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Towards a New Era for the Legal Profession

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Abstract: The article discusses the regulatory trends and new challenges that the legal profession is currently facing in Europe. To show the complexity and specificity of the professional phenomenon, this article opens with an overview of the main dominant theory – constructions on professions in sociology – followed by analysis of the economic theories of regulation, with particular regards to the public interest and private interest theories. The analysis suggests that the lens through which the professions may be perceived can be different, if not opposite, and as a consequence, the rationale for professional services regulation might be very distant. Starting from the specific EU position towards the application of the competition law in the professional sector, this article provides a comparative analysis of the current legal profession regulations across Europe, considering rules affecting entry restrictions, as well as some restrictions on conduct. This article suggests that the European legal profession is gradually moving from a professional-independence approach to a consumer-centric perspective, even if several forms of alternative resistance are still in place, as the Italian experience shows. In view of the comparative analysis conducted, this article claims that the paradigm of professionalism is not condemned to succumb to commercialism; instead it seems to have hybridized its nature in favour of a new model of regulation, able to promote market competition and innovation without, however, renouncing professionalism and its core values.

Résumé: L'article traite des tendances réglementaires et des nouveaux défis auxquels la profession juridique est actuellement confrontée en Europe. Pour montrer la complexité et la spécificité du phénomène professionnel, cet article commence par un aperçu de la principale théorie dominante – réfléxions sur les professions en sociologie – suivie d'une analyse des théories économiques de la régulation, en particulier des théories d'intérêt public et d'intérêt privé. . L'analyse suggère que la perspective à travers laquelle les professions peuvent être perçues peut être différente, sinon opposée, et par conséquent, la justification de la réglementation des services professionnels pourrait être très différente. A partir de la position spécifique de l'UE vis-à-vis l'application du droit de la concurrence dans le secteur professionnel, cet article fournit une analyse comparative des réglementations actuelles des professions juridiques en Europe, compte tenu des règles concernant les restrictions à l'entrée. L'Auteur suggère que la profession juridique européenne passe progressivement d'une approche d'indépendance professionnelle à une perspective centrée sur le consommateur, même si plusieurs formes de résistance alternative sont encore en place, comme le montre l'expérience italienne. Au vu de l'analyse comparative effectuée, cet article affirme que le paradigme du professionnalisme n'est pas condamné à succomber au commercialisme; il semble plutôt avoir hybridé sa nature en faveur d'un nouveau modèle de réglementation, capable de promouvoir la concurrence et l'innovation sur le marché sans toutefois renoncer au professionnalisme et à ses valeurs fondamentales.

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Zusammenfassung: Der Artikel beschäftigt sich mit den regulatorischen Entwicklungen und neuen Herausforderungen, denen sich die Anwaltschaft in Europa derzeit gegenüber sieht. Um die Komplexität und Spezifität des Berufsphänomens aufzuzeigen, beginnt dieser Artikel mit einem Überblick über die dominierende Haupttheorie – Berufskonstrukte in der Soziologie – gefolgt von einer Analyse der ökonomischen Regulationstheorien unter besonderer Berücksichtigung der Theorien des öffentlichen und privaten Interesses. Die Analyse legt nahe, dass das Objektiv, durch das die Berufe wahrgenommen werden, unterschiedlich sein kann, wenn nicht sogar gegensätzlich, und folglich könnte die Begründung für die Regulierung von Berufsdienstleistungen sehr voneinander abweichen. Ausgehend von der spezifischen Position der EU zur Anwendung des Wettbewerbsrechts innerhalb des Berufssektors bietet dieser Artikel eine vergleichende Analyse der geltenden Rechtsvorschriften für Rechtsanwälte in ganz Europa unter Berücksichtigung von Vorschriften betreffend der Zugangs- sowie Verhaltensbeschränkungen. Dieser Artikel legt nahe, dass sich die europäische Anwaltschaft allmählich von einem Ansatz der professionellen Unabhängigkeit zu einer verbraucherorientierten Perspektive hinbewegt, auch wenn mehrere Formen des alternativen Widerstandes noch zu beobachten sind, wie die italienische Erfahrung zeigt. Im Hinblick auf die vergleichende Analyse behauptet dieser Artikel, dass das Paradigma der Professionalität nicht dazu verurteilt ist, dem Kommerzialismus zu erliegen. Stattdessen scheint es seine Natur zugunsten eines neuen Regulierungsmodells zu hybridisieren, welches Marktwettbewerb und Innovation fördern kann, ohne jedoch auf die Professionalität und seine Grundwerte zu verzichten.

Keywords: legal profession, professional services, professional regulation, competition, liberalization, professionalism, commercialism.

Schlüsselwörter: Anwaltschaft, professionelle Dienstleistungen, berufliche Regulierung, Wettbewerb, Liberalisierung, Professionalismus, Kommerzialismus.

1. Introduction

1. The aim of this comparative study is to discuss the regulatory trends and new challenges that the legal profession is currently facing in Europe.

To set the scene, the first part of this article focuses on the debates regarding the concept of profession from a sociological prospective (Section II) and the justifications for the professions' regulation from an economic point of view (Section III).

Section IV provides a general overview of the European initiatives in this particular sector, focusing on their innovative attempt to apply competition law in the professional sector by classifying professionals as undertakings.

Section V is devoted to analysing the most important developments in the regulation of legal professionals across Europe, considering several reforms affecting entry restrictions (e.g. qualification and entry requirements), as well as restrictions on conduct (e.g. restrictions on fees, advertising, and organizational forms). This comparative analysis sheds light on the similarities and differences in the current national regulatory frameworks in order to provide insights on the evolutionary trend in the regulation of legal professionals. This article suggests that

several EU Member States (MSs) – mostly motivated by the EU advocacy activities – are moving away from a pure professional-independent tradition and towards a consumer-centric approach, including competition and client interest as regulatory guidelines. Nevertheless, despite this evolutionary trend, several forms of alternative resistance are still in place across Europe; the Italian experience seems to testify to this silent resistance (Section VI).

2. This article claims that the traditional paradigm of professionalism is not condemned to succumb to commercialism; instead, it is going to be rewritten and evolve according to the new scenario. A hybrid model of regulation seems to be emerging in Europe, able to promote market competition and innovation without, however, renouncing professionalism and its core values.

Assuming this perspective, this article suggests that lawyers and bar associations (Bars), instead of resisting the new trend in the regulation of professional services towards competition, might take advantage of these changes and reinstate their traditional ethical values, enhancing the public and social relevance of the legal professional's role.

2. Defining a Profession: The Sociological Perspectives

3. Although observations and theoretical studies concerning the sociology of the professions and the phenomenon of professionalism dates back more than a century,[1] today it is not easy to draw up an unambiguous and universally accepted definition of 'the profession', or find unanimous consent concerning the rationale for professional services regulation.

Consensus on how a profession can be defined has never been reached due to the fact that the concept of profession is inevitably a changing one, according to its historical character and the different perspectives and approaches from which it can be legitimately viewed and interpreted.[2]

4. Earlier significant sociological observations on professions, elaborated in the 1930s, offered a view on professionals as a distinctive group in the division of

1 The sociology of profession as a specific science has developed in the first half of the 20th century in Great Britain (Alexander Morris Carr-Saunders & Paul Alexander Wilson, *The Professions* (Oxford: Clarendon Press 1933) and in the US (William J. Goode, 'Community Within a Community: The Professions', 22. *Amer. Sociol. R.* (*American Sociological Review)* 1957, p 194; Ernest Greenwood, 'The Attributes of a Profession', 2. *Soc. Work (Social Work)* 1957, p 45), while the continental sociology of professions emerged in several European countries later, in the 1960s–1980s.

2 Eliot Freidson, 'The Theory of Professions: State of Art', in Robert Dingwall & Philip Simon Coleman Lewis (eds), *The Sociology of the Professions* (London: MacMillan 1983), p 35; Helen Yee, 'The Concept of Profession: A Historical Perspective Based on the Accounting Profession in China', Accounting History International Conference 2001, USA (2001), p 2, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.195.6579&rep=rep1&type=pdf.

labour, arising spontaneously to meet the need of the society and characterized by the 'application of an intellectual technique to the ordinary business of life, acquired as the result of prolonged specialized training' and organized in form of associations 'among the chief objects of which [were] the testing of competence and the maintenance of an ethical code'.[3] The attributes that distinguish an occupation as a profession were more deeply analysed during the 1950s and 1960s, under the then-emerging 'taxonomic approach'. Taking a static perspective, sociologists have attempted to define the concept of profession, underlining the possible attributes by distinguishing professional from non-professional.[4] Most lists basically included a high degree of knowledge and expertise, primary orientation to community interest rather than to individual self-interest, an ethical code, educational and cultural credentials, and a system of rewards (monetary and honorary).[5] Furthermore, over time, several characteristics has been added,[6] including the 'commitment to a calling', 'service orientation', 'autonomy',[7] 'loyalty to colleagues',[8] 'absence of a collective direct social control on the professional community'[9] etc.

5. On the other hand, sociological studies conducted adopting a structural-functionalist approach[10] have enriched the debate: the static approach performed under the trait model has been replaced with a functional one, and the professions are now studied in terms of their relationships with the whole society and their clients. On one side, professions have been defined as a 'mechanism of social control'[11] or

3 Alexander Morris Carr-Saunders & Paul Alexander Wilson, *The Professions.*

4 Sociological studies of professions conducted under the taxonomic approach, and in particular belonging to the so-called 'trait model', have focused on definitional list-making in an attempt to distinguish professions from non-professions. See Douglas Klegon, 'The Sociology of Professions: An Emerging Perspective', 5. *Sociology of Work and Occupations* 1978, p 259, for an excursus on the 'sociological theories of professions and power'.

5 Ernest Greenwood, 2. *Soc. Work* 1957, p 45; Bernard Barber, 'Some Problems in the Sociology of Profession', 92. *Daedalus* 1963, p 669.

6 Geoffrey Millerson, *The Qualifying Associations* (London: Routledge & Kegan Paul 1964); Edgar H. Schein, *Professional Education: Some New Directions* (New York: McGraw-Hill 1970) and Donald Belfall, *Creating Value for Members* (Toronto: Canadian Society for Association Executives 1999).

7 Wilbert E. Moore, *The Professions: Roles and Rules* (New York: Russell Sage Foundation 1976), pp 5–6.

8 Henry S. Drinker, 'The Ethical Lawyer', 7/4 *University of Florida Law Review* 1954, p 375.

9 William J. Goode, 22. *Amer. Sociol. R.* 1957, p 194.

10 The functionalist variant of the taxonomic approach aims at presenting 'more theoretically coherent accounts, seeing a functional relationship between professions and society': Mike Saks, 'Defining a Profession: The Role of Knowledge and Expertise', 2. *Professions & Professionalism* 2012, p 2.

11 Talcon Parsons, 'A Sociologist Looks at the Legal Profession', in Talcon Parsons, *Essays in Sociological Theory* (Glancoe: Free Press 1954), p 382.

as 'stable elements in society'.[12] On the other side, the professions have been presented as being functional, providing a moral foundation for the whole society.[13] With particular regards to the legal profession, 'the role of lawyers is defined [...] as '"collectivity-oriented"[,] not, like that of the business man, as "self-oriented"', and the profession has been considered as an antidote to deviation.[14] Therefore, these explanations of the professions assume that the roles played by the professions in the society – whether sustaining social order or strengthening the moral character of a society[15] – would serve the public good.[16] The image coming from this interpretation is that the profession is an autonomous and self-regulated institution where altruistic members deploy their expertise for the benefit of others, working for the common good and ensuring the stability and the welfare of the whole society. These seem to represent the premises and justifications for the rewards enjoyed by the professionals in terms of status, prestige, economic power and independent regulation.

6. Nevertheless, since the 1970s, these theories have declined in popularity, attacked by several empirical and theoretical critiques.[17] Meanwhile, sociologists have presented a different and new view of the professions grounded on the premise of self-interest and social power rather than recognizing a collective orientation of professionals' actions. It was argued that 'while professions may use the language of altruism and subordinating economic interests to a social calling, the professions were, in fact, an occupational category based on elitist power and extreme economic privilege'.[18]

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12 Talcon Parsons, *Essays in Sociological Theory*, p 370; Alexander Morris Carr-Saunders & Paul Alexander Wilson, *The Professions*, p 497; Emile Durkheim, *On Suicide* (Torino: Utet 1977), p 426.

13 Emile Durkheim, *Professional Ethics and Civic Morals* (London: Routledge 1957).

14 Talcon Parsons, *Essays in Sociological Theory.* In other words, professions are different because they are 'characterized by an admirable sense of responsibility; it is one of pride in service given rather than of interest in opportunity for personal profit' (Alexander Morris Carr-Saunders & Paul Alexander Wilson, *The Professions*, p 471).

15 Mike Saks, 'Removing the Blinkers? A Critique of Recent Contributions to the Sociology of the Professions', 31. *Sociol. Rev.* (*The Sociological Review)* 1983, p 1.

16 Talcon Parsons, *Essays in Sociological Theory.*

17 For a reconstruction of the major critics, see Daniel Munzio & Roy Suddaby, 'Theoretical Perspectives of the Professions', in Bob Hinings, Daniel Muzio, Joseph Broschak & Laura Empson, *Oxford Handbook of Professional Service Firms* (Oxford: Oxford University Press 2015), pp 26–27.

18 Daniel Munzio & Roy Suddaby, 'Theoretical Perspectives of the Professions', in Bob Hinings, Daniel Muzio, Joseph Broschak, & Laura Empson, *Oxford Handbook of Professional Service Firms*, p 27. See also Terence Johnson, *Professions and Power* (London: Macmillan 1972); Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press 1977); Andrew Delano Abbott, *The System of Profession: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press 1988); Anne Witz, *Professions and Patriarchy* (London: Routledge 1992). The root of this trend is often traced to the early 20th century and

In particular, the 'power' and the 'action' approaches have emphasized professional self-interest, the former considering how professionals acquire the power and further maintain and enhance it and the latter analysing how the professionals are able to influence – through their individual and collective action – the environments and organizations in which they operate. Professional self-interest has been seen from two points of view:[19] as a means to reach market control and market shelter in order to ensure professionals' high incomes[20] or as a strategy to distinguish professionals from other workers and service providers,[21] excluding from the professional category other competitors (through entry restrictions) and immoral professionals (through disciplinary measures).[22] This approach 'implies a new definition of professions, focussing attention on organisation as a mechanism of strategy and control'.[23] As underlined by Johnson, professionalism should be considered as 'a peculiar type of occupation control, rather than an expression of the inherent nature of particular occupations. A profession is not an occupation, but a means of controlling an occupation'.[24]

7. It is beyond the scope of this article to go deeper into the history of the sociology of the professions. Nevertheless, the overview of the two dominant theory-constructions on professions in sociology gives us a clear perception that the lens through which the professions may be perceived can be different, if not opposite – and for this reason, the rationale for professional services regulation might also be very distant.

As a consequence, it is not easy to set up either a universally accepted or a European definition of professions, nor to set up a fixed list of occupations falling into this specific category. At present, we can recognize some traits of this phenomenon as occurring frequently (such as independence, intellectual character of the professional performances, personal responsibility, deontology, etc.). We may emphasize some features related to the typical nature of professional services (e.g. complex, intellectual, personalized in nature, etc.) or even detect some

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attributed to the sociologist Max Weber. Richard L. Abel, *American Lawyers* (Oxford: Oxford University Press 1989), pp 14–39; Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (New York: Bedminster Press 1968), pp 342–344.

19 Russel G. Pearce, Noel Semple & Renee Newman Knake, 'A Taxonomy of Lawyer Regulation', 16. *Legal Ethics* 2014, p 258.

20 Stefan Timmermans, 'Professions and Their Work: Do Market Shelters Protect Professional Interests?' 35. *WOX (Work and Occupations)* 2008, p (164) at 165.

21 Eliot Freidson, *Professionalism: The Third Logic* (Cambridge, UK: Polity Press 2001), p 199; Magali Sarfatti Larson, *The Rise of Professionalism.*

22 Robert P. Kaye, 'Regulated (Self-)Regulation: A New Paradigm for Controlling the Professions?', 21. *Public Policy Adm. (Public Policy and Administration)* 2006, p 105.

23 See Thomas Brante, 'Sociological Approaches to the Profession', 31. *Acta Siciol. (Acta Sociologica)* 1988, p 119.

24 Terence Johnson, *Professions and Power*, p 45.

methods in which the professional services are usually provided (e.g. independence and personal responsibility).[25] Nevertheless, we should be aware that every conclusion necessarily reflects the historicity of the phenomenon, the values of the society in which we live, as well as the socio-economic variables and the political and economical settings which operate in our time.[26]

3. Economic Theories on the Profession's Regulation

8. The liberal professions have caught the attention not only of sociologists, but of economists as well, who have elaborated different constructive theories on professional regulation. The area of professional services has always been characterized by highly regulated markets. This strict regulation has been slowly accomplished through a combination of statutory regulation and rules adopted by self-regulatory professional bodies. This approach to professionals' activities has consequently guaranteed – though at different levels – privileged positions in the labour market, thus even creating a type of monopoly ('protected professionals').[27]

9. The set of explanations, recalled to justify regulation of the professions, mainly belongs to the public interest theory.[28] The argument is that the natural dynamics of a free market are insufficient to ensure the efficiency of professional outcomes[29] together with the protection of the consumers, and insufficient to preserve the

25 Tinne Heremans, *Professional Services in the EU Internal Market. Quality Regulation and Self-Regulation* (Oxford: Hart Publishing 2012), pp 9 ff.

26 See Christopher J. Whelan, 'The Paradox of Professionalism: Global Law Practice Means Business', 27. *Penn St. Int'l L. Rev. (Penn State International Law Review)* 2008, p 2: '"Is law a business or profession?" This is one of the oldest and most familiar questions about the practice of law and the work of lawyers. In fact, law has almost always been an occupation that displays characteristics of both business and profession, with changes in emphasis over time. Why is the business/profession dichotomy still discussed today if it is just a "rhetorical fight" between "bottom-line profits and professional virtue?" One reason might be that the normative question "should law be a business or profession?" has been the subject of heated debates in many countries, reflecting ongoing tensions between professionalism and commercialism in the practice of law.' See also Daniel Muzio & John Flood, 'Entrepreneurship, Managerialism and Professionalism in Action: The Case of the Legal Profession in England and Wales', in Markus Reihlen & Andreas Werr, *Handbook of Research on Entrepreneurship in Professional Services* (Cheltenham: Edward Elgar 2012), pp 369-386.

27 Francesco Galgano, 'Professioni intellettuali, impresa, società', *Cont. Imp. (Contratto e impresa)* 1991, p 4; Francesco Galgano, 'Le professioni intellettuali e il concetto comunitario d'impresa', in *Cont. Imp. Eur. (Contratto e impresa Europa)* 1997, p (1) at 3.

28 With particular regard to the legal services regulation and the different economic (and sociological) theories, see Russel G. Pearce, Noel Semple & Renee Newman Knake, 16 *Legal Ethics* 2014, p 258; Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar Publishing 2015), pp 18 ff.

29 Michael Faure, Jorg Finsinger, Jacques Siegers & Roger Van den Bergh (eds), *Regulation of Professions* (Antwerpen: Maklu 1993); Claus-Dieter Ehlermann & Isabela Atanasiu, *European*

good administration of justice together with the rule of law. Regulation is supposed to be a response to market failures generated by the particular features of the legal services profession,[30] as well as the peculiarities of the market for legal services. In fact, the legal sector is often characterized by the presence of information asymmetries between professionals and clients:[31] if the former perfectly know the value of their performance, the latter are not completely aware of it, often neither before nor after purchasing the service. In general, clients are not able to judge the real correspondence between the supply of services and their own personal/professional needs and priorities in order to ascertain the better alternatives. Nor are clients able to assess the quality of the services, once the receive it.[32] It mainly depends on the credence qualities of the most professional services.

10. These information asymmetries can lead to adverse selection,[33] reducing the general quality of legal performances: if clients cannot recognize the

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Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions (Oxford and Portland, Oregon: Hart Publishing 2006).

30 Market failure has been explained as 'a situation where the free play of market forces cannot be relied upon to maximise economic welfare'. Frank H. Stephen, 'Regulation of the Legal Professions or Regulation of Markets for Legal Services: Potential Implications of the Legal Services Act 2007', 19. *Eur. bus. law rev.* (*European Business Law Review)* 2008, p (1130) at 1131.

31 Benito Arrunada, 'The Economics of Notaries', 3. *Eur. J. Law Econ. (European Journal of Law and Economics)* 1996, p 5; Robert G. Evans & Michael J. Trebilcock, *Lawyers and the Consumer Interest* (Toronto: Butterworths 1982); Michael Faure, Jorg Finsinger, Jacques Siegers & Roger Van den Bergh (eds), *Regulation of Professions;* Robin C.O. Matthews, 'The Economics of Professional Ethics: Should the Professions Be More Like Businesses?', 101. *Econ. J.* (*Economic Journal)* 1991, p 737; Frank H. Stephen, 'The Market Failure Justification for the Regulation of Professional Service Markets and the Characteristics of Consumers' and Roger Van den Bergh, 'Towards Efficient Self-Regulation in Markets for Professional Services' in Claus-Dieter Ehlermann and Isabela Atanasiu, *European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions* (Oxford and Portland, Oregon: Hart Publishing 2006), pp 143 & 155.

32 Michael R. Darby & Edi Karni, 'Free Competition and the Optimal Amount of Fraud', in 16. *J. Law Econ (Journal of Law and Economics)* 1973, p (67) at 68–69; Paul Fenn and Alistair McGuire, 'The Assessment: The Economics of Legal Reform', in 10 *Oxf. Rev. Econ. Policy* (*Oxford Review of Economic Policy)* 1994, p (1) at 5; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Hart Publishing 1994), p 216; Alice Woolley, 'Imperfect Duty: Lawyers' Obligation to Foster Access to Justice', 45. *Alta. Law Rev. (Alberta Law Review)* 2008, p (107) at 122. Constitute an exception the so-called 'professionals buyers': Organisation for Economic Co-operation and Development, *Competitive Restrictions in Legal Professions*, DAF/COMP(2007)39, http://www.oecd.org/officialdocuments.

33 Goerge Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism', *Q. J. Econ (The Quarterly Journal of Economics)* 1970, p 488; Iain Paterson, Marcel Fink, and Anthony Ogus, *Economic Impact of Regulation in the Field of the Liberal Professions in Different Member States: Regulation of Professional Services* (European Network Of Economic Policy Research Institutes Working Paper 52/February 2007), p 17, https://www.ceps.eu/system/files/book/1455.pdf; Ran Spiegler, 'The Market for Quacks', 76. *Rev. Econ. Stud. (The Review of Economic Studies)*

different value of professionals' services, they will probably choose only on the basis of the economic parameter – that is, fees. Nevertheless, if low fees become the 'average prices' required for a particular service, clients are no longer willing to spend more and, therefore, the most qualified professionals are discouraged to continue to offer their services. The long-term effect deriving from this series of events is the presence on the market of less competent professionals, with consequence of a general decline in the quality of legal services supplied in the market.

One more possible negative effect of the information asymmetries is identified in the so-called 'Moral Hazard': highly qualified lawyers, aware of the impossibility for the client to monitor and evaluate their professional efforts, may use their informational advantages in an opportunistic manner, providing clients modest-quality services or over-supply quality in order to charge higher fees (even if the client would be better served with lower quality services at a more reasonable price), or even provide to the client totally unneeded services (supplier-induced demand).[34]

11. The regulation of the professional services sector has also been justified on the grounds that the market failures associated with information asymmetries may transcend individual clients, affecting society as a whole. Professional activities produce, in fact, positive or negative externalities: lawyers acting with expertise to ensure the protection of the client's rights contribute to safeguarding the correct administration of justice; otherwise, not only customers, but also third parties may be damaged by a performance of insufficient quality.[35] As a consequence, fees which take into account exclusively the value of performance for the individual client may not reflect the total value that the legal service provides for the whole society and, therefore, some corrective actions are required.

Furthermore, the regulation of the professional services may be justified as an attempt to guarantee distributive justice or on the basis of mere paternalistic goals. With particular regards to legal services, some regulation – i.e. the provision

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2006, p 1113; Hayne E. Leland, 'Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards', 87. *Journal of Political Economy* 1979, p 1328.

34 Frank H. Stephen & James H. Love, 'Regulation of the Legal Profession' in Boudewijn Bouckaert & Gerrit De Geest (eds), *Encyclopedia of Law and Economics, Volume III: The Regulation of Contracts* (Cheltenham: Edward Elgar 2000), p 989; Roger Van den Bergh and Yves Montangie, 'Competition in Professional Services Markets: Are Latin Notaries Different?', 2. *Journal of Competition Law & Economics* 2006, p (189) at 193–194; Edward Shinnick, Fred Bruinsma and Christine Parker, 'Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands', 10. *Int'l J. Legal Prof.* (*International Journal of the Legal Profession)* 2003, p 237;

35 Randal N.M. Graham, *Legal Ethics: Theories, Cases, and Professional Regulation* (3rd edn, Toronto: Emond Publishing 2014).

of maximum caps for fees – may facilitate access to justice for low-income clients and ensure the protection of constitutional rights.[36]

12. The public interest explanations may constitute, therefore, the premise and the justification for the introduction of restrictive legislative and ethical rules. Nevertheless, not all the restrictions can be justified by public interest arguments. Furthermore, 'public interest theories of regulation are challenged by private interest theories'.[37] In particular, several economists are sceptical about the benefits of restrictions concerning entry requirements or the exercise of professional activities. Many commentators argue that regulation of professional services is used to serve mainly the interests of the profession and can be better explained by rent-seeking behaviour, effective lobbying and regulatory capture.[38] Rent-seeking may be ensured through legislative and ethical rules able to reduce competitive behaviours – such as entry control, maximum caps on fees, restrictions on advertising, and prohibitions or limitations on multi-disciplinary practices.

As a consequence, under the private interest theories, regulation and self-regulation of professional services is seen as a mean to supress competition and maximize professionals' economic rents, without producing any benefits for clients.

13. These alternative views have provoked a debate over which rules can be justified in the name of public interest, consumer protection and quality of service. The debate also concerns which rules may excessively restrict competition, promoting only professionals' interests without yielding corresponding benefits to the public at large. The answer is not always easy to find.

4. Professional Services in the European Public Policy Agenda

14. As professional services activities have been included in the current European public policy agenda, the debates regarding the concept of profession and the justifications for their regulation have been revitalized. In fact, the European initiatives in this particular sector not only aim to ensure the freedom of establishment and the freedom to provide professional services within the internal

36 Roger Van Den Bergh, *Towards Better Regulation of the Legal Professions in the European Union* (RILE Working Paper Series n. 2008/7 2007).

37 Roger Van Den Bergh, *Towards Better Regulation of the Legal Professions.* The origin of this approach may be traced in Smith's view, who defined self-regulatory occupational groups as natural institution for 'conspiracy against the public' and 'contrivance to raise prices'. Adam Smith, 'Of Wages and Profit in the Different Employments of Labour and Stock, Part II: Inequalities Occasioned by the Policy of Europe', in Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776 – New York: MetaLibri 2007), p 97.

38 John A. Kay, 'The Forms of Regulation', in Arthur Seldon (ed.), *Financial Regulation or Over-Regulation* (London: Institute for Economic Affairs 1988), p 3342.

Market,[39] but they also include an innovative attempt to apply the competition law in the professional sector.[40] Focussing on this last purpose, both the concept of profession and the regulation's theories can been seen as essential premises in order to define appropriate strategies to ensure a better regulation of the professional services, as well as to guarantee competition among professionals, as required by the EU.

15. In particular, the EU institutions, starting from the Lisbon Strategy, have recognized the crucial role played by the professional services in improving the competitiveness of the European economy.[41]

In the meantime, though ignoring the complex sociological debate regarding the conceptualization of 'profession' and the process of professionalization, the EU has provided a new perspective on the definition of professional service that has some important and practical consequences. Professionals are no longer considered as masters of intellectual activity, but the so-called 'intellectual professional' is now classified as an undertaking. The concept of undertaking is not explicitly defined by the European Treaties, but its meaning can be easily inferred from the European Court of Justice's jurisprudence and from the decisions of the European Commission. To the single and peculiar national concepts, the EU has replaced a broad definition of undertaking, encompassing any entity that carries out economic activity – consisting of providing services on the market – whatever the particular

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39 Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services OJ L 78; Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained OJ L 77; Laurel S. Terry, 'The European Commission Project Regarding Competition in Professional Services', in *Northwestern Journal of International Law & Business* 2009, p 1.

40 Concerning the evolution of the European Community system of competition, see David J. Gerber, 'Transformation of European Community Competition Law', 1. *Harv. Int'l L.J.* (*Harvard International Law Journal)* 1994, p 97.

41 See Council of The European Union, European Council Presidency Conclusions, 22–23 March 2005 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/84335.pdf; European Parliament, *Follow-up to the Report on Competition in Professional Services*, P6_TA(2006)0418, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0418+0+DOC+PDF+V0//EN; European Parliament, *Resolution on Market Regulations and Competition Rules for the Liberal Professions*, 2004 OJ (C 91E) 126, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B5-2003-0432+0+DOC+PDF+V0//EN; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Professional Services – Scope for more reform – Follow-up to the Report on Competition in Professional Services*, COM(2004) 83 of 9 February 2004 (SEC(2005) 1064): COM/2005/0405 final, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0405; Commission Communication, *Report on Competition in Professional Services*, COM/2004/0083 final, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52004DC0083.

status of the entity and the way in which it is financed.[42] As a consequence, intellectual services classified as a regulated profession in a particular MS,[43] as well as professional activities characterized by peculiar attributes (i.e. 'the services are of an intellectual, technical or specialized nature and that they are provided on a personal and direct basis'[44]) could be classified as undertakings.[45]

16. This innovative assumption has led to several Commission initiatives aiming at giving an economic perspective on the regulation of the liberal professions; in compliance with this perspective, the Commission has had rigorous discussions about the justifications for the professional restrictive rules existing in several countries.[46] In particular, in 2002, the Commission has commissioned to the *Institut für Höhere Studien* (IHS) an independent study on the economic impact of regulation in the area of liberal professions in different MSs in order to obtain a better understanding of the existing framework on regulation in the EU and its effects.[47]

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42 Case C-41/90, *Höfner ed Elser c. Macrotron*, ECLI:EU:C:1991:161; Case 118/85, *Commissione c. Italia*, ECLI:EU:C:2002:36. Luigi Scudiero, La nozione di impresa nella giurisprudenza della Corte di Giustizia, in IV. *Foro it.* (*Foro italiano)* 1994, p 113; Vittorio Afferni, 'La nozione di impresa comunitaria', in Francesco Galgano, *Trattato di diritto commerciale e diritto pubblico dell'economia, II* (Padova: CEDAM 1978), p 134.

43 93/438/EEC: Commission Decision of 30 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty OJ L 203; Case C-35/96, *Commission c. Italia* (1998) Raccolta I-3851.

44 95/188/EC: Commission Decision of 30 January 1995 relating to a proceeding under Art. 85 of the EC Treaty (IV/33.686 – Coapi) OJ L 122, 02/06/1995, 0037-0050.

45 With respect to the legal profession, see Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98; Case C-35/99 *Arduino*, ECLI:EU:C:2002:97.

46 The European attempt to apply the competition law in the professional sector is not an isolated one. The trend towards deregulation was first endorsed in other jurisdictions, such as the US and Australia, and, at the international level, by the Organisation for Economic Co-operation and Development (OECD). Cf. OECD, *Competition Policy and the Professions*, 1985; OECD, *Competition in Professional Services*, DAFFE/CLP(2000)2, http://www.oecd.org/regreform/sectors/1920231.pdf; OECD, DAF/COMP(2007)39. With regards to the US experience: *Goldfarb v State Bar of Virginia*, 421 U.S. 773 (1975); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); Christopher J. Gawley, 'Protecting Professionals from Competition: the Necessity of a Limited Antitrust Exemption for Professionals', 47. *S.D. L. Rev.* (*South Dakota Law Review)* 2002, p 233; Daniel Vázquez Albert, 'Competition Law and Professional Practice', 11. *ILSA J. Int'l & Comp. L.* (*ILSA Journal of International & Comparative Law)* 2005, p 555. More generally, see Terry, in *Northwestern Journal of International Law & Business* 2009, p 1.

47 Report on the Economic Impact of Liberal Professionals in Different Member States, Invitation to Tender, Open Procedure, 2001; Iain Paterson, Marcel Fink, & Anthony Ogus, *Economic Impact of Regulation in the Field of the Liberal Professions.* See also the related critics: Martin Henssler and Mathias Kilian, *Position Paper on the Study carried out by the Institute for Advanced Studies, Wien, Economic Impact of Regulation in the Field of Liberal Professions in Different Member States*, commissioned by the Hans-Soldan-Stiftung, Institute for Employment and Business Law of the University of Cologne, Institute for the Law of the Legal Profession at the University of Cologne,

At the same time, the Commission has launched a consultation with the major stakeholders involved in this sector – i.e. professional bodies, consumer organizations, competition authorities, policy makers, as well as members of the academic world. Moreover, the Commission published another document concerning the regulation of professions in 15 MSs not considered in the previous IHS Study.[48] On 28 October 2003, the DG Competition hosted a Conference where consumers, practitioners and businesses discussed the impact of professional regulation on consumer protection and business development.[49]

17. According to the outcomes of the above-mentioned research and fact-finding works, the Commission highlighted a wide disparity among the levels of regulation across the EU. At the same time, on the basis of economic theories and empirical studies mentioned in the report and its surrounding documents and studies, the Commission concluded that even though some regulation of professional services is necessary to attain the public interest objectives, in some cases, pro-competitive mechanisms should be introduced instead of certain traditional restrictive rules. Therefore, the Commission has invited MS policy makers and professional bodies to make an effort to remove or amend existing restrictive rules – especially those regarding access, fees, advertising and organization – that may be considered unjustified, disproportionate and unnecessary for the public interest, according to the application of the 'proportionality test'.[50]

The Commission acknowledges that some traditional restrictive rules are fully justified in terms of client protection. Nevertheless, it argues that in some cases, pro-competitive mechanisms should be implemented without detriment to the quality of professional services. Its justification of these rules is what prompted the Commission to advocate for a better regulation of the

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Cologne, 2003; RBB Economics, *Economic Impact of Regulation in Liberal Professions: A Critique of the IHS Report* 2003, http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/COMPETITION/CPT_Position_papers/EN_CPT_20030909_CCBE_further_submission_with_regard_to_the_European_Commission_questionnaire_on_regulation_in_liberal_professions_and_its_effects.pdf.

48 European Commission, DG Competition, *Stocktaking Exercise on Regulation of Professional Service. Overview of Regulation in the New EU Member States*, COMP/D3/MK/D(2004), http://ec.europa.eu/competition/sectors/professional_services/studies/overview_of_regulation_in_the_eu_professions.pdf.

49 European Commission, DG Competition, *Invitation to Comment Regulation in Liberal Professions and Its Effects Summary of Responses*, 2003, http://ec.europa.eu/competition/sectors/professional_services/studies/summary_of_consultation_responses.pdf.

50 The Commission – referring indirectly to the Wouters and Arduino cases – acknowledged that professions have certain inherent characteristics which may justify the retention of some restrictions, even if these measures have the effect of restricting competition.

professional services, rather than push for a complete deregulation of the professional market. The MSs should maintain, therefore, the restrictive rules that are necessary and proportionate to ensure client protection and the good governance of the professions.

18. In September 2005, the Commission adopted another Follow-up Report[51] for the purpose of giving an overview of the progress in reforming the national regulation in this sector, achieved by the MSs from 2004 to 2005. The enquiry showed a mixed picture in terms of reform activity. The most competitive MSs have introduced significant reforms towards better regulation, while countries with the highest levels of regulation, such as Italy, have made little, if any, progress in reviewing overly restrictive rules. This framework allowed the Commission to again advocate for the introduction of pro-competitive reforms in order to guarantee a better regulation of the professional services and to maintain this outcome as a fundamental point in the EU Agenda.

19. The European push towards a proportional re-regulation of the professional services has been intense. From 2006 until the last interventions dated 2014–2018, there had been a lack of activity on the EU level on this particular topic. Recently, first, the Commission announced the intention to guide MSs on reform needs in professional services;[52] later on, the Commission formulated specific reform recommendations for each MS, considering the national regulatory environment then in force.[53] These recommendations have been based on the outcomes of the 'mutual evaluation exercise' started in 2014. In order to 'improve transparency on national professional regulations and to assess and discuss justification and proportionality of existing rules', MSs have been required to fill a 'regulated professions database' with all the regulatory measures they have implemented for each profession notified[54] and to review the impact of such measures submitted to the Commission a national action plans (NAPs) by 18 January 2016; any national decision to maintain or amend professional regulations should be considered and

51 Commission Communication, *Report on Competition in Professional Services.*

52 Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *Upgrading the Single Market: More opportunities for people and business*, COM(2015)550 final; See also the European Parliament's intervention 2015/2354(INI).

53 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reform, *Recommendations for Regulation in Professional Services*, {SWD(2016) 436 final}, COM(2016)820 final, http://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=1&year=2016&number=820&version=ALL&language=en.

54 Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee, *Evaluating National Regulations on Access to Profession*, COM (2013)676, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013DC0676.

justified by each MS in the NAPs.[55] Moreover, the European Commission adopted a proposal for a 'directive on a proportionality test before adoption of new regulation of professions'.[56] The aim of the legislative instrument is to create a common framework of proportionality assessments to be taken into account by MSs before proposing new professional regulations or reviewing existing ones.[57] On June 2018, the proposal turned into the 'Directive 2018/958 of the European Parliament of the Council on a proportionality test before adoption of new regulation of professions'.[58]

20. Due the EU approach to professional services, national jurisdictions have been forced to consider two more core values – competition and consumer/client rights – while regulating, self-regulating or rethinking the existing legislative and ethical rules concerning the professional services. For that reason and following the Commission's advocacy activity, the regulation of legal profession has become a hot topic in several MSs.

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55 The MSs' NAPs, http://ec.europa.eu/DocsRoom/documents/17943. Note that Cyprus, Greece, Hungary, Ireland, Malta, and Slovenia did not submit the NAPs before the deadline.

56 European Commission, *Proposal for a Directive of the European Parliament and of the Council on a Proportionality Test Before Adoption of New Regulation of Professions*, COM(2016) 822, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0822:FIN.

The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reform, *Recommendations for Regulation in Professional Services* as well as the European *Commission Proposal for a Directive of the European Parliament and of the Council on a Proportionality Test Before Adoption of New Regulation of Professions*, are part of the so called 'Services Package', together with the Proposal for an European Services e-card and the Proposal for a services notification procedure: see European Commission, *Proposal for a Directive of the European Parliament and of the Council on the legal and operational framework of the European services e-card introduced by Regulation ... [ESC Regulation] ... ,* COM/2016/0823 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0823; European Commission, *Proposal for a Regulation of the European Parliament and of the Council Introducting a European Services E-card and Related Administrative Facilities*, COM (2016) 824 and related documents, http://ec.europa.eu/DocsRoom/documents/20813; European Commission, *Proposal for a Directive on the Enforcement of the Directive 2006/123/EC on Services in the Internal Market, Laying Down a Notification Procedure for Authorisation Schemes and Requirements Related to Services*, COM(2016) 821 and related documents, http://ec.europa.eu/DocsRoom/documents/20502.

57 Hubert Dalli, *Proportionality Test Before Adoption of New Regulation of Professions, Initial Appraisal of a European Commission Impact Assessment*, EPRS (European Parliamentary Research Service), European Parliament, May 2017, http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603230/EPRS_BRI(2017)603230_EN.pdf.

58 Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions, in *GU L 173 9.7.2018, pp 25–34,* https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2018%3A173%3ATOC&uri=uriserv%3AOJ.L_.2018.173.01.0025.01.ENG.

5. The Legal Profession: Professional Regulations and Reforms in the EU Member States

21. The level of legal professional regulation varies considerably across MSs. As pointed out by the IHS Study,[59] in 2001, legal services were characterized by a low degree of regulation in UK,[60] Belgium, Denmark, Netherland, Ireland, Finland, and Sweden, while in several other MSs, such as Germany, France, Spain, Portugal, and Luxembourg, the level of professional regulation and self-regulation was generally considerably higher. Finally, the IHS Study have attested that MSs such as Greece[61] or Austria have imposed excessive requirements on regulated legal professions. The heterogeneity across Europe with regards to the level of restrictiveness concerning both access to legal services and exercise of activities of the legal profession is confirmed by the updated data provided by the European Commission in 2016.[62]

22. Despite this variegate framework of legal services regulation and self-regulation, during the past years, significant reforms in the regulation of the legal profession have taken place at the national level, and measures of enforcement have been adopted by National Antitrust Authorities and Courts across Europe. These interventions have mainly focused on reviewing both entry restrictions and restrictions on conduct (i.e. restrictions on fees, advertising, and organizational forms). In fact, as pointed out by several studies concerning the regulation of the professions, these restrictive measures usually affect competition in a negative way without providing any corresponding benefits for the society and consumers.[63]

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59 Iain Paterson, Marcel Fink, & Anthony Ogus, *Economic Impact of Regulation in the Field of the Liberal Professions.* Concerning legal services, see the regulation indices elaborated by the IHS: Austria 7.3; Belgium 4.6; Denmark 3.0; Finland 0.3; France; 6.6; Germany 6.5; Greece 9.5; Ireland 4.5; Italy 6.4; Luxembourg 6.6; Netherlands: 3.9; Portugal 5.7; Spain 6.5; Sweden 2.4; the UK 4.0.

60 Traditionally, the UK proves to have a low level of professional regulation, combined with a policy directed towards the opening of the professional sectors to the competition. This structural approach dates back at the 1970s. It's not surprising that – according to the European Commission and the European studies – the UK is the leading MS in applying competition law to professional regulation. For more details about the transformation of the traditional English vision of legal practice as a profession into business, see Christopher J. Whelan, 27. *Penn St. Int'l L. Rev.* 2008, pp 472 ff.

61 It has been affirmed that 'Greek lawyers are subject to a much higher degree of regulation relative to the OECD average: 'Greece has been one of the very few advanced economies with fixed minimum prices and with a complete ban on advertising. There are also geographical restrictions: Greek lawyers are allowed to practice within a specific area only, not in the whole national territory.' European Commission, *The Economic Adjustment Programme for Greece – Third Review* (Occasional Papers 77, February), p 36.

62 COM(2016)820 final (n 53), chart 5.

63 See COM/2004/0083 final (n 41). Moreover, cf. the specific group of restrictions considered in the COM(2016)820 final (n 53).

It is beyond the scope of this article to recall all the MSs' ongoing activities directed towards the liberalization or the improvement of the regulation of legal services. Nevertheless, some examples may be useful to perceive the impact of the EU initiatives in this sector.

5.1. Fees

23. With particular respect to fees, often lawyers would provide their services on a fixed-fees basis. It has been argued that mandatory fees may mitigate the problem of adverse selection, ensure the quality of the services provided, protect clients against excessive charges, provide consumers useful information about the average costs of the professional services and reduce the transaction costs of negotiating fees in complex cases.[64] Nevertheless, mandatory fees have been challenged by national Antitrust Authorities and the European Commission[65] as anticompetitive; they also cannot be justified on public interest grounds. Moreover, recommended fee schedules have been considered by the European Commission to have negative effects on competition similar to the effects of mandatory fees.[66] In particular, fixed fees heavily restrict or exclude competition between lawyers, depriving clients of the benefits of lower prices (under the minimum fee) and generating the possibility of a levelling of prices towards the maximum fee.

24. In response to the Commission's advocacy activities, the majority of MSs have abolished fee regulation for services provided by lawyers, allowing lawyers and clients to determine the fees through a fee agreement (usually in writing). Consequently, the Bars have lost their powers to determine binding maximum and minimum prices.[67] As

64 See COM/2004/0083 final (n 41), spec. pp 11 ff; Sandra De Waele, 'Liberal Professions and Recommended Prices: the Belgian Architects Case', *Competition Policy Newsletter* 2004, p 3; Organisation for Economic Co-operation and Development, *Reviews of Regulatory Reform – Italy: Better Regulation to Strengthen Market Dynamics* (Paris: OECD Publishing, 2010).

65 See COM/2004/0083 final (n 41), spec. pp 11 ff.

66 See COM/2004/0083 final (n 41), spec. pp 12 ff.

67 For example, the Italian system of legal fees has completely been renewed: Law Decree N. 223/2006 has prohibited fixed compulsory minimum fees, Law Decree n.1/2012 (Art. 9) has abolished professional fee schedules for all regulated professions. L. 247/2012 – replacing the previous statute governing the legal profession, which dated back to 1933 – has allowed the free negotiations between lawyers and clients on prices, permitting flat fees, hourly rate fees, and percentage fees that are drawn up in writing. Spain has abolished the ability for the Bar to establish indicative scales of professional fees, only allowing the existence of guidance for the sole purpose of taxation of costs criteria and the oath of accounts (See Art. 14, l. 2/1974, added by Law No. 25/2009 of 22 December 2009, amending Various Laws for the Adaptation thereof to Law No. 17/2009 of 23 November 2009 on Freedom of Access to Service Activities and the Exercise thereof). Similarly, the Greece Law 3919/2011 – an action plan on structural reforms – has included, among others, specific dispositions for the liberalization of some key professions, (i.e. lawyers, notaries, chartered accountants and engineers) and, with particular regards to lawyers, the removal of restrictions on

recently pointed out by the European Court of Justice, a regulation issued by a Bar Association which does not allow a lawyer and his client to agree upon a fee below the minimum amount laid down by the professional rule – without that lawyer being subject to a disciplinary procedure – is capable of restricting competition in the internal market within the meaning of Article 101(1) TFEU.[68]

Nevertheless, in some MSs, indicative scales of professional fees set up by the Bars may represent, today, a non-mandatory and supplementary guidance for the lawyers. Furthermore, even in those jurisdictions, where a statutory fees system is still in force,[69] the statutory prices may be increased or decreased by consent, through an explicit client-lawyer agreement.[70]

Concerning this deregulation trend – which is also endorsed by the most conservative jurisdictions – which aims at the abolition of fixed prices and the subjecting of lawyers' fees to private contractual freedom in the relationship between lawyers and clients, Germany can be considered as an exception. In fact, the liberalization of German fees has involved only out-of-court services: since 2006, the compensation between lawyers and clients in out-of-court matters can be freely negotiated,[71] and a lower remuneration than the statutory one may be agreed, while for other legal services, fee regulation remains still in place. Legal fees are set for the most part by statute (*Rechtsanwaltsvergütungsgesetz* (RVG)) and, in general, minimum fees could not be derogated (nevertheless, extraordinary poverty or close personal relationship with the clients may constitute exceptions to the general rule).[72]

5.2. Advertising

25. While most of the MSs have permitted some forms of advertising by lawyers, advertising activities have been restricted in several manners, and

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fixed minimum tariffs; lawyer's fees may be determined through a fee arrangement in writing with the client – with no legally set maximum fee (for more details, see Ersi Athanassiou, Nikolaos Kanellopoulos, Roxani Karagiannis, & Agapoula Kotsi, *The Effects of Liberalization of Professional Requirements in Greece* (Athens: Centre for Planning and Economic Research (KEPE) 2015), p 14.

68 Joined Cases C-427/16 and C-428/16 *CHEZ Elektro Bulgaria AD* v. *Yordan Kotsev and FrontEx International EAD* v. *Emil Yanakiev* ECLI:EU:C:2017:890.

69 I.e. the Rechtsanwaltstarifgesetz in Austria – which has been mentioned by the European Commission for possessing minimum fixed prices: COM/2004/0083 final, p 12.

70 For more details, see Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Comparative Study* (Dordrecht: Springer 2013), pp 72ff; Marianne Roth, 'Cost and Fee Allocation in Civil Procedure – Austria, Questionnaire' (2010), http://www-personal.umich.edu/~purzel/national_reports/Austria.pdf; Martin Henssler, 'The Organisation of Legal Professions', in Martin Schauer and Bea Verschraegen (eds), *General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé. Ius Comparatum – Global Studies in Comparative Law* (vol 24, Dordrecht: Springer 2017).

71 See R*echtsanwaltsvergütungsgesetz (Attorney Remuneration Law) – RVG,* Section 4.

72 See RVG and BRAO (Bundesrechtsanwaltsordnung –Federal Lawyers' Act), spec. s. 49b.

price advertising has been banned in most jurisdictions. According to Paterson, Fink and Ogus's study,[73] at the time of their study (2003), advertising limitations were present in Austria, France, Italy, Ireland (solicitors) and Spain, and all forms of publicity were banned in Greece, Portugal and Ireland (for barristers). These restrictions or bans have usually been justified by recalling the information asymmetry between lawyers and clients (the latter possessing not enough information to assess legal services' claims). Therefore, clients need particular protection from misleading or manipulative advertising. Nevertheless, as observed by the European Commission regarding the effects of lawyer advertising:

> There is [...] an increasing body of empirical evidence which highlights the potentially negative effects of some advertising restriction. This research suggests that advertising restrictions may under certain circumstances increase the fees for professional services without having a positive effect on the quality of those services. The implication of these findings is that advertising restrictions as such do not, necessarily, provide an appropriate response to asymmetry of information in professional services. Conversely, truthful and objective advertising may actually help consumers to overcome the asymmetry and to make more informed purchasing decisions.[74]

26. As a response to these criticisms, advertising restrictions and bans have been abolished for services provided by lawyers in several MSs.[75] The Italian experience represents a clear example of this deregulation trend. In fact, the ban on advertising was removed in 2006 (l. 4 August 2006 n. 284) and this deregulation trend was intensified in 2012 (L. 247/2012). In the meantime, the Italian Bar (*Consiglio Nazionale Forense* – CNF) has modified the Code of

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73 Iain Paterson, Marcel Fink, & Anthony Ogus, *Economic Impact of Regulation in the Field of the Liberal Professions.*

74 COM/2004/0083 final, p 14. Concerning the legal profession, see Frank H. Stephen & James H. Love, in *Encyclopedia of Law and Economics,* p 989; Organisation for Economic Co-Operation and Development, DAF/COMP(2007)39. Please note that, as underlined by the European Commission, '[i]n many countries a distinction is also made between "publicity" or "informative advertising", and "advertising" or "promotional publicity", the idea being that a wider dissemination of information on the part of professionals is accepted, or becoming accepted, while proactive promotional advertising is still prohibited. The latter may include in particular comparative advertising, cold-calling and soliciting. However, the line between what is considered "informative" and what is considered "promotional" varies between countries and professions' (see Commission Staff Working Document, *Progress by Member States in Reviewing and Eliminating Restrictions to Competition in the Area of Professional Services* {COM(2005) 405 final}, SEC/2005/1064 final/2, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005SC1064).

75 This trend was first endorsed independently by the European Commission Advocacy's actions, by some MSs, such as the UK (in the 1970s) and Denmark (in the 1990s).

Conduct in light of the new legislative reforms. Furthermore, in 2016, the CNF extended the possibility for legal practitioners to use every advertising tool (including the Internet). This can be considered a great innovation considering that a short time before (in 1991), the CNF affirmed that lawyers should consider the prohibition on advertising their services a privilege and an honour for the legal professions. Accordingly, to the disciplinary case law, lawyers could not even put their name in bold characters in the telephone book.[76] Today, fair and truthful information is allowed, even if some limitations still remain.[77] This deregulation trend has been endorsed by other MSs, where originally most forms of advertising were banned, such as Spain[78] and France.[79] MSs where originally advertising activities were totally banned,[80] are also gradually moving in the direction of liberalization. For example, Greece has recently removed the effective ban on advertising (Law 3919/2011); according to Article 6 of Law 4038/2012 and Article 40 of Law 4194/2013, the publicity and promotion of legal services are now allowed in accordance with the status and the dignity of the legal function. The publication of a business website is permitted, even if it must be communicated to the bar association where the legal professional or the law firm is registered.[81] Moreover, in Ireland, the historical near-blanket ban on advertising by barristers has been removed, and in 2005, the Slovenian prohibition on advertisement for legal services has been judged illegal and against the constitution by the Constitutional Court of the Republic of Slovenia and, as a consequence, the Bar Act was emended, allowing lawyers to provide information concerning their work.[82]

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76 See CNF, 23 September 1982 (1984) Rassegna Forense 73.

77 Lawyers should in every case give information regarding their legal activities, the structure of their legal office, the specialization eventually acquired and their professionals and scientific titles (Art. 10 l. 247/2012 – Art. 17 Italian Legal Ethics Code).

78 Historically, under Spanish law and pursuant to the Spanish National Bar Association Rules, lawyers' publicity was strict prohibited: cf. Art. 31 *Estatuto General de la Abogacía*, promulgated on 24 July 1982; *Conclusiones al VI Congreso Abogacía Española: Publicidad* [6]. *VI Congreso Abogacía Española: La Coruña, septiembre, 1995, Consejo General de la Abogacía Española. Aranzadi.* 1995; For more details, see *Abogacia Española, La publicidad de los servicios jurídicos por parte de la abogacía, Informe* 8/2013, http://www.abogacia.es/wp-content/uploads/2012/07/CJ-INFORME-No-8-2013-Publicidad-servicios-juridicos-por-la-abogacia.pdf.

79 In France, only in 1991 was lawyers' advertising allowed under certain conditions (Art. 161 Decret 27 November 1991, 91-1197).

80 Iain Paterson, Marcel Fink, & Anthony Ogus, *Economic Impact of Regulation in the Field of the Liberal Professions.*

81 Also, Portugal has moved towards liberalization of the advertising activicties: see Art. 94 of the *Estatuto da Ordem dos Advogados*, last approved by the Law n. 145 of 9 September 2015.

82 The Legal Services Regulation Act 2015 (Number 65 of 2015); Article 6.13. Code of Conduct for the Bar Of Ireland (25 July 2016). Decision of the Constitutional Court of the Republic of Slovenia, 24 November 2005, n. U-I-212/03-14.

5.3. Organizational Forms

27. Several MSs imposed restrictions on organizational forms. Different jurisdictions allow forms to range from solo practitioners to partnership firms (with limited or unlimited liability) to corporate firms. For example, in Poland, '[a]dvocates and legal advisers can exercise the profession as sole practitioners or in different corporate forms including civil partnership, registered partnership, professional partnership, limited partnership and limited-joint stock partnership but not in a limited liability company and joint-stock company', in Slovakia, '[a]dvocates may practice only: as sole practitioners, in association with other lawyers (advocates), in a Partnership (Public Limited Company) as a Partner, in an unlimited Partnership (Commandite Company), as an unlimited Partner (Complementary) or in a Limited Liability Company as an Administrator', the form of limited liability company is allowed in different MS, among which Austria, Belgium and Slovenia.[83]

In some European countries, specific shareholding, ownership and voting requirements may also been seen. For example, in several MS, irrespective of the legal form admitted and chosen, all shares[84] or at least more than 50% of the shares have to be held by lawyers or professionals.[85] Voting rights are exclusively reserved to lawyers in several jurisdictions.[86]

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83 See Commission Staff Working Document, *Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reform Recommendations for Regulation in Professional Services* – SWD/2016/0436 final.

84 Such as in Belgium, Cyprus, Croatia, Czech Republic, Estonia, Luxemburg, Romania, Slovenia; in Sweden, '[o]nly advocates may become shareholders/member of the Board/ or partner of a Swedish law firm. Exceptions are granted upon agreement of the Board but in any case the shareholding and voting rights are limited to 10%.'; exceptions are also admitted in Finland, where 'shareholders of a lawyers' company can only be lawyers except in limited circumstances authorised by the Finnish Bar Association': for more details see SWD/2016/0436 final.

85 Such as in Austria, Spain and Germany. However, in Germany, '(. . .) in 2014, the Constitutional Court held that the rule providing that the majority of shares and voting rights must belong to lawyers was unconstitutional. Germany announced in its National Action Plan that the respective provisions will be modified and the restrictions will be repealed.' In Portugal, '[t]he law on professional companies from 2015 implements the possibility to establish professional companies, introduced for most of the highly regulated professions by the framework law, in parallel with regular companies, and in accordance with any legal form of types of companies available under Portuguese Law. However, the professional companies need to ensure that 51% of the shares are owned by professionals and that one manager is a professional as well. Additionally the law introduces also a restriction on legal persons owning shares in more than one professional company.': SWD/2016/0436 final.

86 E.g. In Belgium, Lithuania and Malta; in Denmark '[n]on-lawyer may not possess more than 10% of the capital and the voting rights of a lawyer company'; also in Sweden '[o]nly advocates may become shareholders/member of the Board/ or partner of a Swedish law firm. Exceptions are granted upon agreement of the Board but in any case the shareholding and voting rights are limited to 10%': SWD/2016/0436 final.

Some limits in the regulatory frameworks may be encountered also with regards to the members allowed to join these partnerships: only lawyers, lawyers and members of (all/some) other professions (regulated and/or non-regulated), non-professionals (trades and/or investors).

28. In fact, currently, some MSs allow lawyers to practice law in an multi-disciplinary practice setting (often referred to as MDP[87])[88]; nevertheless, is quite common to envisage restrictions on MDPs in the regulations of several MSs concerning the kind of professionals that can be part of a MDP[89] as well as voting and shareholding rights.[90] In some jurisdictions, Alternative Business Structure (ABS) law firms allow for non-lawyer owners and investors.[91] Even in those jurisdictions

87 MDPs are alternative business structures that provide a mixture of legal and non-legal services. Concerning the situation of MDPs in the US, see https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_state_action.html.

88 In some MSs, the setting up of multidisciplinary companies is not yet permitted (such as in Austria, Czech Republic, Latvia, Lithuania and Romania). For example, in Austria, MDPs are not allowed (only certain forms of cooperation between lawyers and other professionals are permitted). In Czech Republic, 'lawyers cannot team-up with other professions within the same company. Only lawyers may hold shares in law firms.' In Latvia, 'sworn advocates must practice individually or in collaboration exclusively with other sworn advocates. Sworn advocates may establish offices of sworn advocates, registered in the Latvian Council of Sworn Advocates'. In Lithuania, 'Joint practices of advocates and other professionals are not allowed'. In Romania, 'joint exercise of professions is prohibited'. In Sweden, '[a]dvocates are authorised only to work with other advocates': See SWD/2016/0436 final.

89 For example, in Belgium, '[l]awyers are banned from jointly exercising the profession of lawyer with certain professions such as judge, notary and bailiff. The joint exercise with certain other professional activities is restricted where conflicts of interest can arise'. In Germany, a lawyer's firm may only include other legal or accounting professionals as shareholders. Nevertheless, recently the Constitutional Court held that the ban of a professional partnership of lawyers with physicians and pharmacists was unconstitutional. In the Netherlands, 'lawyers may only enter into a partnership with a closed list of professions such as registered notaries, tax advisers, patent attorneys and members of the tax registry'. In Poland, '[a]dvocates and legal advisers can create multidisciplinary companies only with patent agents, tax advisers and foreign lawyers' (as established by the Act of 4 March 2010 on the provision of services in Poland).

90 Cf. ns 80–83.

91 In Europe, the UK has opened the path to ABS, followed by some MSs which have dropped the prohibition (e.g. Italy, l. 124/2017). Nevertheless, a general resistance is still in place, reflecting the CCBE position on ABSs: CCBE, *Guidelines for Bars & Law Societies on Free Movement of Lawyers Within the European Union*, http://www.ccbe.eu/documents/publications/. Outside the EU, Australia has allowed ABS firms, Canada is on the road to introducing ABS in the legal service sector, while the American Bar Association has tried to resist to non-lawyer ownership and investment. See Judith A. McMorrow, 'UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US', 47. Georgetown Journal of International Law 2016, p 2; Canadian Bar Association, *Futures: Transforming the Delivery of Legal Services in Canada* (August 2014), https://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Futures-Transforming-the-Delivery-of-Legal-Service; The Law Society of Upper Canada, *Alternative*

where ABSs have received full legal recognition, it is not surprising to find some restriction (e.g. concerning the percentage of non-lawyer ownership interest),[92] in order to ensure that lawyers' professional obligations are met.

29. Historically, business structure restrictions have appeared to be justifiable in order to protect legal professionals' independence and ethical standards, avoid conflicts of interest, and ensure personal responsibility and liability towards clients. Nevertheless, the European Commission has underlined that 'structure regulations appear to be least justifiable in cases where they restrict the scope for collaboration between members of the same profession'.[93] Moreover, even if

> [b]usiness structure regulations appear to be more justifiable in markets where there is a strong need to protect practitioners' independence or personal liability, there might however be alternative mechanisms for protecting independence and ethical standards which are less restrictive of competition. In some markets, stringent ownership restrictions might therefore be replaced or partially replaced by less restrictive rules.[94]

30. This variegate framework, prompted the Commission in 2004 to require MSs to reconsider their restrictive rules, assess legal form and shareholding requirements, incompatibility rules and multi-disciplinary restrictions, in particular taking into account the proportionality of these restrictions in relation to core principles, such as the independence of the profession, and to the corresponding supervisory arrangements. In addition, consideration should be given to the cumulative effect of such requirements in situations where their effects might be accentuated in the case of extensive reserves of activities. This kind of restrictions were also fully considered in the last reform recommendations for regulation in professional services (2016/2017); exercise requirements such as restrictions on corporate form, shareholding requirements, restrictions on joint exercise of professions, and so on are, in fact, covered by the restrictiveness indicator tailored in the mentioned European Communication.[95]

Business Structures and the legal profession in Ontario: A Discussion Paper, 2014, p 27, and *Report of the Alternative Business Structures Working Group*, 2017, https://www.lsuc.on.ca/ABS/; American Bar Association, *For Comment: Issues Paper Regarding Alternative Business Structures,* 2016, https://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf.

92 For example, Italian law has recently allowed the possibility for financial members to join the legal firm as investitors; nevertheless, the percentage of the nonlawyer ownership interest must be restricted to a maximum of 33% (l. 124/2017).

93 COM/2004/0083 final, p 17.

94 COM/2004/0083 final, p 17.

95 For more details, see SWD(2016)436.

5.4. Qualification and Entry Requirements

31. In almost all MSs, registrations with the relevant professional body (Bar) and/or in a professional register are compulsory and subject to the possession of a particular professional qualification. This is a natural consequence of the fact that the legal profession is considered a 'regulated profession' across Europe. A common definition of 'regulated profession' arises at the EU level; as it is stated in Article 3.1., lett. a, 2005/36/CE, 'the regulated profession' is a

> professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where the first sentence of this definition does not apply, a profession referred to in paragraph 2 shall be treated as a regulated profession.[96]

This is the reason that, in the most recent EU Communication on professions,[97] particular emphasis is devoted to qualification and entry requirements as a basic component of the regulation of the legal profession.

32. In terms of general qualification, it is not surprising to find that the majority of MSs currently require a legal professional to have attended an institution of higher education (usually a law degree),[98] followed by a mandatory traineeship and/or additional professional experience, as well as a bar examination.[99] In fact, today, the presence of these three elements – university education, vocational training and access exam(s) – can be considered a common feature of the national regulations. Also, the

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96 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the Recognition of Professional Qualifications, in Official Journal of the European Union, L 255, 30.9.2005, p 22–142.

97 COM(2016)820 final.

98 Nevertheless, see the peculiar reform recently announced by the Solicitors Regulation Authority concerning the pathway to qualify as a solicitor in England and Wales: as part of a new approach, the Qualifying Law Degree (QLD) will be abandon in favour of a centralized examinations system, the Solicitors Qualifying Exam (SQE). Roland Fletcher, 'Legal education and proposed regulation of the legal profession in England and Wales: a transformation or a tragedy?', 50. *The Law Teacher* 2016, p 371; Mark Davies, 'Changes to the training of English and Welsh lawyers: implications for the future of university law schools', 52. *The Law Teacher* 2018, p 100; Jenny Gibbons, 'Policy recontextualisation: the proposed introduction of a multiple-choice test for the entry-level assessment of the legal knowledge of prospective solicitors in England and Wales, and the potential effect on university-level legal education', 24. *Int'l J. Legal Prof.* 2017, p 227.

99 COM(2016)820 final, p 18.

exceptional and controversial Spanish regulation,[100] which did not impose traineeship and entry exam to obtain the title of lawyer, has been amended.[101]

33. What might vary from MS to MS is instead the duration of the licensing procedure, with a range going from generally around six to eight or nine years.[102] Moreover, some MSs impose a double selection ('incoming and outgoing') in order to become a lawyer. In particular, law graduates are required to pass an exam at the end of the university path, in order to start the vocational stage, and a second one at the end of the traineeship, in order to acquire the relevant title and to become a member of the profession. This is, for example, the case of the German regulation, which imposes two state legal exams.[103] Another peculiarity of the German model of the educational and professional path, is that it is common to all the classical juridical professions[104]; this is because the aim of the German system is to create the so-called *Einheitsjurist,* a jurist that is able to provide legal services as a judge as well as a lawyer.[105]

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100 Philip Leith & Fernando Galindo Ayuda, 'Legal Education in Spain: Becoming a Lawyer, Judge, and Professor', 8. *Int'l J. Legal Prof.* 2001, p 177.

101 *Real Decreto 775/2011, de 3 de junio, por el que se aprueba el Reglamento de la Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de Abogado y Procurador de los Tribunales,* BOE, n. 143, 16 giugno 2011, 61762.

102 This is, for example, the case of Slovenian regulation, which required a law degree followed by four years' practical experience as a University Bachelor of Law, of which at least one year after having passed the state examination of legal profession with a lawyer or a law firm, in court, the state prosecutor's office, the public attorney's office or notary's office, as a regular employee under a full-time employment contract (Art. 25 of the Bar Act, The Official Gazette of the Republic of Slovenia, No. 18-817/1993, dated 9 April 1993, Official Gazette of the Republic of Slovenia, No. 24-1465/1996, 10 May 1996; Decision by the Constitutional Court, Official Gazette of the Republic of Slovenia, No. 24-1455/2001, 5 April 2001, Official Gazette of the Republic of Slovenia, No. 54/08, 2 June 2008, Official Gazette of the Republic of Slovenia, No. 35/09, 8 May 2009).

103 For more information concerning the licensing procedure in Germany, see *Bundesrechtsanwaltsordnung* (BRAO), Arts 4–17; see also the *Gesetz zur Reform der Juristenausbildung vom 11.07.2002*, Bundesgesetzblatt 2002 Teil I Nr. 48, 2592; Johannes Riedel, 'The Reform of Legal Education in Germany', 0. *Eur. J. Legal Educ.* (*European Journal of Legal Education)* 2001, p (3) at 3–10; Annette Keilmann, 'The Einheitsjurist: A German Phenomenon', 7. *Germ. Law Jour.* (*German Law Journal)* 2006, p (293) at 297–298. A dual bar exam, as in the German system, is also required in Poland. For more information concerning the Polish formal requirement to be admitted to the Bar, see Adam Bodnar & Dominika Bychawska, *The Legal Profession in Poland*, 2009, https://www.osce.org/odihr/36308?download=true.

104 To be admitted to the bench, the same formal qualification is required as that for the admission to the bar: Heinrich Amadeus Wolff, 'Bar Examinations and Cram Schools in Germany', 1. *Wis. Int'l L.J. (Wisconsin International Law Journal)* 2006, p 109. Also in Slovenia, under the Art. 25 Bar Act, both a state exam at the postgraduate stage as well as a test of knowledge after four years of practical experience are required.

105 Similarly, also in Slovenia, 'postgraduate training and the final exam do not focus on the lawyer's profession but cover all legal professions'. Nevertheless, 'Slovenia's future lawyers must pass an

Additional professional qualification requirements can be observed in some countries, such as Belgium, France, Bulgaria, Germany and Greece, in order to practice before the highest courts, and in some jurisdictions, the number of licenses granted to lawyers to access these courts are restricted.[106]

The importance of education and training lasting after the admission to the Bar; this is supported by the fact that in almost all MSs, particular attention is paid to continuous professional development. Nevertheless, in several countries it remains voluntary.[107]

6. Restrictive Rules Are Removed but Do Barriers Still Remain? Some Insights from the Italian Experience

34. The Italian professional regulation and self-regulation system has been considered one of the most restrictive ones. Nevertheless, as mentioned in the previous paragraph, in the past two decades, it has been reformed by several legislative interventions aiming to promote competition in the sector. Accordingly, the CNF has reshaped some of the Code of Conduct's rules in order to align them to the new legislative provisions.

As a consequence, lawyers are currently entitled to agree on fees with clients in writing, with no legally set minimum or maximum fee, to give information to consumers about their services by any means, to set up law firms as partnerships (STP), to practice in business together with other lawyers or other professionals (multidisciplinary practice), and to open their business to financial members (investors), which may join the firm as shareholders' – capital accounts.

35. However, even if self-regulatory bar associations and lawmakers have reshaped the legal profession regulation – reforming the kind of restrictions which prevent competition, unless clearly justified by public interest considerations – several forms of alternative resistance seems to be still in place. The current process of reassessment of the historic restrictions still reveals itself as troublesome, given the standing out of adversarial approaches in this particular sector. In practice, while the Italian Competition Authority (AGCM) has intensified its

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additional test relating to the practice of law by lawyers (including the Code of Conduct and lawyers' fees). Moreover, trainee lawyers in Slovenia are also required, after having passed the final exam, to work as a lawyer, judge, public prosecutor or a notary public for another year and must be employed for a probationary period of another 4 years'. See Martin Henssler & Mathias Kilian, *Position Paper on the Study carried out by the Institute for Advanced Studies,* p 270.

106 This is the case of the Belgian regulation, according to which the lawyers entitled to practice before the *Cour de Cassation/Advocaat bij het Hof van Cassatie* are appointed by the King upon proposal by the Supreme Court, see SWD(2016)436 final (n 78); also the Italian regulation restricts access to the Italian High Court – *Corte di Cassazione*: L. 31 December 2012 n. 247, Art. 22.

107 For example, continuous professional development is voluntary in Czech Republic, Greece, Malta, Slovakia, Slovenia and Spain.

advocacy and enforcement activity in order to ensure the application of the competition law in the area of professional services,[108] the CNF seems to consider the deregulation measures a potentially constant threat to the core values of the legal professions. The CNF's difficulties in internalizing the new liberalization measures are evident considering the last antitrust proceeding carried out by the AGCM against the CNF. In October 2014, the AGCM fined the CNF for the infringement of Article 101 TFEU by adopting two anti-competitive behaviors[109]: (1) the CNF's publishing on its website the lawyers' table of fees, which had been abrogated in 2006 in accordance with the liberalization process, along with a note (CNF, n. 22-C/2006), pointing out that a lawyer asking for a fee below the minimum rate can be sanctioned on the basis of the professional code of conduct; (2) the CNF's issuance of an opinion (n. 48/2012) according to which lawyers cannot advertise through Internet platforms (such as AmicaCard) that offer professional services at a reduced fee to the customers affiliated with the website (AmicaCard circuit), behaviours against the ethics rule prohibiting the unfair acquisition of clients (Article 19 Code of Conduct). From the AGCM's point of view, such behaviours might create a significant obstacle to effective competition in the relevant market, limiting the autonomy of individual legal practitioners, impeding their possibility to properly access to the market; furthermore, the AGCM has judged these limitations as detrimental to consumers, who could not benefit from competition as regards fees. The CNF has appealed the AGCM's decision, but in 2016, the highest administrative court agreed with the AGCM's position, confirming the fine of EUR 912,536.40 against the CNF.[110]

36. Furthermore, the latent opposition of the CNF to the economic reforms seems to also reverberate its effects on the behaviour of legal professionals. A statistical study published recently by CENSIS[111] on the status of the Italian legal profession provides interesting insights. In spite of the effective regulatory and self-regulatory measures adopted to include more competition among legal

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108 The advocacy and enforcement activities carried out by the AGCM have intensified, especially following the legislative liberalization of the professional sectors (see D.L. 4 July 2006, n 223 in GURI n 153 of 4 July 2006 converted into Law 4 August 2006, n 248, GURI n 186 of 11 August 2006; DL 13 August 2011 n 138, GURI n 188 of 13 August 2011, converted into Law 14 September 2011, n 148, GURI n 216 of 16 September 2011; DL 24 January 2012 n 1, GURI n 19 of 24 January 2012, converted into Law 24 March 2012, n 27, GURI n 71 of 24 March 2012 (also known as 'Cresci Italia'); law 31 December 2012, n 247, GURI n 15 of 18 January 2013) and according the findings of its 2009 inquiry (AGCM, *Indagine conoscitiva sul settore degli ordini professionali (IC34)* (Ediguida, 9/2009).

109 See AGCM, 'I748 – Condotte Restrittive Del CNF – Provvedimento n. 25154', 2014.

110 Consiglio di Stato, sez. VI, judgment 22/03/2016 no 1164.

111 CENSIS, *Rapporto annuale sull'avvocatura italiana*, 2016, http://www.cassaforense.it/media/4240/rapporto_censis_marzo2016.pdf. CENSIS is an Italian institute of socio-economic research. For more details, see www.censis.it.

professionals, the Study highlights that the Italian lawyer at present has the same profile as some decades ago.[112] Legal professionals are currently entitled to use the Internet, but they still prefer using personal human relationships, even in order to attract new clients. They are allowed to advertise using any tools, but they do not take advantage of this possibility. They can organize their activities into business forms, but they prefer working alone. They are going to be integrated into the European market, but they do not use the related benefits. Notwithstanding the actual globalization, they prefer to look only at the local market.

37. In particular, looking at lawyers' advertising activities, the report highlights that the 87% of lawyers promote themselves by word-of-mouth, and of these, 76.3% do so through social relationships and friendships, 24.6% through collaboration with other professionals, 15.4% through participation in local or national public life, 13.4% through their website, 4.4% by organizing seminars and congresses, and 1.3% by advertising on journals and review. These data find confirmation in the second part of the same survey, where the clients interviewed have declared that the main channel to find a lawyer is personal or professional knowledge (32.2%) or through the suggestion of parents, friends, relatives, and so on (49.5%), while the Internet is unused (1.6%). With regards to the use of ICT facilities, the survey highlights that only one quarter of the law firms use a website as 74.2% of the interviewed lawyers declared that they do not have a website. In southern Italy, the percentage rises to 84.5%, and only 4.9% of them use the website to interact with clients. Notwithstanding the relaxed business structure regulation, legal professionals mainly prefer to act as individual professionals: 66.6% are individual owners of a law firm, 13.4% have an associate partnership, and 0.7% are in a business structure. In any case, at least in Italy, lawyers prefer micro-structure than macro-structure to provide their services: in 38% of the cases, the lawyer is the only person working in the firm, in 25.5% of the cases, up to three professionals are implemented; in 27.2% of the cases, up to nine professionals are implemented, and only in 9.4% of cases do the law firms have ten or more professionals. Finally, the

112 A similar feeling has been echoed by some scholars with particular regard to the German situation: as pointed out by Frank H. Stephen, '[w]hilst many commentators have identified the German legal profession as gradually moving in the direction of greater liberalization, Mathias Kilian (2010) reports the sentiment towards further liberalisation running into opposition when in spite of most written and oral presentation to the 2010 Juristentag those attending this annual meeting of German Lawyers voted against: free choice of business structures; external ownership of professional services firms; the introduction of multidisciplinary practice; and the abandoment of specific rules on advertising for members of regulated professions. Voted also went against a further relaxation of the rules on no-win-no-fee arrangements and against doing away with minimum fees for court work'. Frank H. Stephen, *Lawyers, Markets and Regulation* (Cheltenham: Edward Elgar Publishing 2015), pp spec. 74 and 75. See also M. Kilian, 'German Chocolates, Austrian Trainees, Swiss In-House Counsel and More: Correspondent's Report from Europe', in *Legal Ethics* 2010, pp 220–222. 13.

legal services provided by the Italian lawyers are mainly connected with the local market: only 2.3% of legal professionals declared that they provide services in international disputes.

38. Although the Italian legislation and the ethical rules surrounding legal services are moving in the direction of a greater liberalization, the Italian legal profession seems to live a moment of immobilism: this is hardly acceptable, especially if we consider that the legal profession today is going through an economic and professional crisis[113] and that this strategy is able to ensure neither client protection nor professional welfare.

7. Final Remarks

39. Historically, lawyers, especially those belonging to the civil law tradition, have largely been self-regulated and not governed by the competitive forces operating in commercial sectors of the economy. Nevertheless, it seems that this assumption cannot be used any longer as an excuse to avoid changes. It is undoubted that the legal profession is now facing a new trend in the regulation of professionals services – towards competition – and we have a new vocabulary to consider: lawyers as businesses.

40. This progressive evolution in legal services regulation seems not to be designed to materialize into a total shift from professionalism to commercialism; rather, what emerges from the current regulatory framework is that the majority of MSs are going to adopt a hybrid strategy, which combine features that are inherent to the professionalism paradigm, with innovations that are linked to a consumerist-competitive perspective.

Substantial steps towards consumerist-competitive reforms are attested to – for example – by the liberalization of legal services advertising rules, as well as by the abolition of fixed prices and the subjection of lawyers' fees to a lawyer-client agreement. Moreover, the reform concerning the organizational forms – including the possibility to admit non-lawyer partners or investors in law firms – have reshaped the traditional isolation of legal professionals and the exclusive idea of lawyers as individual providers.

In this changing context, the protection of the interests of the clients/consumers, of the whole society and, more generally, of the public interest, as well as the maintenance of a high quality of legal services, are preserved through a combined regulatory strategy, which, rejecting the total overlap between

113 Eighty per cent of the lawyers interviewed believe that it is not a positive moment for the legal profession, which is living in economic and professional crisis: see CENSIS, *Rapporto annuale sull'avvocatura italiana.*

professionals and business men, tries to defend the core values and key features of the professionalism.

This approach is reflected, first, in the choice – quite common to all MSs – to maintain entry restrictions. The educational, training and licensing procedure is still consistent across Europe, and this ensure that only practitioners meeting minimum quality standards – in terms of knowledge, competence, skills and ethical values – can offer their services in the market.

Second, even if the traditional restrictions concerning professionals shall be relaxed, several corrective mechanisms have already been implemented in order to mitigate the effects of the above-quoted consumerist-competitive reforms. Non -exhaustive examples of corrective mechanisms are: (a) limits to comparative or misleading publicity, even though strict advertising bans have been abolished. (b) Although several national regulations allowed non-lawyer involvement in law firms and/or joint multidisciplinary partnership, restrictions concerning shareholding, ownership and voting requirements, as well as limitations are still maintained. (c) While lawyer's fees have been submitted to private contractual freedom, information duties towards clients have been strengthened.

In this fickle and challenged context, Bars and lawyers – key components in legal service regulation – in their respective roles of regulator and regulated, are called to think about how – and not if – they would like to respond to these changes.

41. Blind resistance to the actual new and in certain ways unedited context, marked by increasing globalization and deregulation, seems not to be a strategy consistent with the needs of members of the legal professions. Instead, lawyers and Bars might take advance of this new framework and take a chance to get involved proactively to reinstate their own ethical values, enhancing the public and social relevance of the legal professionals' role, so as to deserve the claimed respect by the collectivity. Rather than recalling – with little or no effectiveness – the traditional rules, they might consider analysing and underlining the best way to preserve what they consider the key role of the legal profession while adapting to new circumstances.

After all, the new era of change may represent a new opportunity for the legal profession, an opportunity for individual lawyers to regain their ethical conscience, thus achieving an authentic awareness of their identity and enhancing the public and social relevance of the legal professionals' role, and for Bars, an opportunity to modernize the traditional professional policies in order to enhance regulatory accessibility and effectiveness, while revitalizing, rather than deserting, professionalism.