

Unclassified

English - Or. English

14 May 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

Competition and Regulation in Professional Services – Note by Latvia

10 June 2024

This document reproduces a written contribution from Latvia submitted for Item 8 of the 77th meeting of Working Party 2 on 10 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/competition-and-regulation-in-professional-services.htm

Federica MAIORANO
Federica.Maiorano@oecd.org

JT03543583

Latvia

1. Introduction

1. While competition law holds significant importance, there are instances where the competition objectives must be harmonized with broader considerations, including consumer welfare, societal goals, and other societal values such as trust in healthcare providers. Striking this balance remains a central challenge for policymakers and competition authorities. In this context, the Competition Council of Latvia (the CC) will present the regulatory analysis within professional services, with a specific focus on the doctors and dentists, as well as the advocacy efforts aimed at enhancing competition not only in health sector but also within legal and notarial services. Since the only extensive analysis conducted so far refer to the restriction that regulates doctors and dentists, this essay will primarily focus on the advocacy process involving these healthcare professionals. Additionally, the CC has initiated communication with notaries and physiotherapists. However, a more in-depth analysis is still required to continue a balanced pro-competition advocacy. Although regulation plays a critical role to ensure the quality, safety, and ethical conduct of professionals across various sectors, certain regulation might impede competition. Overly strict regulation risk to hinder competition and discourage the entry of new professionals, it may also result in higher costs and a lack of incentives for professionals to innovate or improve service quality. Taking into consideration these aspects, the CC will further expand on the recent successful advocacy efforts in health sector. The CC identified similar restrictions among other professions, including notaries and physiotherapists. However, pro-competitive advocacy process for these professions is still ongoing, as it requires a more in-depth analysis of the specific restrictions within the context of each profession. Considering the CC's latest experience, we will share our conclusions when it comes to competition promotion in highly regulated services. There are various elements that contribute to effective advocacy which will be explored in detail below. Finally, the advocacy process is time consuming activity that requires tactful communication, which at times might be challenging. The CC will also discuss the main challenges that it faced in its experience regarding advocacy. This contribution aims to provide a comprehensive overview of the competition advocacy process within professional services and introduce to the latest activities regarding competition promotion in certain liberal professions.

2. Advocacy process for pro-competitive reform

2. In order to foster competitive environment in the markets, the CC engages in two primary mechanisms: enforcement and competition advocacy. While enforcement involves penalisation of anti-competitive behaviour, competition advocacy attempts to influence policymakers and stakeholders to adopt pro-competitive policies before the anti-competitive practices even occur.

3. The CC recently encountered a complaint on a restriction within Medical Association's Code of Ethics, which specifically restricts physicians from enticing patients away from their colleagues. The provision prohibits physicians from actively soliciting patients who are already under the care of another physician. Rather than immediately launching a formal investigation, the CC adopted a strategic approach to engage with stakeholders (doctors and dentists) and address potential competition concerns. The

advocacy process included close communication with the Latvian Medical Association (Medical Association), who fulfils State-delegated task to ensure doctors' certification process and who oversees the compliance of the Code of Ethics. In case there is a breach of ethical standards, including the ones written in the Code of Ethics, the Medical Association can either issue a warning to a medical practitioner, report the breach of ethical standards to the relevant Certification Board or even propose to withdrawal the relevant certificate of the medical practitioner.

4. Our initial communication with the Association was first informal conversation, where the CC informed the Association about the ongoing investigation. In order to better understand the original purpose and the proportionality of the restriction that affects competition, the CC invited the Association to submit any relevant information that should be considered in the analysis. Finally, the CC sent a detailed formal letter to the Association outlining all our concerns and our position on the potential competition issues, particularly the prohibition of any competition among doctors. This letter was more extensive than usual, providing the Medical Association with a thorough analysis of the applicability of competition law to liberal professions as well as the competitive concerns and suggestions, and an invitation to find a balanced approach between patient protection and competition within the health sector. Additionally, the CC expressed willingness to assist in formulating a prohibition in a way that it strikes a fair balance between competition and patient protection.

3. Analytical Framework for Assessing Regulations (restrictions):

5. From a theoretical standpoint, the restriction among undertakings could be considered either as restriction by object or by effect. According to the latest practice, evaluation of the object restriction still requires an assessment of the legal and economic context as it is crucial to consider the proportionality of the restriction within the particular industry. When the CC evaluated the restriction written in the Code of Ethics that prevents doctors from competing with each other, it was assessed whether this prohibition could be objectively justified by the need to protect patients' interests, in particular protecting them from dishonest action by doctors. This analysis was conducted in close collaboration with the Medics Association itself and most of analysis was based on the arguments presented by the Association.

6. In the analysis of the clause that prohibits doctors from enticing clients, the CC took into account the content of the provision, its purpose, and its economic and legal context. The CC recognized that prohibition of client (patient) enticement could be viewed as a restriction by object. However, the CC also acknowledged the necessity to regulate certain practices within the specific sector, especially when the prohibition is intended to protect the special relationship between a patient and their doctor. Given that there have not been any penalties for violating the provision since 2011, and that similar (but not identical) provisions exist in other countries and similar professions, the CC considered this restriction to be most likely proportionate. However, the CC noted that a restriction that is too broad still could potentially affect competition and lead to higher medical costs for patients. Therefore, a careful balance is needed when crafting such a prohibition to protect patients while simultaneously maintaining healthy competition environment which ultimately benefits the patients as well. In the letter addressed to the Medical Association, the CC also suggested how to amend the provision in a way that it allows for competition while also ensuring patient protection from potentially dishonest solicitation. This proposal involved a more narrowly defined prohibition.

7. During the assessment, the CC focused on two key factors: the assessment of consumer welfare and study of similar prohibitions in other countries or among other liberal professions. In the process of understanding the nature of the restriction within the economic and legal framework, the CC paid considerable attention to the justifications presented by the Association. The CC placed a great deal of emphasis on consumer welfare, particularly in the context of patient protection and included Association's explanation that the activity of a doctor in healthcare is a specific type of service and that a special relationship of trust must be established between the doctor and the patient during the treatment process. Conversely, the CC also considered existing research published by OECD¹ indicating that there is little evidence that such restrictions benefit consumers, but there is substantial evidence that such rules result in higher prices for consumers and higher profits for service providers.

8. In its analysis of the restriction, the CC considered not only consumer welfare and how the restriction might impact the consumers but also carried out comparative studies with other countries and professions. The CC conducted a study of other professional regulations in Latvia and concluded that the non-solicitation clause is contained in Latvian Code of Ethics for Notaries, as well as the Code of Ethics of the Latvian Association of Physiotherapists. CC also reviewed the regulation of the codes of ethics of a number of other regulated professions - notaries, solicitors, bailiffs, nurses, physiotherapists, insolvency practitioners and legal protection supervisors - to understand whether the existence of such a prohibition in the Medical Association's Code of Ethics is exceptional. The CC conducted a comparative study with other EU countries, and examined whether the Medical Codes of Ethics or similar regulatory acts in other countries also contain provisions that would prevent a doctor from soliciting the clients of another doctor.

4. Factors Contributing to Successful Advocacy

9. In the experience of the CC a number of key elements are instrumental in driving successful advocacy. For example, it is important to be clear in communication with the parties who are not specialised in competition law, the CC recognises that too complex legal and regulatory issues can be excessive for stakeholders. Therefore, their primary goal is to convey the most important concepts in a straightforward manner. When advocating for a cause, the CC ensures that the messages are concise, jargon-free. In the letter, the CC use plain language to explain the competition law, emphasizing its relevance to health profession and Medical Association. Following the initial interaction with the Association, it became evident that there was a misunderstanding of the scope of competition law. As such, it was crucial to clarify that associations are also subject to competition law. The CC's primary objective was clear communication, aiming to simplify the complex issue and address all potential questions regarding why competition law governs the health profession and why Medical Association is a subject under competition law. Thorough the analysis and the correspondence with the Association, the CC consistently highlighted exemplary practices from other countries where the formulation more accurately achieves the goal of patient protection while still allowing medical practitioners to compete with each other.

10. In the process of issuing the letter of concern, the CC expressed its openness to dialogue and maintained positive and open communication. During the assessment the CC found the same restriction that prohibits to compete for clients among notaries. Although

¹ OECD, Policy Roundtables, Enhancing Beneficial Competition in the Health Professions (2004), p.43.

this was only preliminary concern without such an in depth analysis as compared to Medical Association, the Notary Association still answered to our letter of concern that they aware of the purpose of the Competition Council's concerns and is opened to correct or completely revise their Code of Ethics.

11. Successful advocacy requires persistence in communication. The initial stages of communication may not always produce immediate outcomes, and the process of advocacy is often complex and multifaceted, requiring continuous effort and engagement. Therefore, it is important to maintain ongoing dialogue with the relevant parties. In line with this approach, the CC has recently taken the initiative to reestablish communication with the Association and sent another letter requesting for updates on any recent developments pertaining to the concerns previously raised by the CC. The CC received the letter from the Association introducing to the changes made in the Code of Ethics of Medical Association with the new corrections taking into account the CC's concerns.

5. Challenges Faced by Competition Authorities

12. The obstacles that the CC identified during latest advocacy activity was the initial resistance from the professionals. In the preliminary assessment, the CC discovered an identical restriction in the Notary Code of Ethics and subsequently communicated their concerns via a letter. However, the first response from the Council of Notaries was a debate over the CC's concerns and the scope of competition law. The question of whether to continue with advocacy efforts concerning restrictions among notaries remains open. Conversely, the Medics Association demonstrated a more receptive attitude during discussions, expressing a willingness to amend the problematic wording that restricts doctors from soliciting each other's clients. However, concrete steps followed only nine months later after the letter of concern was sent out. It is also important to consider that the process may take longer depending on the decision-making procedure. In case of Medics Association, change in the Code of Ethics can only be made at the conference attended by all association members, which occurs only twice per year and only if the Association reaches the quorum.

13. The competition authorities should also consider that some stakeholders may not understand the benefits of competition or the application of competition law and how it relates to their profession. This was evident in the case of the Medical Association, where the Association initially questioned the applicability of competition law and their status under competition law since doctors are not the classical subjects under the competition law terms. The CC considered these concerns and explained the theory and definition of "undertaking" within competition law. The CC explained that any activity involving the offering of goods and services on a given market is an economic activity, including the provision of medical treatment services. Therefore, the Medics Association is also considered to be an association of undertakings.

14. Lastly, a crucial factor in the advocacy process is the limitation of resources. The CC primarily responds to complaints or tip-offs, as the screening of regulations demands significant time and resources. While the CC primarily addresses existing competition concerns, we are also aiming to proactively publish a clarification for professional associations, which will be published on our website and will emphasize the application of competition law to associations and remind them of the importance of maintaining healthy competition among professionals.

6. Conclusions

15. Professional services are subject to extensive regulation by either national governments or professional associations themselves. These regulations cover various aspects, including entry requirements, advertising, business structures, and other activities. The goal of these regulations is to ensure quality, uphold ethical standards, and ensure public safety. However, they can also create barriers to entry and limit competition. Within this contribution, the CC covered latest advocacy examples concerning potential competition problems linked to the restrictions among doctors and notaries. Regulating professional services is a complex task with consequences for a variety of stakeholders, and achieving a balance between competition, consumer welfare, and societal objectives is a significant challenge for policymakers and competition authorities. In this contribution the CC provided the most recent example of the advocacy process for pro-competitive reform in health sector and offered a comprehensive overview of the assessment framework. The CC also highlighted the elements that contribute to successful advocacy, including clear communication, a willingness to engage in dialogue, and persistence. Additionally, the CC also discussed the challenges encountered during the advocacy process, such as initial resistance, a lack of resources, or a misunderstanding of competition concerns.