

*The legal profession between  
regulation and competition\**

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## INTRODUCTION

Although there is no clear-cut definition of “liberal professions”, the main feature characterising them certainly is the high level of technical knowledge required for their practice. It is mainly due to such feature that in most countries liberal professions are covered by a large range of regulation, which is mainly justified on grounds of protection of public interest involved in the exercise of certain activities. More specifically, it is argued that due to the information asymmetry characterising the market for professional services and impeding the market forces to reach efficient outcomes by themselves, regulation is necessary in order to protect public interest especially in terms of guarantee of services quality.

Professional regulation may derive from different sources, that can be both provisions of state law and rules issued by professional bodies. As a result, a distinction between self-regulation and regulation by state/public authorities arises. However, it occurs quite often that a regulatory system is in fact a hybrid between these two categories so that elements of self-regulation are mixed with elements of regulation by the state.

The typical instruments used by regulators within the liberal professions are restrictions on entry and restrictions on professionals’ conduct in the market. Both kinds of regulation raise great concern for the negative effects they may have for consumers, since they may in fact eliminate or limit competition between services providers, thus reducing the incentives for professionals to work cost-efficiently, to lower prices, to increase quality or to offer innovative services.

As a consequence, lots of discussions have taken place on the matter of regulation of liberal professions, suitability of liberalisation and opening of such sectors to competition. However, the elimination of regulatory restrictions governing the liberal professions requires a careful consideration mainly as to the type and characteristics of the market for each individual professional service because each single professional activity shows its own features which necessarily affect the opportune level of regulation (or liberalisation).

Since the range of problems connected to the general matter referred to as “liberalisation of the liberal professions” is very wide, the present paper necessarily focuses on some specific topics. First of all, the paper circumscribes the analysis to the market for legal services. After recalling the economic theories of regulation referring to the characteristics of the market for legal services as to the supply and demand side, some specific instruments of conduct regulation are considered, while entry regulation will not be dealt with. More specifically, economic insights on regulation of fees, advertising restrictions and regulation concerning the organisational forms for the exercise of the legal professions will be analysed. The findings of the economic analysis of those regulatory instruments are helpful in order to examine the policies of competition authorities on liberalisation of the market for legal services and to evaluate the main judgments given by the European Court of Justice on the lawfulness of some professional regulation under EC competition law. The consistency of competition law and policy with the economic approach is ultimately analysed in the paper.

# **I. ECONOMIC ANALYSIS OF PROFESSIONAL REGULATION AND COMPETITION POLICY**

## **1. THEORIES OF REGULATION: PUBLIC INTEREST**

### **1.1 Information asymmetry**

The traditional justification adduced by economists for professional regulation and self-regulation is that it arises as a remedy to market failures (*public interest* theories). This view of regulation is grounded on the concept that market mechanisms are in theory able to achieve the optimal allocation of resources but in practice there are conditions preventing the market from achieving efficiency, so that regulation becomes the instrument designed to counteract such market failures with the aim of improving social welfare<sup>1</sup>.

The main source of market failures for professional services in general, and for legal services in particular, is information asymmetry. The efficient outcome of competitive markets is based on the assumption of full and perfect information for both suppliers and consumers of the goods or services provided in the market. However in some cases, as the one at issue, this condition is not fulfilled. A defining feature of the legal service (as well as the liberal professions in general) is that its provision requires a high level of technical knowledge; clients may not have this knowledge and therefore find it difficult to assess the quality of the services they purchase nor to ascertain whether the services offered actually satisfy their requirements.

Legal services, in fact, as professional services in general, are often referred to as *credence* goods<sup>2</sup>, as opposed to *search* or *experience* goods<sup>3</sup>. While

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<sup>1</sup> J. DEN HERTOOG, *General Theories of Regulation*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, Part V, 1999, p. 225.

<sup>2</sup> M. R. DARBY and E. KARNI, *Free Competition and the Optimal Amount of Fraud*, in *Journal of Law and Economics*, 1973, vol. 16, pp. 111-126.

<sup>3</sup> P. NELSON, *Information and Consumer Behaviour*, in *Journal of Political Economy*, 1970, vol. 78, pp. 311-329.

*search* goods are such that their quality can be determined prior to purchase, and *experience* goods need consumption for their quality becoming apparent, the quality of credence goods cannot easily be judged either by prior observation or even by consumption or use, due to lack of information and (technical) knowledge, often accompanied by lack of experience in making repeated purchases.

The main consequences of asymmetric information are adverse selection and moral hazard. Adverse selection relates to a moment prior of the purchase of the concerned good, that in the case of legal services is the client's choice of professional. Customers know that in the market there are both high and low quality lawyers but due to insufficient information they are unable to distinguish them. It means that due to the risk of hiring a low quality professional, that is perceived as a cost by the consumer, the price potential clients will be willing to pay for the service will be lower than the one they would pay if they could identify a high quality professional. As a consequence, even high quality services – whose provision implies higher costs – will be valued at that lower price, which will be insufficient to keep the high quality professionals in the market. These circumstances generate a race to bottom, leading to a decline in quality and ultimately low quality services will drive high quality professionals out of the market (the well known Akerlof's market for lemons).

Such problem of information and monitoring of lawyer's services is not a burden carried only by consumers, but it may also negatively affect the professions' own interests as well. As it was just pointed out, consumers' low willingness to pay for legal services due to lack of information and confidence about quality will force a certain number of lawyers to withdraw from the market, and probably the best lawyers will be the first in exiting the market, because of higher costs. Therefore, the confidence of the public will be even less, the market will shrink again, and so on, until the very existence of the profession is threatened<sup>4</sup>.

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<sup>4</sup> K. HELLINGMAN, *An Economic Analysis of the Regulation of Lawyers in the Netherlands*, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 174.

As mentioned before, the second effect of information asymmetry is moral hazard, which arises after the client has already selected the professional. In order to describe moral hazard it can be pointed out that, on the one hand consumers cannot judge the adequacy or even necessity of the legal service provided, and that on the other hand lawyers perform two roles, *i.e.* the agency function, consisting in the diagnosis of the problem and identification of the appropriate strategies to deal with it, and the service function, that is the treatment of the problem through supply of the service using technical knowledge to implement the chosen strategy<sup>5</sup>. The main consequence of such situation is that the lawyer could have pecuniary interest in suggesting expensive remedies foreseeing that he then will implement the recommended strategy, given that the client is not in the position to judge the suitability and goodness of it. This gives rise to what is referred to as “supplier induced demand”: lawyers are likely to oversupply services and the market will fail to provide the socially optimal amount of legal services.

According to this view, the market for legal services fails to reach on its own the equilibrium due to information asymmetry. Therefore it requires regulatory interventions.

## 1.2 Public goods and externalities

Although information-related problems are the most commonly cited source of legal services market failure, additional causes can be identified, but they're of lesser concern than the informational problem.

Legal services can be seen as public goods, since professional competence of lawyers mostly takes the form of provision of information. Information generally satisfies both conditions of non-rivalry and non-exclusivity that are typical of public goods. Use of information by one person is not at the expense of other consumers, and it is impossible or too expensive

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<sup>5</sup> W. EMONS, *Credence Goods and Fraudulent Experts*, in *Rand Journal of Economics*, 1997, vol. 28 pp. 107-119; F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal Profession*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, 1999, vol. III, p. 989.

to exclude people from consumption of the good. Furthermore, it is often argued that the proper functioning of law and the correct justice administration are essential features of society in general, and that therefore legal services have some degree of public goods<sup>6</sup>.

According to economic theories of public goods, there is a danger that without regulation the market might undersupply or inadequately supply public goods, because – having specific reference to the professions – it may cost professionals more to provide the information than it is worth to consumers.

A third argument for regulation is based on the concern that externalities may arise from the provision of legal services because their social value goes beyond that accruing to the professional and client. The provision of the service, and therefore decisions made by professionals and their clients, may have an impact also on third parties and not only on the direct purchaser of the service. As it was already mentioned, a relationship between the quality of lawyers' services and the quality of the legal system can be envisaged. First of all, lawyers draft contracts, and the quality of such contracts indirectly determines the rate of civil litigation: the more clear the agreements, the less litigation before courts will be necessary and therefore the less costs parties and the community as a whole will bear.<sup>7</sup> Secondly, lawyers also select cases to be brought to courts; using the courts only when necessary will again save private and social costs. Finally, when cases are brought to court, the quality of lawyers' arguments will affect the quality of judgments (and this has special importance for common-law systems, for precedential purposes).<sup>8</sup>

As a result, externalities arise in the legal profession, where the quality of the legal services provided by the lawyers affects social costs or benefits. This kind of market failure implies that those directly involved in the market

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<sup>6</sup> I. PATERSON, M. FINK, A. OGUS, *Economic Impact of Regulation in the Field of Liberal Professions in Different EU Member States*, Institute of Advanced Studies, Vienna, January 2003, p. 16.

<sup>7</sup> K. HELLINGMAN, *An Economic Analysis of the Regulation of Lawyers in the Netherlands*, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, pp. 179-180.

<sup>8</sup> A. OGUS, *Regulation of the Legal Profession in England and Wales*, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 317.

for these services fail to take proper account of these external effects. The social value of the service exceeds the private value it has for the client. As a result, if the price for the service was determined by the market, so that it reflected the value the private client gives to it, the supply of the service would be below the socially optimal level. Therefore, in order to achieve an efficient outcome, market mechanisms need to be corrected so that the professional service will be valued taking into consideration also the effects it has on the social welfare.<sup>9</sup>

### 1.3 Insufficiency of non-regulatory mechanisms

It must be pointed out that, according to public interest theories of regulation, market failures are a necessary but insufficient condition – on their own – for the imposition of regulation. Although it cannot be denied that in such circumstances consumers and society as a whole need a certain degree of protection and quality guarantee, a range of non-regulatory mechanisms may exist which correct market failures.

The first of such mechanisms is generally envisaged in the use of warranties, *i.e.* guaranteeing the consumer a specific service quality in advance of purchase and possibly thereby signalling the high quality of services to potential clients. However, this device often fails to combat market failure due

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<sup>9</sup> AGCM, *Indagine Conoscitiva nel Settore degli Ordini e Collegi Professionali*, 1997, available at [www.agcm.it](http://www.agcm.it), p. 32.

In addition to asymmetric information, public goods and externalities, it could be said that legal services may be characterised by a fourth source of potential market failure, namely monopoly power. Lawyers are in some cases provided by law with elements of monopoly power in the supply of certain services (litigation before courts). Monopoly power can lead to less provision at a higher cost to consumers and is therefore inefficient compared with what it would be obtained in a competitive market. The significance of monopoly power as a source of potential market failure depends on the particular nature of the regulatory restrictions, particularly those relating to entry, which however will not be discussed in this paper.

to the same information-related reasons that create the market failure itself, so that their use is rare within the liberal professions<sup>10</sup>.

Another important non-regulatory mechanism for maintaining quality standards is the possibility of repeat purchases and the mechanism of reputation.

Incentives for a professional to maintain high quality of services can arise from repeat purchases: if consumers can evaluate quality and can make that evaluation known more widely, reputation will be formed for service providers and that will serve to signal quality to others. However, the reputation mechanism can mitigate a potential market failure under certain conditions. At least a small probability in the view of consumers that the professional will choose to provide a high quality service in order to induce repeat purchases must exist, and the quality of the service must be learnt quickly by a sufficient number of consumers. Additionally, repeat purchases must be frequent enough to provide a return on the professional's initial honesty in providing a high quality service<sup>11</sup>.

These elements suggest that reputation is not likely to work as a corrective mechanism in the market for legal services, since they can be considered as credence goods, so that their quality may not be ascertained even after provision, and in many cases purchases are not frequent. However, it should be pointed out that the significance of reputation effects actually varies according to both the type of service and the type of client. More specifically, a routine service bought regularly by a large client is the most likely to benefit from reputation effects: quality is measurable, the client has the resources to

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<sup>10</sup> An additional reason preventing the use of such a mechanism is that if the warranty provides full compensation in the event of failure, warranties offered by professional services firms may even act as a magnet to higher risk clients. In this case the informational asymmetry will operate against the professionals and moral hazard will be envisaged on behalf of clients, that will be willing to obtain the service even in very difficult cases knowing that in case of failure they can be compensated. D. LLEWELLYN, *The Economic Rationale for Financial Regulation*, Financial Services Authorities - Occasional Paper Series 1, April 1999, p. 29.

<sup>11</sup> J. TIROLE, *The Theory of Industrial Organisation*, Cambridge Mass., MIT Press., 1988, p. 164.

measure it, and the provider can benefit from the client acting on this knowledge in making repeat purchases<sup>12</sup>.

Ultimately, civil liability rules could work as a mechanism to overcome a potential market failure. Professional negligence or incompetence leading to harm can lead to litigation and the threat of action by the courts to compensate a client receiving poor quality advice should in theory provide an incentive to maintain quality standards. However, the role of litigation is constrained by usual informational problems. Substantial difficulties arise in determining the quality of the service at issue and the causal link between the service provided and the damage suffered by the client<sup>13</sup>.

It can be concluded that although the negative effects of asymmetric information could in principle be addressed through market mechanisms – such as the ones mentioned above – in some markets, and specifically in the market for (legal) professions, these mechanisms may be imperfect. Therefore, the typical solution to this problem has been the setting of some forms of quality regulation, in order to cure particularly information asymmetries. Such regulation usually consists in some kind of information regulation, prohibiting false and misleading information, that in the legal profession is implemented through restrictions on advertising, and in some price regulation, that is implemented in the form of fixed or recommended fees.

It should be noted that minimum quality standards also consist in entry regulation which operates as a form of certification or licensing conferring monopoly rights over the services, since they can be only provided by members of a professional body that have a certain degree of educational qualification. However this kind of regulation will not be examined in this paper.

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<sup>12</sup> F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal Profession*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, 1999, vol. III, p. 989; R. VAN DEN BERGH, *The European Internal Market in progress*, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 35; OECD, *Competition in Professional Services*, in *Journal of Competition Law and Policy*, 2002, vol. 3, pp. 60-61.

<sup>13</sup> C. CURRAN, *The American Experience with Self-Regulation*, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 52.

## 2. PRIVATE INTEREST THEORIES

Besides the above examined theories envisaging regulation as a response to market failures in order to protect public interest, “contra-regulatory” opinions are sustained that envisage regulation of legal services as the expression of interest-group protection, postulating that professional bodies will advance their members’ interests, so that rent-seeking behaviour will occur<sup>14</sup>.

Although it can be true that professional regulation can be read as a way to protect public interest, especially in terms of service quality, some other elements must be taken into account. More specifically, professionals may have not appropriate incentives to control and enforce the quality standards posed by regulation. Therefore it must be investigated whether rules are effectively used to assure minimum quality and are not mostly concerned with restricting competitive behaviour between professionals in order to benefit them<sup>15</sup>.

According to private interest theories of regulation, the regulatory agency will come, in the course of time, to serve the interests of the branch of industry involved. The benefits of regulation for a certain branch are deemed as being obvious: regulators can ban the entry of competitors in the market, so that the level of prices rise and they can maintain minimum prices more easily than a cartel.

Under this view, regulation is not directed at the correction of market failures, but at setting up income transfers in favour of the industries in exchange for political support<sup>16</sup>. Applying this approach to professional regulation entails that professionals *capture* government through their regulatory bodies and structure them so as to limit the supply of new professionals and

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<sup>14</sup> M. FAURE and R. VAN DEN BERGH, *Self Regulation of the Professions in Belgium*, in *International Review of Law and Economics*, 1991, vol. 11, p. 176.

<sup>15</sup> R. VAN DEN BERGH, *The European Internal Market in progress*, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 40.

<sup>16</sup> G. STIGLER, *The Theory of Economic Regulation*, in *Bell Journal of Economics and Management Science*, 1971, vol. 2, pp. 3-21.

reduce competition between existing practitioners in the marketplace. As a result, restrictions will decrease the supply of professionals, increase professional fees and increase the incomes of practitioners. This view is reinforced by the consideration that professional bodies are in a strong position to lobby governments in order to influence the outcome of regulation so that it will serve the interests of the group in charge of political support for re-election obtained by politicians.

Moreover, most of professional rules are set through self-regulation, that is considered as the ultimate form of regulatory capture. Those rules can in fact be interpreted as not serving the public interest, but as being the result of rent-seeking behaviour of professionals. As already mentioned, it can in fact create barriers to entry, thereby raising prices and conferring rents on incumbent practitioners. Moreover, standards governing professional practice may be devised more to confer utility on suppliers than to meet consumers preferences and the prospect of gaining such advantages may determine a social deadweight loss in that professional groups will spend resources to persuade legislators to grant them self-regulatory powers<sup>17</sup>.

Some criteria indicate that successful rent-seeking is possible. Groups that will obtain wealth transfers in their favour are likely to be small sized (relatively to the other groups existing within the general public), single-issue oriented and well organised; by contrast, the suppliers of the rents are large groups, which are difficult to organise and which face information problems.

Under these conditions, wealth transfers take place from the public to well-organised interest groups, that will have more political influence<sup>18</sup>. These characteristics are met within the market for legal services. Governments will face incentives to provide regulation either in the general public interest or in the interest of the specific professional group. Wealth transfers will take place from the large group of potential clients spread in the general public, that is difficult to organise, faces high transaction costs and significant information

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<sup>17</sup> A. OGUS, *Self Regulation*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, 1999, vol. V, p. 587.

<sup>18</sup> M. FAURE and R. VAN DEN BERGH, *Self Regulation of the Professions in Belgium*, in *International Review of Law and Economics*, 1991, vol. 11, p. 177.

problems, and that, therefore, will be less efficient in exerting political pressure, to the smaller and better organised lawyers' body<sup>19</sup>.

On the basis of the finding that in the market for legal services rent-seeking is likely to happen, (self) regulation measures can thus be read as the result of successful lobbying by lawyers associations that allow them to earn significant economic rents, and not a response to market failures that serve the public interest. It follows that negative effects for consumers of restrictive regulations, that may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-efficiently, to lower prices, to increase quality or to offer innovative services, may overcome the alleged advantages that they may have in the public interest, so that costs of regulation outweigh its benefits.

Besides the foregoing analysis, based on the evaluation of the characteristics of the market for legal services, it would be important having also empirical evidences confirming this view. Several studies have tried to assess rent seeking on the basis of parameters such as earnings and employment rates (as indicator of the success in limiting entry) of professionals<sup>20</sup>. However these studies are not conclusive in proving rent seeking behaviour, especially as far as the market for legal services is concerned. It is thus necessary to stress the importance and necessity to improve empirical studies supporting this view. The support of significant data as to the affirmation rent seeking conduct by professionals is in practice feasible could in fact help to reach the result that ethical rules of professions may be more easily found to be in contrast with competition law.

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<sup>19</sup> M. FAURE and R. VAN DEN BERGH, *Self Regulation of the Professions in Belgium*, in *International Review of Law and Economics*, 1991, vol. 11, p. 177; J. DEN HERTOOG, *General Theories of Regulation*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, Part V, 1999, p. 240.

### 3. CONDUCT REGULATION AND COMPETITION POLICY

It was pointed out that the appropriate purpose of regulation of the liberal professions is to protect consumers by maintaining standards of service and operating systems of accountability in the supply of professional services, and that, however, such regulation can potentially impede competition amongst practitioners, thus being detrimental to consumers.

In the last years the European Commission and national competition authorities have been broadly considering and criticising the effects of regulation of the liberal professions and they express the view that this highly regulated sector should be opened to competition.

A research paper prepared for D.G. Competition of the European Commission was published in 2003. According to the outcome of the study, there is a positive relationship between high levels of professions regulation and excess profits (*i.e.* profits above the normal competitive level) for professionals<sup>21</sup>. More specifically, the authors of the paper found that professionals gain higher profits in more regulated countries. In their view, this finding supports the idea that economic benefits are gained by highly regulated professions at the expense of consumers welfare. In addition, they found a negative correlation between the degree of regulation and volume of output. The authors, therefore, concluded that output could be increased if regulation intensity was to be reduced<sup>22</sup>.

Generally speaking, competition authorities do not fail to recognise that the rationale for regulating professions is that their customers are generally not in a position to assess the quality of the professional services they buy. They agree on the statement that by their nature professional services are characterised by asymmetry of information between suppliers and consumers

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<sup>21</sup> I. PATERSON, M. FINK, A. OGUS, *Economic Impact of Regulation in the Field of Liberal Professions in Different EU Member States*, Institute of Advanced Studies, Vienna, January 2003. Thereafter, the Commission has adopted two reports on the subject: the first report of 9 February 2004 “*Report on Competition in Professional Services*” was followed on 5 September 2005 by the report “*Professional Services - Scope for more reform*”. The European Parliament resolution of 12 October 2006 supports the Commission in its efforts to rid the sector of overly restrictive regulation which inhibits competition and, it argues, would be beneficial to the EU economy and consumers.

<sup>22</sup> Critiques of this study are made by RBB Economics, *Economic Impact of Regulation in Liberal Professions, A Critique of the IHS Report*, September 2003.

and that in order to protect consumers from exploitation of their position of relative weakness some restrictions on supply may be justified. It means that authorities believe that some regulation is necessary in order to ensure service quality, but, at the same time, that the benefits arising from such regulation must be carefully weighted against the costs. It is noticed that historically such costs have meant higher prices and reduced output for consumers caused by reduction in competition which regulation determines by restricting market entry, controlling prices, preventing truthful advertising and prohibiting commercial relationships<sup>23</sup>.

According to the view of competition authorities, regulation of professional services should only aim to correct information asymmetries typical of professional markets that create the main concern as to the protection of the public interest. To this extent, rules should be implemented such that they provide instruments that could really work as to help and protect clients *ex ante* in the choice of the service they actually need and of the professional that could provide it in the best way, and *ex post* in the evaluation of the quality of the professional's performance. These regulations must not restrict competition more than is appropriate or necessary, because otherwise they would have the effect of raising the price and limiting innovation in the provision of professional services. In other words, the proportionality principle must be satisfied. To this end, it must be considered whether alternative measures less restrictive of competition are available.

The main concern is that, particularly where the restrictions are imposed by professions regulating themselves, there are no guarantees that the restrictions on competition are the minimum necessary to achieve goals of consumer protection, or that they maximise overall consumer benefit by striking the right balance between consumer benefits from competition and from protection. It is actually sustained that suppression of all competition is not necessary and goes beyond to the main goal that is to assure service quality. It is deemed that professions can be sufficiently subject to market forces so that competition among practitioners would benefit consumers. It is argued that consumers would benefit from competition about prices and from advertising that truthfully informs about quality and price differences so that,

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<sup>23</sup>OECD, "Competition in Professional Services", *Journal of Competition Law and Policy*, 2002, vol.3, p.63

without restrictions concerning these competitive instruments, it would be easier to compare input or output quality<sup>24</sup>.

Moreover, it is noted that professional's regulation should be drafted in such a way as to take into account the different kinds of customers, with the different levels of protection they need, thus providing for different levels of restrictions of competition<sup>25</sup>.

More specifically, it is recognised that business customers are likely to have superior information about the quality of services, as they make regular repeat purchases and possess the resources necessary to monitor quality, being able to use different lawyers at the same time and to compare their efficiency. Reputation can work in this setting as a device to maintain high levels of quality of services supplied to frequent purchasers, because professionals would lose future business if they behave opportunistically. As a result, such consumers may not require the same degree of quality protection as do small consumers. In this case, price competition and fee advertising may not have quite a significant role to play as for an individual private buyer. Larger buyers may obtain most value from rules that permit the maximum competition in non-price factors, such as flexible and innovative service offerings, and in the productive efficiency of professionals.

By contrast, private consumers are likely to buy professional services infrequently and most of them will lack the resources (either in monetary terms or in terms of knowledge) to monitor the quality of those services, so that information asymmetry is more likely in such cases and the need for some form of quality protection is stronger<sup>26</sup>. As a result, regulation of legal services should take this differences into account, making proper distinctions and authorities underline that this does not seem to be the case in existing regulatory frameworks.

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<sup>24</sup> OECD, "Competition in Professional Services", *Journal of Competition Law and Policy*, 2002, vol.3, p.63.

<sup>25</sup> INDECON, *Assessment of Restrictions in the Supply of Professional Services*, prepared for the Irish Competition Authority, Dublin, March 2003, § 1.18-23; LECG Ltd., *Restrictions on Competition in the Provision of Professional Services*, Report for the Office of Fair Trading, London, December 2000, § 99; OECD, "Competition in Professional Services", *Journal of Competition Law and Policy*, 2002, vol.3, p.60.

<sup>26</sup> OECD, "Competition in Professional Services", *Journal of Competition Law and Policy*, 2002, vol.3, p.60-61.

In order to better understand and evaluate the above mentioned statements, we will now turn to consider current competition policy having regard to some specific measures of conduct regulation, namely fees regulation, advertising restrictions and regulation on organisational forms for the legal practice. The views of competition authorities will be evaluated in light of economic insights that each of the above mentioned regulatory instrument involves.

### 3.1 Regulation of fees

The first instrument of regulation that will be dealt with relates to fee scales. Fees for professional services are not always negotiated freely between customers and providers, since in many countries they are set mostly by regulation. Traditionally, legal organisations have been permitted to establish mandatory or recommended fee schedules, price competition being prevented as it is deemed as unethical and not in the public interest. In Italy, for instance, lawyers' fees are set out in special tariff scales issued by the Italian Ministry of Justice. However parties are free to negotiate fees which depart from those contained in the table, as long as the minimum and maximum rates given for each service are followed<sup>27</sup>.

Generally speaking, fee schedules can take several forms, setting fixed, minimum or maximum prices, that can be either mandatory or recommended. Fixed tariffs or minimum tariffs are deemed to create greatest concern, since

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<sup>27</sup> The Italian Government issued a new regulatory system concerning free market and competition, the so called "*Bersani Decree*" (Title 1 of Law 4 August 2006 n. 248). The new provisions on competition and consumers' rights are meant to change citizens-consumers and service suppliers relationship by introducing innovative facilities and opportunities with the purpose of enhancing open market, flexibility, employment opportunities, free competition and consumers protection tools. The reforms introduced in the Italian legislation refer to several sectors. As to the professions, the law is aimed at providing more flexibility and more freedom of choice (art. 3 , Bersani Decree); professionals will be free to offer an increasingly competitive service, with a broader choice for consumers; no more minimum or mandatory fees: fees will be negotiated by the parties and may be related with the service performance. Self-employed professionals can advertise their services; clients can make more informed decisions, based on what they really need; admissibility of interdisciplinary companies consisting of diverse professionals (architects, lawyers, accountants, etc.); broader offering of integrated services, with more competitive Italian firms at an international level. Negotiations for the adoption of secondary regulation for implementation of the reforms are still in act.

they are likely to have the most detrimental effects on competition, reducing the benefits that competitive markets deliver to consumer.

It was mentioned that the main reason adduced by professionals as to price restraints is that competition between lawyers and the charging of too low fees is seen as unethical and contrary to the “dignity” of the profession. In a more economic perspective, the various kinds of fees settings or price controls have been justified on grounds of public interest in order to grant the quality of legal services as a response of information and agency problems. As it was already pointed out, due to information problems the potential client would bear high search and monitoring costs in the choice of a “good” professional. Consumers cannot judge the quality of a lawyer’s services without asking advice to another lawyer, since high technical knowledge is required for such activities, and it is difficult for consumers themselves to acquire the expertise that would be necessary for the quality assessment (*bounded rationality*)<sup>28</sup>.

Moreover, the consumer is not able to foresee and understand what kind of legal remedy is suitable for his needs before the diagnosis of the lawyer. In such a situation of asymmetrical information that impedes an *ex-ante* evaluation of quality, negotiations of fees would be difficult<sup>29</sup>. In addition, an assessment of quality is not even possible after the provision of the legal service (*credence goods*). The client cannot always be sure of his lawyers competence, because the outcome of the case is likely to be influenced by other factors.

As a result, some quality regulation has always been deemed necessary and fees regulation is justified as being a necessary measure for granting certain levels of quality in the provision of legal services. It is seen as a remedy to the fear that the most competent providers of such services that are likely to bear higher costs would leave the profession because they could not be rewarded

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<sup>28</sup> A. PAPA MALATESTA, *Le Società per l'Esercizio delle Professioni Intellettuali*, at <http://archivioceradi.luiss.it/impresa/mercato/index.htm>, pp.7-8.

<sup>29</sup> K. HELLINGMAN, “An Economic Analysis of the Regulation of Lawyers in the Netherlands”, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p.172.

enough for their superior ability and that the reduced earning potential would discourage promising prospects from entering the market for lawyers<sup>30</sup>.

However, even if quality standards provided by this kind of conduct regulation can be considered appropriate for the public interest protection, the consequences of price controls must be taken into account, since they determine significant restraints of competition in favour of established lawyers. Competition authorities emphasise that fee schedules, whatever their form, constitute a means of reducing price competition among practitioners or at least serve to ‘soften’ price competition between professionals. They are a form of price collusion and imply a transfer of resources from consumers to suppliers compared with the situation of a competitive market in which there is open competition in price. They create a deadweight loss in the market and thus serve to reduce economic efficiency<sup>31</sup>.

As already mentioned, the greatest difficulties are created by mandatory fixed and minimum prices. They are obviously significant restrictions of competition as they actually amount to horizontal cartels fixing (minimum) prices, that are the most detrimental for consumers’ welfare, because they directly interfere with the outcome of the competitive process, leading customers to pay higher prices or not receiving the quantities they desire<sup>32</sup>. Collusion restricting price competition directly raises prices and causes a wealth transfer from consumers to the cartel as well as a deadweight loss (*allocative inefficiency*). In addition, the prospects of profits that are easy to make may reduce incentives to keep productions costs low (*productive inefficiency*) and to innovate (*dynamic inefficiency*)<sup>33</sup>.

On the basis of the foregoing economic insights, price fixing agreements have always been considered by competition authorities as

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<sup>30</sup> J. W. YOUNGER, “Competition Policy and the Self-Regulating Professions”, in M. J. TREBILCOCK, P. SLAYTON, *The Professions and Public Policy*, University of Toronto Press, 1978, pp.36-37.

<sup>31</sup> INDECON, *Assessment of Restrictions in the Supply of Professional Services*, prepared for the Irish Competition Authority, Dublin, March 2003, § 2.40.

<sup>32</sup> EC Horizontal Guidelines, § 25.

<sup>33</sup> R. VAN DEN BERGH, P. CAMESASCA, *European Competition Law and Economics. A Comparative Perspective*, Intersentia, 2001, p.171

agreements restricting competition by object thus being evaluated as *per se* infringement of competition law as they are presumed to have negative market effects. It is thus unnecessary for competition authorities to take into account their actual effects on competition and on the market and to balance eventual economic benefits with the anti competitive effects<sup>34</sup>. For these reasons professional rules concerning mandatory fee scales have been increasingly challenged by competition authorities. More specifically, as far as minimum tariffs are concerned, it is argued that although they can operate as an incentive for high quality professionals not to exit the market at the same time they do not prevent other professionals from providing low quality services. On the contrary, they actually provide the latter with too high and unjustified rents<sup>35</sup>.

As a consequence, some countries (such as Austria, Portugal and Spain), have introduced a system of recommended scale fees for the legal profession. Nevertheless this kind of rules are criticised by competition authorities on the same grounds as the mandatory ones, arguing that their effect is cartel-like price fixing. According to a widely held view, the existence of a recommended scale of fees drawn up by a profession's self-regulatory body will result in such recommended fees actually being charged<sup>36</sup>.

However, further consideration would be necessary before prohibiting such fees regulation as always causing anti competitive effects. Economic analysis could show that prices resulting from such agreements will not necessarily be above competitive levels. More specifically, price fixing cartels may prove to be ineffective because of cheating on the agreed price<sup>37</sup>.

The ability of market players to form a cartel and thereby to increase price and sustain the increase is not that obvious. It is well established in economic literature that preventing cheating on a cartel agreement, *i.e.*

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<sup>34</sup> EC Horizontal Guidelines, §18

<sup>35</sup> AGCM, *Indagine Conoscitiva nel Settore degli Ordini e Collegi Professionali*, 1997, at [www.agcm.it](http://www.agcm.it).

<sup>36</sup> EUROPEAN COMMISSION, *Report on Competition in Professional Services*, 9 February 2004, available at [www.europa.eu.int](http://www.europa.eu.int), p. 12; OECD, "Competition in Professional Services", *Journal of Competition Law and Policy*, 2002, vol. 3, p. 70.

<sup>37</sup> R. VAN DEN BERGH, P. CAMESASCA, *European Competition Law and Economics. A Comparative Perspective*, Intersentia, 2001, p. 195

preventing members from charging lower prices than the ones agreed upon by the cartel, is difficult since each member has a stronger incentive to defect upon the cooperative agreement than to stick with it<sup>38</sup>. Players face the well known prisoners' dilemma so that they have a mutual interest in cooperating in order to achieve the monopoly outcome but there is also a conflict as if one of them sticks to the agreement then the other can earn higher profits by deviating from the cooperative agreement and lowering prices<sup>39</sup>.

For this reason some conditions should be fulfilled for a cartel to be sustainable in practice. Generally speaking, cartels are likely to be successful in those circumstances in which the transaction costs of cooperation are low. The first condition enabling these costs to be low concerns the number of cartel members. The greater this number the higher transactions costs will be. It is self evident that the fewer the parties involved the easier will be negotiating the agreement, monitoring it, detecting and punishing deviations with some speed.<sup>40</sup> This requirement is not satisfied in the case of the legal profession, since professional "cartels" have many members.<sup>41</sup>

A second factor maintaining low transaction costs and thus increasing the possibilities of success of a cartel relates to product homogeneity. The more homogeneous the product or service produced, the easier it will be for a cartel to monitor and detect whether a member is defecting the agreement, that is whether deviations from the cartel price are really due to differences in the product or contain an element of cheating<sup>42</sup>. For legal services it can be argued that it is very unlikely for a lawyer to repeat the same performance even when he solves similar issues. For instance, different consumers may demand a

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<sup>38</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p. 354.

<sup>39</sup> A. DIXIT, S. SKEATH, *Games of Strategy*, New York, London, W.W. Norton & Company, 1999, pp.255 and ff.

<sup>40</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p. 380.

<sup>41</sup> F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal Profession*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, 1999, vol. III, p. 999.

<sup>42</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p. 382.

different service in terms of number of meetings with the lawyer or speed of completion. In other words, although the formal work for two clients might be identical the ancillary services they require may be different and vary in cost. Hence, demand may well be heterogeneous and pose problems for cartel discipline<sup>43</sup>.

Moreover, differences in (marginal) costs between cartel members will affect the ease with which the cartel can agree on price and in the ability to use sales as an indicator of cheating. If players have different costs, the agreement typically requires that they produce different levels of output at different prices and it renders harder monitoring and detection of non cooperative conduct<sup>44</sup>. Law firms of the same size and mix of work are likely to have similar cost structures. However similar services may be offered both by small and larger firms, and in this case further considerations can be put forward. For instance, it is argued that in the market for a legal service such as conveyancing<sup>45</sup> (in Scotland and Ireland) there are a large number of very small firms mainly dealing with households and small business clients, that will bear homogeneous costs, suggesting more cartel discipline. On the other hand, there are also larger firms, that are more likely to be involved in more commercial business, having a higher opportunity cost of their time and hence a different cost structure. This may interfere with cartel discipline<sup>46</sup>.

Buying power may also counteract the cartel's ability to increase prices. Large buyers may succeed in obtaining discounts causing the cartel to unravel<sup>47</sup>. However this kind of countervailing power in the market for legal

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<sup>43</sup> E. SHINNICK, F. STEPHEN, *Professional Cartels and scale fees: chiselling on the celtic fringe?*, in *International Review of Law and Economics*, 2000, vol. 20, p. 411.

<sup>44</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p. 380.

<sup>45</sup> Recently the example given by the market of conveyancing has been discussed in a conference held in Brussels in December 2006 on "*The economic case for professional services reform*".

<sup>46</sup> E. SHINNICK, F. STEPHEN, *Professional Cartels and Scale Fees: Chiselling on the Celtic Fringe?*, in *International Review of Law and Economics*, 2000, vol. 20, p. 412.

<sup>47</sup> R. VAN DEN BERGH, P. CAMESASCA, *European Competition Law and Economics. A Comparative Perspective*, Intersentia, 2001, p. 173.

services can only be envisaged for the business clients and not for the individual small consumers, as it will be further explained below.

The foregoing analysis points out that although there might also be some elements, (such as the existence of barriers to entry essentially provided by entry regulation) that could reinforce the belief that scale of fees are analogous to cartel prices having the effect of subsidizing inefficient lawyers and producing economic rents for others, conditions complicating the sustainability of cartels hold. Competition authorities do not take into account this consideration in expressing their strongly negative view on regulation of fees.

This evaluation, in fact, at least casts doubts on the view that fee schedules will always turn out in cartels between professionals. More specifically, the difficulties envisaged for successful collusion in the market for legal services certainly go against the authorities' conviction that recommended fees are tantamount to mandatory fees. Some empirical evidence on conveyancing prices in Scotland and Ireland at points in time where there was a recommended fee scale confirm that recommendations will not automatically be followed by professionals and thus will not necessarily determine price fixing cartels<sup>48</sup>.

It is thus clear that economic insights can turn out to be useful in the assessment of the actual impact on competition of such fees setting rules and of the strength of authorities' affirmations on this respect. And it should be pointed out that before straightforward claiming the necessity of prohibiting certain regulations as determining restrictions of competition economic analysis should be taken into account, also with reference to efficiency arguments that in some cases could overcome the anticompetitive concerns.

Referring to fee scales, and to minimum price fixing in particular, it could indeed be argued that legal services are a strong case for efficiency explanations based on principal agent theories to apply. The strength of such arguments, that are essentially used for justifying vertical minimum price fixing and are based on the idea of it preventing from free riding and assuring of a

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<sup>48</sup> E. SHINNICK, F. STEPHEN, *Professional Cartels and scale fees: chiselling on the celtic fringe?*, in *International Review of Law and Economics*, 2000, vol. 20, pp. 407-423.

certain level of quality, mainly relates to substantial search costs which consumers may face to allow an informed purchase, that, as we have already pointed out, are high in the case of legal services. More specifically, the strongest case for efficiency gains from such restraints is linked to the high complexity and technicality of the product, to the limited knowledge of the product by the consumer, and to the limited comparability of price and quality typical of credence goods<sup>49</sup>.

Up to the present point mainly minimum fees were considered. However price regulation in the legal sector takes also place through the setting of maximum fees. Such rules can be of lesser concern for competition law than minimum fees, at least because they can act as a threshold so that too high prices cannot be charged to consumers and price competition below these prices could in theory take place. Nonetheless competition authorities stress they still are competitive constraints and can determine collusion on the market for legal services justifying prices above competitive levels. Authorities actually recognise that maximum prices might protect consumers from excessive charges only in those markets with high entry barriers (such as quantitative entry restrictions) and a lack of effective competition, conditions that are fulfilled, for instance, in the market for notarial services<sup>50</sup>.

One additional and more specific explanation can be given to maximum fees. Their rationale in fact can be seen in assuring that poor or even middle-income consumers can afford high quality services. However, although maximum fees can help to achieve this objective, alternative least restrictive measures can be envisaged. Authorities, for instance, say that legal

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<sup>49</sup> R. VAN DEN BERGH, P. CAMESASCA, *European Competition Law and Economics. A Comparative Perspective*, Intersentia, 2001, p. 254. However, it should be pointed out that in the case of legal services besides fees regulation there are other rules (specifically restrictions on advertising) that are recognised as having the effect of increasing rather than decreasing consumers' search costs, so that this argument could be contradicted, as it will be discussed below.

<sup>50</sup> EUROPEAN COMMISSION, *Report on Competition in Professional Services*, 9 February 2004, at [www.europa.eu.int](http://www.europa.eu.int), p. 12.

professionals may provide services to the poorest consumers *pro bono*, either by personal choice or pursuant to guidance from professional associations<sup>51</sup>.

Indeed great importance is given by competition authorities to the existence of non-regulatory corrective mechanisms as restrictions on competitive practices and especially on price competition through the setting of fees scales by professionals are considered as not explicitly addressing the issue of quality of services. Besides the foregoing explanation based on the potential effect of collusive behaviour, competition authorities also contradict that in general terms fee scales are justified as satisfying a demand from consumers for guidance to help with their budget plans, overcoming risks connected with information asymmetry. To this extent it is recognised that there might be a variety of methods of addressing this issue, which have less potential impact on competition, such as historic surveys of actual fees charged or widespread advertising of fees.

An effective level of transparency would entail for the consumer more insights into the suppliers, price, quality, characteristics of the process or the contractual conditions governing services<sup>52</sup>. In fact more issue-specific instruments are deemed to be useful in order to provide quality standards. If the problem is envisaged in asymmetrical information, and especially in lack of information on the consumers' side and the high search and monitoring costs they incur, it could be solved through information regulation<sup>53</sup>. Rules providing for a mandatory duty to disclose information to potential clients could be effective<sup>54</sup>. In such a case regulation guaranteeing the truth and correctness of the information given would also be necessary, in order to prevent misleading information to be provided<sup>55</sup>.

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<sup>51</sup>OECD, "Competition in Professional Services", *Journal of Competition Law and Policy*, 2002, vol.3, p. 71.

<sup>52</sup> DUTCH MINISTRY OF ECONOMIC AFFAIRS, *Public interest and market regulation in the liberal professions*, 2004, p. 45.

<sup>53</sup> AGCM, "Parere su Disegno di Legge recante "Delega al Governo per il Riordino delle Professioni Intellettuali", *Bollettino*, n. 4, 1999.

<sup>54</sup> AGCM, "Parere su Disegno di Legge recante "Delega al Governo per il Riordino delle Professioni Intellettuali", *Bollettino*, n. 4, 1999.

<sup>55</sup> M. FAURE, *Regulation of Attorneys in Belgium*, in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 105.

As far as this matter is concerned, it is stressed by authorities that fee guidance may be acceptable where charges are determined independently and objectively, so that they merely reflect changing market conditions and professionals and clients are clearly free to negotiate. For this reason, competition authorities are also against the publication of recommended prices. Beyond the above mentioned concern that they may have significant negative effect on competition, since they may facilitate price collusion between professionals, it is sustained that they could mislead consumers about reasonable levels of tariffs rather than providing them with useful information about the average costs of services<sup>56</sup>.

In order to protect competition and consumers, such information on prices of services should really be a reliable and impartial parameter enabling clients to make comparisons between prices charged by professionals. Such information should thus consist in publication of historical or survey-based prices collected by independent parties (such as consumers organisations). In other words, it is deemed that information on tariffs should not be given by professionals nor decided or recommended *ex ante* by professionals themselves or by their associations, but such information should consist in statistical data that should be collected *ex post* by third parties once they've been freely set by professionals. In this way, data refer to prices actually practised in the market, and they effectively reflect market forces, so that they can provide consumers with proper parameters in order to judge the professional services he is offered and the price he is asked<sup>57</sup>.

However, as far as this kind of information regulation is concerned, it can be pointed out that consumers may not be able to properly understand the information they get, for example because they are difficult or impossible to compare. In these circumstances, such rules may not be effective in providing clients with instruments that should enable them to judge more easily and at lower costs the professionals' quality.

Moreover, it is also argued that the balance of professional regulation should be shifted from *ex ante* restrictions, that seek to avoid the provision of poor quality services and the unnecessary induced demand of services in a way

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<sup>56</sup> EUROPEAN COMMISSION, *Report on Competition in Professional Services*, 9 February 2004, at [www.europa.eu.int](http://www.europa.eu.int), p. 13.

<sup>57</sup> AGCM, "Parere su Disegno di Legge recante "Delega al Governo per il Riordino delle Professioni Intellettuali", *Bollettino*, n. 4, 1999.

that is both indirect and negative for competition, to *ex post* regulation, that could address the same problems in a less distorted way. More specifically, liability rules should be taken into account as a means for disciplining legal services market. This kind of legal instrument would act directly on the lawyer as a disincentive for lowering the quality of his service. The threat of *ex post* punishment for professionals who are found to have breached professional rules or service commitments should increase the professional's carefulness in performing his tasks and his good behaviour<sup>58</sup>.

However, for this kind of regulation having effect, besides the setting of rules of conduct and service commitments and of a monitoring regime, the punishment regime should be such that it could actually work in practice. The usual informational problems may arise for the client for successfully enforce professional liability rules. First of all, he may not be able to judge whether the lawyer has exercised the necessary care and diligence in dealing with his case: consumers in fact may not always be able to tell whether they received poor quality service. Secondly, it may be very hard to prove such liability, as it was already pointed out.

For all the foregoing arguments, based both on economic insights (collusion) and on the alleged existence of less restrictive measures (so that actual regulations do not pass the proportionality test), competition authorities firmly sustain the necessity of the removal of fee scales, whatever their nature<sup>59</sup>. The abolition of those provisions is deemed as not only improving

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<sup>58</sup> M. FAURE, "Regulation of Attorneys in Belgium", in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 105.

<sup>59</sup> Recently the European Commission has found the scale of recommended minimum fees of the Belgian Architects Association in breach of European competition rules. The recommended minimum fee scale operated by the Belgian Architects' Association laid down an architect's fees as a percentage of the value of the works realised by the entrepreneur and applied to all architectural services provided in Belgium by independent service providers. The Commission believes the recommended fee scale, like fixed prices, constitute an infringement of the European competition rules because it seeks to coordinate the pricing behaviour of architects in Belgium, something which is not necessary for the proper practice of the profession. Recommended prices can mislead consumers as to what is a reasonable price for the service they are receiving and as to whether this recommended price is negotiable. In the Commission's view, the fees should reflect an architect's skills, efficiency and costs – and perhaps reputation – and should not be dependent solely on the value of the works or the price of the entrepreneur. In any event, the architect should determine the fee independently of competitors and in agreement with the client only. The Commission has decided to fine the

price competition and efficiency, but also as potentially leading to improvements in dynamic efficiency (in terms of, for example, new ways of providing services in the future). In addition, dynamic efficiency gains may occur through a low-cost incumbent undercutting competitors and forcing them to become more efficient<sup>60</sup>.

However, it must be pointed out that such liberalisation may not necessarily entail only positive effects, as in practice it can lead to mixed results for consumers' benefit. An important example is given by the deregulation of notaries in the Netherlands, that has taken place in 1999. Regulatory changes have been introduced in order to gradually leave notary tariffs free of restrictions. Only in family practice (testaments, prenuptial agreements) maximum tariffs were maintained for protecting less wealthy persons, while unrestricted price setting now applies to all other notarial services<sup>61</sup>. A report issued by the Notary Monitoring Committee on the developments in the notarial profession between 1999 and 2003 concluded, as far as concerns tariffs, that negative effects have taken place. The tariffs of a large number of notaries have increased on average since 1999. The prices in family matters have increased considerably. Moreover, real estate tariffs have increased only in the most common category of house prices, that is in the segment of the cheapest houses, while they've decreased in the top and middle segment<sup>62</sup>.

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Belgian Architects Association € 100.000,00. This amount reflects a gradual approach by the Commission in fining anti-competitive practices in the professions (in its first decision concerning tariffs of professional bodies, in 1993, the Commission condemned the fixed tariffs of the association of Italian customs agents without imposing a fine. In 1996, the Commission took a decision concerning the recommended tariffs of the association of Dutch forwarding agents, imposing a symbolic fine of €1000) and also the fact that the fee scale was abolished in 2003 (Decision COMP/38.549, 24/06/2004).

<sup>60</sup> INDECON, *Assessment of Restrictions in the Supply of Professional Services*, prepared for the Irish Competition Authority, Dublin, March 2003, § 2.40.

<sup>61</sup> [www.justitie.nl/english](http://www.justitie.nl/english).

<sup>62</sup> The Committee argued that the increase in notary fees was caused by several factors, such as low price elasticity in this sector, too little countervailing power from the side of consumers and the fact that there is still too little competition between notaries. COMMISSIE MONITORING NOTARIAAT, *Eindrapport, Periode 1999-2003*, at [www.justitie.nl/Images/11\\_21107.pdf](http://www.justitie.nl/Images/11_21107.pdf).

It is necessary to point out that the notarial profession actually differs from the profession of lawyers, since it is more strictly regulated especially as far as entry regulation is concerned (in most European countries the number of notaries is very low, with consequences

The foregoing evidence, together with the finding that economic arguments adduced for complete liberalisation of fees setting the legal profession, are not fully consistent with the results of economic analysis (since conditions complicating cartel like behaviour in the market for legal services exist), confirms that competition policy on this point is too strong and straightforward.

### 3.2 Restrictions on advertising

Besides restrictions concerning fees setting, Competition authorities also sustain that other professionals' regulations should be relaxed. The legal profession has usually been subject to close regulation providing for either a total ban on advertising or restrictions, both on manner and content. Ethical provisions set such restrictions as advertising is deemed to be in contrast with the principles of *dignity* of the profession: the general rule is that a lawyer may not go after clients<sup>63</sup>. However, in the last two decades many States have relaxed such restrictions. In Italy, for instance, advertising has traditionally been totally prohibited, but in October 2002 art. 17 of the deontological code<sup>64</sup> was amended to allow some types of publicity and advertising, especially concerning the form<sup>65</sup>.

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arising for example in terms of cartels sustainability). For more recent views on liberalisation of the notarial profession see documents of a conference held in Brussels in November 2005 on "*Better regulation of professional services*".

<sup>63</sup> M. FAURE, "Regulation of Attorneys in Belgium", in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p. 95.

<sup>64</sup> Code approved by the *Consiglio Nazionale Forense* 17 April 1997 and amended on 16 October 1999 and 26 October 2002, available at [www.consiglionazionaleforense.it](http://www.consiglionazionaleforense.it).

<sup>65</sup> *As to form*: Allowed are now: signs outside one's office, brochures, internet sites, juridical publications or 'annuaires', brochures etc. as well as relationship with the press/media about a case, where the relevant information is non confidential. Such contacts with the press/media for self- publicity are not allowed, even indirectly. Still forbidden are: publicity in print media, TV or radio. Forbidden is also advertising via billboards or flyers as well as soliciting by phone call, sponsorships, using the internet to offer free advice, either on one's own website or on a third party's website. Seminars and conferences organised directly by lawyers' cabinets are allowed forms of publicity in some cases, but prior authorisation by the professional body is obligatory.

*Concerning the substance*: Allowed are: personal information, listing of publications, information on the professional practice, a logo, indication of 'quality certificates' (this has to be approved by the professional body). It is also allowed to offer consultancy services via

The general economic argument for justifying advertising prohibition on lawyers is based on grounds of public interest in order to prevent the negative consequences on service quality arising from information asymmetries. More specifically, it is sustained that advertising cannot provide a client with details of the skill or expertise of a particular professional. In addition, the complexity of the activity and the information asymmetries involved in the provision of legal services will make it difficult for clients to detect untruthful advertising claims, potentially lowering the service quality and giving rise to adverse selection, as mentioned above.

However it is now widespread belief that arguments based on the asymmetrical information problem and the inability of consumers to assess quality should only lead to a certain kind of regulation, *i.e.* regulation prohibiting manipulative advertising<sup>66</sup>.

The reference usually made to information problems may in fact well support a position that is opposite to the public interest theory. It can be argued that the problems in evaluating service quality arise specifically because there is a lack of information available to clients and that information enhancing instruments such as advertising would help alleviate these problems. As a result, competition authorities challenge advertising restrictions for legal services, arguing that they may reduce competition by increasing the costs of gaining information about different products, making it more difficult for consumers to search for the quality and price that best meets their needs. Although it is recognised that due to information asymmetries consumers may find it difficult to assess information about professional services, it is believed that consumers can be protected through particular regulation prohibiting misleading or untruthful claims by professionals, since advertising restrictions

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internet. Preconditions are that the service is not offered for free and that the lawyer that will treat the case is clearly identified. Additionally it is allowed to continue the name of a dead partner if he (or his heirs) expressly agreed to it. Still forbidden are: all information regarding third parties, the name of clients (even if they have given their permission), specialisation (except those allowed by law), prices of each service (it is forbidden to indicate that the first meeting is free), the percentage of cases won, the turnover of the cabinet, the offer of services.

<sup>66</sup> M. FAURE, "Regulation of Attorneys in Belgium", in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p.107.

do not operate in favour of consumers' benefit<sup>67</sup>. For these reasons advertising of the types, characteristics and prices of services offered by professionals should be admitted, in order to help customers to lower search costs in gathering the necessary information for a correct choice of the professional<sup>68</sup>.

The foregoing view is mainly based on economic analysis of restrictions on advertising by professionals that has been carried out from an "economics of information" perspective based on insights of Stigler's analysis<sup>69</sup>. Stigler's model assumes that consumers operate in a market for homogeneous commodity and face a distribution of seller-quoted prices for that commodity. The consumer, under these circumstances, wants to find the lowest possible price but it involves some costs as well as benefits. The rational consumer will continue his search process as long as the marginal benefits exceed marginal cost. The optimal search strategy of consumers is affected by the extent of advertising, because it is seen as being equivalent to a large amount of search by a large number of consumers. By reducing search costs, therefore, advertising should stimulate more price comparison shopping and lead more consumers to obtain the good at lower price<sup>70</sup>.

Underlying this view of "advertising-as-information" is the idea that competition requires informed consumers, as well as producers, who are informed about the behaviour of other producers, and advertising is seen as a source of such information. Advertising is deemed to facilitate competition by informing consumers about different products and allowing them to make better informed purchasing decisions. More specifically, it has been noted that advertising can be informative in three respects: it can inform consumers about the existence of suppliers; it can provide information on the characteristics of different products in a market with differentiated products and it can help

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<sup>67</sup> EUROPEAN COMMISSION, *Report on Competition in Professional Services*, 9 February 2004, available at [www.europa.eu.int](http://www.europa.eu.int), p.19.

<sup>68</sup> AGCM, "Parere su Disegno di Legge recante "Delega al Governo per il Riordino delle Professioni Intellettuali", *Bollettino*, n. 4, 1999.

<sup>69</sup> G. STIGLER, "The Economics of information", *Journal of Political Economy*, 1961, vol. 69, pp.213-225.

<sup>70</sup> F. H. STEPHEN, "Advertising, Consumer Search Costs and Prices in a Professional Service Market", *Applied Economics*, 1994, vol. 26, p.1177.

consumers in judging the quality of the product on offer from different suppliers<sup>71</sup>.

This perspective can then be transposed into the market for legal services. It is argued that in a market where there is too little information for consumers on the quality of the services offered the first way to reduce the high information costs customers have to bear is to allow professionals to give potential clients information on the quality of the services they offer and the prices charged. According to this view, advertising restrictions may reduce competition by increasing the costs of gaining information about different products, making it more difficult for consumers to search for the quality and price that best meet their needs.

Economic literature and empirical research on professional advertising have mainly concentrated on two aspects of this issue, that relate to the effects of advertising on the degree of quality of the services provided and on the level of fees charged by professionals and their ability to price discriminate, as it will be explained below.

### ***3.2.1 Advertising, fees levels and price discrimination***

Within the analysis of the relationship between advertising and prices charged by existing competitors in the market, an important mechanism is the connection between advertising and sellers' individual price elasticity<sup>72</sup>. It is sustained that in markets for relatively homogeneous products advertising will stimulate consumers' search activity for low-prices, which will cause the demand curve facing each firm to become more price elastic. It means that more price comparison by consumers will lead to greater reductions in sales for any seller who raises prices, and this will lead to lower prices in the presence of advertising<sup>73</sup>. In markets for relatively non-homogeneous goods, advertising will help consumers gathering information for quality comparisons. It will do

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<sup>71</sup> L. G. TELSER, "Advertising and Competition", *Journal of Political Economy*, 1964, vol. 72, pp.537-562.

<sup>72</sup> W. COMANOR, T. WILSON, "The Effect of Advertising on Competition: A Survey", *Journal of Economic Literature*, 1979, vol. 17, pp.453-476.

<sup>73</sup> G. STIGLER, "The Economics of information", *Journal of Political Economy*, 1961, vol. 69, pp.213-225.

so by increasing consumers' familiarity with a wider variety of market options, again causing increases in own-price elasticity of the demand curve. In the case of search goods this will be accomplished by directly informing consumers of the availability and qualities of alternative seller's products, and in the case of experience goods advertising will indirectly increase consumer information by encouraging experimentation with more market brands<sup>74</sup>.

A problem arises in ascertaining whether this view can apply to legal services, and, more specifically, whether such services can be looked at as being homogeneous goods. It is actually true that some routine services, the quality of which varies little, if at all, from one lawyer to another, so that quality is not a significant variable from either the lawyer's or client's perspective, can be regarded as being sufficiently standardised. In this case, the above mentioned considerations (and Stigler-based approach of informative advertising, that assumes that goods are homogeneous) may apply. Consumers will search and compare on the basis of the advertised prices, lawyers' demand will be more elastic and fees charged lower<sup>75</sup>. However, no legal service is ever fully routine and fully standardised. If we consider legal services as non-homogeneous products, the full application of the view envisaging a relationship between advertising and increased price elasticity will be harder. It can, in fact, hold for search and experience goods, whose quality can be ascertained prior or after purchase, but not for credence goods, whose quality may not be judged even after purchase. Thus seller advertising of credence goods may be more misleading than informative<sup>76</sup>.

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<sup>74</sup> P. NELSON, "Advertising as Information", *Journal of Political Economy*, 1974, vol. 82, pp.729-754.

<sup>75</sup> J. R. SCHROETER, S. L. SMITH, S. R. COX, "Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation", *Journal of Industrial Economics*, 1987, vol. 36, pp.49-60.

<sup>76</sup> S. COX, "Advertising Restrictions among Professionals: *Bates v. State Bar of Arizona*", in Kwoka J. and White L. (eds.), *The Antitrust Revolution: The Role of Economics*, Glenview, ILL, Scott Foresman, 1989, p.135.

There are many empirical studies analysing the relationship between professional advertising and fees<sup>77</sup>. Some of them compare the fees of a professional service across States with varying levels of restrictions on advertising, the result being that the severity of the restrictions affect fees: in the States prohibiting or restricting advertising higher fees are charged than in those permitting advertising<sup>78</sup>. Other studies compare the fees charged by advertisers with those of non-advertisers, the general outcome being that advertisers have lower fees, which is in line with the informative approach to advertising<sup>79</sup>.

However, the relationship between advertising and fees level can be looked at also from another point of view. Particularly, besides theories envisaging advertising as information there are also theories considering it as *persuasion*. According to this view, advertising is a way for a firm to erect an artificial distinction between its product and those of its rivals. The consequence of product differentiation arising from advertising is some monopoly power for the concerned firm, that will be therefore able to raise prices above cost, causing a dead weight loss on the economy<sup>80</sup>.

This theory can apply not only to competition between existing rivals, but also to new entrants to the market, where the product differentiation effect of advertising can be detrimental to competition. Harvard scholars, in the tradition of Bain's view of product differentiation as entry barrier, consider advertising as a strategic advantage for existing firms, that can thus deter newcomers entering the market. Advertising is a means for establishing consumers' brand loyalty, discouraging their search and experience. It will raise new entrants' costs and operate as a barrier to entry. New comers may, in fact,

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<sup>77</sup> For a review of this literature: J. H. LOVE, F. H. STEPHEN, "Advertising, Price and Quality in Self-Regulating Professions", *International Journal of the Economics of Business*, 1996, vol. 3, pp.227-247.

<sup>78</sup> L. BENHAM, "The Effect of Advertising on the Price of Eyeglasses", *Journal of Law and Economics*, 1972, vol. 15, pp.337-352; J. CADY, "An Estimate of the Price Effects of Restrictions on Drug Price Advertising", *Economic Inquiry*, 1976, vol. 14, pp.493-510.

<sup>79</sup> S. COX, A. DE SERPA, W. CANBY, "Consumer Information and the Pricing of Legal Services", *Journal of Industrial Economics*, 1982, vol. 30, pp.305-318.

<sup>80</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p.537.

be forced to charge lower prices than the incumbent in order to attract consumers, and may have to spend more on promotion to change the consumers' brand loyalty. Existing firms thus enjoy a first mover advantage enabling them to charge high prices<sup>81</sup>.

Under this view, the ban or restrictions on advertising by lawyers could be interpreted as a means of protecting new lawyers entering the market, enabling them to compete without incurring in the disadvantage that advertising by well-established lawyers could cause on them, raising the costs they have to bear to enter the market. Incumbent lawyers could well rely on the reputation they've already acquired in operating in the market, for example through "traditional" means such as referral from previously satisfied customers or other lawyers. The advertising-as-persuasion approach, however, has not been very much used in the analysis of professional advertising, that has mostly concentrated on the informative perspective.

Actually, insights from the view considering advertising as information have also been used to explain the opportunities for price discrimination in the market for legal services. Generally speaking price discrimination, that is the provision of similar services at prices which are in different ratios to their marginal cost, can work successfully where three conditions are met. First of all, there must be some element of market power on the supplier part, so that the seller faces a downward sloping demand curve, allowing him to set prices above marginal cost. Secondly, the supplier must be able to identify different groups of consumers and to separate them, segmenting the market into groups. Finally, it must be possible to prevent arbitrage, *i.e.* resale of the good from one group to the other<sup>82</sup>.

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<sup>81</sup> R. VAN DEN BERGH, P. CAMESASCA, *European Competition Law and Economics. A Comparative Perspective*, Intersentia, 2001, p.121.

<sup>82</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p.106.

The market for legal services can be said to satisfy the above mentioned conditions<sup>83</sup>. Market power stems from the entry rules and restrictive practice rules, such as the ones concerning scale fees and advertising, that prevent price competition between lawyers. Moreover, professionals are able to identify and distinguish between groups of clients having different willingness to pay, on the basis of the information they get directly from clients, the different kind of service they are required to perform and the high search costs for clients due to information asymmetries. Finally, arbitrage can be obviously prevented due to the nature and characteristics of the legal services that impede resale between different consumers groups, also because of the high degree of expertise and technical knowledge that is required for the performance of such tasks, and that cannot be easily acquired by a non-professional<sup>84</sup>.

As it was already pointed out, the acceptance of the informational role of advertising, equating it to a very large amount of search by a large number of potential consumers, leads to the already mentioned conclusion that the greater incidence of advertising in a market, the lower will be the level of professional fees. On the basis of these insights, it has been argued that market-wide advertising of prices may also adversely affect the ability of professionals to price discriminate. The existence of information costs on consumers helps professionals to price discriminate. The introduction of informative advertising will reduce search costs, thus increasing consumers' price comparison and demand price-elasticity. The reduction of acquiring relevant information will especially increase the elasticity of demand of high-income clients by more than that of their low-income counterparts, so that advertising will actually determine a reduction in price discrimination<sup>85</sup>. On the basis of the foregoing considerations, there are several studies showing that

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<sup>83</sup> F. H. STEPHEN, J. H. LOVE, D. GILLANDERS, A. PATERSON, "Testing for Price Discrimination in the Market for Conveyancing Services", *International Review of Law and Economics*, 1992, vol. 12, p.398.

<sup>84</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p.107.

<sup>85</sup> J. H. LOVE, F. H. STEPHEN, "Advertising, Price and Quality in Self-Regulating Professions", *International Journal of the Economics of Business*, 1996, vol. 3, p.231.

deregulation of the legal profession, with specific reference to relaxing of the advertising restrictions, reduces the extent to which price discrimination is possible, and that therefore such liberalisation is welfare-enhancing<sup>86</sup>.

However, it can be pointed out that all of the analyses on the effects of informative advertising on price discrimination in the legal market are restricted to price advertising. Non-price advertising is deemed to be particularly relevant in the case of legal services, where price may not be the principal determining factor on consumers' choice. Under the informative approach also non-price advertising may reduce search costs in identifying potential suppliers or providing consumers with information that are relevant for the choice of the supplier. As a result, the perspective that reduced search costs restrict the ability to price discriminate could apply also for non-price advertising. On the contrary, the view of advertising as persuasion, could lead to the opposite conclusion. If non-price advertising is a means to product differentiate, it could increase the opportunity for price discrimination, having asymmetric effects on the elasticity of demand in different market segments<sup>87</sup>. As a conclusion, the effects of the introduction of non-price advertising on the ability of professionals to price discriminate are not as clear as in the case for price advertising.

### ***3.2.2 Advertising and service quality***

The second aspect of advertising that needs to be explored relates to its effects on service quality. In investigating the relationship between advertising and quality of products, the Chicago economist Phillip Nelson argued that

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<sup>86</sup> S. DOMBERGER, A. SHERR, "The impact of competition on pricing and quality of legal services," *International Review of Law and Economics*, 1989, vol. 9, pp.41-56; F. H. STEPHEN, J. H. LOVE, D. GILLANDERS, A. PATERSON, "A Critical Assumption in Testing for Price Discrimination in the Market for Conveyancing Services", *International Review of Law and Economics*, 1993, vol. 13, pp.109-111; S. DOMBERGER, A. SHERR, "Price Discrimination in Conveyancing: A Reply to Our Critics", *International Review of Law and Economics*, 1993, vol. 13, pp.103-107; F. H. STEPHEN, J. H. LOVE, D. GILLANDERS, A. PATERSON, "Testing for Price Discrimination in the Market for Conveyancing Services", *International Review of Law and Economics*, 1992, vol. 12, pp.397-404; F. H. STEPHEN, J. H. LOVE, D. GILLANDERS, A. PATERSON, "Deregulation and Price Discrimination in the Conveyancing Market", *Managerial and Decision Economics*, 1993, vol. 14, pp.365-375.

<sup>87</sup> J. H. LOVE, F. H. STEPHEN, "Advertising, Price and Quality in Self-Regulating Professions", *International Journal of the Economics of Business*, 1996, vol.3, p.232.

advertising is a signalling device of the high quality of the product<sup>88</sup>. In his work on advertising as a source of information, he shows that advertising is especially used as far as experience goods are concerned. The producer of experience goods knows whether they are high or low quality goods; however consumers do not have this information and can only acquire it after purchasing the product. Suppliers' goal is gaining repeated purchases by consumers and this is going to happen only if the product is high quality. For this reason it is likely that only high quality producers are going to spend in advertising, because they know that those expenditures will be covered by the revenue generated by repeated purchases of the good. Consumers will recognise this logic, thus purchasing the product that is advertised as it is a signal of its high quality.

However it has been noted that these arguments hold only on the assumption that high quality and low quality firms bear the same costs in producing the good. Low quality firms, bearing very low production costs, can advertise and sell their products and still earn profits. Such firms are not interested in repeated purchases, but only into attracting new customers. Thus it is likely that also advertising of bad quality products happens, since the profit arising from every first-time purchase (*opportunism premium*) can well be higher than the expenditure in advertising, due to the low production cost<sup>89</sup>. As a result, where costs vary between suppliers of different quality and where the cost to consumers of judging quality is high even after purchase, there may be a negative relation between advertising and quality.

The latter view well fits the case of legal services. Low quality lawyers are likely to bear lower costs than those providing good services. Moreover, legal services are credence goods, so that their quality can be assessed by the client either at a very a high cost (the judgment of another professional will be necessary, due to the high degree of technical knowledge such activity involves), or cannot be assessed at all even after purchase. This can give rise to opportunistic behaviour by the lawyer, also considering that (non-business)

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<sup>88</sup> P. NELSON, "Advertising as Information", *Journal of Political Economy*, 1974, vol. 82, pp.729-754.

<sup>89</sup> R. SCHMALANSEE, "A model of Advertising and Product Quality", *Journal of Political Economy*, 1978, vol. 86, pp.485-503.

consumers are generally deemed as not repeat purchasers of legal services, so that the mechanism of reputation of being high quality is not likely to work in such a market. Moreover, opportunistic behaviour will be even more rewarding when the market resembles the Akerlof's market for lemons. Due to information asymmetries, adverse selection will happen, so that incompetent lawyers will not be automatically driven out of the market because clients are not able to punish low quality performance<sup>90</sup>.

A related problem arising in markets having the above mentioned characteristics is false and misleading advertising. In a market where "lemons" can be offered and where quality cannot be ascertained by consumers at all, or only at very high cost, fraudulent advertising may be envisaged. In this case, the introduction of appropriate legal rules banning misleading advertising is appropriate.

Generally speaking, in cases where there is a danger of opportunism it is efficient protecting consumers' confidence when some conditions hold. Information asymmetries must exist, so that the advertiser (lawyer) is the cheapest information producer; information provided through advertising must be productive, i.e. it improves the welfare of society; information costs are reduced and a confidence premium is paid (in the case of lawyers the confidence premium maybe granted through regulation of fees)<sup>91</sup>. These conditions hold here.

It is important pointing out that this analysis also implies that regulation imposing advertising restrictions does not actually achieve the result of efficiently deterring opportunistic behaviour and granting service quality. Advertising, in fact, reduces search costs of consumers, so that regulation prohibiting misleading advertising will be more efficient than a ban on it.

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<sup>90</sup> R. VAN DEN BERGH, "The European Internal Market in progress", in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p.37.

<sup>91</sup> R. VAN DEN BERGH, P. CAMESASCA, *European Competition Law and Economics. A Comparative Perspective*, Intersentia, 2001, p.123; R. VAN DEN BERGH, "The European Internal Market in progress", in Faure M., Fisinger J., Siegers J. and Van Den Bergh R. (eds.), *Regulation of Professions*, Antwerpen, Maklu, 1993, p.37

### 3.3 Restrictions on organisational form and multi-disciplinary partnerships

The legal profession is also subject to regulations on business structure. There are rules restricting the organisational forms which can be adopted by providers of legal services. For instance, for many years in most countries they could only operate as sole practitioners or in partnerships with other lawyers and could not incorporate, as limited liability arising from being a corporate entity is deemed to be in contrast with personal and unlimited liability typical for the professions.

A more particular restriction on organisational form refers to the ability to engage in multi-disciplinary practices. Such restrictions may refer either to ownership structure of professional services company, the scope of collaboration with other professionals, or the opening of branches or conclusion of alliances. The second mentioned issue will be discussed here, that concerns the possibility of integrated co-operation between lawyers and professionals of other disciplines (non-lawyers, that in most cases are accountants).<sup>92</sup>

It can be pointed out that the need for forms of cooperation between professionals, and, more specifically, for multi-disciplinary practice, arises as a consequence of the increasing demand for highly specialized service providers.<sup>93</sup>

Due to technological developments in both industry and professional services, professionals face increasingly complex issues, that require higher and deeper knowledge and expertise, so that cooperation becomes a necessary tool to cope with such issues.<sup>94</sup>

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<sup>92</sup> R. G. LEE, "From Profession to Business: the Rise and Rise of the City Law Firm", *Journal of Law and Society*, 1992, p.39.

<sup>93</sup> M. GALANTER, T. M. PALAY, "Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms", *Virginia Law Review*, 1990, vol. 76, pp.747 ff. .

<sup>94</sup> A. PAPA MALATESTA, *Le Società per l'Esercizio delle Professioni Intellettuali*, at <http://archivioceradi.luiss.it/impresa/mercato/index.htm>, p.9.

Globalisation is another factor that has influenced the demand for integrated service firms. Multinational businesses want international, multidisciplinary, integrated firms to handle complex cross-border transactions.<sup>95</sup>

On the other hand, it has been concluded that clients consider there are few problems that are strictly “legal” in nature, and it is rarely sufficient to rely on lawyers alone to arrive at appropriate solutions. They are found as to want one comprehensive solution to their problems and not to retain multiple, separate service providers, pay the start-up costs of educating multiple providers, and receive advice that may be contradictory or impossible to implement.<sup>96</sup>

The demand for highly skilled professionals is increasing, and the cost of obtaining, training, and retaining such individuals is also increasing. Cost-conscious clients, desiring to eliminate transaction costs associated with employing multiple professional organisations to solve overlapping business problems, are turning to multi-disciplinary partnerships (MDP’s) in order to obtain the optimal delivery of various services.<sup>97</sup>

However, the regulation of co-operation between lawyers and non-lawyers requires a delicate balancing of interests. More specifically, the above mentioned advantages arising from multi-disciplinary practice must be weighted against some important principles governing the legal profession.<sup>98</sup>

The duty to maintain independence, to avoid conflicts of interests (*i.e.* duty of loyalty towards the client) and to respect client confidentiality particularly are deemed to be endangered when lawyers exercise their profession in an organisation which allows non-lawyers a relevant degree of control over the affairs of the organisation. Regulations restricting or

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<sup>95</sup>OECD, “Competition in Professional Services”, *Journal of Competition Law and Policy*, 2002, vol.3, p.

<sup>96</sup> Consumer Alliance Comments, at [www.abanet.org/cpr/consumer.html](http://www.abanet.org/cpr/consumer.html) .

<sup>97</sup> LAW SOCIETY OF SCOTLAND, Multi-disciplinary Practices Working Party, *Report on Multi-Disciplinary Practices in Scotland*, 2000, at [www.hg.org/multi.html#articles](http://www.hg.org/multi.html#articles) .

<sup>98</sup> R. G. LEE, “From Profession to Business: the Rise and Rise of the City Law Firm”, *Journal of Law and Society*, 1992, p.40.

prohibiting multi-disciplinary practices are grounded on the foregoing arguments.<sup>99</sup>

As to the principle of independence, it can be stated that the ability to exercise independent professional judgment depends, first, on the capacity to examine and evaluate the situation objectively, without having the perception of the issue impaired by competing forces. When advising a client, a lawyer must ignore any commercial or other pressures, he must not be compromised in giving advice by his own economic interests, nor those of the business entity within which he practises.

In the case of multi-disciplinary practices different pressures may be brought to bear, and this can lead to an erosion of the principle of independence of legal advice and representation, since lawyer's professional objectivity may be affected by the lawyer's pecuniary interest in the enterprise.<sup>100</sup>

The second concern relates to conflicts of interest. It can take several forms: conflicts between the interests of the lawyer and those of the client; conflicts created by a lawyer's personal interest in the client's business or affairs; and conflicts of interest between different clients represented by the lawyer.<sup>101</sup>

A conflict can arise out of the lawyer's pecuniary interest in the MDP and out of the nature of the parties represented and it can lead to hidden fees and inappropriate referrals. For instance, a lawyer economically tied to a MDP would be disposed to recommend to clients to engage the non-lawyer professionals of the enterprise for needless work or for work that would be better done by another, competing enterprise. Moreover, also tying arrangements, binding clients to purchase both the legal and non-legal services from the same group of professionals, could be envisaged.<sup>102</sup>

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<sup>99</sup> CCBE, *Position on Integrated Forms of Co-operation Between Lawyers and Persons Outside the Legal Profession*, 1999, at [www.ccbe.org/doc/En/mdpuk.pdf](http://www.ccbe.org/doc/En/mdpuk.pdf).

<sup>100</sup> M. BUCKLEY, *Multi-Disciplinary Practices: Towards a Policy Framework*, Discussion Paper Prepared For The Special Committee On The International Practice Of Law, Canadian Bar Association, 1998, p.13.

<sup>101</sup> CCBE, *Position on Integrated Forms of Co-operation Between Lawyers and Persons Outside the Legal Profession*, 1999, at [www.ccbe.org/doc/En/mdpuk.pdf](http://www.ccbe.org/doc/En/mdpuk.pdf).

<sup>102</sup> M. BUCKLEY, *Multi-Disciplinary Practices: Towards a Policy Framework*, Discussion Paper Prepared For The Special Committee On The International Practice Of Law, Canadian Bar Association, 1998, p.18.

Referring to confidentiality, the lawyer's absolute duty to keep confidential any client information obtained in the course of the professional relationship, unless authorized by the client or required by law to disclose it, is one of the necessary foundations of the legal profession. The main concern is that, due to the differences in ethical rules governing the legal and non-legal professions, so that there is not uniformity among different professions about the circumstances under which client information may, must, or must not be disclosed to a third party, such a duty would in practice be impaired.<sup>103</sup>

Besides the foregoing arguments supporting restrictions on the choice of organisational form for the provision of legal services, there are other economic factors that must be taken into account and that lead to the opposite conclusion. Competition authorities focus their attention on the arguments that are now going to be analysed in claiming that these rules negatively affect competition and should thus be relaxed.

First of all, one of the main the economic rationales supporting multi-disciplinary partnership is envisaged in the economies of scope that can be captured through that organisational structure.<sup>104</sup> Economies of scope are present whenever it is less costly to produce a set of goods in one firm than it is to produce that set in different firms. Sources of economies of scope can be found in cost complementarities, occurring when producing more of one good lowers the cost of producing the second good, and in the circumstance in which particular outputs share common inputs.<sup>105</sup>

Referring these general insights to the particular case of legal services, it can be argued that clients benefit from economies of scope arising where a professional firm includes lawyers and specialists from other disciplines, so that a broad range of services can be provided, and clients can thus be better off due to so called "one-stop shopping".<sup>106</sup>

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<sup>103</sup> M. BUCKLEY, *Multi-Disciplinary Practices: Towards a Policy Framework*, Discussion Paper Prepared For The Special Committee On The International Practice Of Law, Canadian Bar Association, 1998, p.21.

<sup>104</sup> F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal Profession*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, 1999, vol. III, p.1005.

<sup>105</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p.83.

<sup>106</sup> OFT, *Competition in Professions*, Report by the Director General of Fair Trading, London, March 2001.

Generally speaking, economies of scope may exist when a legal problem has dimensions involving a range of specialties. The more complex the issue, the more beneficial for customers will be the availability of specialists. Specialisation gives rise to gains, both for clients and professionals, when a number of lawyers associate not only between themselves, but also with some other professionals specialised in similar subjects, that could be necessary in order to properly deal with the clients' needs.<sup>107</sup>

“One-stop shopping” following multi-disciplinary practices is seen to bring the benefits of ease of use by consumers, increasing efficiency, greater income and economies of scale.<sup>108</sup> In fact, a restriction on business structure leads firms to substitute alternative and more costly forms of competition, forcing customers to go to several different professionals to obtain a package of services rather than to a one-stop shop. This is equivalent to an increase in the marginal cost of providing the professional service (that is a leftward shift in the supply curve).<sup>109</sup>

Moreover, economies of scale arise as a consequence of the increase in firms size and of the greater the output of the (multiproduct) firm. The main source of scale economies in the case of the provision of legal services can in fact be envisaged in that the greater size permits a greater division of labour, thus favouring specialisation.

The provision of legal services through a group of professionals allows lawyers to focus on specific branches of law, therefore determining productivity gains and lowering the costs of providing services.<sup>110</sup> Lawyers and accountants should be able to achieve economies of scale since the common structure would comprise a greater number of service providers. These economies of scale could have positive effects for consumers in terms of price.

Another advantage arising from the possibility to provide services through a group of professionals specialised in different subject matters can be

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<sup>107</sup> F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal Profession*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, 1999, vol. III, p.1004.

<sup>108</sup> LECG Ltd., *Restrictions on Competition in the Provision of Professional Services*, Report for the Office of Fair Trading, London, December 2000.

<sup>109</sup> LECG Ltd., *Restrictions on Competition in the Provision of Professional Services*, Report for the Office of Fair Trading, London, December 2000, § 75.

<sup>110</sup> L. PEPALL, D. RICHARDS, G. NORMAN, *Industrial Organisation: Contemporary Theory and Practice*, 2002, Cincinnati, South-Western College Publishing, p.70.

envisaged in risk spreading. Different specialties may, in fact, face different business cycles and thus fluctuations in specialist income may be spread across the group.<sup>111</sup>

Arguments in favour of multi-disciplinary practices can also be put forth on grounds of transaction costs. It was already pointed out that liberal professions are characterised for implying very high transaction costs for consumers due to information asymmetries, clients' bounded rationality and possibility of opportunistic behaviour by the professionals that increase such costs significantly. The opportunity to deal with a single entity providing a range of services will determine savings on transactions costs (such as search costs, negotiating costs and costs of implementing and enforcing the resulting agreement) for clients, benefiting from the one-stop shop.

Also agency costs arising from information asymmetry play an important role in this analysis. It was already underlined that the case of legal services can be looked at as a case of supplier-induced demand, due to the function that the professional performs. He performs the agency function, consisting in the *diagnosis* of the problem and recommendation of the suitable remedy and it is assumed that the same lawyer will also perform the service function, implementing the strategy he has advised, thus giving rise to the moral hazard problem. It is in fact very likely that the lawyer performing the agency function is not the one that can also perform the service function in the best way and at least cost.

Generally speaking, these agency costs can be reduced when legal services are provided through an organised structure encompassing lawyers specialised in different branches. In this way it will be more likely that the service function will be carried out by the least cost professional, that could be one of the specialists within the firm. The professional working in a large firm would, in fact, receive only a small share of the profits arising from demand he induces from the client, therefore having less incentive in inducing unnecessary demand than a sole practitioner.<sup>112</sup>

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<sup>111</sup> F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal Profession*, in Bouckaert B. and De Geest G. (eds.), *Encyclopedia of Law and Economics*, 1999, vol. III, p.1005.

<sup>112</sup> F. STEPHEN, J. LOVE, "Regulation of the Legal Profession", in *Encyclopaedia of Law and Economics*, in B. Bouckaert and G. De Geest (eds) *Encyclopedia of Law and Economics*, Volume III, 1999, p.1004.

This view can also be extended to multi-disciplinary practices, but in this specific case there might be some complicating factors. It will be very likely that the lawyer performing the agency function will advise a professional within the same structure, that might not be the best and least cost in performing that problem.

This may happen because the income of the lawyer indicating the professional performing the service function is a share of the income of the whole structure, so that he may act on conflict of interest. Another reason may be that, recommending the client to another firm for the performance of the service may mean that the client's future business will also be lost.<sup>113</sup>

The European Commission has underlined the importance of the above mentioned arguments based on efficiency of multidisciplinary practices. Nonetheless, it has not failed to recognise the relevance of some complicating factors, so that business structure regulations appear to be more justifiable in markets such as the legal market, in which the need to protect practitioners' independence or personal liability is stronger. However, the Commission has underlined that there might 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. Rules deemed to be proportional are not specified by the Commission though.

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<sup>113</sup> F. STEPHEN, J. LOVE, "Regulation of the Legal Profession", in *Encyclopaedia of Law and Economics*, in B. Bouckaert and G. De Geest (eds) *Encyclopedia of Law and Economics*, Volume III, 1999, p.1005.

## II. APPLICATION OF EUROPEAN COMPETITION LAW

### 1. ART. 81 OF THE EC TREATY

As it was pointed out, most of the behavioural regulation governing the legal profession is deemed to have restrictive effects on competition. The application of the competition rules to the liberal professions is a widely debated issue.

On the one hand, professional associations that in most cases adopt such restrictive regulations, generally take the view that professions should not be fully subject to the constraints of national and Community competition law, due to their special characteristics that justify some degree of regulation. On the other hand, competition authorities are strongly challenging such restrictive regulations, that are considered as not protecting the public interest and as detrimental for consumers, since at least they do not appear respective of the proportionality principle.

In general terms, as far as application of competition law to liberal professions is concerned, a distinction is made between measures adopted by professional associations (self-regulation) and legislative or regulatory instruments adopted by public authorities.<sup>114</sup> Under Community competition law, in fact, the first case will envisage liability of the members of the profession and their associations under art.81, and the latter the liability of Member States under art.3(1)(g), 10 (which requires Member States to “abstain from any measure which could jeopardise the attainment of the objectives of the Treaty”) and 81.

On the basis of the latter provisions rules adopted by public authorities that restrict competition in a professional service can be challenged (so called “State action” case law). According to this line, Member States are required “not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules

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<sup>114</sup> R. BARATTA, “In Tema di Tariffe Professionali e Diritto Comunitario”, *Giustizia Civile*, 2002, vol. III, p.538.

applicable to undertakings”.<sup>115</sup> According to the judgments of the ECJ, articles 10 and 81 of the Treaty “are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [81] or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere”<sup>116</sup>.

For instance, in *CNSD*, the Court stated that Italy failed to fulfil its obligations under Articles 10 and 81 of the Treaty by adopting and maintaining in force a law which, in granting the relative decision-making power, required the CNSD to adopt a decision by an association of undertakings contrary to Article 81 of the EC Treaty, consisting of setting a compulsory tariff for all customs agents<sup>117</sup>. By contrast, in *Arduino*, as it will be deeply explained in the following pages, the Court held that the Italian State did not infringe art.10 and art.81, adopting a regulation which approved, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession<sup>118</sup>.

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<sup>115</sup> Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* [2003] ECR I-08055; Case C-35/99 *Arduino*, [2002] ECR I -01529, para. 34; Case 267/86 *Van Eycke* [1988] ECR 4769, para. 16; Case C-185/91 *Reiff* [1993] ECR I-5801, para. 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, para. 14; Case C-96/94 *Centro Servizi Speditoporto* [1995] ECR I-2883, para. 20; Case C-35/96, *Commission v. Italy (CNSD)* [1998] ECR I-03851, para. 53.

<sup>116</sup> Case 267/86 *Van Eycke* [1988] ECR 4769, para. 16; Case C-185/91 *Reiff* [1993] ECR I-5801, para. 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, para. 14; Case C-96/94 *Centro Servizi Speditoporto* [1995] ECR I-2883, para. 21; Case C-35/96, *Commission v. Italy (CNSD)* [1998] ECR I-03851, para. 54.

<sup>117</sup> Case C-35/96, *Commission v. Italy (CNSD)* [1998] ECR I-03851, para. 60. As to the second part of the prohibition envisaged by the Court in art.10 and 81, that concerns the delegation of regulatory powers by the State, it was noted with reference to the qualification of association of undertakings, that, in order to envisage such delegation, it is required that anticompetitive rules are adopted by a body whose majority of members are representative of the public authorities and that such rules are not issued on the basis of well pre-defined public interest criteria. Case C-309/99, *Wouters* [2002] ECR I-1577, para. 68; and EUROPEAN COMMISSION, *Report on Competition in Professional Services*, 9 February 2004, at [www.europa.eu.int](http://www.europa.eu.int), p.19.

<sup>118</sup> Such regulation, in fact, could not be said to have delegated to private economic operators responsibility for taking decisions having the effect of depriving the provisions on tariffs of the character of legislation, as national legislation did not set requirements capable of ensuring that, when producing the draft tariff, the CNF conducted itself like an arm of the State working in the public interest (it did not lay down public interest criteria to follow; the fees draft needed Minister’s approval and could be amended by the Minister). Nor such legislation was deemed to require or encourage the adoption of agreements, decisions or concert. Case C-35/99 *Arduino*, [2002] ECR I -01529, paras. 38-44.

However, it must also be pointed out that in the *CIF*<sup>119</sup> judgment the ECJ decided that where undertakings engage in conduct contrary to Article 81(1) and where that conduct is required or facilitated by State measures, a national competition authority has a duty to disapply those State measures and give effect to Article 81 (and 82) EC. The ECJ stated that although articles 81 EC (and 82 EC) are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles are to be read in conjunction with Article 10 EC, which lays down on Member States a duty to cooperate. Thus Member States are required not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.

The case law of the ECJ demonstrates that the main point to be solved as to the application of competition law to the liberal professions is the qualification of professionals (and their bodies) as undertakings in the meaning of art. 81 of the Treaty. This point has been the object of several judgments, as it will be analysed below.

## 1.1 Professionals as undertakings

In general terms, in order for the prohibition of art.81 to apply, the regulation of the profession must be regarded to as being a restrictive agreement, decision or concerted practice attributable to one or more undertakings or to an association of undertakings.

The first step is thus to ascertain whether professionals can be regarded to as undertakings. It is settled case law that “the concept of undertaking encompasses every entity engaged in an economic activity, regardless the legal status of the entity and the way in which it is financed”<sup>120</sup>, and that “any activity consisting in offering goods and services on a given market is an economic activity”<sup>121</sup>.

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<sup>119</sup> Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* [2003] ECR I-08055.

<sup>120</sup> Case C-41/90, *Höfner and Elser v. Macroton* [1991] ECR I-1979, para. 21.

<sup>121</sup> Case 118/85, *Commission v. Italy* [1987] ECR 2599, para. 7.

As the focus is on the activities or functions of the entity and its legal personality is irrelevant, professions are to be considered as undertakings within the meaning of art.81, since they engage in economic activities.

As far as legal services are concerned, it has been stated that they carry on an economic activity, since they “offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves”.<sup>122</sup>

Furthermore, it has been held that “the fact that the activity [...] is intellectual, requires authorisation and can be pursued in the absence of a combination of material, non-material and human resources, is not such as to exclude it from the scope of Articles 81 and 82 of the EC Treaty”<sup>123</sup> and that the complexity and technical nature of the services professionals provide and the fact that the practice of their profession is regulated cannot alter the conclusion they carry on an economic activity.<sup>124</sup>

However, it must be noted that there are some situations falling outside the scope of the broad definition of undertaking as to application of art.81 (and 82) of the EC Treaty.

In principle, no undertaking can be envisaged, and the rules on competition do not apply, when an organisation, on the basis of regulation imposed by the State, carries out an activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity.<sup>125</sup>

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<sup>122</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, para. 48.

<sup>123</sup> Case C-35/96, *Commission v. Italy* (CNSD) [1998] ECR I-03851, para. 38.

<sup>124</sup> Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para. 77, (with regard to medical practitioners).

<sup>125</sup> Joined Cases C-159/91, C-160/91 *Poucet and Pistre* [1993] ECR I-637, paras. 18 and 19, (compulsory social security system scheme based on principle of solidarity is not an undertaking)

The same is true also when an entity performs tasks of a public nature, *i.e.* tasks that are performed in the public interest and are essential functions of the State so that they amount to exercise of the powers of a public authority.<sup>126</sup>

With specific reference to the legal profession, it has been stated that “when it adopts a regulation ..., a professional body such as the Bar [of the Netherlands] is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (*Poucet and Pistre*), nor exercising powers which are typically those of a public authority (*Sat Fluggesellschaft*). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity”.<sup>127</sup>

The fact that professionals can be regarded to as being “undertakings” for the application of competition law, implies that their professional associations are to be considered as “associations of undertakings” within the meaning of art.81 of the EC Treaty.

However, the regulatory framework in which the professional bodies operate can involve different degrees of public authorities intervention, so that in some cases it becomes difficult to ascertain whether the responsibility for issuing rules restricting competition is to be deemed on the association or on the public authority.

The answer to this problem is crucial for the application of competition law, since it is established that “art.[81] ... relates only to the conduct of undertakings and does not cover measures adopted by Member States by legislation or regulations”.<sup>128</sup>

First of all, as we already mentioned, the legal status of the association is irrelevant as to competition rules; “the public law status of a national body ... does not preclude the application of Article[81] of the Treaty. ... Accordingly, the legal framework ... and the classification given to that framework by the various national legal systems are irrelevant as far as the

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<sup>126</sup> Case C-364/92 *Sat Fluggesellschaft* [1994] ECR I-43, para. 30, (concerning the control and supervision of air space), and Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paras. 22 and 23, (concerning anti-pollution surveillance of the maritime environment).

<sup>127</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, para. 58.

<sup>128</sup> Case C-2/91, *Meng* [1993] ECR I-5751, para. 14.

applicability of the Community rules on competition, and in particular Article [81] of the Treaty, are concerned”.<sup>129</sup>

However, a body regulating professional conduct is not an “association of undertakings” if it is composed of a majority of representatives of public authorities as opposed to representatives of private operators. If, a professional association is composed exclusively of representatives of the profession and is not required by law to take its decisions in compliance with various public-interest criteria, it must be considered to be an association of undertakings.<sup>130</sup>

The situation is more complicated when the power to adopt regulation is delegated to the professional body by the State. In most cases such regulatory powers are granted to professional association in order to ensure the “proper exercise” or the “dignity” of the profession.

In *Wouters*, where the Dutch legislator granted the power to the national Bar Association to adopt regulation in order to ensure “the proper practice of the profession”, the Court held that the professional body may escape the qualification as “association of undertakings” when the “Member State ... is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings”.<sup>131</sup>

Therefore the professional association will not qualify as an association of undertakings when the delegated regulatory authority can be exercised only to implement carefully defined public-interest criteria.<sup>132</sup>

Moreover, art.81 also applies to measures that *formally* appear to have been adopted by the State. For instance in *CNSD*, the professional association

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<sup>129</sup> Case C-35/96, *Commission v. Italy* (CNSD) [1998] ECR I-03851, para. 40, and Case 123/83 *BNIC v. Clair* [1985] ECR 391, para. 17.

<sup>130</sup> Opinion of Advocate General Léger in Case C-309/99, *Wouters* [2002] ECR I-1577, para. 84.

<sup>131</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, para. 68.

<sup>132</sup> According to the Commission Report on Competition in Professional Services, in order to escape the qualification of association of undertakings, a professional body should comply with both conditions of being composed of a majority of representatives of the public authorities and being bound to observe pre-defined public interest criteria. EUROPEAN COMMISSION, *Report on Competition in Professional Services*, 9 February 2004, at [www.europa.eu.int](http://www.europa.eu.int), p.19.

of customs agents was conferred the power under Italian law to issue binding rules on tariffs. The tariffs set by CNSD were subsequently made generally binding by a Decree of the Minister for Finance, although “no provision laid down by law or regulation confer[red] on the Minister for Finance the power to approve the tariff”. The Court held “the national legislation in question wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs”, so that the Ministerial Decree was just “the appearance of a public regulation”.<sup>133</sup>

By contrast, in *Arduino*, where the compulsory fee schedule for lawyers was adopted by the professional association (Consiglio Nazionale Forense), but could not enter into force without approval by Ministerial Decree, the Court held that “the fact that a Member State requires a professional organisation to produce a draft tariff for services does not automatically divest the tariff finally adopted of the character of legislation.”

Nonetheless the Court acknowledged that, although “the Italian State obliges the CNF, composed exclusively of members of the Bar elected by their fellow members, to present every two years a draft tariff for fees ..., [it does] not lay down public-interest criteria, properly so-called, which the CNF must take into account”. As a result, the national legislation was considered as not containing “either procedural arrangements or substantive requirements capable of ensuring, with reasonable probability, that, when producing the draft tariff, the CNF conducts itself like an arm of the State working in the public interest”.<sup>134</sup>

However, applying a formalistic approach, the Court stated that the CNF could not be regarded to as an association of undertakings, thus falling out of the application of competition law, since art.81 is “in itself concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States”.<sup>135</sup>

The same approach and criteria adopted by the ECJ in *Arduino* has been applied also in a more recent Italian case, concerning the State

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<sup>133</sup> Case C-35/96, *Commission v. Italy* (CNSD) [1998] ECR I-03851, paras. 57 and 59.

<sup>134</sup> Case C-35/99 *Arduino*, [2002] ECR I -01529, para. 39.

<sup>135</sup> Case C-35/99 *Arduino*, [2002] ECR I -01529, para. 34.

examination for access to the Italian Bar (*Mauri*), on which the ECJ gave a preliminary ruling in 2005.<sup>136</sup>

In this case the national court had asked, essentially, whether Articles 81 EC and 82 EC preclude a national law rule (more specifically, it was Article 22 of Decree-Law No 1578/33) providing that, in connection with the State examination, the examination committee is to consist of five members appointed by the Minister for Justice, namely two judges, a professor of law and two advocates, the latter being nominated by the CNF on a joint proposal by the bar councils of the district concerned.

The Court, according to settled case-law (expressly dealing with art. 81 and 10 EC) held that, even assuming that advocates may, as members of the State examination committee, be treated as ‘undertakings’ within the meaning of Articles 81 (and 82) EC, it does not appear that, in the circumstances of the specific case, the State has divested its own rules on access to the profession of advocate of the character of legislation by delegating to advocates responsibility for taking decisions concerning access to their profession. It was observed that the State occupied a significant position on the examination committee itself by the presence, out of five members, of two judges who, even if they are not hierarchically subordinate to the Minister for Justice, must none the less be regarded as an emanation of that State; that the Ministry of Justice had substantial powers enabling it to supervise each stage of the examination committee’s proceedings and even to intervene in those proceedings if necessary; thus, that Ministry appoints the members of the examination committee, chooses the examination subjects, may annul the examination in the case of irregularities and may intervene by appointing its own representative to implement the instructions received in order to ensure that the examinations are conducted in a disciplined and orderly fashion; that a negative decision by the examination committee may be subject to proceedings before the administrative court which will re-examine the case.

The supervision carried out by the State at each stage of the examination at issue in the main proceedings led to the conclusion that it had not given up the exercise of its powers in favour of private economic operators. Therefore, the Court has concluded that Articles 81 EC (and 82 EC) do not preclude a rule such as the one examined in the case.

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<sup>136</sup> Case C-250/03 *Mauri* [2005] ECR I-0000.

It is self evident that most of the judgments given by the ECJ on the matter do not actually examine the contents of regulation of professionals, and therefore their effects on competition, since they do not go beyond the “preliminary” matter related to the meaning of undertaking under art. 81. There is only one case in which the ECJ has examined the actual effects on competition of a professional regulation as it will be explained in the following pages.

## 2. THE “WOUTERS EXCEPTION”

When it is ascertained that a given rule has been adopted by an association of undertakings (and it has not been imposed by the State), such a rule will be prohibited under art.81 if it has an object or effect that (appreciably) restricts competition and may affect trade between Member States, unless the conditions for exemption laid down in art.81(3) are met.

However in *Wouters* the ECJ issued a peculiar ruling. It held that a regulation that satisfied all the conditions for the prohibition of art.81(1) to apply, *i.e.* it was adopted by an association of undertakings, its effect appreciably restricted competition and it was capable of affecting trade between Member States, was nevertheless not caught by art.81, without the need to assess whether the conditions for exemption of art.81(3) were met.

This case concerned two Dutch lawyers, Mr. Wouters and Mr. Savelbergh, members of the Amsterdam and Rotterdam Bars respectively, who separately applied to the Bar of the Netherlands (NOVA, *Nederlandse Orde van Advocaten*) for authorisation to enter into partnership with the Dutch practices of Prince Waterhouse and Arthur Andersen. Both application were refused by NOVA, on the basis of the 1993 Regulation on Joint Professional Activity concerning partnerships with other professions.

The above mentioned regulation does not impose an absolute ban on partnerships with non-lawyers. It allows partnerships between lawyers and certain other professionals, such as notaries and patent agents, subject to the overriding principle that a NOVA member must not enter into any arrangement that might jeopardise the independence of the members of the Bar. More specifically, lawyers are prohibited from entering multi-disciplinary

partnerships with accountants, on the ground that this is necessary to protect confidentiality between lawyers and their clients.

The judgment of the ECJ on the “MDP Regulation” contains two parts that is important to notice. Initially the Court found that the Bar of the Netherlands is to be considered as an association of undertakings for the purpose of art.81, since it is “composed exclusively of members of the Bar elected solely by members of the profession. The national authorities may not intervene in the appointment of the members...” and “when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not required to do so by reference to specified public-interest criteria”, it is just required to act “in the interest of the proper practice of the profession”.<sup>137</sup>

Moreover, the Court held that the prohibition of multi-disciplinary partnerships of members of the Bar and accountants, laid down in the 1993 Regulation, was “liable to limit production and technical development within the meaning of Article [81](1)(b) of the Treaty”, therefore having an adverse effect on competition, and that it might affect trade between Member States.<sup>138</sup>

As to the adverse effect on competition, the Court in fact found that legal and accountancy areas of expertise might be complementary. Since legal services, especially in business law, more and more frequently require financial advice, a multi-disciplinary partnership between lawyers and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. The Court recognised that in this way “clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the one-stop shop advantage)”.

Furthermore, the Court also believed that such forms of practice could have beneficial effects on grounds of reduced fees, since “economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services”.<sup>139</sup>

The Court then also considered some possible pro-competitive effects of the ban on multidisciplinary partnerships; it considered that unlimited

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<sup>137</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, paras. 61 and ff. .

<sup>138</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, paras. 86-96.

<sup>139</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, paras. 87-89.

authorisation of multi-disciplinary partnerships between the legal profession, (that has not high concentration levels, due to some of its specific features, such as the prohibition of conflict of interest, that in practice works as a structural limit) and a profession as concentrated as accountancy, “could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market”.<sup>140</sup>

Nonetheless, it was also held that competition in legal services could be granted by less restrictive means. For all these reasons, the Court affirmed that the ban on multidisciplinary partnerships had adverse effects on competition.

However the ECJ, in spite of the aforementioned findings and of the affirmation of anti-competitive effects of the concerned measure, held that “not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [81](1) of the Treaty”.

The Court argued that for the prohibition of art.81 to apply “account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives”.<sup>141</sup>

In this specific case, the ECJ found that the concerned regulation was designed to ensure the *proper practice of the legal profession*, and to that purpose, in particular, it was designed to ensure the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest and the duty to observe professional secrecy.

These obligations are fundamental for the market for legal services and the Court stated that they might be affected by admitting the possibility for the

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<sup>140</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, paras. 92-93.

<sup>141</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, para. 97.

practice of law jointly with other liberal professions, especially with the profession of accountant, that is not subject, in general, and more particularly, also in the Netherlands, to similar requirements of professional conduct.

It agreed that NOVA was entitled to consider that its member might no longer be in a position to represent their clients independently if they belonged to an organisation which was also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon, and for certifying those accounts.<sup>142</sup>

In light of those considerations, the ECJ denied that “the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession”, so that the regulation adopted by NOVA did not “infringe Article [81](1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned”.<sup>143</sup>

The result of this case is a very striking judgment. Above all, it is difficult to refer the reasoning of the Court to the existing competition law categories. This judgment introduces elements other than pure competition concerns that should be taken into account when assessing whether an agreement falls under art.81 prohibition.

It is, in fact, concluded that there might be other legitimate considerations to be respected: if the measures concerned are necessary for a social or public purpose, such as safeguarding the integrity of the legal profession, they might be objectively justified and hence fall outside the scope of application of competition rules despite their restrictive effects.<sup>144</sup>

It is pointed out that this reasoning does not amount to the adoption of a “rule of reason” approach under EC competition law. As it is stated in the opinion of Advocate General Léger, the rule of reason, introduced in the US in order to remedy to the rigidity of the provisions of the Sherman Act that does

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<sup>142</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, paras.100-105.

<sup>143</sup> Case C-309/99, *Wouters* [2002] ECR I-1577, paras. 109-110.

<sup>144</sup> A. J. VOSSESTEIN, Annotation of *Wouters* and *Arduino*, *Common Market Law Review*, 2002, vol. 39, pp.856-859.

not contain a provision similar to art.81(3) of the EC Treaty, is “an analytical method intended to draw up, for every agreement in its own context, the balance-sheet of its anti- and pro-competitive effects”.

The Advocate General recognises that in EC competition law, the Court has made limited use of such an instrument and that anyway it “is strictly confined to a *purely competitive* balance-sheet of the effects of the agreement. Where, taken as a whole, the agreement is capable of encouraging competition on the market, the clauses essential to its performance may escape the prohibition laid down in Article [81](1) of the Treaty. The only legitimate goal which may be pursued in accordance with that provision is therefore exclusively competitive in nature”.<sup>145</sup>

In this case, it is not maintained that the effect of the Regulation is to encourage competition on the market in legal services, and the Court does not does not engage in such balance of pro-competitive and anti-competitive effects. The prohibition of multi-disciplinary partnerships between lawyers and accountants is considered as necessary in order to protect certain aspects of the profession, such as independence and loyalty to the client, which are essential for clients and administration of justice.<sup>146</sup>

This reasoning therefore amounts to introducing into the provisions of Article 81(1) considerations which are linked to the pursuit of a public-interest objective. It seems to resemble the Court findings in another case law, where it was stated that to the extent arrangements pursue social policy objectives, their inherent effects, even if they are restrictive of competition, are not prohibited by competition law.<sup>147</sup>

However, the Advocate General Léger’s states in his opinion that this cannot be considered as a general solution applying to *all* the rules adopted by professional associations for the application of EC competition law, since the heterogeneity and specificity of each professions and of the rules they adopt must be taken into account.

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<sup>145</sup> Opinion of Advocate General Léger in Case C-309/99, *Wouters* [2002] ECR I-1577, paras. 101 ff. .

<sup>146</sup> A. J. VOSSESTEIN, Annotation of Wouters and Arduino, *Common Market Law Review*, 2002, vol. 39, pp.858-859.

<sup>147</sup> Case C-219/97, *Maatschappij Drijvende Bokken*, [1999] ECR I- , paras. 46-47.

More specifically, not all professional regulation that restrict competition can be found not in contrast with art.81(1) on grounds of the foregoing grounds of public interest envisaged in the necessity of assuring the proper practice of the professions, even if this justification is alleged by the professionals issuing those regulations.

This should mean that only in some specific and particular cases professional regulations restricting competition could not be found infringing art.81, that is only in those cases in which a public interest purpose is recognised by the Court as being on the basis of the regulation at stake.

The Advocate General in fact notes that, having regard to the characteristics of the market for legal services, there actually may be cases in which, certain professional rules may be likely to encourage competition, so that their lawfulness can be judged not taking into consideration social policy purposes, but only the effects they have on competition in the market.

For instance, he considers that, as a remedy to information asymmetry, rules restricting advertising may make it possible to avoid a falling-off in the general quality of the services in the long term; also fees schedules could guarantee normal competition in the market for legal services.

As a result, professional rules which are in fact capable of encouraging or guaranteeing normal competition on the market for legal services might fall outside the prohibition laid down in Article 81 by virtue of the usual interpretation of the provision, having regard to their effects on competition, balancing the negative against the positive ones.<sup>148</sup>

Such balancing is usually made under art.81(3) of the Treaty, when granting exemption to an agreement that falls under the prohibition of art.81(1)<sup>149</sup>, and the Advocate General actually reminds that in EC competition law there are no infringements which are inherently incapable of qualifying for an exemption under Article 81(3) of the Treaty.

In fact “the wording of Article 81(3) makes it possible to take account of the particular nature of different branches of the economy, social concerns and, to a certain extent, considerations connected with the pursuit of the public

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<sup>148</sup> Opinion of Advocate General Léger in Case C-309/99, *Wouters* [2002] ECR I-1577, para. 112.

<sup>149</sup> A. JONES, B. SUFRIN, *EC Competition Law: Text, Cases and Materials*, Oxford, 2001, p.

interest”. Professional rules which, in the light of those criteria, produce economic effects which are positive, taken as a whole, should therefore be eligible for exemption under Article 81(3) of the Treaty.<sup>150</sup>

However, in this specific case, it seems that the restrictive rules, prohibiting MDP’s between lawyers and accountants, did not determine in practice significant “efficiency gains”, so that the balancing of anti-competitive effects with the pro-competitive ones could not have taken place in practice. In fact all the arguments of the case are based on considerations of “proper practice” of the profession.

This means that in certain cases Courts can decide not to outlaw some regulation as in contrast with art.81 because they pursue social objectives. And then it will depend on the Courts’ interpretation whether a rule pursue that objective or not. It is not the perception of the regulatory body of what is to be deemed as public interest that makes some rules escaping the prohibition of art.81.

Thus we should try to read the *Wouters* decision not as the affirmation of a sort of “privilege” for the liberal professions in general with respect to the application of competition law, so that their regulations, pursuing the public interest for definition, could not be found in contrast with competition law. It is just that it is recognised that on a case by case basis Courts can decide not to outlaw some provisions, taking into consideration principles that are deemed as important as competition in the market is.

However this seems difficult, because the reasoning of the Court in this judgment is very peculiar, and goes beyond the normal and established interpretation of competition law, introducing an exception that in practice could determine even more difficulties in the liberalisation process of the sector of the liberal profession, that is sustained by the Commission and national competition authorities.

Application of competition law in the sector of the liberal professions could in fact be better made on the basis of normal principles of competition law, balancing the pros and cons of the regulations with the “conventional” instruments, because the introduction of exceptions could result in practice dangerous.

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<sup>150</sup> Opinion of Advocate General Léger in Case C-309/99, *Wouters* [2002] ECR I-1577, para. 113.

This takes us back to the usual problem of identifying the objectives and the aims of competition law (more specifically: consumers' welfare or total, social welfare?) and thus of affirming whether only pure competition concerns must be taken into account or also other interests.

Additional comments on this judgment can be added on the basis of the results of the economic analysis of regulation of legal services. The Court takes into account some of the restrictive effects on competition arising from a ban on multidisciplinary partnership.

It refers to the impossibility for consumers to benefit from the one-stop shopping, that in more economic terms means lower search costs for consumers, and that economies of scope can be captured, as well as to the potential cost savings arising from the economies of scale that structure would produce.

These anti-competitive effects of the ban on multidisciplinary practices are then weighted against one pro-competitive effect of it, that is envisaged in the higher level of concentration (thus enhanced market power) that would arise in the market for legal services in case of abolition of such ban.

However the result of this balance between negative and positive effects of the prohibition leads to the conclusion that the concerned rule restricts competition, so that the anticompetitive effects actually outweigh the pro-competitive ones, also because it is argued that less restrictive means would be available for obtaining the same result.

Nonetheless the judgment does not outlaw this restrictive regulation, that is then justified on grounds of public interest, such as professional ethics; the consequential effects restrictive of competition are considered as inherent in the pursuit of ethical objectives, such as independence, confidentiality and loyalty. It means that the Court believes that in this case the costs on society (which are expressed in terms of public interest protection) that the abolition of such ban would produce outweigh the benefits it could give rise to.

In terms of economic theories, it means that the Court seems to accept here the public interest explanation of regulation. However this judgment of the Court may not be totally in harmony with economic insights arising from the above mentioned theories.

As it was pointed out at the beginning of this paper, regulation for legal services has been justified as a response to market failures, and especially to the information asymmetry that characterises this particular sector. The main

consequence of those information problems is that some kind of service quality regulation is necessary in order to protect consumers that, due to the high level of technical knowledge involved, are not able to evaluate the service they receive.

However the kinds of regulation that seem to be more justifiable on this ground, *i.e.* in helping consumers to judge to a certain extent the quality of the legal services, are some fees setting rules (clients would in fact not be able to evaluate the appropriate tariff for the professional service, since they do not distinguish the high and low quality services, with the consequence of adverse selection) and some advertising restrictions (clients could not be able to distinguish misleading claims). In fact, from this point of view, restrictions on multidisciplinary practice do not appear appropriate to address the problem of information asymmetry.

The Court must have viewed the regulation banning MDP's in its overall context as improving and guaranteeing the quality of legal services when it held that its aim was to ensure that consumers are provided with "the necessary guarantees in relation to integrity and experience".

Moreover, it seems that, when the Court held that the Bar Association "could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned", it refers to one of the alleged advantages produced by self-regulation. It is in fact argued that the specific knowledge of professional bodies, especially concerning the risk of services being of poor quality, would lead to lower costs in regulating. The above mentioned belief expressed by the Court, appears resembling this view.

By contrast, against that advantage, disadvantages also exist. More specifically, the professional body may lack appropriate incentives to control and enforce quality standards, that can just be used as a means to restrict competition intra professionals. It is in fact argued that a regulation adopted by the professional body, even if justified as protecting ethical principles, can represent the ultimate form of regulatory capture, so that it may be the consequence of the ability of a professional body, acting like a cartel, to determine a regulatory framework leading to the main benefit of the producers, rather than of consumers. Where the public interest argument is weak, as it seems to be the case for the MDP's regulation, interest group theories can explain certain rules as a consequence of successful rent-seeking behaviour.

However in this case the Court rejects this latter view, interpreting the rules as protecting the public interest, where the lawyers' respect of the principles of independence, confidentiality and loyalty towards consumers is deemed as more important than respect of competition, even if competition produces beneficial effects on consumers.

It is true that applying the principles of competition to the professions does not imply that consumers will automatically be protected. Indeed, because of the peculiar character of the professions, their self-regulation necessarily plays an important role in consumer protection. But, as competition authorities stress, this role should be thought as to better conform to the competitive model.

The Court should have focused on assuring that consumers of legal services are provided with a wider range of options among which they can choose effectively; it should have given more importance to the economic effects of a ban on MDP's, that are negative both for the consumers and for the quality of legal services in general. Through such a kind of cooperation, in fact, a more sophisticated and specialised service can be offered, and the needs brought about by globalisation and internationalisation would be satisfied.

For this reason it should be recognised that regulation should be not outlawed when it focuses on what the professional does towards the client, rather than on the institutional setting. In the market, it should be up to consumers to choose among several options they are offered. Where necessary, regulation can provide minimum thresholds of quality and requirements of information disclosure to avoid the worst consequences of information asymmetry and to facilitate informed selection by the consumer. In this case it should be admitted under competition law, even if it inevitably restricts competition. On the other hand, when institutional frameworks are regulated, such as in the present case, the priority should be given to the competitive concerns of the measure, having respect to its economic effects.

### **III. CONCLUSIONS**

The legal profession is characterised by high levels of regulation of conduct of lawyers in the market, that mainly consists in fees setting, advertising restrictions and regulation concerning organisational form and that are mainly justified as guaranteeing service quality to consumers as a response to the information asymmetry typical of the market for legal services.

Competition authorities are increasingly challenging the above mentioned regulatory instruments, underlining that they negatively affect competition in the market in terms of allocative, productive and dynamic efficiency. For this reason they sustain the view that liberalisation of this sector is necessary, since the introduction of competition between professionals will enhance consumers welfare.

However, with the help of economic analysis of the concerned regulations, it can be concluded that the aforementioned position of competition authorities supporting the elimination of the behavioural restrictions on lawyers can be regarded to as being too strong.

As far as regulation of fees is concerned, although it is true that fee schedules may have the effect of a price fixing cartel, so that fees may be set above competitive levels, thus negatively affecting consumers, it must be noted that consumers may be more interested in the high level of quality for the service they purchase rather than in its price.

The concern of the too high prices produced by price regulation can indeed be justified for mandatory fee schedules rather than for recommended fees. Many factors complicating collusion do exist in the market for legal services, so that price recommended to professionals may not be have the same (detrimental) effect of a price fixing cartel.

Moreover, the substitution of some price regulation with more information as to guarantee the quality of services provided, does not seem so feasible. Consumers will certainly benefit from having access to data (for instance survey data) regarding professional activities, but they may not be able to properly interpret and compare them, due to the typical information problems that characterise the market. For this reason, information regulation,

guaranteeing access to truthful and reliable information, should be added to some recommendation on prices.

Indeed the complete liberalisation of professional services as to price competition may not produce the wished effects in terms of fees reduction. It may have mixed effects, as it has happened in the Netherlands, where the abolition of fixed fees for notarial services has been followed by an increase in prices, and it has shown that in practice some activities cross-subsidize others and that notaries are able to price discriminate between private and business consumers.

If the effects of deregulation of price setting in legal services are not that clear-cut, more conclusive findings can be reached as far as restriction on advertising are concerned.

Empirical studies show that advertising have positive effects on consumers since it determines low prices charged by lawyers; advertising restrictions are found to increase fees without having necessarily positive effects on quality. In addition, however, it should be pointed out that results of the studies on the effects of advertising on service quality are not very clear.

Nonetheless, we can conclude on this matter that some advertising of legal services can be beneficial, both for consumers and professionals, and it is for this reason that in many countries professional bodies are gradually reducing restrictions on advertising. It should be noted that it is important that regulation punishing untruthful and misleading advertising should be enforced in order to enhance consumers protection.

As to the third regulatory instrument we analysed, that concerns restrictions on the choice of organisational form for the practice of the legal profession and, more specifically, the issue of multidisciplinary practices, the conclusions are still widely debated.

If it is beyond doubt that such practices can determine cost savings in terms of search costs for consumers, and determine a cost-efficient provision of services (since economies of scope and of scale would be produced), their effects on the quality of services provided still create perplexity.

For instance, in the case of a partnership between lawyers and accountants, clients may not be sure that the professional providing the connected service are actually the best, since some conflict of interests may arise. The lawyer hired for some service, may in fact advice the client to hire the accountant-partner for monetary returns, and not because he provides a high quality service.

Besides this, other concerns may arise, such as the proper protection of some fundamental principles of the legal profession, such as independence and confidentiality, mainly due to the different regulation of the different professions.

As it can be noticed, the issue of introduction of competition in the market for legal services is indeed very complicated, and not of clear-cut definition. This is mainly because the widespread deregulation supported by competition authorities does produce mixed effects, and this is actually due to the trade-off that takes place between price and quality of the legal services.

It was shown that, if the elimination of restrictive regulation could determine positive effects on prices, it is not sure that quality of services provided can be properly guaranteed. For this reason, in order to see whether regulation or deregulation is more beneficial, these contrasting effects must be balanced: it will depend on whether consumers are concerned more with prices or with quality of services provided.

In addition, the outcome of this balance can also vary on the basis of the different types of clients. Private clients certainly need different levels of protection from business clients. The latter will actually gain more from intra-professional competition, as they need less protection in terms of quality guarantee, since they repeat purchasers of the services, and in this case reputation can work as a mechanisms for maintaining high quality standards. But this is not the case for private purchasers of services.

Moreover, also application of competition law to the professions does not seem very easy in practice. This is mainly due to the wide range of interests that are involved in the market for legal services, that are not only economic, so that the analysis of the market does not only involve considerations purely based on competitive factors. The public interest is deeply affected in this

market, so that any analysis concerning the legal profession on grounds of competition law must necessarily take it into account and balance the economic effects of some competitive restraints against the public interest objective they are aimed to.

Since the outcome of this balance seems to be complicated to estimate, some solutions other than complete liberalisation through abolition of conduct regulations of the sector could be opted for. For instance, instead of concentrating on introduction of intra-professional competition, through the abolition of the restrictions we analysed, introduction of some inter-professional competition could be taken into consideration.

As we noted, the main problems arise due to the public interests connected with the practice of the legal profession, that are due to the core characteristics of some activities. They require that high degree of technical knowledge that is the cause for the asymmetry of information that is typical of the concerned market. This is the main factor that determines the regulation of legal services that works in order to guarantee the quality of such services.

However, it could be noted that public interests are not involved at the same level for every kind of activity carried on by legal professionals, as well as the necessary degree of technical knowledge is not always so sophisticated. To this extent, a distinction can in fact arise between the legal defence of clients before courts, that is a fundamental right for each individual, as it is recognised by the Constitution of most countries, and the legal advice that is given in the performance of a consultancy activity.

Recognising that some specific activities do not actually require only a qualified lawyer, thus introducing competition between different professionals on a case by case basis where public interests are not to be affected by this fact, could actually produce positive effects.

Through the relaxation of some entry regulation that decreases the level of monopoly rights of the legal profession in some activities that do not need those restrictions in order to protect public interests, the subsequent conduct regulation might then have less detrimental effects on competition, and especially on prices for consumers.

This attempt has been carried out in the market for conveyancing in England and Wales, where non-solicitors were admitted to offer conveyancing services in competition with solicitors. If this solution has led at a first time to a reduction of fees by solicitors in this field as a response to the threat of new entrants in the market, however fees have then increased after the introduction of this form of competition.

This finding is another confirmation of the fact that the issue of introduction of competition in the market for legal services is still open and gives rise to many contrasting problems that is difficult to solve. The judgments of the ECJ on the matter can probably be read as a confirmation of such a tension.

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