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Competition and Regulation in Professional Services – Note by BIAC

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BIAC

1. Introduction

Business at OECD (BIAC) is grateful for the opportunity to comment on the issue of competition and regulation in professions and occupations. In doing so, it builds on its previous contributions in respect of disruptive innovation in legal services[1] and competitive restrictions in legal professions.[2]

Business generally thrives in the context of a stable regulatory environment that promotes growth, innovation, and job creation, as well as free and fair competition on the merits.

BIAC therefore endorses the need for action on the issue of professional regulation and occupational licensing.[3] BIAC also believes the debate on this is timely. Empirical evidence[4] indicates that professional regulation and occupational licensing has greatly expanded, often going beyond the traditional "liberal professions" (such as law, health, finance and engineering) to cover a whole plethora of other occupations.[5] With the provision of services now accounting for over 70% of global GDP[6] and the perceived "servification" of the economy (that is, the rising indirect contribution of services into the production of goods, either as inputs and activities within firms, or as outputs bundled with goods) the time is ripe for a fundamental reassessment of the need and scope of regulation across services. The debate is also timely in light of technological developments, especially for those professions that are more prone to have elements of work transition from bespoke to increasingly routinised work.

At its best, regulation performs the fundamental role of addressing market failures and protecting consumers. At its worst, it can function as a protectionist measure, promoting "closed shops" and severely hindering competition. Distinguishing between the two[7] – and,

[1] OECD, Disruptive Innovation in Legal Services – Note by BIAC, DAF/COMP/WP2/WD(2016)6 (June 6, 2016), https://one.oecd.org/document/DAF/COMP/WP2/WD(2016)6/En/pdf.

[2] OECD, Competitive Restrictions in Legal Professions, DAF/COMP(2007)39, at 349-350 (Apr. 27, 2009), https://www.oecd.org/daf/competition/40080343.pdf [hereinafter OECD Legal Professions].

[3] In line with the OECD Secretariat's Background Note for this session, we use the terms professions and occupations interchangeably to refer to any job subject to licensing or regulation, although distinguish between the two where necessary.

[4] *See, e.g.*, Indre Bambalaite, Giuseppe Nicoletti & Christina von Rueden, *Occupational Entry Regulations and Their Effect on Productivity in Services. Firm-Level Evidence* (OECD Econ. Dep't, Working Paper No. 1605, 2020), https://doi.org/10.1787/c8b88d8b-en. *See also Communication on Taking Stock Of and Updating the Reform Recommendations for Regulation in Professional Services of 2017*, COM(2021) 385 final (July 9, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0385.

[5] Though often very jurisdiction-specific, these occupations can include, among others, tour guides, driving school instructors, hairdressers, etc.

[6] Rainer Lanz & Andreas Maurer, *Services and Global Value Chains — Some evidence on Servicification of Manufacturing and Services Networks* 2 (WTO Working Paper ERSD-2015-03, 2015), https://www.wto.org/english/res_e/reser_e/ersd201503_e.pdf.

[7] *See* OECD Legal Professions – Background Paper by the Secretariat, *supra* note 2, at 20-26 (offering an interesting comparison between policy rationales, contrasting the "public interest approach" with the "private interest critique," in which professionals can be "better explained by [their] rent-seeking behaviour, effective lobbying and regulatory capture," ultimately observing that for competition policymakers, the "complexities of the current regulatory framework may only be fully understood by a combined use of both approaches").

crucially, striking the right balance between public interest objectives and open markets – is at the heart of this debate.

Competition authorities have a crucial role to play, both in terms of advocacy efforts as well as enforcement activity, in this debate. Yet this will not likely be an easy task. The sheer scale and breadth of regulation, the lack of consistency across countries (and sometimes within countries), and the highly specific nature of the objectives being pursued, taken in their legal, social, and cultural context, all make for a complex policy jigsaw.

At the end of the day, BIAC calls for a clear, consistent, well-articulated and visible analytical framework, in terms of both advocacy efforts and enforcement activity, that can be applied to the specificities of each context. At its most basic, the analytical framework should:[8]

- Identify and assess the regulatory measure that restricts competition;
- Identify in detail the objective being pursued, connected to public interest goals;
- Examine whether the restrictions are inherent in/needed for the pursuit of the public interest objectives (a necessity test); and
- Assess whether the proposed restrictions go beyond what is necessary to ensure the objective or whether there are less restrictive means of achieving the same ends (a proportionality test).

In this paper, BIAC (i) provides observations on some of the complexities that can arise when considering regulation; (ii) considers the pros and cons of regulation in more detail and provides thoughts on the need for a careful balancing act; (iv) offers views on the role of competition authorities in this complex jigsaw; before (v) offering some concluding remarks.

2. A Timely Debate – One Bedeviled By Complexity

Before embarking on a general overview of the advantages and disadvantages of regulation, BIAC wishes to highlight three themes that, from a business perspective, contribute heavily to introducing complexity into the debate: context, forms of regulation, and technological advancements.

2.1. The Relevant Context is Important

Given the sheer breadth and scale of regulation, as well as the evidently inconsistent approach to regulation across different jurisdictions, it is important that the context for any regulation be assessed carefully and thoroughly.

Businesses are just as likely to be "protected" by regulation (e.g., those that comply with regulation and benefit from reduced entry from others) as they are to be restricted by regulation. Examples of the latter are many, from business customers that may face reduced choice, through businesses with different business models that face undue entry barriers, to businesses that are hampered in their search for international talent. Inconsistent regulation across borders, often introduced in a protectionist vein, are of particular concern to business.

[8] The OECD has previously identified principles for regulation, which are relevant to this analysis *See* John M. Taladay & Paul Lugard, *The Ten Principles of Ex Ante Competition Regulation*, COMPETITION POL'Y INT'L (Nov. 2022), https://www.pymnts.com/cpi-posts/the-ten-principles-of-ex-ante-competition-regulation/.

BIAC also acknowledges, nonetheless, that regulation is often deeply rooted in historical traditions and the diverse legal, social, and cultural context of different countries. As noted by Von Rueden and Bambalaite,[9] these differences in approach often reflect each jurisdiction's economic and industrial output, legal systems, and societal views on the role of the state. The high levels of difference between countries in terms of the share of the workforce holding an occupational license[10] has led some to conclude that the "variance shown by these values suggests that [the policy justifications] may not be valid and that in many countries there is scope [for] an assessment of the regulation imposed on professionals to ensure that the market failures effectively exist."[11] As the OECD Secretariat's Background Note also states,

> *The risk deriving from poor quality is especially severe in certain sectors, such as healthcare or constructions, where licensing is prevalent. In other occupations, however, the public interest rationale for licensing is less convincing. It is in these occupations that regulatory approaches diverge [sic] across countries largely diverge, suggesting that the rationale and evidence basis for regulating are not always robust.*[12]

BIAC observes that there is an increasing propensity to impose professional requirements or occupational licensing as a regulatory tool, often bringing new trades or professions under the scope of regulation. Instinctively, whether this is necessary and/or proportionate has to be measured in context. In some cases, these occupations (e.g., travel, tourism, construction) can be susceptible to activity from rogue or unscrupulous actors whose actions can impact consumers adversely, potentially harming consumers undermining their confidence, and reducing the incentives for other suppliers to provide a quality service in the market as a whole.

Addressing these issues requires a careful contextual analysis of the alternatives open to consumers and enforcers (e.g., not simply whether consumer protection laws exist, but whether they are actively enforced and whether access to justice is readily available and legal recourse is effective for them), as well as the propensity of consumers to seek redress (noting that the less important/less costly a service is the lower the incentive for individual consumers to seek redress may be). Likewise, the case is often made that the advent of online review platforms can satisfy the information asymmetries prevalent for "experience" goods (where the consumer can only assess the quality of the service after the fact), but this pre-supposes that the reviewers are representative (not skewed towards the extremes, let alone subject to bot activity), that the reviews are meaningful (and not just a quick click), and that they are not subject to manipulation (e.g., strong-arm tactics of suppliers to seek only the highest ratings), all of which would end up eroding public trust in ratings.

A fulsome contextual analysis is therefore of critical importance when assessing the need for and proportionality of measures.

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[9] Christina von Rueden & Indre Bambalaite, *Measuring Occupational Entry Regulations: A New OECD Approach*, (OECD Econ. Dep't, Working Paper No. 1606, 2020), https://doi.org/10.1787/296dae6b-en.

[10] *See* OECD, Competition and Regulation in the Professions and Occupations – Background Note by the Secretariat, DAF/COMP/WP2(2024)1, at 9 fig. 2.1 (May 3, 2024), https://one.oecd.org/document/DAF/COMP/WP2(2024)1/en/pdf [hereinafter OECD Professions and Occupations Background Note].

[11] Cristiana Vitale, Rosamaria Bitetti, Isabelle Wanner, Eszter Danitz & Carlotta Moiso, *The 2018 Edition of the OECD PMR Indicators and Database: Methodological Improvements and Policy Insights* 40 (OECD Econ. Dep't, Working Paper No 1604, 2020), https://doi.org/10.1787/2cfb622f-en.

[12] OECD Professions and Occupations Background Note, *supra* note 10, ¶ 141.

2.2. The Manifold Manifestations of "Regulation"

The literature tends to identify a clear dichotomy between regulation (state imposed) and self-regulation (self-generated rules), but the reality, especially important for businesses subject to regulation, is that regulation often paints a complex and confusing picture for businesses.

The fact of the matter is that some businesses may be subject to both state regulation and self-regulation or be members of bodies that have both regulatory and representative functions, blurring distinctions. State intervention, moreover, may manifest itself in different forms: sometimes compelling through law, but other times encouraging or providing a framework for self-regulation or even "delegating" certain functions to private operators. In Europe, for example, competition cases have covered multiple scenarios, including:

- Condemning customs agents in Italy for fixing tariffs even where some element of state compulsion existed. In this case, the Italian National Council of Customs Agents (CNSD) was held to have infringed Article 101 for fixing tariffs to be charged and invoicing methods to be employed by all customs agents, despite an earlier finding that the Italian state had compelled CNSD to fix the tariffs (although not the invoicing methods), for which the Italian state had also been held liable pursuant to Article 4(3) TFEU combined with Article 101.[13] The key factor in this case appears to have been that, although national legislation required CNSD to adopt a tariff, it did not stipulate any specific price levels or ceilings that had to be taken into account nor did it define the criteria on the basis of which CNSD was to draw up the tariff. The margin of discretion thus allowed to CNSD was deemed sufficient to allow for an infringement of Article 101 TFEU.
- Not condemning haulage tariff-setting in Germany, on the basis that the professional organization could be characterized as a body of experts who were independent of the economic operators concerned and were required, under the law, to set tariffs taking into account not only the interests of the association and its members, but also the public interest and the interests of other undertakings and sectors.[14]
- Not condemning a body composed of members of the Italian Bar, on the basis that it merely formulated a draft tariff or recommendation which was, in any event, ultimately subject to state approval.[15]

European jurisprudence is often difficult to reconcile (see section IV.B below) – and the cases cited may be old and potentially discredited – but they do highlight that businesses often operate under nuanced or hybrid regulatory regimes and can face very different outcomes based on fine distinctions.

BIAC encourages competition authorities to take account of the regulatory framework when assessing the context of rules and modulating its advocacy and enforcement efforts accordingly. A clear, unified, and consistent framework of analysis for these situations would be most welcome by business.

[13] Case C-35/96, Comm'n v. Italy, 1998 E.C.R. I-3851.

[14] Case C-185/91, Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff, 1993 E.C.R. I-5801.

[15] Case C-35/99, Arduino, 2002 E.C.R. I-1529.

2.3. The Challenges of Ever-Evolving Technology

There is little doubt that technological progress – and the development of artificial intelligence (AI) in particular – has the potential to substitute labor with capital and thus change the provision of professional services radically. As Susskind and Susskind observe, "the overall trajectory of technological advance is clear and of great importance for the professions – more and more tasks that once required human beings are being performed more productively, cheaply, easily, quickly, and to a higher standard by a range of systems."[16]

The transition from bespoke to increasingly routinised work places the emphasis on the capture and utilization of data, diminishing the role played by people, or indeed bypassing them altogether, in the provision of services.

The key question, in this context, is whether new forms of competition through innovation are encouraged or facilitated – and how this is appropriately balanced against the policy objectives of regulation to begin with. BIAC suspects that a key focus of competition authorities and regulators alike will be on regulatory measures that dictate defined business models or corporate structures, which are often the most difficult to justify and can create clear disincentives and impediments to the introduction of disruptive technology.

Nonetheless, as noted below, such assessments need to be balanced carefully against the rationale of regulation, especially where customers in the sector (e.g., legal services) can come in very different forms, ranging from highly sophisticated purchasers of the services, who can be expected to have all the required information on quality and costs to make an informed choice, to individual consumers, who may well not.

3. A Careful Balance – The Case For and Against Regulation

In light of the above, and despite the complexities, BIAC endorses a careful balancing act when assessing the need for and appropriateness of regulation and/or deregulation.[17]

3.1. The Case For Regulation

The policy rationale for professional regulation and occupational licensing is well-rehearsed and is premised on potential market failures that can cause harm to consumers and which therefore justify a regulatory intervention. These market failures are broadly:

Information Asymmetries: In many scenarios, a consumer of services will know far less about the nature of the work than the person providing it. The services are *experience goods* (where the consumer can only assess the quality of the service after the fact; e.g., travel, design, or personal care services) or, more difficult still, *credence goods* (where the consumer will always lack the information to assess the quality of the service; e.g., legal, or medical services). In many cases it will be extremely difficult to connect "quality" – an elusive concept – with outcomes for the consumer, who may be satisfied (or at least not dissatisfied) with an outcome, despite having no real notion as to whether it was a quality service or good value for money.

[16] RICHARD SUSSKIND & DANIEL SUSSKIND, THE FUTURE OF THE PROFESSIONS 206 (2022).

[17] BIAC notes, for example, the growing movement in states across the United States to reform occupational licensing laws, which are seen as overly burdensome and restrictive for entry into certain occupations.

Externalities: Poor services (which may nonetheless satisfy individual consumers) can generate risks for other third parties. For example, poor accounting practices may create risks for other stakeholders, inferior medical services can raise public health concerns, or shoddy engineering or construction services can put lives at risk.

Public Goods: These are services where it is broadly accepted that general availability of – or access to – such services is in the general good (e.g., legal and medical services), so there is a specific need to get entry incentives (including possibly remuneration) right.

3.2. The Forms and Dangers of Regulation

Set against these justifications, there are multiple forms of rules and requirements, which can nonetheless have a detrimental effect on competition,[18] insofar as they can (i) limit or deter market entry; and/or (ii) impact the competitive dynamics of the market.

The rules that can impact market entry are plentiful, including:

- *Qualitative Requirements*: These typically cover qualification requirements, such as years of education and training, mandatory exams, continuous professional development, adherence to ethical standards, etc. Such qualification requirements are often accompanied by reservation of exclusive rights to provide the services under licensing regimes. Lesser forms of regulation may include certification schemes (while certification is not required to enter the market it may denote a certain level of quality and competence), negative licensing (which allows for prohibition of practice but involves no prior approval or formal license to operate)[19] or registration or compulsory membership requirements with a professional association. These requirements emphasize the importance of quality in a given sector but, depending on the severity of the requirements and how easily they can be achieved, can limit market entry into certain occupations.
- *Quantitative Rules*: These limit the number of participants that may practice at any one time, either as a whole or on a geographic basis (e.g., linking ratio of professionals to local demographics, setting a minimum distance between providers), or limiting foreign entry into a market. Insofar as these measures are specifically designed to limit entry quantitatively, they ostensibly appear to be more "protectionist" in nature and thus more difficult to justify. There may, however, be good public policy rationales for such restrictions, especially in the case of "public goods" justifications, ensuring the right incentives to enter the market and providing for an adequate geographic spread in respect of availability and access.
- *Organization and Structure Measures*: These tend to focus on the extent to which – or the conditions under which – professionals can operate with other professionals in the same or a different field; fixed corporate structures and limitations on who can hold a stake in the same; and liability and insurance requirements in order to

[18] BIAC acknowledges the limitations in the empirical evidence on the impacts of regulation. *See* OECD Professions and Occupations Background Note, *supra* note 10, ¶ 68 ("The literature focusses mostly on licensing and entry regulation, that is requirements to access the profession, rather than conduct regulation, such as bans on advertising or various forms of price regulation. Moreover, it is usually hard to disentangle the impact of the specific elements of entry regulation, such as exams or training. Finally, the empirical studies covered in this paper do not examine whether regulation is proportionate and whether it does achieve its objectives.").

[19] Recommended by the New South Wales Productivity Commission together with the application of consumer protection legislation for cases where the risk of consumer harm is perceived to be low. This, of course, presupposes that there is a robust system of consumer protection enforcement.

operate. These measures tend to impact the availability of business models and will presumably come under heavy scrutiny in those sectors most prone to technological replacement of labor, for fear that such rules would limit the incentives to innovate and disrupt markets with different business models. Nonetheless, these rules are often designed as indirect protections of quality.

The rules impacting the behavior of professionals and licensed occupations, on the other hand, are most often related to advertising and promotion (total bans or limiting comparative advertising) and tariff-setting (fixed prices, recommended prices, limitations on discounting). These measures are most likely to be viewed as having a clear detrimental effect on competition (see section IV.B below), but there may be sound public policy rationales for even price-fixing.[20] For instance, BIAC notes that the remuneration of certain legal professions in France is set by decree, albeit with the input of the Autorité de la Concurrence, designed to achieve a balance between fair and clear pricing for users and a reasonable remuneration for professionals.[21]

3.3. Striking the Right Balance – An Analytical Framework

The need for – and scope of – regulatory measures therefore requires a rigorous assessment, in its proper context and in light of the specific idiosyncrasies of any given sector. BIAC proposes a clear, consistent, well-articulated, and visible – in both advocacy efforts and enforcement activity – analytical framework that:

- Identifies and assesses the regulatory measure that restricts competition;
- Identifies (and stress-tests) in detail the objective being pursued, connected to public interest goals;
- Examines whether the restrictions are inherent in/needed for the pursuit of the public interest objectives (a necessity test); and
- Assesses whether the proposed restrictions go beyond what is necessary to ensure the objective or whether there are less restrictive means of achieving the same ends (a proportionality test).

BIAC notes that its proposed analytical framework is broadly aligned with those countenanced in the OECD Secretariat's Background Note.[22]

4. The Pivotal Role of Competition Authorities

Competition authorities may not always be ideally positioned to perform the full balancing exercise, especially when it comes to considering alternatives to regulation.[23] They are, however, ideally placed to help design, endorse, and promote the right analytical framework for policymakers, as well as provide specific input on key elements of the

[20] For example, the tariffs set for airport transfers established in numerous cities.

[21] *See Freedom of Establishment*, AUTORITÉ DE LA CONCURRENCE, https://www.autoritedelaconcurrence.fr/en/node/5720 (detailing the 2015 Law for Growth, Activity and Equal Economic Opportunities (Macron Law) which covers notaries, court bailiffs, judicial auctioneers and lawyers at the French Administrative Supreme Court and French Supreme Court).

[22] *See* OECD Professions and Occupations Background Note, *supra* note 10, §§ 4.1-4.4.

[23] Competition authorities that also have consumer protection enforcement powers can often balance the two, but they will not always have full leverage over effective methods of redress.

framework, such as the identification of restrictive measures and their likely effects on a market.

Competition authorities can – and should – also instill their characteristic rigor in others when assessing each of the key components of the analytical framework, encouraging:

- A full identification of each of the restrictive measures and their likely impact on the market (e.g., impaired entry, reduced choice); and
- A proper identification of the precise public policy interest being pursued, beyond general and imprecise statements justifying regulatory intervention.

It is only when the precise impact of, and precise justification for, a restriction have been identified that a necessity and proportionality test can be applied. In doing so, the same rigor should be exercised when considering alternatives to regulation.

4.1. Advocacy Efforts

There is no doubt that, given the proliferation of regulation and occupational licensing, the number of different and diverse stakeholders that may be involved, as well as the detailed assessments required to determine the right balance, a huge amount of time and effort will be required. BIAC believes, nonetheless, that the effort is both needed and timely.

BIAC recommends a staggered and prioritized approach to the exercise:

- Develop and agree on a clear and well-articulated analytical framework for the assessment, ideally one that is applied consistently across jurisdictions (BIAC hopes that this roundtable event will help to contribute to this first step).
- Develop and promote a vocal and sustained articulation of the framework, both publicly (so that businesses can self-assess against the recommended analysis) and with relevant public policy stakeholders, so that it is applied in practice. To the extent the analytical framework can be embedded – with specific competition authority input, if possible – into legislative and regulatory processes, this would be a welcome development for new regulation, as well as existing regulation that nonetheless is reviewed periodically.[24] BIAC emphasizes the need and benefits of a very public and visible articulation of the analytical framework so that businesses – and indeed consumers – can both self-assess but also help stress-test the adequacy of regulation and bring potentially objectionable measures to the attention of authorities.
- Develop a campaign for existing and established regulations that focuses on the clearest priorities, i.e., (i) those sectors that are least likely to require regulation at all, especially those where participants tend to be SMEs, which will be disproportionately impacted by heavy regulatory burdens given their more limited resources to manage compliance;[25] and (ii) those sectors where existing measures are particularly restrictive.

[24] Embedded periodic reviews of regulation will be particularly important for those sectors most prone to change, for example, through technological developments.

[25] In a similar vein, competition authorities can consider differential regulatory burdens depending on the size of firms, with lighter requirements for SMEs.

4.2. Enforcement Activity

BIAC acknowledges that the OECD Secretariat has chosen to eschew any analysis of enforcement activity for purposes of this roundtable event, focusing instead on advocacy efforts.[26] There is clearly plenty to discuss on advocacy, so this is understandable. BIAC believes, nonetheless, that advocacy and enforcement are two sides of the same coin and should be aligned and mutually-reinforcing, so it would be remiss of us not to mention it at all.

To the extent that competition authorities have the ability to challenge state regulation, they should readily consider doing so, especially in priority cases. In the EU, for example, DG COMP has the ability to challenge state measures,[27] and there are ample precedents of intervention against regulation impacting competition.

There is also ample precedent in the EU of challenges to self-regulation. In the seminal *Wouters* case,[28] the courts ruled that that not every decision of a professional body restricting competition is necessarily a breach of competition law, instead encouraging an analysis that:

- Takes account of the objectives of professional regulation, which are connected with public interest goals;
- Examines whether the anti-competitive effects are inherent in the pursuit of the public interest objectives (the necessity test); and
- The anticompetitive effects must not go beyond what is necessary in order to ensure the proper practice of the profession (the proportionality test).

BIAC notes – and approves – the similarity and alignment of the *Wouters* approach with the analytical framework being considered for the assessment and advocacy interventions in the public sphere.

The so-called "*Wouters* doctrine" has since been considered in other cases involving professional services, such as *OTOC*[29] and *Italian Geologists*,[30] as well as being extended

[26] *See* OECD Professions and Occupations Background Note, *supra* note 10, ¶ 5 ("Enforcement cases are not included in the scope of the paper.").

[27] DG COMP has the ability to directly establish member state liability under a combination of Articles 101 and 102 TFEU (the competition prohibitions) and Article 106(1) TFEU (on state measures applicable to public undertakings or undertakings to which member states have granted special or exclusive rights) and/or Article 4(3) TFEU (the so-called duty of sincere cooperation). In fact, the European courts have taken this further, finding that the supremacy of EU law places a positive duty on national courts and authorities to disapply national law that contravenes EU law. Accordingly, to preserve the effectiveness of Article 101 TFEU, the Court of Justice of the European Union (CJEU) ruled that a national competition authority is obliged to disapply national legislation that requires or encourages undertakings to participate in anti-competitive conduct on the basis of Article 101 read in conjunction with Article 4(3) TFEU. Case C-198/01, Consorizio Industrie Fiammiferi v. Autoritá Garante della Concorrenza e del Mercato, 2003 E.C.R. I-8055.

[28] C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577. *Wouters* is an important CJEU ruling concerning competition law and the freedom of establishment. In both of these areas, the CJEU held that restrictions (in this case, a ban on multi-disciplinary partnerships for lawyers and accountants) could be justified on the grounds of legitimate public policy (in this case ensuring the impartiality of the legal profession) if the measures taken were both necessary and proportionate (and in the case of restrictions on competition, purely ancillary) to that objective.

[29] Case C-1/12, Ordem dos Técnicos Oficiais de Contas v. v Autoridade da Concorrência, EU:C:2013:127 (Feb. 28, 2013).

[30] Case C-136/12, Consiglio nazionale dei geologi, EU:C:2013:489 (July 18, 2013).

to sporting rules.[31] In more recent judgments of the European courts,[32] however, there appears to be a more truncated review. In both these cases, the European courts appear to determine that the fixing of fees is an infringement *by object* and, as such, could not be justified by the pursuit of legitimate objectives, thus disapplying the *Wouters* doctrine in the case of *by object* restrictions.[33]

BIAC notes these developments with concern and urges clarity, in the EU and elsewhere, on the proper analytical framework to be applied in these instances. Ending up with situations where distinctions are drawn (between regulation and self-regulation; between enforcement and advocacy efforts) on how to properly analyze these complex fact patterns would seem entirely counter-intuitive and a recipe for diverse and unfair outcomes.

Given the complexities of the analysis, a further option would be for competition agencies to establish informal "sandbox" processes where the balancing exercise is conducted – in a manner removed from the heat of enforcement actions – with full participation of all relevant stakeholders.

5. Conclusion

Business generally thrives in the context of a stable regulatory environment that promotes growth, innovation, and job creation, as well as free and fair competition on the merits. BIAC endorses the need for action on the issue of professional regulation and occupational licensing, given that businesses are just as likely to be restricted by regulation as they are to be "protected" by regulation.

BIAC calls for a clear, well-articulated, and visible analytical framework that can be applied to the specificities of each context and emphasizes the need and benefits of a very public and visible articulation of the analytical framework so that businesses can both self-assess and call out instances of potentially objectionable measures.

In particular, BIAC calls for the consistent application of the analytical framework, both across jurisdictions[34] and, crucially, across both advocacy and enforcement efforts.

[31] Case C-519/04, Meca-Medina v. Comm'n, 2006 E.C.R. I-6991.

[32] *See* Case C-438/22, Em Akaunt BG, EU:C:2024:71 (Jan. 25, 2024) (an ordinance of a professional legal organization setting minimum amounts for lawyers' fees). *See also* Case C-128/21, Lietuvos notarų rūmai, EU:C:2024:49 (Jan. 18, 2024)(concerning rules adopted by the professional organization of notaries in Lithuania aligning the way notaries calculate the amount of fees for some of their activities).

[33] This truncated approach has also been reflected in the sporting context. *See, e.g.*, Case C-333/21, Eur. Superleague Co., EU: C:2023:1011 (Dec. 21, 2023).

[34] This should help to harmonize regulations across jurisdictions, which is particularly relevant for multinational businesses. Businesses tend to benefit from international regulatory harmonization and mutual recognition regimes that facilitate cross-border professional services and reduce administrative burdens.