the following observation:

“The number of restrictions in services sectors remains high in many EU Member States, with detrimental impact on investment, growth and employment. The contribution of the business services sector to the productivity of manufacturing and other sectors is essential for the modernisation of EU economies. The range, level and number of restrictions prevailing in business services and regulated professions, especially in engineering, accounting, architecture and legal services, warrant special attention.”²³

As part of its latest package of proposed economic growth measures, the Commission has also made specific recommendations to Austria, Belgium, Germany and Luxembourg. It has urged these Member States, in particular, to take action to deal with shareholding requirements, restrictions on voting rights, legal form and multidisciplinary activities in professional services. It has also noted that the action plans submitted by some of these Member States, are extremely tentative and propose only limited measures in this area, whilst the Commission believes that there is scope for much more ambitious proposals.

In summary, therefore, there would certainly appear to be sufficient consciousness at a European level of the importance of productivity for professional services, and a great deal of activity is being undertaken to deal with this issue. However, even after a decade of concerted action in this area,

²³ 2016 European Semester, 18 May 2016, COM(2016) 321
http://ec.europa.eu/europe2020/pdf/csr2016/csr2016_eccom2016_en.pdf

results remain mixed. The possible explanations for this may point to ways in which future action can be made even more effective.

Firstly, results are difficult to achieve because the regulatory environment for professional services is extremely complex, highly decentralised and highly politicised. As a result, national authorities find it difficult to assess the continuing need for rules or to apply public interest tests. Even in those jurisdictions which have had some success in introducing reforms, such as the United Kingdom, the scrutiny process is largely based on self-assessment by regulatory bodies themselves. This inevitably leads to an inbuilt bias against reform and panders to the cultural tendency amongst such regulators to view all their actions as 'in the public interest'.

Secondly, the tools available at a European level have led to a historical focus on mobility, through the mutual recognition of qualification process. However, this is only one element of the overall productivity equation. Even if professional recognition was entirely automatic between Member States, it is unlikely that numbers moving between countries would be much greater than at present because of the prevailing industrial structure of all of the professional services sectors and other perceived obstacles to cross border working. The Architects' Council of Europe for example reported in 2012, for example, that a survey of its members suggested that whilst only three percent of the profession is currently working in another European country, around thirty five percent would 'seriously consider' relocation. However sixty six percent cite personal issues as a reason for not doing so, whilst around a third feel that they have insufficient language skills or insufficient knowledge of local planning or building regulations.²⁴

Before setting out some recommendations which might help to move the reform agenda in professional services forward, it is worth reflecting briefly on whether there are any useful lessons to be gleaned from other parts of the world.

Lessons from elsewhere

It would be extremely helpful for the European Union if it could identify a role model in the form of another economic community elsewhere in the world which demonstrates how reform of the regulated professions can occur. This section of the report therefore looks at practice within a number of other major economic trading blocs as well as at a number of individual countries which would appear to be performing well in this area.

a) Regional Economic Communities

i) APEC

Asia-Pacific Economic Cooperation (APEC) is not a formal free trade area or customs union but is rather a forum that encourages members to liberalise on a unilateral and MFN basis. It also seeks to encourage greater standardisation including in professional services. APEC established a Group on Services (GOS) with a specific remit to facilitate the liberalisation of investment and its supporting sectors. It has also created a Services Trade Access Requirements (STAR) Database in order to promote market access. Beyond this, individual initiatives have been established for the accountancy and legal professions. The Accountant Services Initiative resulted in the Non-Binding Guidelines for the Regulation of Foreign Accountancy Professionals, which provide guidance on issues that APEC economies may wish to consider for future amendments of rules and regulations of their professions. The Legal Services Initiative also produced a database of relevant regulatory frameworks and information to increase the knowledge base of regulators, law firms, businesses, and others connected to the legal profession. The database centres on the rights and licensing of foreign lawyers in APEC jurisdictions, as well as collaboration between lawyers from different jurisdictions.

In the area of architecture and engineering, APEC has been able to go further. The APEC Architect Framework project has brought together 14 APEC economies and set standards for qualification across the different member jurisdictions. Architects can apply in their home country to be entered on

²⁴ The Architectural Profession in Europe 2012:
http://www.ace-cae.eu/public/documents/sector_study_2012_draft_final.pdf

an APEC register, which demonstrates they have met the required level of mutually recognised qualification. Once on this register, they are entitled to automatic recognition of their qualifications in another APEC country, although this does not necessarily entitle them to access the market. The engineering profession has taken a similar approach establishing the International Register of Professional Engineers, while also providing a framework for recognition of experienced professional engineers by responsible bodies in each of the member organisation economies. Available information on the use of the APEC register for both professions suggests that by 2011 there were 6280 APEC engineers registered. The biggest users of the agreement were the Japanese with 2,589 registered APEC engineers, followed by New Zealand with 1,472. The architect agreement has been less widely used. In 2008 there were only 529 registered APEC Architects out of the 232,000 licensed architects in the 14 APEC members participating in the agreement.

The APEC experience is interesting because it reinforces the lesson from the European Union's experience that focusing on mutual recognition of professional qualifications does not in itself promote mobility. However, the concept of promoting convergence in regulation on a best practice basis and approaching this from the perspective of the promotion of investment, is an interesting idea and one that could perhaps assist the European Union. To date, most of the reflection on professional regulation, not least because of its complexity, has been bottom up and led from within the professional services sectors themselves. A more formal expansion of scrutiny over the professions from a broader economic viewpoint could be helpful. It is noteworthy in this context, that most of the reforms that have taken place in the regulated professions in Europe in the past decade have been part of wider economic reform packages, often stimulated by external scrutiny, for example from the institutions monitoring financial stability support programmes implemented in the aftermath of the financial crisis in Greece, Spain, Portugal and Ireland.

ii) NAFTA

The North American Free Trade Area (NAFTA) has been endeavouring over the past two decades to eliminate barriers to trade and investment between Canada, the United States and Mexico. The agreement has been hailed as one of the first of its kind to address the mobility of professionals. The agreement articulates minimum education requirements and relevant credentials among professions included under NAFTA²⁵. Access to the architecture, engineering, accountancy and legal professions has been improved to some extent by the agreement, although to some extent subsequent trade deals with other parties have reduced the effort that the parties have put into these agreements.

An initial agreement to work towards a mutual recognition agreement for professional architects in the three countries was signed in 2005, and was one of the first professional services recognition programmes created under NAFTA. In 2014, the US National Council of Architectural Registration Boards, Canadian Architectural Licensing Authority, and Federacion de Colegios de Arquitectos de la Republica Mexicana agreed on the mutual recognition of architect credentials across all three countries.²⁶ In order to take advantage of the agreement, architects must satisfy education and work qualifications, including: completion of a professional degree accredited by the regulatory authority; minimum of ten years post-licensure experience in home jurisdiction; verified proof by local regulatory authority of 'good standing'; knowledge of codes, laws and practical matter of host country; and the submission of a dossier of work to satisfy 'responsible control and comprehensive practice' requirement.

The engineering profession also reached a mutual recognition agreement in 2002, however this agreement only includes Canada, Mexico, and the US state of Texas, as each US state has its own regulatory requirements which requires each state to join of its own accord. The agreement allows for temporary licensing (3 years) with the opportunity to renew or extend to a permanent license, subject to visa and immigration requirements²⁷.

In 2003, the accountancy profession established a mutual recognition agreement, identifying education, examination and experience as the principal elements for granting accounting certification

²⁵ Appendix 1603.D.1 'Professions – Minimum Education Requirements and Alternative Credentials'. NAFTA <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=8fd98e3e-4495-43a8-ba47-4a6955d6b5db#Ap1603.D.1>

²⁶ <http://www.ncarb.org/Certification-and-Reciprocity/International-Programs/Tri-National/TriNational-PR.aspx>

²⁷ <http://www.peqnl.ca/dialogue/issues/2011/March%202011/Articles/NAFTA%20Mutual%20Agreement.pdf>

and licensing²⁸. The legal profession, on the other hand, has been slower to engage. Whilst the NAFTA agreement does address foreign legal consultants under professional services, the legal profession has yet to establish any official mutual agreements between the three countries. The agreement recommends collaboration between relevant professional bodies, and to aid future liberalisation each party should establish common procedures throughout its territory for authorization of foreign legal consultants.

Overall, one of the major lessons from the NAFTA experience is that the consideration of mutual recognition or harmonised standards, stimulates a process of internal unification and streamlining of domestic standards and regulatory processes. Beyond this, they also help in the process of wider negotiations. Both Canada and the US have acknowledged that the NAFTA agreements have led to and aided in negotiations on professional access with other APEC jurisdictions, particularly Hong Kong and Australia.

However, although mutual recognition of qualifications at a regional level may help to promote a reflection on regulation, there is no necessity for it to do so. In fact, there is a risk that, if the task of negotiating terms for recognition is delegated entirely to professions without any overarching scrutiny, existing restrictions can end up being even more deeply entrenched. The example of the agreement between the American Bar Association and the Council of European Bars and Law Societies to agree that certain issues, such as non-lawyer ownership (or 'alternative business structures') should be 'off the table' in negotiations to increase transatlantic lawyer mobility through the Transatlantic Trade and Investment Partnership (TTIP) is a case in point²⁹.

b) Other Countries

It is perhaps also instructive to look at the experience of individual countries outside the European Union to see if any lessons to be learned as to how professional services can be regulated more effectively in order to produce better functioning and more productive markets.

Table 12, below sets out the OECD's professional services regulatory indices for Australia, New Zealand and the United States as well as for all EU Member States for each of the main regulated professions. This shows that there has been a general, but by no means universal, downward trend in regulatory barriers over the past decade³⁰.

These figures also show that certain countries have a tendency to regulate more than others and then do so across all sectors. This is the case in Austria, Bulgaria, Croatia, Greece, Luxembourg, Poland, Portugal, Slovakia and Spain for example. There is also an almost universal application of higher levels of regulatory restrictions in the legal sector, and to some extent in audit, when compared to architecture and engineering. It is also striking that New Zealand and Australia have noticeably lower levels of regulatory barriers, as measured by the OECD, than almost all EU Member States, with the notable exception of Finland. It is therefore perhaps worth considering whether there are any particular lessons to be learned from these two non-EU countries.

²⁸ <https://media.nasba.org/files/2011/04/MRA-PMRA-With-Canada-and-Mexico-Apr2008.pdf>

²⁹ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/European_Legal_Profe1_1415787235.pdf

³⁰ This however, does not necessarily mean an overall reduction in the regulatory burden in the sectors covered, since the PMRs only cover specific distortionary barriers such as fee scales etc.

Table 12: OECD Professional Sector Regulatory Indicators

Country	Accountants			Lawyers			Architects			Engineers		
	2003	2008	2013	2003	2008	2013	2003	2008	2013	2003	2008	2013
Austria	3.06	3.06	2.38	4.00	4.00	3.63	2.90	2.65	2.42	2.90	2.60	2.42
Belgium	3.23	3.23	3.23	4.69	4.31	4.31	2.17	2.35	2.35	0.00	0.00	0.00
Bulgaria	.	.	1.04	.	.	3.96	.	.	.	.	.	.
Croatia	.	.	2.65	.	.	5.08	.	.	3.54	.	.	3.54
Cyprus	.	.	2.90	.	.	3.71	.	.	2.94	.	.	2.90
Czech Republic	3.40	2.46	2.38	3.46	3.27	3.27	2.10	2.10	2.10	2.13	2.10	1.71
Denmark	0.77	0.77	0.96	2.52	2.15	2.15	0.19	0.19	0.19	0.00	0.00	0.00
Estonia	.	2.04	2.04	.	3.02	3.02	.	1.08	1.04	.	1.08	1.04
Finland	2.08	2.08	1.71	0.38	0.77	0.77	0.00	0.00	0.00	0.00	0.00	0.00
France	3.13	3.27	2.90	3.04	3.23	3.23	2.63	3.29	3.25	0.00	0.00	0.00
Germany	2.98	2.60	2.60	3.54	3.54	3.56	2.92	3.31	2.75	2.69	1.81	1.69
Greece	2.92	2.75	2.38	5.10	5.10	4.48	2.58	2.58	2.58	2.58	2.58	2.58
Hungary	2.13	3.00	3.00	4.46	4.83	4.83	2.83	2.42	2.46	2.02	1.83	1.92
Ireland	1.94	1.15	1.15	3.48	3.48	3.48	0.81	0.19	0.19	0.19	0.19	0.19
Italy	3.54	2.88	2.08	3.79	3.54	2.40	3.42	2.83	1.96	3.46	2.83	1.96
Latvia	.	.	.	.	.	4.29	.	.	2.06	.	.	2.06
Lithuania	.	.	1.00	.	.	3.88	.	.	1.29	.	.	1.25
Luxembourg	3.23	3.44	3.23	4.15	4.17	3.96	3.38	3.31	3.35	3.33	3.27	3.35
Malta	.	.	1.33	.	.	3.60	.	.	1.25	.	.	0.44
Netherlands	2.81	2.31	2.13	2.71	2.79	2.79	0.75	0.00	0.00	0.00	0.00	0.00
Poland	3.75	3.75	3.40	3.73	3.92	3.90	2.83	2.83	2.83	2.83	2.83	2.83
Portugal	.	3.17	3.17	3.83	3.92	3.88	2.31	3.00	3.00	2.23	2.23	1.65
Romania	.	.	2.60	.	.	4.00	.	.	.	.	.	.
Slovak Republic	2.17	2.17	2.17	.	.	3.79	3.17	3.17	2.79	3.04	3.04	2.83
Slovenia	.	.	2.69	.	.	3.46	.	.	2.15	.	.	1.96
Spain	2.56	2.83	2.83	5.08	4.23	3.40	2.33	2.21	1.75	1.71	1.71	1.75
Sweden	2.25	1.63	1.63	0.81	0.56	0.56	0.00	0.00	0.00	0.00	0.00	0.00
United Kingdom	1.88	1.75	1.75	1.23	0.79	0.79	0.73	0.73	0.73	0.00	0.00	0.00
Australia	1.56	1.56	1.38	1.58	1.58	2.31	0.00	0.00	0.00	0.00	0.00	0.00
New Zealand	1.00	1.00	0.96	3.93	3.93	3.43	0.00	0.00	0.00	0.00	0.00	0.00
United States	1.25	1.25	.	1.81	1.81	.	1.15	0.96	.	1.21	1.40	.

Source: OECD PMRs 2015, www.oecd.org

The OECD has often held both countries out as role models for other countries given their proactive approach towards regulatory reform and the extent to which they have used external cooperation to prompt domestic reform.

One example of this was the 2004 protocol between the Australian and New Zealand Boards responsible for accounting standards, which agreed to minimise differences between accounting standards in the two countries, exchange information, develop a joint work programme and to share staff resources. This cooperation even extended to participation in each other's standards-setting bodies. This cooperation has been made easier by the fact that both accounting standards bodies have adopted IFRS standards with few amendments. This illustrates the potential importance of international standards to remove barriers to cooperation and recognition and to create the environment for a better regulated market, even if this is not necessarily guaranteed.

The New Zealand Ministry of Business, Innovation and the Employment produced a sectors report³¹ in 2014 which showed that the professional, scientific and technical sector of the New Zealand economy was experiencing growth above the overall New Zealand rate of GDP growth. Although labour productivity in the sector had been relatively flat over the previous decade, around 14% of professional services firms reported investment in R&D activities and 50% reported innovation activities, both of which were above the average for New Zealand's main economic sectors of activity. The possible causal link between New Zealand's lower level of regulation in professional sectors and the above average level of R&D and innovation is worth exploring in more detail as it could suggest ways in which European Union Member States could create a better climate for improving TFP.

Recommendations

There are a number of recommendations which emerge from this analysis which could help both individual Member States and the European Institutions to make more progress in tackling Europe's professional services productivity problem. These recommendations fall into three broad categories: Those which deal with the political economy barriers to reform, those which address diagnostic tools and those which involve the priorities for future action.

a) *The Political Economy of Reform*

i) *Keep Pushing the Issue*

At a pure policymaking level, although progress in removing barriers has been slow and incomplete, as tables 10 and 11 show, there have been some results. There is therefore no reason why policymakers at a European level should not continue to press Member States for further reforms. Although the European Commission has encouraged Member States to address barriers to productivity improvements in their professional services markets, the level of engagement has varied. Commission should continue to push Member States to action which is in both their interests and the interests of the wider European economy. In order to do so it might consider the following:

- Increasing the detail and prescriptiveness of its recommendations;
- Inviting greater scrutiny of national action plans in the area of professional services regulatory reform. For example, by developing and involving user panels
- Instigate this as a European Commission competition policy priority and a topic of regular engagement with national competition authorities

ii) *Instigate Debate about political obstacles to reform*

Reforming professional services markets is made particularly difficult by the delegation of responsibility for regulation to professional associations and chambers. The potential for conflicts of interest to arise in the conduct of these tasks has been well explored by the European Court of Justice over the past two decades. For example, in *Arduino* (C-35/99), the Court made clear that

³¹ <http://www.mbie.govt.nz/info-services/business/business-growth-agenda/sectors-reports-series/pdf-image-library/the-new-zealand-sectors-report-2014-main-report/Part%20-%20-%20Sector%20Snapshots.pdf>

European competition law should apply to the regulators of professional services markets and in *Wouters* (C-309/99), the Court went further and stated:

“The fact that the governing bodies of a Bar are composed exclusively of members of the Bar elected solely by members of the profession, and that in adopting acts such as that regulation³², the Bar is not required to do so by reference to specified public-interest criteria, supports the conclusion that such a professional organisation with regulatory powers cannot escape the application of Article 85³³ of the Treaty”

The attention that national competition authorities have paid to this area have, however, been mixed, given many other competing priorities. The question must therefore be posed whether ex-post competition policy scrutiny is sufficient for professional services regulators, given the importance of the markets they regulate.

There are also a number of fallacies about professional services regulation which it is important to confront in this debate. The first is that lower professional services regulation necessarily means a worse public interest outcome. The European Commission, for example, observed in its *Mutual Evaluation Report on the Regulatory Framework Governing Civil Engineers* that:

“In Member States regulating the profession, there is a tendency to consider that once the civil engineer is fully qualified there is no need to check the work performed except in well determined cases, whereas in non-regulating countries, there tends to be more supervision over the individual works of a civil engineer. Non-regulating countries also point out that public interest objectives such as consumer protection are adequately safeguarded by non-profession specific legislation, such a consumer protection law or legislation on construction standards”.

In other words, the question needs to be asked whether it is more relevant to control entry and practice conditions for professionals through sector regulation, or the work that they actually perform through more general measures at the whole economy level.

The second, is whether, professional associations and chambers can realistically be expected to act in the public interest, given the usual composition of decisionmaking bodies within these entities, which largely consists of members of the regulated profession itself, often elected by that membership. This then raises the question of whose interests are being safeguarded by regulation: The interests of the profession, or the interests of users of services and the wider public interest? But regulation that is led from within a profession may also disadvantage those who are regulated. The case of continuing professional development (CPD) is a good case in point. As the European Commission has also pointed out in its mutual evaluation report into the architectural sector:

“Across the European landscape in regulated professions there is a trend towards increasing CPD requirements, often administered by the professional bodies. Given the rapid advancements in technology and practice that professionals face, this seems a suitable measure to ensure they keep pace with key developments. However, implementation of this objective diverges significantly and contains the potential for imposing expensive as well as time consuming burdens on professionals.”

It should also not go unremarked that mandatory CPD requirements also offer an opportunity for professional bodies to extract additional rent from the professionals whom they regulate either by retaining the exclusive right to provide this training, or by giving access to other training providers to enter this market.

The underlying productivity problem within Europe's professional services markets will not be easily tackled until the organisation of regulation is addressed more comprehensively. In some Member States, such as the UK, Ireland and Denmark a concerted effort has been made to separate out the representational and regulatory aspects of professions. In England and Wales, for example, which is a legally separate jurisdiction within the United Kingdom, the Legal Services Act 2007 required the

³² i.e. the regulation at issue in this case which dealt with MDPs

³³ Now Article 101 TFEU

professional bodies that had traditionally regulated solicitors and barristers to ringfence regulatory decisionmaking from their representational interests. The performance of the professional bodies in this area was also made subject to the overarching scrutiny of the Legal Services Board (LSB), established under the Legal Services Act. In its most recent report³⁴ on the performance of the legal services regulators, the LSB observed:

“Amongst other things we consider that the lack of independence between regulators and representative bodies...

- risks undermining the credibility of regulation in that the public is likely to perceive that the profession is policing itself (and therefore inferentially to be ‘protecting their own’)*
- creates scope for professional bodies to delay reforms which would benefit competition and consumers, generating regulatory uncertainty and deterring investment*
- hampers the transparency of the cost of regulation as a result of some of the regulators sharing resources and costs with their representative arms and income from the practising certificate fees being used for non-regulatory permitted purposes.”*

These considerations apply to all professions where regulatory powers and representational functions are jointly exercised. Closer external scrutiny of rulemaking and governance in the professions could play an important role in shedding light in this area. National competition authorities should be given the analytical tools to examine practice in this area, using examples and experience from Member States who have already taken action.

b) Diagnostic Tools

iii) Don't just focus on PMRs

The use of PMR indices in the debate on regulation of professional markets has been a useful way of attracting attention to the level of restrictions that have historically existed. They have certainly played a part in helping to stimulate the removal of some of the most limiting barriers. However, as a tool these are compiled at too aggregate a level to reflect some of the nuances of professional regulation. There is also a difficulty of interpretation with these indices since a lower index does not necessarily mean better market outcomes. The quality of these indices is also occasionally compromised by the fact that they rely on a detailed understanding of regulatory measures and their impact. The European Commission also noted in its report on the mutual evaluation exercise for architects that Member States had clearly adopted different interpretations of a question, posed as part on that exercise, in relation to restrictions on joint practice, leading to underreporting of restrictions.

PMRs could perhaps be a better, more effective tool if they were not only compiled on the basis of questionnaires that are open to different interpretations but were also subject to a more centralised basis of assessment. This is potentially a highly labour intensive task, as it would involve a much deeper central understanding of the functioning of all professional services markets across the European Union. However it is only by doing so that the full effects of national restrictions could be captured.

Another alternative would be to create a counterpart demand side index to reflect the goals that regulation is intended to achieve, such as environmental protection, freedom from conflict of interest (achieved for example through ensuring choice and transparency), alongside more general demand factors such as price, ex post satisfaction with the services provided, ex ante trust in quality etc. Although many demand side factors are probably even harder to measure than the restrictions applying on the supply side, by looking in greater detail at this side of the equation policymakers would be able to begin thinking about the causality between regulation and desired outcomes.

³⁴ http://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/pdf/1605_THEMATIC_REPORT.pdf

iv) Improve data

Reforms in any market are easier to take when supported by better data. “Better data” means primarily ensuring the collection and availability of statistics at a more detailed level of statistical classification as well as the introduction of greater continuity and transparency in statistical aggregates, since the level of data currently available for professional services is insufficient to support and measure reforms. Better data would also increase the transparency of these markets and make it easier for new entrants to identify gaps in the market. It would also assist suppliers into those markets, such as insurers, whose greater engagement could potentially help to remove the need for some areas of professional services regulation (e.g. the expansion of title insurance in the property market).

v) Disaggregate supply

Box 4: Public Interest Justifications cited by Member States in the Engineering Sector

Protection of the environment and the urban environment, including town and country planning: Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Hungary, Italy, Malta, Poland, Portugal, Slovenia, Spain and the United Kingdom.

Public Health: the Czech Republic, Denmark, Ireland, Malta, Portugal, Slovenia and the United Kingdom.

Preservation of cultural, historical, archaeological and artistic heritage: Austria, Hungary, Italy, Lithuania, Malta, Poland, Portugal, Slovenia and the United Kingdom.

Road safety: Bulgaria, Portugal, Slovenia and Spain.

Public Security: Austria, Croatia, Cyprus, Denmark, Germany, Lithuania, Malta, Portugal and Slovenia.

Protection of life, health and safety of people: Bulgaria.

Protection of consumers and recipients of services: Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Hungary, Germany, Italy, Ireland, Malta, Poland, Portugal, Spain and Slovenia.

Public interest/trust: Greece

Saving measures: Denmark

Prevention of fraud: Portugal.

One area which could be explored in greater detail is the scope for breaking the traditional professional services aggregates (accountancy, architectural services, engineering services and legal services) into more detailed areas of activity. By focusing on those activities for which professionals in different sectors have exclusive competences, it should be easier to free up the supply chain elsewhere. This has happened, for example, in international trade negotiations for legal services when the WTO Secretariat provided advice³⁵ to WTO members on how commitments could be improved by adopting a different classification of legal services from the traditional statistical classification for legal services, the UN CPC 861. By reframing what was understood by ‘legal services’, the WTO secretariat was able to encourage more comprehensive commitments in this area whilst also allowing members to ensure that areas which could justifiably be restricted in the national interest were protected.

vi) Provide diagnostic tools for analysing public interest justifications

The reviews of regulated sectors produced by the European Commission as part of the mutual evaluation exercise which has been underway since 2013, reinforce the view that Member States frequently prey in aid public interest justifications for regulation without any explanation of exactly how the two are linked.

Box 4 sets out the various justifications that Member States have put forward for the regulation of the engineering sector, which is the least regulated of all of the professional services sectors. The Commission could play a useful role in galvanising thinking about how causality, necessity and proportionality in regulation can be rethought. There may, for examples, be interesting

tools that could be imported from within the professional sectors themselves. The application of risk analysis tools used in engineering, such as ALARP (“As Low As Reasonably Practicable”) could be helpful. This was defined by the Court of Appeal of England and Wales³⁶ in the following way:

“Reasonably practicable’ is a narrower term than ‘physically possible’ ... a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is

³⁵ Background Note on Legal Services by the WTO Secretariat to Council on Trade in Services, S/C/W/43, 6 July 1998

³⁶ Edwards v. National Coal Board, [1949] 1 All ER 743

placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.”

The key is therefore properly understanding and exploring the risks and matching regulatory measures to the degree of risk involved. Although, this analysis is far from new, it is not well-known amongst many regulators, particularly in those sectors which have not previously framed regulatory discussions in terms of the risks or ‘evils’ they are aiming to protect against. It may therefore be necessary to produce a diagnostic tool at European level which provides guidance on when regulation is justified.

c) *Priorities for Future Action*

i) *Focus energy on improving market structure*

The evidence of reforms adopted across the European Union so far suggest that priority has been given to the removal of barriers such as fee scales and advertising prohibitions. Even if such barriers have not been entirely removed, their impact on the productivity of the professional services sectors has been helpful. It is, however, also clear from the previous analysis that major structural problems remain in most professional services sectors, in the form of too high a proportion of micro-businesses and a producer centred supply of services (i.e. the user of professional services may need to contract separately with different professions when engaging in a single transaction because of prohibitions on multi-disciplinary practices). This suggests that the focus of the next phase of reforms should focus firmly on barriers to forms of practice, ownership and joint exercise of activities.

ii) *Press for International Standards and removal of international barriers*

Examples from free trade areas and other agreements made by other countries suggest that the maintenance of external scrutiny helps to promote reform. However, it also appears to be the case that the promotion of reform is more successful when it is linked to, and uses international standards. The fact that around 130 jurisdictions worldwide have made a public commitment to adopt IFRS as their accounting standard, should make it progressively easier in future to remove unnecessary regulatory barriers in audit and accountancy. The European Union should aim to be ambitious in its trade agreements and even if Member States are reluctant to make additional commitments, they can be used to shed greater light on existing restrictive regulatory practices in professional services. This was the case for example, with the Canada-EU Free Trade Agreement, which set out in unprecedented detail the regulatory barriers, both discriminatory and non-discriminatory, that Canadian professionals would encounter in trying to practise the regulated professions in any EU Member State. Transparency is the first step towards removing barriers and therefore trade agreements could prove to be an important tool in reform.

iii) *Promote ICT*

Lastly, there is an extremely significant area which has not been explicitly considered in this report so far, in the form of the impact of information technology on the professional services sector and the potential changes that this could mean for the way in which individual sectors are regulated, and indeed even for the need for them to be regulated at all.

Technology is fundamentally changing the way in which users of services interact with service providers. At the most obvious level it is reducing the justification for regulation on the basis of asymmetry of information by dramatically increasing transparency. Although fully functioning, consumer friendly ‘Tripadvisor’ style tools do not yet exist for professions, these will undoubtedly emerge as they have done for craft trades. Indeed, there are even examples of cross border consumer websites for craft trades which have grown up in response to the need from individuals to access tradespeople to deal with property that they own in other countries, for example, <http://www.findatradeinfrance.com/>.

The application of technology can also impact on professional services in other ways, for example, by enabling professional services to be embodied in products and services on a commoditized basis³⁷. The German construction company Huf Haus for example, specialises in producing and assembling factory produced buildings that can be erected in days by its own in-house team and which require no local architectural input. The company produces around 150 houses per year about 40% of which are exported. Around 200 Huf Houses have been built in the United Kingdom and the company has just opened a new show house in recognition of its expanding market there. In the engineering sector, technology is influencing both process management and product engineering.

Technology is also changing the training needs of all professions and may require fewer, or very different professionals in future. This has been extensively explored, for example, by Professor Richard Susskind, who has argued that the future legal sector labour market³⁸ will create the need for new types of worker in the legal sector, including: Process analysts, project managers, online dispute resolution practitioners and risk managers. The sort of fundamental shift in the industry that this represents means that there is an opportunity to ensure that the professional services markets are appropriately regulated in future. It also suggests that it is vital for innovation that incumbent regulators in the industry do not inhibit such developments by trying to extend their regulation to cover new types of employment which may be stimulated by technological developments.

This is a rich and exciting area for further exploration and it would be worth promoting the application of ICT within the professional services sector as another mechanism for stimulating change in regulatory approaches.

Conclusions

This report has attempted to provide some insight into the ongoing productivity underperformance of professional services markets in the European Union. It has reviewed the activity taken at both a European and national level in recent years and although progress has been made, this has been painstakingly slow and patchy. The overall conclusion reached by this report, taking into account the individual experience of different Member States and the experience of other parts of the world, is that reform cannot be relied upon to come from within the sector itself because of a combination of inbuilt conservatism and vested interests. The recommendations made in response to this conclusion offer some suggested ways forward ranging from measures to increase transparency and external scrutiny, through to much more radical proposals relating to the governance of the sector and how it is structured. National governments may be reluctant to challenge expert professional sectors to think differently about how they do things but the digital revolution that has really only just begun for the professions, suggests that this challenge will eventually come from the marketplace itself.

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18 May 2016

³⁷ *The future of Architectural Design Practice within ICT developments* S. Sariyildiz & S. Ozsariyildiz Delft University of Technology

³⁸ *The End of Lawyers? Rethinking the Nature of Legal Services*, Richard Susskind