CEPLIS

INDEPENDENCE AND THE EUROPEAN LIBERAL PROFESSIONS

INTRODUCTION

It has been suggested that a paper might be prepared on the subject of the independence of the liberal professions in the Member States and at the European level.

On the assumption that the independence of a profession is a vital if not dominant factor in determining the status of a profession as a liberal profession, it seems to me that a clear understanding of the nature of independence and its relevance to the professions, needs to be explored.

With a view to further research, it is hoped that this paper will stimulate a debate on the subject of independence and its relevance not only for professionals and their professional bodies but also for the consumer of professional services.

I further suggest that any such debate and research should deal with the following general issues:

1) To what extent is the independence of the professions under threat and how is this threat manifested?
2) What are the factors, which define independence?
3) What is the relevance of independence for professionals, professional bodies and the consumers of professional services?
4) What is the relevance of independence and the link between professionals and their professional bodies?

I believe that Ceplis, through its membership covering a broad cross section of the European liberal professions, is in a unique position to initiate a debate and carry out appropriate research on these issues.

I fully appreciate that in the course of this paper I have also expressed some views and made suggestions which reflect my own understanding of the concept of independence and with which others may disagree and even strongly, but hopefully in doing so these views will help to open up a debate.

I also acknowledge that at a European level, different cultures and values may well have a bearing in reaching a consensus on the meaning of independence. It is perhaps noteworthy that in a report published by Spada Limited in 2009, on the regulation of British Professions, the following observations were made in regard to the evolution of the professions:

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1 British Professions Today: The state of the Sector: published by Spada Limited: [www.spada.co.uk](http://www.spada.co.uk) and sponsored by the law Society of England and Wales. The RCIS and The Chartered Institute of Management Accountants
“As professions became more established, with distinct sets of interests, memberships, and bodies of knowledge, so they began to seek monopoly and privilege. To attain this, they had to enter into a special relationship with the state so as to achieve a monopoly, or at least a licensure. This agreement has come to be called the “regulative bargain” with the state. The political culture of a society, which influences the style of this regulatory bargain, can be seen as crucial for the development of a profession.

As a “mixed economy” Britain falls somewhere in between the extremes of the most capitalist or free market orientated states, e.g. the United States, and the state controlled, command economy of the former USSR.

In continental Europe, professions generally have been and are mainly employed in the public sector connected to or controlled by state authorities. The Anglo-American “ideal type” by contrast, stresses the freedom of self-employed practitioners to control working conditions. These differences are also reflected in the types of professionalisation; the Anglo-American type focuses on “private government” within an occupation, whilst the Continental type focuses on the political struggle for control within an elite bureaucratic hierarchy”.

Why should the professions be concerned?

Over the last number of years various reports and statements have emerged from Member States and the Commission, which have indicated a degree of dissatisfaction as to the manner in which professional bodies have managed or regulated the behaviour of their members. Governments have been critical of the professions in regard to such matters as access to the professions, competition, supervision of professionals and not least the perceived costs in the provision of services to consumers.

A more recent example has been the statements of EU Prime Ministers of the 12th February 2012 in a joint latter to the Presidents of the European Union and Commission to reduce the number of regulated professions in Europe through the introduction of a new tough proportionality test set out in legislation. The letter goes on to request the Commission to convene without delay a new forum for the mutual evaluation of national practices to help identify and bring down unjustified regulatory barriers, examine alternatives to regulation which ensure high professional standards and assess the scope for further alignment of standards to facilitate mutual recognition of professional qualifications.

Whether or not the proposals made by the Prime Ministers, are acted upon, the statements made in the letter provide a strong indication in regard to attitudes towards professions, indications that the professions should not ignore.

Already there are indications that some Member States are taking steps to radically reduce the regulatory powers of professional bodies as for example in regard to the legal professions in Ireland and in other jurisdictions such steps raise concerns in those jurisdictions as to the independence of the professional bodies and of their member
PROFESSIONAL REGULATION

What does a regulated profession mean?

Linked to the overall idea of individual professional independence is the role of a professional body whose members are “regulated” by that body, whether on the basis of some form of exclusive self-regulation, co-regulation, delegated self-regulation or exclusive state regulation. A crucial question, is whether a professional’s freedom to exercise his or her professional activities independently, is in turn dependent upon the professional body which is empowered by law to regulate its members, is also entitled to exercise its powers independently.

It would appear that “strictu sensu” a profession whose members are “regulated” by a professional body, which in turn has the legal powers to:

- Determine the basis upon which members are admitted to practice their profession
- Exercise the power to discipline their members for misconduct by imposing various sanctions including the power to bar members from practicing
- Represent their members and the profession generally in all matters affecting members rights to practice
- Establish ethical standards which members are expected to maintain
- Ensure compliance by members of their statutory obligations.

The foregoing is probably a description of a “classical” regulated profession where the representative body exercises a high degree of professional autonomy, which it considers is essential in order to maintain not only its independence from State control, but also the independence of its individual members in the provision of their professional services.

However it has to be acknowledged that that there are within Europe professional organisations and associations which may not have the legal powers to exercise all of these functions. Some of the powers may be exercised by state authorities or partially between a state Authority and a professional body. Similarly a professional body’s sole function might be to represent the interests of its members and in some cases with little or no recognition by the State.

It would I think be worthwhile for Ceplis to get a clear picture of which categories applies to each of its members.
INDEPENDENCE OF A PROFESSION

The concept of independence

It is, I suggest rather difficult to define or identify the characteristics of an independent profession or indeed the extent to which such independence is a vital ingredient in a democratic society. Independence can apply to the functions of a professional body or to the members of a profession in the exercise of their duties to act impartially on behalf of their clients.

As regards the independence of professional bodies, Peter Gay, Professor of History at Yale University remarked:

“Professionalization, that characteristic element in the nineteenth division of labor, was not free from...ambiguities. It advanced mastery, but at a cost. Like the universities, the professions struggled for self-government but appealed to the state for legitimation; the state could offer them autonomy they craved by extending recognition; it could prescribe in detail, with the professionals’ collaboration and in their interest, the rules under which practitioners were licensed to perform their mysteries. Such support would shield the professions – and their presumed beneficiaries, the public in need of their services - from the depredations of charlatans. Huddling under this sheltering umbrella, the professions labored to secure the right to police themselves. This paradoxical struggle to freedom under protection worked with relatively little tension, largely because bureaucrats, legislators and professional men were usually of the same class-at times the same person. They understood each other.”

Although one might disagree with the alleged motivations of our nineteenth-century forebears, no doubt some of the sentiments expressed by Peter Gay would resonate amongst those seeking to reduce the role of professional bodies.

By way of counter balance it is worth noting the comments of the Law Society of Ireland in regard to the concept of independence contained in their Submission to the Irish Minister for Justice on the proposed Regulation of Legal Services Bill namely:

“The legal profession stands in the gap between the relative powerlessness of the individual and the overwhelming power of the State. An individual must have confidence that there is no potential for pressure, through the professional regulatory system, from the State on that individual’s legal adviser or on the codes of conduct and regulation that governs the independence that legal advised. Therefore, the independence of the regulator of the legal profession is synonymous with the independence of the profession.

“ As stated by the Supreme Court of Canada in 1982: “The independence of the bar from the state in all its pervasive manifestations is one of the hallmarks of a free

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society. Consequently regulation of the members of the law profession must, in so far as human ingenuity can so design, be free from state interference.” 3

Of interest is the reference to Liberal professions in a European Court of Justice case, in which the Court defined liberal professions as “activities which involve a marked intellectual character, require a high-level qualification and are usually subject to clear and strict professional regulation. In the exercise of such an activity, the personal element is of special importance and such exercise always involves a large measure of independence in the accomplishment of the professional activities.”

Similar observations are reflected in Directive 2005/EC where “liberal professions [....] are, according to this directive, those practised on the basis of relevant professional qualifications in a personal, responsible and professionally independent capacity by those providing intellectual and conceptual services in the interest of the client and the public.”

More recently has been the definition of the Liberal Profession adopted by the French Parliament namely;

“The term liberal professions defines the persons who exercise regularly, independently and under their own responsibility, an activity of generally civil nature aiming at ensuring, in the interest of the client or of the public, benefits of primarily, intellectual, technical or care-related nature, obtained through appropriate professional qualifications and in accordance with ethical principles or professional ethics, without prejudice to the national laws applicable to other forms of self-government.”

Whilst it is acknowledged that some of the earlier remarks are made in the context of the legal profession, and more specifically arising out of particular developments affecting the legal profession in Ireland, nevertheless it would appear to me that the principle of independence as expressed by the Irish Law Society, are equally applicable for other professions whose members interface with the State on behalf of their clients.

4 EU Case C- 267/99 Christiane Adam
6 Official Journal of the French Republic 23rd March 2012
Earlier, I set out the general areas in which it seems to me that “regulation” would apply to a profession. Whilst some of these features may not apply to all professions, it is I think worthwhile discussing these features in some further detail.

**Admission to practice**

Members of Ceplis will be well aware of the ongoing initiatives of the European Union to open up the opportunities for professionals’ qualifications to be recognised on a cross border basis through out Europe and the provision of services either by way of establishment or the provision of services on a temporary basis. These initiatives have brought the role of the professional bodies into focus and in particular in regard to any professional requirements, which might be considered to be barriers to access.

Arguments can, and are put forward, as to whether or not a regulated profession should have the right to determine the appropriate levels of education or training which justify the admission of the applicant to the ranks of the profession and as a consequence the right to practice that profession.

Should the right to determine whether or not an individual is suitably qualified to practice a particular profession, be the sole prerogative of a professional body? It is not uncommon to find that at a European level in regard to the legal profession, the right to exercise the practice of law, or more particularly to do so under the general title of “lawyer” is dependent on admission to the relevant Bar Association. It would be interesting to know whether similar requirements for other professions exist in Europe.

Can it be stated with confidence however, that the right of a regulated professional body to determine the conditions under which an individual may be permitted to practice is a right which an essential characteristic of the independence of that profession? Opponents will argue that the reservation of such rights to a professional body alone can lead to a form of elitism whereby that profession seeks to control the number of entrants into the professional field and is thus anti competitive. Supporters will argue that it is only the professions’ peers who are in a position to gauge whether or not an individual has achieved an appropriate level of competence, especially following a prescribed period of training, before that individual should be let loose on an unsuspecting public.

**Discipline**

Whatever may the views of state authorities regarding the role of professional bodies in the regulation of their members, the performance of such bodies in the investigation of complaints of misconduct and the imposition of sanctions, receives most public scrutiny. Many of the professions have established extensive (and expensive) procedures to ensure that complaints from whatever source are fully investigated in
accordance with fair procedures. Despite this perceptions grow, sometimes fuelled by misleading media reports, that professional bodies are biased in favour of their own.

So far as the writer is aware many of the regulated professions have taken steps to ensure that the members of committees established for that purpose are drawn from other public and private sources as well as from members of the relevant profession. Again the question must be asked as to whether the right to impose sanctions on members of a profession by a regulated professional body is an essential characteristic of the independence of that profession? Once again opponents would argue that professional bodies are not to be trusted in this regard whilst supporters will argue that it is only experienced practitioners who will have the skill and expertise to gauge whether or not an individual has failed to comply with the professional standards expected of him.

Representation

It may seem axiomatic that at the very least, a professional body should be entitled to be recognised as the sole body, which represents views and opinions on behalf of its members, and thus little needs to be said on this subject. However of interest could be to know whether in any particular member State a profession is represented by more than one professional body and the extent to which that body is recognised.

Ethical standards

One would probably need to go no further than to study the Ceplis Common Values of the Liberal Professions in the European Union Code in order to identify the commonly held ethical standards appropriate for professionals. But to what extent are codes of conduct a distinguishing factor in determining the independence of a professional body unless that body has both the power to sanction its members and the willingness to exercise that power where a breach of the code has taken place? Are codes of conduct nothing more than a list of self-evident truths? Members of the public could be forgiven for cynicism in the face of professionals failing to observe the standards expected of them and more particularly where the profession acting by its representative body appears to have failed to take any meaningful action.

The Ceplis Common Values referred to above lists these values as follows;

1  Confidentiality
2  Participation in Continuous Professional Development
3  Independence and Impartiality
4  Honesty and Integrity
5  Supervision of Support Staff
6  Compliance with Codes of Conduct and Practice
7  Professional liability Insurance
8  Conflict with moral or religious beliefs.

No doubt all of these values are worthwhile objectives. The question might be asked however as to whether the self-imposition of these values at either a professional or
professional body level. can by themselves be regarded as hallmarks of independence. It seems to me that the issue is not so much a question as the identification of such standards but rather a question as to the extent to which professionals comply with such standards and the role of professional bodies in ensuring compliance. A true measure of independence would be the degree to which professional do in fact so comply and professional bodies enforce compliance.

**Compliance with statutory obligations**

As professionals come under increasing statutory control especially in the field of “whistle blowing”, so professional bodies come under obligations to monitor compliance by their members. The requirements of the 3rd Anti Money laundering Directive in the case of lawyers, accountants and estate agents comes to mind.⁷

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⁷ Directive 2005/60/EC of 26th October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
FURTHER REFLECTIONS ON THE CONCEPT OF PROFESSIONAL INDEPENDENCE

In this part of my paper I would like to make some personal observations on the concept of independence and to explore the basis upon which professionals and their professional bodies consider that independence is a vital component for their existence. The term itself is elusive notwithstanding the frequency of its reference in many quarters. Perhaps it is most easily identified for the legal profession where the generally held principle that in the administration of justice, judges and by extension lawyers, should be free from State or political interference in the decision making process as in the case of judges, and the provision of legal advice as in the case of lawyers. Furthermore, so the argument goes, the body, which regulates the legal profession, should also be free from such interference.

Whilst the justification for the legal profession may be relatively clear-cut, do similar justifications apply for all other professions? To answer that question I think we need to define or perhaps more precisely refine the concept of professional independence.

Definition of Professional Independence.

One of the tasks, which Ceplis might consider, is to endeavour to reach agreement amongst its members as to an appropriate definition of Professional Independence.

At a basic level the expression implies the obligation of a professional to provide their services free from undue influence from third parties and in accordance with predetermined and enforceable professional standards. Third parties would include not only persons or commercial entities who might be in a position to exercise control over the decision making process by professional and their professional bodies, but also decisions imposed by State authorities or authorities controlled by the State. In regard to the latter point however, a distinction might be made between bureaucratic control and justified state intervention. It seems difficult to envisage circumstances where a profession would not be free from some degree of state intervention.

Does it all boil down to the achievement of a balance between the interests of the professional and the interests of the State?

The Independence of professionals

How does the principle of independence manifest itself in relation to the activities of individual professionals? I suggest that in addition to the overall requirement that professionals should not be subject to undue influence, certain aspects of the Ceplis Common Values do underline the necessity for such independence having regard to the interests of the consumer. More specifically these may be summarised as follows;
1 Undue influence

It is perhaps stating the obvious that in the discharge of their professional duties or obligations towards their clients, professionals should not be placed in a position that their services should be compromised through a competing obligation to a third party. This principle is based upon ethical grounds that a professional cannot have two masters (conflict of interest) and that the professional should always act in the best interests of his or her client.

The legal, auditing and medical professions come to mind in the application of these principles but doubtless they have a general application. A question also arises whether the independence of a professional is compromised in what are known as multi-disciplinary practices or partnerships.

2 Confidentiality

It seems almost axiomatic that any information concerning the affairs of a client should not be divulged by a professional without the consent of the client. Professionals have always prided themselves that the right to privacy of clients is protected in this way. This ethical obligation of confidentiality has long been regarded as an inviolable and indeed in Civil law jurisdictions has found expression as a legal obligation in the case of lawyers and the professional secret.

As mentioned previously, professional bodies can be obliged to ensure compliance by their members of their statutory obligations. This raises concerns that in doing so, access to files may be required which in turn raises issues as to the security of confidential information.

3 Compliance with Codes of Conduct

Differing professions have established through the aegis of their respective professional bodies, codes of conduct, which reflect the ethical and professional standards, expected of their members. The extent to which such standards are or are capable of being enforced may be a moot point, but at a very minimum compliance failure should entail the opprobrium of fellow professionals.

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8 For example the Irish Institute of Certified Public Accountants includes the following definition of independence in its Code of Ethics: “(a) Independence of mind- the state of mind that permits the provision of an opinion without being affected by influences that compromise professional judgment, allowing an individual to act with integrity, and exercise objectivity and professional judgment. (b) Independence in appearance- the avoidance of facts and circumstances that are so significant a reasonable and informed third party, having knowledge of all relevant information, including any safeguards applied, would reasonably conclude a firm’s or a member of the assurance team’s integrity, objectivity or professional scepticism, had been compromised.”
The independence of Professional Bodies

There seems to be a view that in order for members of a profession to exercise their activities independently, so also must their professional body be entitled to exercise its powers independently. Is this position justifiable?

In the first instance a distinction should be made between professional bodies whose sole function is to represent the interests of its members and a professional body which is empowered by its members and by the State to regulate its members either wholly or partially on the lines set out earlier in this paper. In the case of a pure representational body the independence of that body is easily discernible, as its activities would in general not conflict with a public interest.

However in the case of a professional body which can impose its authority on its members through varying forms of legally enforceable sanction, the necessity for independence, that is to say independent of State involvement, becomes less clear. Presumably the power of a professional body to take effective action against its members must have been devolved from the State. Thus from a public interest point of view, the State must be entitled to intervene if there is compelling evidence that the professional body is not exercising its powers in a satisfactory manner. What the State giveth, it may also take away.

Following this line of thought, it seems to me that the issue is not so much a question of the independence of a professional body as such, but a question of the competence of that body to discharge exercise its powers impartially. Insofar as the professional body may be composed of professionals, such professionals would be better placed to exercise judgement regarding the behaviour of members, rather than faceless civil servants. I suggest therefore that the independence of a professional body should be best described as a conditional form of independence. Namely that in the exercise of their powers a professional body should always be entitled to exercise those powers independently of State interference on condition that it manages and controls its members in a highly competent, impartial and effective manner.

The symbiotic relationship of professionals and their professional body

Although the reasons why professionals sought the establishment and recognition of professional bodies and in particular to be in a position to exercise powers on the lines previously mentioned, are self evident, the overall desire of a profession to maintain an ethos should not be overlooked or underestimated.

Professionals take great pride in their profession and expect that fellow professionals will maintain the highest standards of probity and integrity in their dealings with the public. Furthermore this sense of pride is reflected in the manner in which the relevant professional body conducts its affairs on behalf of its members and also on behalf of the public.

Any failure by a fellow professional to maintain the standards set by the professional body is a cause of shame. It is this sense of collegiality, which motivates professionals
to participate in and provide their services on a voluntary basis to their professional bodies and in many instances provide financial compensation in appropriate cases.

An excessive erosion of this symbiotic relationship between the professional and its professional body, can only lead to a less compassionate and more bureaucratic organisation.

**Independence of the professions and the public interest**

Whilst professionals and their professional bodies may well consider that their independence is an essential component as a liberal profession, does the same hold true for clients of individual professionals and the general public as far as the role of the professional bodies is concerned? Access by state authorities to confidential information must give rise to concern. There can be little doubt that in the case of individual clients, such matters as confidentiality of information, the obligation to act in the best interests of the client and other client centred ethical standards are all of significant interest to them. Any erosion of these standards can only result in the breaking of the bond of trust between the professional and client. Furthermore clients need to be assured that the professional body can provide oversight and has the capability to take effective action where a breach of the standards arises.

From the point of view of the client, what difference does it make if the supervision of members of a particular profession is managed by a professional body drawn from the ranks of the members’ own profession or a State controlled authority? I would argue that there is a significant difference due to the symbiotic relationship between professionals and their professional bodies and that the professional body acting impartially and independently is in a much stronger position to ensure compliance by its members.

The foregoing can be summed up rather neatly from a further quotation from the Spada report where under the heading of political consultation it states;

> “Professional bodies are key institutions for post-industrial states founded on liberal principles, providing an effective method of regulation certain spheres of economic life without developing an oppressive central bureaucracy. Just as professions are (partially) regulated by government, vice versa, professions have a role to play in moderating government. The professions provide another “check and balance” on government, with its tendency to centralise power and to produce increasing quantities of legislation and regulation in an ad hoc reactive fashion”

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9 See earlier footnote 1 page 1.
CONCLUSIONS

Earlier in this paper, I suggested that of crucial importance is to determine whether or not a professional’s freedom to exercise his or her activities independently is in turn dependent upon the professional body which regulates the profession generally is also entitled to exercise its powers independently. No doubt those supporters of a “free market” approach would answer the question emphatically in the affirmative, whilst those who would support a degree of state intervention would argue that professional independence is not entirely so dependent provided appropriate demarcation lines between the role of the professional body and the state authority are in place and strictly observed.

A further factor which may need to be taken into account and indeed investigated, is whether all liberal professions share the same sense or awareness of independence. Is it possible that some professions and their governing bodies are more concerned as to the preservation of their independence than others?

With a view to reaching an understanding of the nature of the concept of independence, and its relevance not only for professionals and professional bodies alike but also for the consumer of professional services, I suggest therefore that in order to do so Ceplis might consider the following:

1 Commission and publish a Study either internally through its own resources or externally through an appropriate research institute, whose terms of reference could include inter alia the following;

- Determine to what extent the concerns expressed in this paper are justified.
- Ascertain the level of independence enjoyed by the professional bodies who are members of Ceplis and their powers.
- Analyse the nature of and application of independence for professionals and professional bodies.
- Determine the extent to which such independence is relevant for the consumer of professional services.
- Determine the basis on which the independence of professionals is an essential link to the independence of professional bodies

2 In the short term obtain some explanation of the position adopted by the Prime Ministers in their letter of the 12th February regarding their proposal that the number of regulated professions in Europe should be reduced. What exactly do they have in mind? It is hard to believe that such a proposal could be made “out of the blue”, without some detailed document having been first prepared.

3 As a matter of general policy to review all proposed European union legislation not only from the point of view as to impact on the professions but also as regards any impact on the independence of all or any of the professions.
John Fish  
Hon. Secretary  

Irish Inter Professional Association  

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