POLICY ROUNDTABLES

Competitive Restrictions in Legal Professions

2007

Introduction

The OECD Competition Committee debated competitive restrictions in legal professions in June 2007. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Roger van den Bergh for the OECD, written submissions from Australia, Belgium, Brazil, Canada, the Czech Republic, Denmark, European Commission, France, Hungary, Indonesia, Ireland, Italy, Korea, Lithuania, the Netherlands, New Zealand, Poland, Portugal, Romania, South Africa, Spain, Switzerland, Chinese Taipei, Turkey, the United Kingdom, the United States, BIAC and CCBE as well as an aide-memoire of the discussion.

Overview

Regulation of the legal professions, including self-regulation, typically involves many restrictions on entry and professional conduct. Certain restrictions may be a remedy to market failures and may also be based on distributional or paternalistic motives. But other restrictions can be based on rent-seeking and achieve cartel-like effects. The major policy challenge is to identify and remove the restrictions which are unnecessary or disproportionate to achieve public interest goals. Competition law and advocacy can play a major role in this respect, either by challenging anti-competitive activity as illegal or advocating changes to laws and regulations.

The establishment of an independent, transparent and accountable regulatory authority for legal services markets merits serious consideration. Among others, it could *ensure* that: i) entry restrictions are eased or eliminated where they are not related to quality; ii) a legal profession has no exclusive right to perform tasks that do not necessarily require extensive and broad legal professional training.

Related Topics

Improving Competition in Real Estate Transactions (2007)
Enhancing Beneficial Competition in the Health Professions (2004)
OECD Guiding Principles for Regulatory Quality and Performance (2005)
Competition in Professional Services (1999)

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COMPETITIVE RESTRICTIONS IN LEGAL PROFESSSIONS

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FOREWORD

This document comprises proceedings in the original languages of a Competitive Restrictions in Legal Professions, held by the Competition Committee in June 2007.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les restrictions à la concurrence dans les professions juridiques, qui s'est tenue en juin 2007 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

In the light of written submissions, the background note and the oral discussion, the following points emerge:

(1) Regulation of the legal professions: market failures and rent-seeking

Regulation of the legal professions, including self-regulation, typically involves many restrictions on entry and professional conduct. Certain restrictions may be a remedy to market failures and may also be based on distributional or paternalistic motives. But other restrictions can be based on rent-seeking and achieve cartel-like effects.

Traditionally, the legal professions (attorneys, barristers/solicitors, advocates, Latin notaries) are heavily regulated. Rules restricting entry into the legal professions and governing different modes of professional conduct are contained both in statutory law and self-regulatory rules issued by professional bodies. With respect to entry, there are not only qualitative restrictions (education, apprenticeships and exams) but also quantitative restrictions based on demographic or geographic criteria. In addition, professional titles are protected and membership of professional bodies may be required. With respect to business conduct, there are often rules on advertising, forms of business organization and partnerships.

Certain regulations are in the public interest as a remedy to market failures arising from (a) information asymmetries and (b) negative externalities. Legal quality and integrity are difficult to assess for inexperienced individuals who do not buy these services regularly. Consequently, there is a risk of adverse selection (quality deterioration) in particular segments of the legal services market where professionals meet buyers without independent legal expertise. Apart from adverse selection, information asymmetries also lead to principal-agent problems. Professionals may reduce quality below optimal levels or generate excessive demand. Other market failures justifying regulation are negative externalities. Poorly qualified legal professionals cause harm to third parties and society at large if legal transactions turn out to be invalid.

Regulation and self-regulation at times appears to serve mainly the private interests of the profession rather than broader consumer interests. Professional associations of legal professionals are powerful pressure groups. They are small (compared to their number of customers), single-issue oriented and well-organized. This may enable them to achieve high profits without compensating benefits for society at large. They may "capture" public authorities or attain the right to regulate themselves. While self-regulation allows for quality standards to be set by professionals who may be better informed than lay public authorities, this advantage may be outweighed by the harm from the potential for anti-competitive restrictions.

(2) Removing unnecessary restrictions

The major policy challenge is to identify and remove the restrictions which are unnecessary or disproportionate to achieve public interest goals. Competition law and advocacy can play a major role in this respect, either by challenging anti-competitive activity as illegal or advocating changes to laws and regulations.

In most OECD jurisdictions, it had been firmly established that rules of competition law (in particular, the prohibition of price-fixing) apply to the legal professions. However, some restrictions may be justified if it can be shown that they serve consumers' interests.

The U.S. Supreme Court makes a distinction between naked price-fixing agreements that are held per se illegal and restrictions on advertising that might protect consumers from false or misleading claims. The European Court of Justice has accepted that restrictions of competition, in particular the prohibition of inter-professional cooperation between lawyers and accountants, may be considered necessary for the proper practice of the profession.

The prohibitions of competition law apply only to anti-competitive practices that have been initiated autonomously by legal professionals and their associations and usually not to regulatory measures decided by states. The Canadian "regulated conduct defense" seems to provide a broad scope for restrictions of competition. In the U.S., there is a narrower "state action defense". To be immune from the prohibitions of antitrust law, rules that restrict competition must reflect a clear articulation of the state's policy with regard to professional behaviour and must have been subject to active state supervision. Under European law, a state can be held liable for infringing the competition rules if it delegates its powers to professional associations and does not provide for adequate control of decisions adopted by such associations and the possibility to take decisions of last resort.

For policymakers, the crucial challenge is to find out whether anti-competitive restrictions are suitable for attaining a public interest goal and do not go beyond what is necessary to achieve that objective. Competition authorities of OECD countries increasingly challenge price restrictions and advertising restrictions. Minimum prices, for example, appear to be a disproportionate measure to guarantee quality. Advertising restrictions may be justified if they ban deceptive practices, but objective and verifiable information should be allowed to circulate freely.

(3) Informed versus uninformed buyers

Two broad categories of buyers can be identified, distinguished by the information available to them about providers of legal services. The potential for market failure, and resultant need for regulation, varies across these categories.

In market segments where informed buyers such as large corporations or public authorities buy legal services on a regular basis, information asymmetries may be overcome by the buyer's skills and the reputation mechanism. Consequently, less regulation designed to protect purchasers will be needed in such instances.

Conversely in markets with uninformed and irregular buyers, regulation may be needed to prevent adverse selection. Whereas existing exclusive rights cannot be easily justified as a mechanism to protect quality for buyers with legal qualifications, exclusive rights can serve a valuable role in areas where information asymmetries are pervasive (e.g., legal advice on family matters). Generally, regulation should not be profession-focused but be targeted at particular segments of the legal services market when market failures are most serious.

(4) Independent regulatory authority for legal services

The establishment of an independent, transparent and accountable regulatory authority for legal services markets merits serious consideration.

According to the British model, the Head of the Authority and the majority of its member must not be practicing lawyers. The Authority is able to enact new regulations and may also delegate regulatory functions to already existing or newly established regulatory bodies (called front-line regulators). The front-line regulators are not allowed to combine regulatory with representative functions. The Authority is given the power to issue regulatory guidance, to direct front-line regulators to take specific actions, to amend or veto rules of front-line regulators and to remove the authorization of the latter if they abuse their competences. The advantages of establishing an Independent Regulatory Authority seem considerable. Disproportionate restrictions contained in self-regulatory rules may be vetoed. The lack of consumer representation inherent with most self-regulatory bodies is remedied since the majority of the regulatory authority consists of non-lawyers. The proposed institutional framework creates possibilities for competition between self-regulatory bodies. This competitive self-regulation may satisfy diverging preferences concerning the regulation of legal services markets and lead to more efficient and innovative rules. Most importantly, competitive self-regulation may reduce or eliminate monopoly rents.

(5) Entry restrictions

Entry restrictions should be eased or eliminated where not related to quality.

In some OECD countries, entry is restricted because the number of law schools is limited or the pass rate in bar exams is artificially low. In Ireland, the Law Society is both the regulator of the Solicitor profession and the sole provider of professional training. Similarly, the number of barristers is limited by the capacity of the sole training school in Dublin. In the United States, American Bar Association is in charge of accreditation of law schools. The accreditation committee has been criticized for protecting the interests of bar associations, law school deans and faculty members. In Brazil and Poland, the bar exam seems to be quite selective with a pass rate of approximately 15-20 percent. In Korea, the number of candidates passing the bar exam is determined by the Minister of Justice. In each of these countries, there is a risk that the regulation is abused to limit entry for the sake of protecting incumbents rather than for protecting consumers. Removing the legal profession's control over the entry process thus remains an important issue.

(6) Exclusive rights

A legal profession should not have an exclusive right to perform tasks that do not necessarily require extensive and broad legal professional training.

In most jurisdictions, lawyers only enjoy a monopoly over representing clients in courts. The market for legal advice remains largely open. For the legal transfer of landed property and the registration of transfers in public registers (conveyancing services), there are diverse situations. Latin notaries enjoy exclusive rights to provide conveyancing services in their jurisdictions. But in certain Common Law jurisdictions (England, Wales and, in the near future, also Ireland and New Zealand) the market for conveyancing services has been opened up to a new category of professionals, licensed conveyancers. Empirical evidence suggests that allowing a second group of professional to provide a service may stimulate price competition and greater price consciousness among consumers, even though the vigour of competition may ultimately be reduced by accommodative reactions between the professions. Removing exclusive rights for legal transactions that do not require high level of technical skills and preserving

beneficial price competition for such tasks remains an important challenge for policymakers in many OECD jurisdictions.

(7) Advertising and price restrictions

Rules that prevent truthful advertising and that limit competitors from lowering prices are the most difficult to justify as being in the public interest.

Advertising and price restrictions are gradually being removed in most OECD countries, with Italy being the most recent to lift restrictions. However, in some countries, restrictions on prices and advertising remain in place. For example, in Turkey, the bar association establishes minimum tariffs that are then communicated to the Minister who approves them by silence. In the Czech Republic, a full liberalization of fees is still impossible. In most Latin notary jurisdictions, pricing rules remain that prevent significant discounting. Price restrictions are not the only restrictions to remain. Excessive advertising restrictions also remain. In Ireland, there is a total ban on advertising for barristers. Some restrictions on advertising concern particular types of advertising. In Portugal, for example, there is a prohibition on advertising fees, but other forms of advertising are permitted. In the near future, such price and advertising restrictions will likely be challenged under competition laws if they emanate from private associations of legal professionals.

SYNTHÈSE

du Secrétariat

Les documents soumis par les pays, la note de référence et les discussions orales ont fait ressortir plusieurs points :

(1) La réglementation des professions juridiques : défaillances du marché et recherche d'une rente

La réglementation des professions juridiques, autoréglementation comprise, implique en règle générale de nombreuses restrictions visant l'accès à la profession et le comportement à observer. Certaines restrictions peuvent être destinées à pallier les défaillances du marché, ou motivées par des objectifs redistributifs ou paternalistes. D'autres peuvent cependant s'expliquer par la recherche d'une rente et produire des effets analogues à ceux d'une entente.

Traditionnellement, les professions juridiques (*attorneys*, *barristers/solicitors*, *advocates*, notaires latins) sont fortement réglementées. Les règles qui en limitent l'accès et qui régissent différents modes de comportement professionnel sont énoncées dans des textes de loi ou édictées par des instances d'autoréglementation. S'agissant de l'accès à la profession, il existe non seulement des restrictions qualitatives (formation, stages et examens), mais aussi des restrictions quantitatives fondées sur des critères démographiques ou géographiques. De plus, les titres professionnels sont protégés et l'adhésion à un organisme professionnel peut être obligatoire. En ce qui concerne le comportement professionnel, la publicité, ainsi que les formes d'entreprise et de collaboration sont souvent réglementées.

Certaines réglementations servent l'intérêt général, car elles visent à remédier aux défaillances du marché découlant (a) de l'asymétrie de l'information et (b) des externalités négatives. La qualité des services juridiques et l'intégrité des professionnels sont difficiles à évaluer pour des personnes inexpérimentées qui n'achètent pas régulièrement ce type de services. Il y a donc un risque d'antisélection (détérioration de la qualité) dans certains segments du marché des services juridiques où les professionnels entrent en relation avec des acheteurs qui ne bénéficient pas de conseils juridiques indépendants. Outre cette antisélection, l'asymétrie de l'information soulève également des problèmes de relation d'agence. Les professionnels peuvent faire baisser la qualité en la ramenant en deçà du niveau optimal ou générer une demande excessive. Les autres défaillances du marché justifiant la réglementation sont les externalités négatives. Les membres des professions juridiques qui n'ont pas toutes les qualifications requises portent préjudice à des tiers et à la société dans son ensemble lorsque des transactions juridiques sont frappées de nullité.

La réglementation et l'autoréglementation semblent parfois servir essentiellement les intérêts privés de la profession, plutôt que les intérêts plus généraux des consommateurs. Les associations qui représentent les professions juridiques sont des groupes de pression puissants. Elles sont de petite taille (par rapport à l'importance de la clientèle), axées sur un domaine particulier et bien organisées, ce qui peut leur permettre d'obtenir des avantages substantiels sans que cela soit contrebalancé par des effets positifs pour la société dans son ensemble. Elles peuvent « s'approprier » les autorités publiques ou acquérir le droit d'édicter elles-mêmes leur réglementation. Même si l'autoréglementation permet que des normes de qualité soient énoncées par des professionnels susceptibles d'être mieux informés que des autorités qui ne

sont pas expertes en la matière, le préjudice causé par les restrictions anticoncurrentielles potentielles peut l'emporter sur cet avantage.

(2) La suppression des restrictions inutiles

Le principal enjeu pour les autorités publiques consiste à identifier et à supprimer les restrictions qui sont inutiles ou disproportionnées pour atteindre des objectifs d'intérêt général. Le droit de la concurrence et les plaidoyers en faveur de la concurrence peuvent jouer un rôle important à cet égard, soit en contestant les activités anticoncurrentielles en raison de leur illégalité, soit en préconisant des modifications des textes législatifs et réglementaires.

Dans la plupart des pays de l'OCDE, il a été fermement établi que les règles du droit de la concurrence (en particulier l'interdiction des ententes sur les prix) s'appliquent aux professions juridiques. Néanmoins, certaines restrictions peuvent se justifier à condition qu'il soit démontré qu'elles servent l'intérêt des consommateurs.

La Cour suprême des États-Unis fait une distinction entre des accords d'entente sur les prix dits purs, qu'elle juge illicites en soi, et les restrictions à la publicité susceptibles de protéger les consommateurs d'affirmations mensongères ou trompeuses. La Cour de justice européenne a reconnu que les restrictions à la concurrence, en particulier l'interdiction de la coopération interprofessionnelle entre avocats et comptables, peut être jugée nécessaire au bon exercice de la profession.

Les interdictions prévues par le droit de la concurrence s'appliquent exclusivement aux pratiques anticoncurrentielles introduites, de manière autonome, par les membres des professions juridiques et les associations qui les représentent, et pas en règle générale aux mesures réglementaires adoptées par les pouvoirs publics. Au Canada, le moyen de défense fondé sur une conduite réglementée (« *regulated conduct defense* ») semble largement prêter aux restrictions à la concurrence. Aux États-Unis, le moyen de défense fondé sur la doctrine de l'intervention de l'État (« *State action defense* ») est plus restreint. Pour être exemptées des interdictions de la législation antitrust, les règles limitant la concurrence doivent être l'expression claire d'une politique de l'État vis-à-vis du comportement des professionnels (« *clear articulation* ») et avoir été soumises à un contrôle actif de l'État (« *active State supervision* »). En vertu du droit européen, un État peut être tenu responsable d'un manquement aux règles de la concurrence lorsqu'il délègue ses pouvoirs à des associations professionnelles sans contrôler leurs décisions comme il le devrait ni conserver le pouvoir de décision en dernier ressort.

Le défi capital que doivent relever les responsables de l'action publique consiste à déterminer si les restrictions anticoncurrentielles sont indiquées pour réaliser un objectif d'intérêt général et ne vont pas au-delà de ce qui est nécessaire pour atteindre cet objectif. Les autorités de la concurrence des pays de l'OCDE remettent de plus en plus en cause les restrictions visant les honoraires et la publicité. Les honoraires minima, par exemple, semblent constituer une mesure disproportionnée pour garantir la qualité. Les restrictions à la publicité peuvent se justifier lorsqu'elles interdisent les pratiques frauduleuses, mais les informations objectives et vérifiables doivent pouvoir circuler librement.

(3) Des acheteurs informés ou non

On peut identifier deux grandes catégories d'acheteurs, qui se distinguent par l'information dont ils disposent sur les prestataires de services juridiques. Le risque de dysfonctionnement du marché, et le niveau de réglementation requis, varient selon ces catégories.

Sur les segments de marché où des acheteurs informés, comme les grandes entreprises ou les pouvoirs publics, acquièrent régulièrement des services juridiques, l'asymétrie de l'information peut être surmontée

par les compétences de l'acheteur et le mécanisme de notoriété. Dans ces circonstances, il y a donc moins lieu de réglementer pour protéger les acheteurs.

À l'inverse, sur les marchés comptant des acheteurs non informés et irréguliers, la réglementation peut s'imposer pour empêcher l'antisélection. Alors que l'existence de droits exclusifs se justifie difficilement comme un mécanisme de protection de la qualité lorsque les acheteurs ont des compétences juridiques, ces droits peuvent être utiles dans les domaines où l'asymétrie de l'information est généralisée (comme dans le cas du conseil juridique sur les questions familiales). De manière générale, la réglementation ne doit pas être axée sur une profession, mais ciblée sur des segments particuliers du marché des services juridiques lorsque les défaillances du marché sont des plus graves.

(4) Une autorité de réglementation indépendante pour les services juridiques

La création d'une autorité de réglementation indépendante, transparente et responsable pour les marchés des services juridiques mérite d'être sérieusement prise en compte.

Dans le modèle britannique, le responsable de l'Autorité et la majorité de ses membres ne peuvent pas être des juristes en exercice. L'Autorité peut adopter de nouvelles règles et déléguer ses fonctions réglementaires à des instances de réglementation existantes ou nouvellement créées (dénommés « *Front Line Regulators* » ou FLR). Les Front Line Regulators ne sont pas autorisés à cumuler fonctions réglementaires et fonctions de représentation. L'Autorité est habilitée à énoncer des principes réglementaires, à ordonner aux FLR de prendre des mesures réglementaires spécifiques, à modifier les règles adoptées par les FLR ou à y opposer son veto, ainsi qu'à retirer son agrément à un FLR ayant abusé de son pouvoir. Les avantages de la création d'une autorité de réglementation indépendante semblent considérables. Les restrictions disproportionnées prévues par les règles professionnelles peuvent faire l'objet d'un veto. Le problème de la non-représentation des consommateurs, inhérente à la plupart des instances d'autoréglementation, est résolu, la majorité des membres de l'autorité de réglementation n'étant pas juristes. Le cadre institutionnel proposé permet également que les instances d'autoréglementation se fassent concurrence. Cette autoréglementation concurrentielle permet de prendre en compte les préférences divergentes concernant la réglementation des marchés des services juridiques et se traduire par des règles plus efficientes et plus innovantes. Surtout, l'autoréglementation concurrentielle peut réduire ou supprimer les rentes de monopole.

(5) Les restrictions visant l'accès à la profession

Les restrictions à l'accès à la profession doivent être assouplies ou supprimées lorsqu'elles ne sont pas liées à la qualité.

Dans certains pays de l'OCDE, l'accès à la profession est restreint parce que le nombre des facultés de droit est limité ou que le taux de réussite aux examens du barreau est artificiellement bas. En Irlande, le Barreau est à la fois l'autorité de réglementation de la profession de *solicitor* et le seul organisme de formation professionnelle. De même, le nombre des *barristers* est limité par la capacité de l'unique centre de formation, situé à Dublin. Aux États-Unis, l'American Bar Association est chargée de l'habilitation des facultés de droit. On a reproché au comité d'habilitation de protéger les intérêts des barreaux, ainsi que des doyens des facultés de droit et du corps enseignant. Au Brésil et en Pologne, l'examen du barreau semble particulièrement sélectif, le taux de réussite s'établissant aux environs de 15 à 20 %. En Corée, le nombre des candidats admis à l'examen du barreau est fixé par le ministère de la Justice. Dans chacun de ces pays, le risque existe que la réglementation soit utilisée à mauvais escient pour limiter l'accès à la profession afin de protéger ceux qui en font partie, plutôt que les consommateurs. Il importe donc de supprimer le contrôle exercé par la profession juridique sur le processus d'accès à la profession.

(6) Les droits exclusifs

Aucune profession juridique ne doit disposer d'un droit exclusif d'accomplir des tâches qui ne requièrent pas nécessairement une formation juridique étendue et approfondie.

Dans la plupart des pays, les avocats bénéficient simplement du monopole de la représentation des parties en justice. Le marché du conseil juridique demeure largement ouvert. Concernant le transfert légal de propriété d'un bien foncier et l'enregistrement des transferts dans des registres publics (services liés au transfert de propriété foncière), les situations diffèrent. Dans ce domaine, les notaires latins ont l'exclusivité au sein de leur zone de compétence. Toutefois, dans certaines juridictions de *Common Law* (en Angleterre, au Pays de Galles et aussi, prochainement, en Irlande et en Nouvelle-Zélande), le marché des services liés au transfert de propriété foncière a été ouvert à une nouvelle catégorie de professionnels, les *licensed conveyancers* (rédacteurs agréés d'actes de transfert de propriété). L'expérience nous porte à croire qu'autoriser un second groupe de professionnels à délivrer un service peut stimuler la concurrence sur les prix et sensibiliser davantage les consommateurs à cet élément, même si l'intensité de la concurrence peut en définitive être limitée par des réactions de concertation entre les professions. Supprimer les droits exclusifs pour les transactions juridiques qui ne requièrent pas de compétences techniques de haut niveau et préserver les avantages de la concurrence sur les prix pour ces tâches demeurent un enjeu important pour les pouvoirs publics dans de nombreux pays de l'OCDE.

(7) Les restrictions portant sur la publicité et les honoraires

Les règles qui interdisent la publicité digne de foi et qui limitent les possibilités de baisse des prix par les concurrents sont celles qui sont le plus difficiles à justifier en invoquant l'intérêt général.

Les restrictions visant la publicité et les honoraires sont progressivement supprimées dans la plupart des pays de l'OCDE, l'Italie étant le dernier en date à les avoir levées. Dans certains pays, toutefois, ces restrictions sont toujours en vigueur. Ainsi en Turquie, le barreau fixe des honoraires minima et les transmet ensuite au ministre qui les approuve tacitement. En République tchèque, une libéralisation totale des honoraires demeure impossible. Dans la plupart des pays de notariat latin, ces règles relatives aux honoraires continuent d'empêcher des remises importantes. Les restrictions de prix ne sont pas les seules à persister. Des restrictions excessives à la publicité restent également en vigueur. En Irlande, les *barristers* ont interdiction totale de faire de la publicité. Certaines restrictions portent sur des types particuliers de publicité. Au Portugal, par exemple, il est interdit de faire de la publicité sur les honoraires, mais d'autres formes de publicité sont autorisées. Dans un proche avenir, ces restrictions portant sur les honoraires et la publicité seront vraisemblablement remises en cause en vertu du droit de la concurrence dès lors qu'elles émanent d'associations privées représentant des membres des professions juridiques.

TOWARDS BETTER REGULATION OF THE LEGAL PROFESSIONS*

Background paper by the Secretariat

1. Introduction

Traditionally, the legal professions have not been subjected to the competitive forces which operate in commercial sectors of the economy. Regulation of the legal professions has been achieved through a combination of direct government regulation and, to a large extent, through rules adopted by self-regulatory professional bodies. This paper provides an overview of the economic rationale and the effects of such regulation, and identifies ways for governments to move towards better regulation of the legal professions. The professions discussed are those of advocate[1] and Latin notary in civil law jurisdictions (most EU states), solicitor/barrister in some common law jurisdictions (England/Wales, Ireland) and attorney. Within the group of legal professionals, Latin notaries occupy a special position since they have a dual role as holders of a public office and liberal professionals. To become a legal practitioner in all OECD countries applicants must fulfil education requirements and comply with rules of professional conduct. In some countries, the right to perform certain legal services has been reserved to licensed professionals. The precise scope of the reserved tasks of the legal professions, the severity of the entry restrictions and the applicable rules on professional conduct vary significantly across OECD countries.

The quality and the competitiveness of professional services have important spill-over effects since they affect the costs of necessary inputs for the economy and business. Regulations regarding entry into the legal professions and rules regarding professional conduct which restrict competition may unnecessarily increase the costs of legal services.

The restrictions of competition resulting from regulation, including self-regulation, take different forms. In principle some of them may be fully justified. In the field of services provided by advocates, solicitors/barristers and attorneys, there are:

- qualitative entry restrictions (minimum periods of education, professional examinations, and minimum periods of professional experience);
- compulsory membership to a professional body enjoying public law status2;
- protection of professional titles indicating expertise in legal matters;

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1 The titles in the relevant European languages are: avocat (France), avvocato (Italy) abogado (Spain), advocaat (Netherlands), asinajaja (Finland).

2 For example: 'Ordre des Avocats' in France, 'Orde van Advocaten' in the Netherlands, 'Ordine degli Avvocati' in Italy or 'Anwaltskammer' (Germany).

- reserved tasks: legal advice (at least in some jurisdictions), exclusive rights to appear in court coupled with compulsory legal representation;

- statutory limitations on the pricing of legal services (in many countries and in Italy until very recently contingency fees are prohibited)

- self-regulatory rules (some subject to approval/assessment by the competent Minister) on: i) minimum fees3, ii) advertising, and iii) forms of business organization and multi-disciplinary partnerships.

In the field of services provided by Latin notaries, regulation takes the following forms:

- qualitative entry restrictions (minimum periods of education, professional examinations, and minimum periods of professional experience);

- quantitative entry restrictions based on demographic or geographic criteria;

- protection of the professional title of Latin notary;

- reserved tasks, in particular exclusive rights for allowing a transfer of real estate property to have full effect vis à vis third parties (conveyancing services)4, business incorporations and, in some jurisdictions, family matters (marriage contracts, partnership contracts, wills);

- statutorily fixed fees for particular services;

- additional self-regulatory rules (eventually subject to approval/assessment by the competent Minister) on advertising and forms of business organization and partnerships.

In recent years some elements of the regulation and self-regulation of the legal professions are increasingly criticized for their anti-competitive effects and lack of legitimacy. Certain types of rules (in particular fee and advertising restrictions and bans on multi-disciplinary practices) have since been questioned by competition authorities.[5]

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3 In some countries (for example Germany) fees for in court services are fixed by statute.

4 In common law countries, conveyancing services are provided by solicitors and in England/Wales also by licensed conveyancers in competition with the former. In the Czech Republic and Hungary, Latin notaries do not enjoy exclusive rights for transferring ownership of property but compete with other lawyers.

5 The European Commission launched a stocktaking exercise to gain better insight in the potential negative impact of professional regulations and their possible justification. As a part of this exercise, the Directorate General Competition published an independent study on the regulation of professions (Paterson, Fink and Ogus 2003; see Box 1), which provided additional support for a critical re-assessment of regulation of professional services. In 2004 and 2005, the European Commission published two Communications on this subject. (Report on Competition in Professional Services COM (2004) 83 final; Professional Services - Scope for More Reform COM 2005 (405) final) The European Parliament adopted two resolutions which support the European Commission in its efforts to remove overly restrictive regulation inhibiting competition and causing harm to the EU economy and its consumers. However, in its last resolution the European Parliament also stressed the need for more independent economic research on the effects of regulation (including self-regulation) in the legal professions. Meanwhile, these initiatives have led to a critical examination of existing rules and several changes of the regulatory policy at the EU Member States' level. (Resolution on Market Regulations and Competition Rules for the Liberal Professions, OJ, 15.04.2004, C 91 E, pp. 126-128; Resolution on follow-up to the report on Competition in Professional

Today, most commentators agree that the particular characteristics of markets for legal services require some form of regulation but that, at the same time, there is a risk that regulation (also self-regulation) may excessively restrict competition and promote the interests of the professions, without yielding corresponding benefits to the public at large. Economic analysis is helpful in understanding the rationale for governmental regulation and self-regulation of legal professions; it also sheds light on restrictions which are unnecessary or disproportionate to the relevant policy goals. This paper summarizes the main insights from the economic analysis of the regulation of legal professions. Its goal is to inform the policy discussion on potentially unwarranted limits on competition and other deficiencies of the current organization of the legal professions. Ultimately, it identifies suggested policy guidelines.

The paper will proceed as follows:

- The second section will present the main economic arguments in favour of regulation, including self-regulation, discussing possible anticompetitive effects originating from it.
- The third section of the paper will discuss in greater detail different types of professional regulation, including overviews of empirical research[6] on:
  - exclusive rights;
  - regulation of entry (qualitative and quantitative entry restrictions);
  - regulation of fees and advertising; and
  - choice of business organization and restrictions on multi-disciplinary partnerships.
- The fourth section of the paper will combine the insights from the economic and legal analyses in previous sections to formulate policy guidelines.
- The fifth section will conclude.

2. Regulation of the markets for legal services: public interests, private interests and rules of competition law

There are two sets of questions that need to be answered for improving the quality of the regulation of legal services markets.

- First, is regulation necessary from a public interest perspective? Is there a risk that the content of state regulation and/or self-regulation is influenced by private interest motives rather than public interest objectives?
- Second, how can the legal system, in particular principles of competition policy, reduce the scope for private interest regulation and enhance competition where this is in the public interest?

Services, 12 October 2006.) The U.S. antitrust authorities are also concerned about the anti-competitive effects of self-regulation in the legal profession (services offered by attorneys). They submitted a detailed letter to the American Bar Association outlining their concerns regarding a newly proposed definition of the practice of law, which excludes qualified lay services and may hurt consumers (Joint Agencies [US FTC and US DOJ] 2002).

6 This research is still relatively limited, though is more extensive for Europe than other regions. More empirical work has been done on the medical professions, see OECD 2005.

Both sets of questions will be dealt with in this section.

An extensive economic literature has shown that free markets for legal services may not produce efficient outcomes.[7] There are three market failures:

- asymmetric information;
- externalities; and
- undersupply of public goods.

Besides market failures, distributional goals and paternalism may drive public interest regulation of the markets for legal services.

The public interest theories are challenged by private interest theories of professional regulation, which stress that regulatory measures may be enacted to reduce competition and increase profits for professionals, without generating outweighing benefits for society at large. This risk is particularly serious if regulatory powers are delegated to professional associations. Anti-competitive self-regulatory rules may conflict with competition law and be declared invalid and punished by (criminal or administrative) fines. Competition law applies only to anti-competitive practices that have been initiated autonomously by legal professionals and their associations and not to regulatory measures decided by states. This section concludes with a discussion of the potential liability of both associations of legal professionals and states for restrictions of competition that cannot be justified on public interest grounds.

2.1 Public interest theories of regulation

2.1.1 Information asymmetry

Many consumers cannot judge the quality of the services offered by the professions before purchase. In the economic literature, a distinction is made between:

- search goods;
- experience goods; and
- credence goods.[8]

A search good is a good the quality of which can be assessed by the consumer before its purchase (for example, color of clothes). An experience good is a good the quality of which cannot be assessed by the consumer beforehand, but only after purchase and consumption of the good (for example, canned food).[9] In ordinary goods markets, brand reputation, results of consumer surveys and tort liability may provide

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7 See generally Noll 1989 and with respect to the legal professions, for example: Arrunada 1996, Faure et al. 1993, Ehlermann and Atanasiu 2006

8 The distinction between search goods and experience goods was first made by Nelson 1970. On credence goods, see Darby and Karni 1973.

9 If experience goods are bought regularly, consumers may learn about their quality through the 'repeat purchase mechanism'. Repeat players, i.e. consumers who purchase services on a regular basis, may build up certain knowledge and experience that reduces the information asymmetry. In such cases, suppliers interested in repeat business will have an incentive to develop a high-quality reputation and quality deterioration will be prevented for quality features that consumers are able to observe.

important quality signals and be effective deterrents of quality deterioration. These mechanisms are more difficult to implement in markets for professional services. Moreover, the latter often are credence goods, the quality of which consumers can almost never learn. Since consumers cannot acquire the necessary information before or after the purchase, they have to rely on external assurances that quality is sufficient. If consumers cannot judge the quality of the service to be acquired, they will not be willing to pay a high price for high quality.[10]

Another problem resulting from information asymmetry is 'moral hazard'. Moral hazard is a problem common in principal-agent relationships characterized by information problems arising from a discrepancy between the goals of the provider of the service (agent) and the objectives of the client (principal). The provider of the service is supposed to act in the best interests of the client. However, since the principal cannot express the price-quality relationship he or she desires, the agent has an incentive to over-supply quality in order to charge higher prices, even if the client would be better served with a lower quality at a more reasonable price.[11]

The above insights are directly relevant for the functioning of the market for legal services.[12] The quality of the services provided by these lawyers has three dimensions (see Plug et al. 2003, p. 29):

- Integrity (impartiality and trustworthiness);
- Legal quality (quality of the given advice, adequacy of legal representation in courts, quality of notarial acts); and
- Commercial quality (perceived treatment by consumers).

Only the latter dimension of quality is easily observable for consumers. Commercial quality includes features of the service offered to clients, such as the location of the lawyers' offices, the availability of free parking space and the friendliness of the personnel. Legal quality is much more important to clients, but difficult to assess.[13]

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10 In a first phase, providers of the highest quality (charging the highest prices) are driven out of the market, since consumers are not willing to pay more than an average price for what they consider (due to the information asymmetry) as an average quality. In a second phase, the average quality will further drop and ultimately only cheap, low quality, services will be sold. This process of 'adverse selection' results in overall quality deterioration, which is neatly described as a 'market for lemons' (Akerlof 1970).

11 There is also the risk that the agent will supply services the client does not need (supplier-induced demand).

12 For example, advocates/solicitors provide advice on a wide range of legal issues and represent parties in court in case of a dispute. Latin notaries provide legal advice to clients on a limited number of legal issues related to real estate, marriage contracts, wills and business corporations. They authenticate what clients want and have agreed upon, thus guaranteeing the legal validity of the transactions.

13 As to the quality of legal counseling, the client does not know whether the lawyer has spent optimal efforts on the case and the given advice is appropriate. With respect to defending clients' interests in courts, it is difficult to assess whether the advocate has used all arguments which could have had a positive bearing on the outcome of the case. In the field of services provided by Latin notaries, the key element of legal quality is how well the preferences of the contracting parties have been laid down in the authenticated legal document. It is hard to find out whether the notary requested and obtained all necessary information from the client. It is also time consuming to check whether the notary's research (for example, on the existence of mortgages on the real estate sold) has been adequate (Nahuis and Noailly 2005, p. 30).

In some markets for legal services the information problems may be mitigated by the 'repeat purchase mechanism'. Consumers may be professional buyers who regularly purchase legal services, so that markets may function efficiently.[14] Whereas large corporate clients may be able to judge the quality, this is not always possible for small firms or individuals who occasionally need a lawyer. Hence, markets for services in competition law and corporate law may function relatively well but markets for advice and legal representation in family matters or labour law may exhibit serious information asymmetries. The same problem will occur on markets for notarial services.[15]

Information asymmetries in the markets for legal services may thus justify regulation to prevent quality deterioration and ensure the integrity of the professionals. Several legal rules support the provision of high-quality legal services:

- The requirement of a university education;
- The required on-the-job work placement;
- Professional training, including the duty to attend post-graduate courses; and
- Regulatory oversight by the professional bodies, which can impose disciplinary sanctions.

The legal monopoly to provide certain services, advertising restrictions and fixed fees have also been advanced by the legal professions as instruments to guarantee quality. However, the risk of market failures does not justify across-the-board regulation of the entire legal profession. Some markets for legal services, in particular those where well-informed repeat purchasers are active, may function reasonably well and may not need regulatory intervention.

2.1.2 Negative externalities

The seriousness of the negative externalities market failure in professional services markets depends on their size, *i.e.* the harm caused to third parties and society in general by low quality services. When a legal professional provides sub-optimal quality, not only the consumer of the service but also other individuals, not involved in the transaction, may be harmed. For example, poor quality legal advice on the legality of contract terms will not only harm the direct buyer of the legal service but also his or her clients at later stages of the production and distribution chain.[16] In a free market, these negative externalities are not internalized in the decision-making process of the suppliers of legal services.

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14 For example, corporate clients may have in-house legal counsels who can judge the quality of the legal services in specialist fields, such as corporate law, competition law and tax law.

15 Many notarial acts qualify either as experience goods, which are bought irregularly, or as credence goods. For example, in the Netherlands real estate is being sold on average every seven years (Baarsma, Mulder and Teulings 2004, p. 4). This implies that mistakes may remain hidden for a seven years' period. Even if consumers buy notarial services several times, the legal quality of the performed services may be assessed only after a relatively long time period. The latter equally applies to the integrity of the notary. For notary services exhibiting credence qualities, buyers will never be able to perform a reliable quality judgment. An example is a poorly drafted will that harms the interests of the testator, who will never be able to recognize its weak legal quality. The picture is again different for large commercial clients, such as real estate agents, banks and corporations. They are repeat buyers and the reputation mechanism (coupled with the threat of liability claims) can provide enough incentives for good quality services in particular market segments (conveyancing services, incorporations of companies).

16 Similarly, an inaccurately drafted will harms the heirs of the deceased person

A first legal remedy to the problem of negative externalities is liability law. The prospect to be held liable in damages should give incentives to potential wrongdoers to adapt their behaviour. Economic analysis of law has shown that liability rules may achieve optimal deterrence of wrongful acts under only a limited set of assumptions (Shavell 1987, Schäfer and Ott 2004, pp. 107-269).[17] Hence, the shortcomings of the liability system seem to justify regulation.

Regulation may overcome quality deterioration caused by negative externalities. In contrast with liability law, which operates *ex post* after harm has occurred, regulation fixes quality standards *ex ante* and may thus prevent unqualified professionals from entering the market. Economic analysis of law has advanced a number of reasons why regulation may be preferred to liability rules:

- Governments may have better information than judges to decide optimal levels of care;
- Regulation might be enforced by criminal sanctions which may have a greater deterrent effect than the duty to compensate, in particular when the defendant is 'judgement proof'18, and
- Liability claims may not be brought if the damage is widely spread among individuals (rational apathy problem) or causation cannot be proven (Shavell 1984).

However, in the field of legal services, information deficiencies may also exist on the side of public authorities and the administrative costs of fixing quality standards may be high. The government does not easily have at its disposal the specific knowledge required to impose quality standards for judging the output of legal professionals.[19] Therefore, input related regulatory measures, such as requiring appropriate education and on-the-job training may be preferable to output-related quality standards. Furthermore, the threat of liability claims will need to co-exist with quality regulation in order to correct the deficiencies of the latter in curing the externalities problem.

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17 In the case of a strict liability rule, compensation is due if there is a causal link between the act of the wrongdoer and the harm suffered. This rule only provides incentives to take efficient care if the amount of compensation equals the actual size of the harm. This will not be the case if the judge cannot perfectly assess the size of the externalities. In the case of a negligence rule, the judge must decide whether the wrongdoer has chosen the legally required level of care. Again, the awarded compensation must equal the actual harm. An additional problem under the negligence rule is that it will only lead to an efficient outcome if the legally required level of care equals the efficient level of care. This will not be the case if the judge has insufficient information to assess the marginal benefit and cost of additional care. (It may be added, though, that the information problem seems less serious that in cases of medical malpractice (see Danzon 1985) since judges are also trained as legal experts.) Moreover, under both negligence and strict liability, the requirement of causation may not be easily satisfied, so that liability rules will not be able to fully internalize the negative externalities caused by poor performance of legal professionals. (Legal systems differ as to the requirements to prove causation. For example, many tort regimes require preponderance of the evidence and few systems accept proportional liability (market share liability). See Spier 2005.)

18 This means that the amount of compensation due is higher than the assets of the defendant. If the latter is unable to pay full compensation, he or she will not consider the full size of the externalities in reaching decisions on law compliance and will not sufficiently be deterred to engage in harmful behaviour. Criminal sanctions, in particular imprisonment, may solve this problem of under-deterrence. See Shavell 1986.

19 For a legislator to set quality levels it must know how to measure quality, which may be as difficult as it is for courts to handle malpractice cases.

2.1.3 Under-provision of public goods

The third market failure is known as the 'public good' problem. A public good has two characteristics, which distinguish it from private goods. A public good is non-rivalrous: the consumption of the good by one individual does not diminish the utility of the good for another individual. A public good is also non-excludable: it is impossible to exclude non paying individuals from consumption (Pindyck and Rubinfeld 1998, p. 672-678). Public goods thus create positive externalities, *i.e.* benefits for parties not involved in the transaction. A public good is a good that can be consumed simultaneously by everyone, even by persons who do not ask and pay for it. In a free market public goods tend to be under-produced, since the producer cannot exclude non-paying beneficiaries. To guarantee that public goods are provided, states may decide to enact regulations on the provision of public goods. Legal professionals generate important positive externalities that are of great value for society in general. Lawyers play a crucial role in the proper administration of justice and notaries contribute to legal certainty by allowing a transfer of real estate property to have full effect vis à vis third parties.

An important positive external effect of exclusive rights is a lowering of the cost of judicial administration. Pleading of cases in court by non-lawyers may place a high burden on judges (particularly in complex cases), whereas qualified professionals may produce better argued cases and more valuable precedent (Bishop 1989).

Similarly, the regulation of the transfer of ownership (conveyancing services) is considered necessary because there is a strong public interest in ensuring that property rights are well-defined and cheaply enforced.[20] Well-defined and enforceable property rights are crucially important for the well-functioning of the economy as they determine ownership of valuable assets and connected liabilities.[21]

2.1.4 Other public interest arguments

Regulation of markets for legal services may also pursue public interest goals other than correction of market failures (information asymmetry, externalities, public goods). Governments may be inspired by goals of distributive justice or by paternalism. Price regulation (maximum prices) may ensure access to legal services for low-income individuals and guarantee protection of constitutionally safeguarded rights. Mininum fees may be inspired by the objective of guaranteeing the quality of services. Besides distributional motives, governments may also consider it necessary to force laymen to get legal assistance when they engage in important transactions.[22] Governments may reject economic approaches when they fear that free markets impede the achievement of legal certainty and even put at risk the maintenance of the

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20 The Latin notary exerts an *ex ante* control of the quality of the transactions (including existence of debts for which the buyer may be liable and availability of building permits). In this way *ex post* transaction costs, such as litigation costs, are reduced or even totally eliminated (see also Arruñada 1996). This intervention does not only create benefits for the direct contract parties but also for third parties (banks providing loans, later buyers) and society at large (legal certainty), which is why it is classified as a public function.

21 Hernando de Soto (2000) has argued that the real cause of poverty in Eastern Europe and Latin America is not lack of money, but the absence of a reliable registration system for landed property which impedes financing of real estate transactions.

22 EU Member States may wish to strike a balance between economic factors (avoiding restrictions of competition) and what they consider to be non-economic factors. Legal professionals have a vital role in the administration of justice and in maintaining the rule of law, both of which are essential foundations of a democratic society (Sforzolini 2006, p. 3). In its latest resolution, the European Parliament also stressed that the reform of the legal profession does not only affect competition but also the field of freedom, security and justice, and more broadly the protection of the rule of law in the EU.

rule of law. To counter this fear, economists may reply that legal certainty and good administration of justice can be rephrased in economic terms.[23]

2.2 Private interest theories of regulation, in particular self-regulation

In contrast with public interest theories, many commentators argue that regulation of professional services is better explained by rent-seeking behaviour, effective lobbying and regulatory capture. In a famous study, Friedman and Kuznets (1945) estimated that professionals earned high economic rents (between 15 and 110 percent) in the US during the period 1929-1936. Following the insights from this seminal study, regulation of professional services is seen to arise and be sustained because it is in the private interest of the members of the profession. Given the large number of professionals, cartels are difficult to organize and to monitor. Regulation ensures the stability of cartels and generates economic rents.[24]

This insight has been applied to the legal profession (Arnauld and Friedland 1977). Cartels will not endure in the absence of entry barriers, but professional regulation prevents new firms or firms active in other areas to enter the market. Harms can arise because:

- Restrictions on entry decrease the supply of professionals below the social optimum; and
- Rules on conduct (regulated fees, prohibitions of advertising) increase prices of professional services.

Public Choice theories suggest that the professions may be effective lobbyists and that politicians, seeking re-election, will not be open to changes that eliminate the economic rents of the professionals.[25] According to the theory of regulatory capture, regulators will tend to identify with the interests of the regulated industry, rather than the public interest (Posner 1974). This is not because government officials are corrupt but because they must rely on information provided by the industry to enact regulation. The professions may abuse their information advantage to prevent the government, which exercises regulatory oversight, from striking down disproportionate anti-competitive rules. Self-regulation has been described as the ultimate form of regulatory capture (Kay 1998). Finally when such non optimal regulation has been

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23 Both can be seen as public goods which are not sufficiently supplied in a free market, so that regulation can also be justified economically (see 2.3). However, in the current policy debate, arguments about a good administration of justice and the need for legal certainty are often presented as non-economic values which in some cases should supersede concerns about restrictions of competition.

24 The original insight can be found in Stigler (1971). The link between the theory of cartels and capture theory was made by Posner (1974). See also McChesney (1987), Van den Bergh (1993) and Hadfield (2000)

25 The legal professions satisfy all criteria to be qualified as powerful interest groups: they are small, well organized and able to cope with the free riding problem through compulsory membership of the professional bodies. (On the free riding problem (*i.e.* advantages also flow to outsiders who do not bear the costs of lobbying), see Olson 1965.) Such small groups will become effective lobbies if the financial interests are sufficiently concentrated so that the potential benefits from organising and lobbying for governmental favours will exceed the associated costs. The professional associations will be often successful in obtaining wealth transfers at the expense of the general public. Consumer interests are more diffuse; the costs of organising consumers to avoid wealth transfers are relatively high and will exceed the expected gains from doing so. As long as the number of new entrants to a profession generates a flow of political rents from the restrictions of competition exceeding the one-time gains from eliminating them, politicians will not have an incentive to change the rules on entry and conduct.

in place for many decades, any liberalization (even a minimal one) would be very forcefully contrasted by the affected special interest.

When there are sound public interest arguments in favour of regulation, the scope for regulatory capture increases since it is difficult to identify the rent-seeking behaviour and private interest restrictions may be more easily enacted. Conversely, the mere fact that restrictions of competition are the result of self-regulation does not imply that professionals earn excessive economic rents since those restrictions may also be consistent with public interest arguments (for example, remedies to asymmetric information). As a consequence rent-seeking is difficult to detect and regulatory capture by powerful professional associations becomes more likely. In sum, the public and private interest theories of professional regulation are not mutually exclusive. The complexities of the current regulatory framework may only be fully understood by a combined use of both approaches.

Section 3 of this paper will provide arguments for and against various types of regulation of the legal services markets. Much of this work has been undertaken to examine whether rent-seeking behaviour is present. At this point it should already be mentioned that the available empirical evidence does not always support the theoretical predictions of the private interest theories; strong conclusions based on theoretical *a priori* reasoning by competition authorities may not have empirical support (Stephen and Love 2000, p. 1001). In the policy debate reference is regularly made to the IHS study written for the European Commission (Paterson, Fink and Ogus 2003). The authors of this study report a positive relationship between the level of regulation and the volume of turnover per practising professional, which suggests higher profits arising from greater regulation and thus supports the private interest theory. However, this and other findings of the report have been criticized as an unreliable basis for policy decisions (see Box 1).

Box 1. The IHS Report on Regulation of Professional Services (2003)

The IHS Report on Regulation of Professional Services (Paterson, Fink and Ogus 2003) covers a broad range of (liberal) professions: lawyers, accountants, architects, engineers and pharmacists. To simplify the very complex picture of diverging forms of professional regulation in different EU Member States and to make these data comparable, the researchers compute a regulation index. Three types of indices are constructed: one for market entry (covering rules on licensing, education requirements and quotas or economic needs tests), one for conduct (covering rules on prices/fees, advertising, location, diversification, form of business and inter-professional cooperation) and one overall index. Each regulation category (such as economic needs tests or restrictions on advertising) receives a weighting that indicates the relative importance of that category in respect of market outcomes. The score for market entry and conduct ranges from 0 as least restrictive to 6 as most restrictive, leading to an overall index between 0 and 12. The higher the respective index score, the more restrictive the regulation system for the profession is assumed to be. According to these indices, the intensity of regulation clearly varies across EU Member States and professions. The study then goes on to find out whether the different degrees of regulation also have an impact on market outcomes. To that end the study undertakes a number of case studies comparing Member States where the level of regulation differs substantially. The relevant indices are then brought in relation with some key economic variables which may indicate that extensive regulation serves the private interests of the regulated professions. The variables considered are the number of firms, employees and professionals, and the total turnover of the regulated profession. In the most regulated countries, the researchers find relatively high volumes of turnover compared to the number of practising professionals. In countries with a high level of regulation, there appears to be a proportionally smaller number of professionals and they receive relatively higher turnover per professional. In countries with low levels of regulation, there are lower volumes of turnover but only in proportional relation to the number of practising professionals (thus also in countries where the overall business is higher). Assuming a connection between volume of business per professional and excess profit, the positive relationship between the level of regulation and the volume of turnover per practising professional seems to offer some support to the private interest theories of professional regulation.

More specifically with respect to the legal profession, the report shows remarkable differences between regulation indices across jurisdictions (Paterson, Fink and Ogus 2003, p. 50 and 57). For lawyers, the indices vary

between 0.3 (Finland) and 9.5 (Greece). Next to Finland, jurisdictions in the low range include Sweden (2.4), Denmark (3.0) the Netherlands (3.9) and England/Wales. In the high range one finds, next to Greece, also Austria (7.3) France (6.6) Luxemburg (6.6) Germany and Spain (each 6.5) and Italy (6.4). Jurisdictions in the mid range are: Ireland (4.5), Belgium (4.6) and Portugal (5.7). For Latin notaries, the overall index ranges between 6.3. (Netherlands) and 11.0 (Germany). High indices are found also in Italy (10.7), France (10.0) Austria (9.6) Spain (9.4) Belgium (9.3). Specific case studies of the lawyers' profession show that Austria and France, which have high regulation indices (7.34 and 6.61 respectively), are medium producers in terms of turnover (given the size of the country) and that the number of legal professionals (registered lawyers and practicing notaries) is low. This results in high turnover per professional. Conversely a group of countries with low regulation indices (Netherlands, Denmark, Finland and Sweden) have relatively low numbers of professionals, but unlike Austria and France the overall volume per professional in these countries is in the middle bracket. More regulation thus results in a higher volume of turnover per professional. The authors also find a low employment level in Austria and relatively high employment in the Netherlands and Denmark.[26] It thus appears from the IHS study that high levels of regulation in the legal profession go hand in hand with lower employment.

The IHS Report reaches the conclusion that "the lower regulation strategies which work in one Member State might be made to work in another, without decreasing the quality of professional services, and for the ultimate benefit of the consumer" (Paterson, Fink and Ogus, 2003, p. 6). However, this conclusion may be too strong, for three reasons.[27] First, the assumption that higher turnover equals higher profit could be incorrect – turnover in a highly regulated profession could be higher because bureaucratic costs are higher - and hence the prices charged. Another possible explanation for higher turnover might be that a smaller number of professionals in these Member States works harder than in other Member States and thus reaches a higher turnover, in spite of a lower price per service. A third explanation may be that the turnover is higher because higher prices reflect superior quality of the services and not because of the existence of excess profits. A fourth explanation may be that profits are competed away by excess quality. Second, the Report does not fully control the risk of spurious correlation. The correlation between the level of regulation (as indicated by the regulation index) and the economic variables may be caused by a third variable linked to the two others that is not controlled for. To isolate the effect of each variable, a regression analysis would have been necessary. Third, the Report assumes a reasonable homogeneity of quality of professional services across EU Member States. This is a very strong assumption given the heterogeneity of preferences (concerning price/quality relationships and the views on the scope of public goods to be provided by the professions) and the concomitant differences in the scope of the professional monopoly. High incomes may also reflect appropriate quality rents. As long as reliable quality measurement does not form part of the empirical work, strong policy conclusions do not seem warranted. Finally, the study presents only a very broad picture of regulation, including self-regulation, and does not sufficiently take account of different effects of different forms of regulation in different professions across different Member States, each of which is featuring own peculiarities.

2.3 Governmental regulation or self-regulation?

From the arguments in sections 2.1-2.4, it can be concluded that there is a need for regulation of markets for legal services. The next sets of questions, however, are more difficult to answer.

A first set of questions relates to the appropriate qualified decision maker over regulation.

- Who is the best regulator?
- Is it wise to leave this task to the professions or is state regulation preferable to self-regulation?

This section of the paper will compare advantages and disadvantages of self-regulation to regulation by governmental authorities.

[26] For more information on this and other findings, see Patterson, Fink and Ogus 2003, pp. 95-96

[27] For a detailed critique, see RBB Economics (2003).

A second set of questions relates to what form this regulation should take. The second set of questions will be dealt with in the Section 3 of this paper.

2.3.1 Advantages of self-regulation

On the positive side, several arguments have been advanced to support the superiority of self-regulation over regulation issued by the state.[28]

First, a self-regulatory regime profits from the fact that the members of a profession possess significant information advantages, minimizing the information costs for the formulation and interpretation of quality standards.[29]

Second, enforcement costs of a self-regulatory regime may be lower than those with state-issued regulation.[30]

Third, self-regulation is favoured because of its greater degree of flexibility compared to government regulation, being less bureaucratic and able to draft and review regulations more quickly and flexibly.[31]

The fourth argument in favour of self-regulation relates to its lower administrative costs.[32]

2.3.2 Disadvantages of self-regulation

On the negative side, self-regulatory bodies are not accountable through normal channels and third parties usually do not participate in establishing the self-regulatory regime. On top of these problems, self-regulatory rules may create entry barriers and enable the professions to achieve super-competitive profits.

It is not necessarily justified that members of a profession can enact rules on market entry and conduct without any control of democratically elected Parliaments. The absence of a significant lay/consumer input into the decision making process exacerbates the problem. If consumers are not well-organized and if there

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28 The classic reference is Miller, 1985. See also Ogus 1995 and Van den Bergh 2006.

29 Self-regulatory agencies typically command a greater degree of expertise and technical knowledge than the state. The professions have the best capacity to control quality and recognize low standards. Compared to the state, they have better knowledge of the ways to guarantee quality and are also better able to monitor compliance and enforce the necessary rules. A regulatory authority cannot easily acquire and maintain a specialized knowledge of each profession.

30 Thanks to the information advantages of self-regulatory agencies monitoring and enforcement costs are reduced. This aspect is particularly important where, as with advertising, it is difficult to give a precise definition of the desired behaviour. Under such circumstances, self-regulation will not only minimize information costs but may also avoid the counterproductive results that can emanate from an adversarial relationship between the professions and public authorities (Baggott and Harrison 1986). On a more general level, self-regulation will reduce enforcement costs since the professions will feel more committed to rules protecting the high standard of the profession enacted by themselves than to statutory regulations on quality.

31 Flexibility is especially important in dynamic markets where consumer preferences regularly change. The argument goes that rules enacted by professional associations are more flexible and therefore less likely to stifle innovation or excessively limit consumer choice.

32 Public regulation is costly to tax payers, some of whom do not consume the product. In the case of self-regulation, costs are borne by the regulated sectors of the economy. Professional bodies can finance the costs of regulation through fees on their membership. Additionally, self-regulatory bodies have incentives to minimize costs of enforcement and compliance.

is no countervailing power at the buyers' side, the views of consumers will not be sufficiently taken into account. To remedy this problem, consumer associations have advocated a significant consumer representation in the boards of professional bodies.[33]

The benefits of self-regulation described in Section 2.3.1 will materialize only if self-regulatory bodies do not abuse their powers to restrict competition.[34] In the past, these bodies were mostly concerned about practices harming the status and dignity of the profession, as well as 'unprofessional' behaviour in contacts with colleagues, and tended to neglect quality assurance vis-à-vis clients. The scepticism with respect to the efficiency of self-regulation was substantiated with evidence showing a proportionally higher number of sanctions imposed for unprofessional conduct in contacts with colleagues than for professional malpractice in relations with buyers of professional services. Equally, professional bodies showed a desire to exclude competition by giving the consumers the impression that the services of all professionals are equally good (Van den Bergh and Faure 1991). In recent years, many professional bodies have increased their efforts to improve quality but this does not imply that the problem of asymmetric information has been sufficiently overcome.

The contentions about the greater flexibility of self-regulation are subject to the *caveat* that self-regulation should not be misused to restrict competition. If the professions can limit competition, they may be able to successfully resist the competition from newcomers adopting more liberal rules. The resistance to change may be more effective when the rules are promulgated by self-regulation than when they are laid down by governmental regulation. The rents may be used to resist competition from competitors offering more efficient rules (Curran 1993). Even if the rents have been dissipated by competition between the privileged or by newcomers, the artificial restrictions on output give rise to what Tullock (1975) has called a 'transitional gains trap'. It is politically difficult to abolish a policy that is inefficient both from the standpoint of the consumers, who pay artificially high prices, and from the standpoint of the privileged, who no longer make exceptional profits. The persons who lose will reluctantly compensate the capital losses of what they consider to be gainers, even though these capital losses are smaller than the overall social welfare gains from removing the output restrictions.[35]

Finally, the argument that all of the costs of regulation are borne in the market in which it is imposed does not hold if restrictions on competition persist. It remains hard to see why the distribution of the costs

33 A related issue, which has received attention in the current policy debate, is whether it is appropriate to combine the regulatory functions of a professional body with the representative functions (Review of the Regulatory Framework for Legal Services in England and Wales 2004). In a democracy, it is perfectly legitimate that professional associations defend the interests of their members. However, it is not immediately evident why the same associations should be empowered to regulate the profession. If a profession is entrusted with powers to pursue the general interest, democratic legitimacy seems to require that an independent public authority supervises the professional body and (dis)approves its self-regulatory rules. The wish to increase the democratic level of the current framework justifies an investigation into appropriate institutional arrangements, which cope with the possible deficiencies of self-regulation in the sector of the legal professions without endangering its benefits.

34 Self-regulation has been described as a social contract between society and the profession which mitigates the problems arising from the information asymmetry (Dingwall and Fenn 1987). However, the reduction of information costs will be achieved only if the self-regulatory bodies have sufficient incentives to control and enforce quality standards.

35 On many occasions, only a 'revolution' will shake loose an economy's inefficient regulation. At this point, it should be pointed out that the most blatant restrictions of competition have been removed because of judgements of the European Court of Justice that declared self-regulatory rules contrary to the freedom of establishment and freedom to provide services, and the deregulation initiatives of the European Commission in the framework of the internal market programme and competition policy (see Van den Bergh 1999 and section 4 of this paper).

of regulation would be split in an efficient fashion between the sellers and the buyers in non-competitive markets. Professional bodies may pass on a substantial part of the costs to the ultimate consumers. When demand is inelastic (as it may be the case for urgently needed professional services) professionals may 'externalise' the great bulk of the costs.

2.4 Rules of competition law

Ideally, an optimal legal system should guarantee that restrictions of competition are justified by the public interest and that anti-competitive practices providing economic rents to legal professionals without generating benefits for society at large are prohibited. Competition law plays a crucial role in banning restrictions that are based on private interest motives only. These prohibitions, however, do not extend to state measures. As a consequence, unnecessary and disproportionate restrictions of competition may survive in statutory law. It is the ultimate responsibility of states to carefully scrutinize existing rules and proposals for new regulation of the legal services markets. By conducting a careful regulatory impact assessment, states should avoid enacting rules whose costs (super-competitive prices) exceed the benefits (curing market imperfections or achieving other goals of public interest).

Competition agencies of many OECD countries have advocated increasing competition in the markets for professional services (OECD 2000, p. 29). Legal professionals have tried to escape from the prohibitions of anti-competitive practices contained in those laws by arguing that legal services do not constitute trade or commerce. Already in 1975, the American Supreme Court decided that the language of Section 1 of the Sherman Act contains no exception for professionals who sell their services for money.[36] After the landmark *Goldfarb* case, which concerned a minimum fee schedule published by the Fairfax County Bar Association, the applicability of U.S. antitrust law has been confirmed in seven more cases (see, for an overview, Kolasky 2006). The US Supreme Court makes a distinction between naked price-fixing agreements that are held *per se* illegal and restrictions on advertising that might serve a pro-competitive objective by protecting consumers from false or misleading claims. In a case concerning the medical profession, the U.S. Supreme Court argued that the latter risk is particularly serious with claims about quality or patient comfort and that, therefore, the judges of the Circuit Court should have engaged in a more detailed enquiry.[37] The latter opinion may be interpreted as a requirement that private interest theories should be supported by evidence.

In Europe, the applicability of the competition rules to the liberal professions has equally been confirmed. Furthermore the European Courts have extended their appreciation on competition grounds also to behavior by professional bodies that conforms to other legal rules. In particular, the European Court of Justice held in the *Wouters* case that not every decision of a professional body restricting competition necessarily is contrary to Article 81(1) of the EC Treaty. The prohibition of inter-professional co-operation between lawyers and accountants was considered "necessary for the proper practice of the profession, as organized in the Member State concerned", despite the effects of restricting competition that are inherent in it.[38] The Court was of the opinion that a lawyer's independence, his or her duty to act in the best interest of the client and the respect of the rule of professional secrecy would be jeopardized if the lawyer is also a member of a business structure which has to control and certify the accounts of the client. As a consequence, the prohibition of multidisciplinary practices between lawyers and accountants (contained in the ethical rules of the Dutch Order of Advocates) is not contrary to Article 81 EC since it is in conformity

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36 The Supreme Court added that "the fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act" (*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) at 788-89).

37 *California Dental Association v. FTC*, 526 U.S. 756 (1999) at 781.

38 Case C-309/99, *Wouters* [2002] ECR, I-1577.

with the objectives of the law that gave the Dutch Order of Advocates the power to self regulate. In its Communication on Competition in Professional Services, the European Commission has indicated how it will apply the *Wouters* test:

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

The European Commission applied the *Wouters* test in a Belgian case and concluded that a scheme of recommended prices is not necessary to guarantee the proper practice of the profession of architect.[39] This view opens the door for economic analysis of public and private interest motives of self-regulation, in order to assess the necessity and proportionality of restrictions on competition. More information on the application of rules of European law to restrictions of competition in the legal professions can be found in Annex 1.

In certain sectors of the economy, actions of governments may be more detrimental to competition than those of private companies. A recurring problem in OECD countries is that states cause damage to consumers and reduce overall welfare by including restrictions of competition in their statutory laws and regulations. In the U.S. and Canada, states can pass laws that shield sectors of industry from the application of the general rules of competition law. The resulting problems are subsumed under the headings 'state action defence' in the U.S. or 'regulated conduct defence' in Canada. Problems resulting from restrictions of competition by governmental action in the U.S. are discussed in Annex 2. In Canada, the main legal mechanism for solving conflicts between the general rules of competition law and mandatory restrictions of competition is the 'regulated conduct defence'. The leading case with respect to the legal profession is *Jabour*, in which the Canadian Supreme Court decided that the Law Society of British Columbia's general mandate to set standards of proper conduct gave it sufficient authority to prohibit lawyers from advertising their services.[40] The Canadian Competition Bureau has adopted a narrow view of the regulated conduct defence in that it would apply only when the regulated conduct is mandated or required by the regulator and the conduct is contrary to the Act, but the *Jabour* judgment extended the scope of the defence from restrictions specifically authorized under provincial legislation to broadly or generally authorized restrictions of competition. Unfortunately, the scope of the regulated conduct defence remains unclear in many respects (see: Goldman and Little 2006). It is interesting to contrast the Canadian experience with U.S. and EU law. Whereas the 'regulated conduct defence' may bring most anti-competitive measures decided by the Canadian provinces outside the reach of the Canadian competition law, the scope of the state action defence is more limited in the U.S., because of the requirements of 'clear articulation' and 'active supervision' (see Annex 2). The scope for anti-competitive state action is even more restricted in the European Union, since the rules on the four economic freedoms provide an additional control mechanism on top of the (joint) liability of Member States for infringement of the competition provisions of the EC Treaty (see Annex 1).

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39 European Commission, Decision COMP/A.38549 of 24 June 2004, Belgian Architects'Association, OJ 06.01.2005, L 4/10.

40 *Attorney General of Canada v Law Society of British Columbia* [1982] 2 SCR 307

3. Theory and evidence on the effects of particular forms of regulation in the markets for legal services

This section of the paper will discuss the main arguments in favour and against the most commonly used forms of professional regulation in the markets for legal services. Certain aspects of professional regulation are often deemed to have a substantial negative impact on competition and to cause significant harm to consumers:

- Exclusive rights and other quantitative and/or qualitative entry restrictions;
- Restrictions on fees and advertising; and
- Restrictions on business organization and multidisciplinary practices.

Still, restrictions on competition may be outweighed by wider public policy benefits. The question whether regulation of professional services may be justified on public interest grounds is the focus of research on professional regulation and of policy making by competition authorities. This section also includes an overview of the empirical work on the real-life effects of different types of regulation, including self-regulation, in the markets for legal services. The work discussed provides useful insights for assessing the necessity and proportionality of the existing restrictions on competition in the legal professions.[41]

3.1 Exclusive rights and other entry restrictions

Entry into the legal profession is limited in different ways: some professionals have exclusive rights to perform certain services; entry into the profession may be reserved to individuals meeting certain quality standards and made subject to quantitative restrictions. In several jurisdictions solicitors/barristers or advocates have the exclusive right to represent parties in courts. In some EU countries the task of drafting and authenticating certain legal documents is entrusted to Latin notaries; their professional monopoly covers real estate services whenever an act requires a registration in a public registry (conveying real property, creating or canceling mortgages), services in the area of corporate law (incorporating companies and establishing associations and foundations) and, in some countries, family services (drawing up or amending marriage contracts and partnership agreements, drawing up or altering last wills, gifts and donations).

Besides reserved tasks, entry restrictions may be of a qualitative or quantitative nature. Qualitative entry restrictions may take the form of:

- Requirements relating to the minimum level and period of education and training (for example, the possession of specific degrees and diplomas);
- Requirements relating to a minimum level or period of professional experience (for example, having undergone an apprenticeship in an established practice);
- Successful completion of professional examinations after a professional education; and

[41] At this point, it should already be mentioned that empirical work on the legal professions is still relatively limited (compared to the medical profession; see OECD 2005). As far as it entails insights that seem relevant for the legal professions, occasional references to research on other professions will be included.

- Requirements relating to personal characteristics, such as citizenship and residence, language competence, and absence of civil or criminal convictions.

Apart from these qualitative restrictions, some legal professions in certain jurisdictions are also subject to quantitative entry restrictions. The best known example is the Latin notary profession where regulation limits the number of professionals in relation to the general population, allows a limited number of professionals for separate geographical areas or limits their number for each geographical area based on population.

At this moment, the most debated exclusive right in Europe relates to conveyancing services. In several jurisdictions, citizens and firms are required to engage one or more licensed legal professionals when they want to sell real estate. In EU Member States, there are four regulatory models. They range from the highly regulated Latin notary system, to a less regulated lawyers' system (exclusive rights for solicitors, eventually in competition with licensed conveyancers), a slightly deregulated Latin notary system (the Netherlands) and a model where legal services are provided by real estate agents. In marked contrast with EU Member States, intervention by a licensed legal professional is not mandatory in the U.S. In the U.S., legal services are provided by real estate brokers, attorneys representing either the seller or the buyer, title insurance companies, escrow companies, which accept deposits of documents or money from both parties in the transaction, and notaries public.[42] Recently, the American Bar Association has proposed a new definition of the practice of law which has, *inter alia*, the effect of excluding lay services related to real estate closings. The U.S. antitrust authorities have formulated objections to this proposal, arguing that reserving certain tasks for the legal profession is contrary to consumers' interests. In their view, there is no reason to fully eliminate lay service providers since there is no proof of consumer harm when particular practices (such as real estate closings) are performed by non lawyers ((Joint Agencies [US FTC and US DOJ] 2002, p. 11).

3.1.1 Economic theory

Exclusive rights and their potential negative or positive effects have been the object of numerous theoretical comments. The classical argument against monopolies is that they cause a welfare loss. It is well-known from price theory that monopoly creates two problems:

- Consumers have to pay more for the product, since the monopolist may charge a super-competitive price (price effect); and

- Consumers may buy less of the product, even though it would be utility maximizing for them to add purchases (allocation effect).

[42] It is important to stress that an American notary public is not comparable with a Latin notary. The U.S. notary public does not need to be a highly qualified legal professional. His or her task is to verify the identity of persons signing legal documents; in the case of a transfer of real estate property the notary public certifies the signature of the seller. Latin notaries combine several functions which in the US system are performed by a wide group of legal and non-legal professionals. Since Latin notaries have to be impartial and neutral, they represent the interests of both buyers and sellers. In the US, each party may choose its own attorney. Latin notaries also take deposits of money (task of escrow companies) and verify the signature of the transacting parties (task of notaries public). Moreover, the Latin notary system can be qualified as a compulsory insurance since parties are not free to choose whether they want to buy title insurance. Clearly, the US system leaves much more freedom for individual choices, since parties may decide themselves which professional services they want to buy. It should be added, though, that banks regularly require title insurance if the buyer wants to finance the purchase of a home by way of a mortgage loan.

If exclusive rights are coupled with numerical restrictions on entry, service providers may restrict output and achieve higher profits to the disadvantage of consumers (Stephen and Love 2000, p. 993). Welfare losses may be substantial if exclusive rights are granted for standardized services which can be provided at a lower cost by non-regulated providers (para-professionals). Conversely, an argument in favour of reserved tasks is that conferring monopoly rights for certain services may lead to an enhanced degree of specialisation. This, in turn, may guarantee a higher quality of services being provided to consumers.[43] As will be further explained below, monopoly rights coupled with quantitative entry restrictions are sometimes defended as a means to guarantee the provision of so-called universal services, though OECD (2004) suggests that such defenses should be treated with skepticism, as many products for which such claims are made would be provided anyway, absent the protection.

The anti-competitive consequences of exclusive rights are most severe when individuals and firms are forced to buy the regulated legal services. In the case of the Latin notary profession, the following arguments are made to justify the limitation of consumers' freedom and the ensuing anti-competitive consequences.

- It may be argued that the Latin notary profession provides a greater degree of legal certainty than the non regulated U.S. system of transfer of real estate property.

- The Latin notary system also allows cheaper enforcement of property rights since notaries draw up 'authentic acts', which have imperative evidential value (with respect to the observations done by the notary) and can be enforced without judicial intervention, so that litigation costs are reduced. In this way, substantial negative externalities for third parties, which are due to invalid transactions, are avoided and enforcement costs are minimized.

- Benefits also flow to society at large since legal certainty may be considered as a public good (see 2.3).

- Moreover, the Latin notary system may lead to efficiency gains in terms of standardization, economies of scope (since the Latin notary performs many functions which in the US are done by several service providers) and high quality of Land Registers thanks to the professional input of Latin notaries.

Conversely, the Latin notary system severely restricts freedom of choice of consumers and the (cumulative effect of) existing restrictions of competition in some countries may go further than necessary to avoid consumer harm. Ultimately, the magnitude of these costs and benefits is an empirical issue. Policy choices remain difficult to make in the absence of a well informed cost-benefit analysis (Van den Bergh and Montangie 2006).

Qualitative entry restrictions which regulate the quality of the services before they enter the market are argued to guarantee high-quality services and avoid adverse selection (see section 2.1). The exclusion of low-quality suppliers will enhance the average level of quality in the market and alleviate the information asymmetry problem between legal professionals and consumers. One may argue that less

[43] As far as the legal profession in England and Wales is concerned, Bishop (1989) argues that consumers of legal services may be better off when the preparation of a case and the pleading of a case in court is entrusted to different legal professionals (solicitor/barrister) according to their relative expertise. Also, in a referral system, barristers who perform poorly will not be able to sustain their position in the market. However, as Stephen and Love (2000, p. 1007) point out, one also should take into account that such division may lead to higher transaction costs in case economies of scope exist when the two legal professionals work in the same office.

restrictive means to guarantee the level of quality of the service rendered are not easily available. Information regulation (duties to disclose) will not work in markets characterized by serious information asymmetries. Liability may be imposed for possible harmful consequences flowing from poor quality services (*ex post* control) but, for reasons explained above (see section 2.2) may not be sufficient to prevent adverse selection if judges face difficulties to assess professional malpractice. Moreover, a liability rule may not offer adequate protection when the damage resulting from low quality service is of a substantial magnitude or widely dispersed among individual consumers.

Qualitative entry restrictions may thus be necessary. However, there is a risk that these regulations will be disproportionate. Professionals may want to maximise their income (rent seeking) by setting the level of qualitative entry restrictions too high. A related risk is that the regulated profession gains monopoly power over the organisation of the required training, thus inhibiting innovation in education (Irish Competition Authority 2006, p. 52-53). Ultimately, qualitative entry restrictions can have the effect of limiting the number of professionals and of the services that are provided (Leland 1979, p. 1338). This may especially be the case when the entry restriction is combined with exclusive tasks for the regulated profession.

Criteria relating to nationality and citizenship or residence as a condition for professional practice have given rise to different views. On the one hand, it is argued that such requirements may be justified when it is deemed necessary for professionals to be familiar with national laws and habits. This argument is of particular importance for legal professions. Residence requirements are claimed necessary to establish a relationship of trust between professionals and consumers and the need to create an adequate possibility for the consumer to take legal recourse in cases of malpractice (Indecon 2003, pp. 19-20). But it has been argued that restrictions on grounds of nationality, citizenship or residence are difficult to justify since they mainly lead to preventing the cross-border provision of services and are a disproportionate measure to guarantee familiarity with national legal systems (Irish Competition Authority 2006, p. 66-68). Given their negative impact on interstate trade, discriminations on grounds of nationality constitute an infringement of European law (see Annex 1).

Quantitative entry restrictions reduce the number of service providers and thus enhance the risk of reduced supply and increased prices. Furthermore, where the quantitative restriction has a geographical component, this may lead to the creation of local monopolies. Numerical limitations exclude any additional services being produced by new entrants to the profession. A justification sometimes offered for quantitative entry restrictions relates to the need to provide universal services. These are services which are deemed to be of crucial importance so that every consumer should be able to purchase them at a reasonable price. It may prove not to be profitable for legal professionals to provide certain services in remote geographical areas or to certain types of consumers. Quantitative restrictions, by increasing overall profitability, are claimed to support the provision of otherwise unprofitable services, e.g. in rural areas. Clearly, this argument cannot support quantitative entry restrictions in densely populated areas, where there is no risk of reduced supply. However, even in sparsely populated areas one would have to establish whether there are no less restrictive alternatives like offering special compensation for rendering public services. OECD (2004) argues that great care should be taken when providing implicit cross subsidies, as they hide true costs from consumers and distort allocation of resources. Often, cross-subsidized services would be provided absent the cross subsidy, though potentially in different ways. In particular, for example, if wills are cross-subsidized by other fees, there should first be evidence that there would be a significantly different level of output absent cross-subsidies. Given the infrequency of provision of such services, it is not clear why highly local provision is an appropriate policy goal.

3.1.2 Empirical evidence

The above discussion has shown that several theoretical arguments have been developed against and in favour of exclusive rights and entry restrictions for professional services. These arguments point into different directions, so that the desirability of those regulatory measures remains ultimately an empirical issue. Unfortunately, empirical evidence on the real-life effects of regulation of the legal services markets remains limited.[44] Deregulation provides excellent opportunities for empirical studies, which compare market outcomes before and after the liberalisation, as do cross-country studies. Relevant evidence includes the following:

- The abolishment of the monopoly of solicitors for conveyancing services in England and Wales (see Box 2);[45]
- The slight deregulation of the notary profession in the Netherlands (See Box 4);46
- Comparative studies across U.S. states; and
- A comparative study on conveyancing services comparing market outcomes in (more or less heavily) regulated markets and liberalized European markets (commissioned by the European Commission)(See Box 3).[47]

On the empirical side, the main questions relate to

- The effects of entry regulation on the number of professionals; and
- The price/quality relationship of the services provided.

Quantitative restrictions will by their own nature have the effect of limiting the number of professionals. Conversely, there is little empirical evidence to support the view that qualitative entry restrictions will lead to a lower number of active professionals. Where such restrictions exist the number of practitioners remains large, which suggests that qualitative entry restrictions do not by themselves restrict the number of professionals and limit competition in this way. Entry into the legal profession in the United States has continually grown over the years, in spite of the existence of qualitative entry restrictions (see a summary of the literature by Stephen and Love, 2000, p. 993-994). One empirical study of the legal profession in different states of the U.S. by Lueck, Olsen and Ransom (1995) even seems to suggest an opposite effect. These authors examined the relationship between state lawyer density, state bar exam pass rates and the requirement of a degree recognized by the American Bar Association (ABA). Their research shows that lawyer density is higher in states were the pass rate is lower and in states where an ABA

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44 Since there is still strong political resistance to deregulation measures in several jurisdictions, opportunities for such empirical work are scarce. At the outset it should be noted that propositions like those of Bishop (1989) that specialisation is more efficient are difficult to test empirically. Olsen (2000, p. 1027) stresses that "studies of quality almost universally suffer from one overwhelming weakness; quality is difficult to measure".

45 The empirical studies on the English conveyancing market are summarized in Box 2.

46 The Dutch legislator has kept the exclusive rights of notaries intact but has reduced entry restrictions and liberalized the calculation of fees. An overview of the empirical work on the deregulation of the Dutch notary profession is presented in section 3.2 (see Box 4).

47 The preliminary results of this study are summarized in Box 3.

recognized degree is required.[48] However, empirical evidence does seem to support the private interest view that a combination of qualitative entry restrictions with geographical limitations has a negative effect on the number of professionals. This seems to be confirmed by a number of analyses focusing on the effect of restrictions on mobility between states for lawyers in the U.S.. It is reported by Stephen and Love (2000, p. 994) that most of these studies show that such lack of reciprocity leads to a lower number of professionals and higher lawyer incomes.

As far as the effect of entry restrictions on prices and quality is concerned, for a long time empirical research remained scarce. Lueck, Olsen and Ransom (1995) found little support for the view that restrictions affect the price of legal services in the U.S.. This outcome suggests that a growing number of lawyers does not necessarily coincide with greater competition in terms of reduced fees. In its communication on professional services (2004. p. 13), the European Commission refers to a staff report of the US Federal Trade Commission by Cox and Foster (1990). In that report, the researchers assessed a number of empirical studies on the effect of entry restrictions. They concluded that a majority of these studies show little or no positive effect of licensing restrictions on the quality of the services provided. As far as the impact of exclusive rights on prices is concerned, the most interesting test case in Europe is the abolishment of the exclusive rights for conveyancing services[49] in England and Wales.

Box 2. Effect of abolishing solicitor monopoly on conveyancing services in England and Wales

Since 1804 solicitors held a monopoly right for conveyancing services in England and Wales. In 1985, the Administration of Justice Act was passed which created a para-profession called 'licensed conveyancers', the members of which have been allowed to offer conveyancing services in competition with solicitors. Actual entry of these licensed conveyancers took place as of 1st May 1987. This liberalisation has been the focus of a number of studies of the market changes between 1985 and 1992. A first study by Farmer, Love, Paterson and Stephen (1988) focused on the market for conveyancing services towards the end of 1986, that is after the decision on abolishing the solicitors' monopoly was taken, but before the first licensed conveyancers actually entered the market. The authors conducted a survey among a representative sample of solicitors in England and Wales to check what their response to enhanced competition for conveyancing services would be. One of their findings is that at that time solicitors' fees showed a downward tendency. This could be explained by the fact that solicitors may already have been lowering their fees in anticipation of the entry of the licensed conveyancers. A later survey by Gillanders, Love, Paterson and Stephen (1992) focused (among others) on fees charged by a representative sample of solicitors for a routine conveyancing transaction in November and December of 1989, *i.e.* after the entry of the licensed conveyancers. Their research took account of data for 27 representative geographic areas. They found lower conveyancing fees in areas where licensed conveyancers had been most active. This seems to confirm the converse assumption that a monopoly right causes fees to be higher and thus works to the disadvantage of clients.[50] However, the researchers themselves put this result into perspective. First of all, they stress that their research was based on fees quoted by the solicitors, not on the actual fees paid by their clients. Moreover, they point out that the fees in areas where the licensed conveyancers had entered the market (namely the larger markets), were already lower in 1986, i.e. before the solicitor's monopoly was abolished. This could mean that the lower fees may (partially) be influenced by other

48 Other explanations for the higher density in states with higher restrictions may include other variables, such as perceived quality of life differences between states. From this perspective, the flow of lawyers into such states, e.g. California, would be even higher if entrance exams had average pass rates.

49 Conveyancing services can be defined as a bundle of professional legal services related to buying and selling real estate property. Conveyancing includes the investigation and transfer of title as well as fulfilling certain legal formalities related to mortgage finance.

50 Indecon (2003) refers to another study revealing evidence on the introduction of the para-profession of licensed conveyancers in New South Wales (Australia). This report seems to confirm that the introduction of some level of competition, coupled with relaxation of restrictions on fee advertising, may result in lower fees charged by solicitors for conveyancing services.

factors than the entry of the licensed conveyancers.

In 1992, Stephen, Love and Paterson undertook a similar research covering the same locations as the earlier 1989 survey and using similar data, *i.e.* quoted fees for conveyancing transactions (Love, Paterson and Stephen 1994). The researchers found that the fees quoted by solicitors were on average higher than those quoted by licensed conveyancers. Furthermore, solicitors' fees had generally risen and even risen faster in markets where they did not face competition from licensed conveyancers. A striking result of the research, however, was that licensed conveyancers' fees also had risen between 1989 and 1992. Furthermore, the fees of licensed conveyancers had risen faster than those of solicitors in markets where both professions were active, thus making fees of both professions more similar. The latter result seems to contradict the assumption that abolishing monopoly rights will lead to lower fees being charged to the benefit of consumers. The researchers admit that their research results can not *per se* assess the effect on fees of the change of the regulatory regime, but suggest that there seems to have been an accommodation between solicitors and licensed conveyancers after the entry of the latter. Looking back on these results, Stephen and Love (1996) have sought explanations for these findings. They present several elements which could explain why the entry of licensed conveyancers has not, as expected, led to lower fees as a consequence of the introduction of a certain level of competition in the market for conveyancing services. One element could be that the fees were to a large extent influenced by the level of solicitor concentration in local markets. Further, the overall level of entry of licensed conveyancers was rather low, especially in rural areas. Several factors may explain this, such as the slump in the housing market in those days and the fact that licensed conveyancers have more limited opportunity for business development and risk spreading across different services, since they can only offer a limited range of services. The fact that licensed conveyancers carry a larger risk may explain why they charge higher fees than expected to compensate for this risk. The authors believe that positive effects may be realized when other multi-services providers (such as banks and building societies) would be allowed to enter the conveyancing market. Since there exists no evidence of such entry, this question remains open. But overall, the evidence seems to suggest that solicitor fees for conveyancing services were lower when more para-provider competition was present.

The European Commission has commissioned a cross-European comparison of regulatory intensity and prices of conveyancing services. Its preliminary results are discussed in Box 3.

Box 3. Preliminary findings from the study on Conveyancing Services Regulation in Europe (2007)

In 2006 the European Commission asked for an independent study of the different levels of regulation and their economic effects in European conveyancing services markets. Regulation does differ substantially across countries[51]. In December 2006, preliminary results of the commissioned study have been published. At the moment of writing (early April 2007) the final report is not yet available but preliminary findings on levels of regulation and transaction costs have already been published on the European Commission's website (http://ec.europa.eu.comm/competition, click Professional Services).

As in the IHS study (see Box 1), the researchers calculate regulation indices and bring them into relation with market indicators. Four regulation indices are constructed: MERI (market entry regulation index), MCRI (market conduct regulation index), MII (mandatory intervention index) and CPI (consumer protection index). Each index ranges from 0 as least restrictive to 6 as most restrictive, leading to an overall MERI+MCRI+MII index of 18. In calculating the indices a weighting is used that indicates the most direct impacts for market structure and market outcomes of several forms of regulation. Market entry regulations (MERI) consist of quotas or economic needs tests (weight of 50%), exclusive rights (25 %) and professional education requirements (25 %). Market conduct regulations (MCRI) comprise restrictions on prices and fees (50 %), advertising (17%), location clauses (11%), form of business organization (11%) and inter-professional cooperation (11%). The MII index varies from 0 (no mandatory intervention by a legal professional) to 2 (mandatory intervention for certification of signatures), 4 (mandatory intervention by one professional) to 6 (if more than one professional must intervene). The CPI is calculated by investigating the availability of compulsory indemnity insurance (38%), control of conduct and quality (25%), continuing education (25 %) and the obligation to provide services (12%).

The researchers find that the MERI index is high in all countries with Latin notaries, with the exception of the Netherlands where important liberalisations took place especially with respect to statutory fees (see Box 4 on the deregulated Dutch notary profession). The same result holds for the MCRI index (with the exception of the Netherlands and Austria). Also the CPI is rather high in countries with Latin notaries. Overall indices (MERI+MCRI+MII) range from a maximum of 18 (Greece) to 7,1 (Netherlands). Many countries have indices between 15 and 14 (Portugal, Belgium, Poland, France, Germany, Italy and Spain). The overall indices are somewhat

51 In most European countries, intervention of Latin notaries is mandatory but the exact scope of their intervention differs *ratione materiae*. Some countries require notarial intervention for the validity of the sales contract (for example, Germany and Poland), whereas in other countries notarial intervention is required only for registration in the Land Register, which makes the property title opposable to third parties (for example, Italy and Belgium), or merely for the certification of signatures (for example, Slovakia and Slovenia). The picture is further complicated since in some countries conveyancing usually involves the intervention of more than one licensed professional: for example, notaries and lawyers representing buyers (Portugal) or notaries and 'gestores administrativos' affiliated to the lending bank who take care of the necessary registration (Spain). In a smaller group of jurisdictions, the involvement of a legal professional is not mandatory but the right to offer conveyancing services is limited to licensed professionals (for example, solicitors and licensed conveyancers in England). Finally, in only two European countries (Denmark and Sweden) neither mandatory intervention nor exclusive rights exist. In practice real estate agents, who bring together sellers and buyers, also take care of the legal formalities in the majority of cases. The level of regulation clearly differs across the groups of countries. With the exception of the Netherlands where important liberalisations took place (see Box 4 on the deregulated Dutch notary profession), Latin notaries are heavily regulated: numerical limits on entry, fixed fees (with the exception of the Netherlands and here as well Austria and Italy[51]) and location clauses. Solicitors are less strictly regulated than Latin notaries. There are no quantitative entry limitations but only education requirements. Fees are negotiable and conduct regulation has been liberalised. English licensed conveyancers are subject to a similar regulatory regime. Finally, Scandinavian licensed estate agents are regulated very little. For example, in Sweden entry into the profession is conditional on registration after passing an exam (two years study and 10 weeks practice) and providing proof of professional insurance.

lower in Slovenia (11,9), Austria (11), and Hungary (9,6). The most liberal countries are the Czech Republic (7,4) and the Netherlands (7,1). Interestingly, the CPI reaches its maximum of 6 in the deregulated Dutch and Austrian market (but also in Italy) and decreases to a problematic 2,6 (very poor consumer protection) in the most heavily regulated Greek market for notarial services. The CPI reaches high levels (between 5,3 and 4,1) in France, Germany, Slovenia, Belgium, Spain and the Czech Republic. Lower values (between 3,5 and 3,1) are found in Hungary and Portugal and Poland. In contrast with the above findings, the combined MERI+MCRI+MII is very low in countries without Latin notaries.

As far as market outcomes are concerned, the preliminary results provide only information about prices. For a sample transaction of 250.000€ with mortgage[52], the Nordic countries (no mandatory intervention or services provided by real estate agents) and the deregulated Dutch notary system are the cheapest: legal costs amount to 0,56 or 0,54% of the transaction value. Traditional notary systems are the most expensive: on average 0,89 % of the transaction value (varying from 0,6% in Germany to 1,5 % in Italy and 2,7% in Greece). The researchers also find that in notary countries fees are incremental conditional on the value of the transaction, whereas they are flat or nearly flat in the Scandinavian countries and England. They consider the last outcome as market-driven and more just since transfers of ownership of real estate with different value will usually involve the same amount of work. The researchers concede that there may be (limited) cross-subsidization between higher and lower fees but that monopoly rents in the case of high value transactions under fixed fees are high. Finally, overall findings show a statistical positive correlation between high regulation indices and high costs (real percentages of legal fees to the transaction value) and thus seem to support the private interest theory of regulation (see 2.5). There are some countries with high regulation indices and rather low cost percentage values (Spain, Portugal, Denmark) but also highly regulated countries with high or very high fees (France, Italy, Belgium). Most importantly, there are no countries with low regulation indices and high costs. In sum, high levels of regulation go hand in hand with high fee levels whereas low levels of regulation are associated with low fee levels.

3.2 Restrictions on fees and advertising

Behavioural restrictions on legal professions that are of potential concern to competition-oriented policymakers include fee restrictions and advertising restrictions.[53]

Fee restrictions that have recently existed or still exist in OECD jurisdictions include

- Mandatory fixed fees;
- Mandatory maximum fees or minimum fees;54
- Recommended fees;55 and

52 This comparison may be inaccurate when there is a difference between the real and the declared value of a transaction.

53 Fees to be paid by the consumer of legal services may take different forms: hourly rates, fees contingent on the outcome of the case, fees for specific services or fees calculated as a percentage of the value of a transaction.

54 For a long time, fee regulation in the form of mandatory fee schedules, imposed by governmental regulation or by "ethical" rules of the profession, was widespread. In recent years, mandatory fee schedules have been challenged by competition authorities as anti-competitive and against the public interest. As a response to these criticisms, governmental fee regulation has been abolished for services provided by advocates (with some exceptions, such as Germany where the liberalisation applies only to out-of-court services) but remains in place for services provided by Latin notaries (with the Netherlands as the most notable exception).

- Restrictions on making the fee dependent on the outcome of the case.[56]

In the legal profession, the use of advertising and marketing may also be regulated. In the past regulations, including self-regulation, varied from a total ban on advertising to the regulation of certain aspects of advertising. Total advertising bans have been put under great pressure by actions of consumer organisations and competition authorities. The European Commission has clearly stated that advertising should be allowed as a legitimate means of competition when it is based on verifiable and representative information[57]. Nevertheless, advertising bans have not totally disappeared (for example, for barristers in Ireland) and restrictions relating to its contents remain in force in several EU Member States. Restrictive rules may relate to particular forms of advertising, such as television advertising or 'cold calling', or the contents of the advertisement (for example, advertising special expertise) or the means by which consumers can solicit help for themselves (e.g., by submitting a request for help on a certain kind of case in a certain geographic area to a web-site that distributes these requests to member lawyers, as described in recent comments in a letter from the US FTC to the Chair of the Ethics Committee of the State Bar of Texas[58]). Furthermore, comparative advertising is generally not permitted in the legal professions.

3.2.1 Theory on fee restrictions and advertising

a. Fee restrictions

Supporters of fee restrictions have argued that such measures may benefit recipients of legal services and generate positive effects on social welfare:

- First, fee regulations are claimed to be a useful tool to prevent the problem of 'adverse selection' (see section 2.1). Consumers, who cannot judge the quality of legal services, will base their purchase decisions mainly on prices and will not be willing to pay higher prices for higher quality. As a consequence high-quality providers will be driven out of the market. It is argued

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55 Self-regulatory bodies have transformed mandatory fees into recommended fees' schedules. Recommended fees are not binding to the providers of professional services but can function as a guideline in calculating fees. Setting a fee, which deviates from the recommended fee, can be subject to disciplinary actions because it would bring the profession into disrepute or generally be considered a breach of the profession's "ethical" rules. In the view of certain competition authorities, recommended fees have effects similar to mandatory fee schedules. It is believed that, in such cases, chances that the professionals deviate from the recommended fee schedule are small, so that the practical consequence of the schedule is akin to the effects of a prohibited price cartel.

56 "Ethical" rules of the lawyers' profession (advocates/solicitors/barristers) still limit the freedom of parties to make the fee dependant on the outcome of the case in many jurisdictions. In U.S. jurisdictions it is common to agree that the attorney receives no fee if the case is lost ('no cure no pay') but if it is won the attorney receives a percentage of the money award to the client (*pars quota litis*). Such contingent-fee contracts are prohibited in most European jurisdictions by the ethical rules of the lawyers' profession. Competition authorities have also challenged the prohibition of contingency fees but reform in this area has met much stronger opposition, even in the most liberal jurisdictions. In England and Wales, a regulated version of contingency fees has been introduced: it allows the lawyer to add a mark-up on the fee (which remains calculated on the basis of hours spent on the case) in the event the case is won. In the Netherlands, the new government has proposed to transpose the current ethical rule prohibiting contingency fees into a mandatory statutory prohibition.

57 European Commission, Decision of 7 April 1999, case IV/36.147, EPI code of conduct, OJ L106/14 of 23 April 1999, at 41.

58 See Letter from US FTC Directors to John Glancy, Chair, Ethics Committee of State Bar of Texas, May 26, 2006. http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf

that fixed fees or minimum fees may overcome this problem and maintain the quality of services offered. Theoretical work in economics shows that fixed prices increase quality in the absence of entry restrictions, by changing the focus of competition to quality. By contrast, fixed prices in combination with entry restrictions will cause counterproductive effects (Graf von der Schulenburg 1986). But in reality governmental regulatory bodies may lack sufficient information to regulate prices (which requires information on marginal costs) and it may be politically unfeasible to simultaneously abolish existing limitations on entry.

- Second, a maximum fee schedule is argued to be helpful in dealing with the problem of 'moral hazard'. Since a consumer of professional services, by lack of complete information, cannot estimate the desired price/quality level, a professional may be inclined to provide services of too high a quality and charge excessive fees, even if the client would be adequately served with a lower quality at a lower fee. A maximum fee schedule may protect consumers against such excessive charges.

- Third, recommended fees can be a tool to inform consumers of the average fees to be paid for certain services. They can also alleviate the burden of drafting offers and/or negotiating individual fees. That way, recommended fees may reduce transaction costs and thus lead to lower fees. This is especially true in markets where search costs are high and where it may be useful for consumers to have information readily available.

- Fourth, contingency fees merit a separate analysis. Economic theory provides the important insight that tying the lawyers' remuneration to the outcome of cases is a way to solve the principal-agent problem and optimize the lawyers' efforts (see for example, Danzon 1983 and Rickman 1994). In public policy discussions, two different considerations play a major role. On the one hand, it is argued that contingency fees (in particular 'no cure no pay' contracts) may improve access to justice by removing wealth barriers. For example, an individual who has suffered a serious personal injury might hesitate to initiate proceedings to recover damages if he or she has to pay large legal expenses (including costs of medical expertise) even if the case is lost. On the other hand, governments fear that contingency fees increase the volume of litigation and lead to a 'claims society'.[59] On top of this, some in legal profession argues that contingency fees jeopardize the lawyers' independence and integrity since advocates get a personal interest in the cases they handle. Such a situation can lead to a conflict of interest between clients and lawyers over when to settle. If the lawyer receives a pre-determined share of any damages awarded but bears all costs if the case is lost, he or she may be inclined to accept a settlement out-of-court offered by the defendant, even if it would be in the client's interest to continue working on the case. However, this argument neglects the fact that a conflict of interest may arise also under the conventional fee system. If advocates are paid on the basis of the number of hours spent on the case, this might induce them to invest more hours than necessary and realize super-normal profits. In sum, theoretical work on contingency fees shows that victims are likely to be better off when contingency fees are available, even though overall welfare effects are ambiguous.

The other side of the coin is that fee restrictions may cause considerable negative effects on social welfare. A fee restriction reduces the level of uncertainty on the supply side and limits or excludes competition between the professionals. This is particularly true for fixed and minimum fees, which prevent any competition on prices and threaten to deprive consumers of the benefit of lower prices in a competitive market. The removal of fee schedules would therefore prove beneficial to consumers, especially for certain

[59] There is no unambiguous theoretical proof of this fear: see, for example, Gravelle and Waterson 1993 and Miceli 1994.

standardized services which are easily comparable (OECD 2000, p. 20). The elimination of fee scales, whatever their nature, will not only improve price competition, but may also lead to improvements in dynamic efficiency and innovation in the markets for legal services. While maximum fees at first glance would seem to be solely in the benefit of consumers, they may have the effect of leading to a levelling of prices towards the maximum fee and thus have an effect equal to that of a fixed price. Recommended fees can have a similar effect: they can facilitate co-ordination of the competitive behaviour of professionals and thus lead to higher prices to the disadvantage of the consumer. However, some professionals may be inclined to disregard the recommended fees and offer services at lower prices than the mandatory/recommended fee. This behaviour has been described as 'cheating' or 'chiselling'. It is generally agreed that it may not always be possible to prevent such cheating or chiselling, and that the ability to do so declines when the number of members of a certain profession is large.

Finally, fee restrictions should be examined from the perspective of proportionality. Even though fee restrictions may, at times, be justified in theory, they remain a very far-reaching regulatory intervention. Quality may be guaranteed by less restrictive means and, from this perspective, regulation of fees may be disproportionate. The problem is exacerbated when fee regulation co-exists with other restrictions, such as reserved tasks and quantitative entry limitations. The cumulative effects of those combined restrictions is likely to be disproportional.

b. Advertising restrictions

Several arguments have been made in defence of advertising restrictions. Advertising restrictions may:

- Prevent consumers from being encouraged to make decisions that they are not qualified to make;
- Prevent charlatans from obtaining business; and
- Reduce costs for service providers.

Advertising restrictions prohibiting the use of false and potentially misleading advertising may be needed to protect consumers. Since professional services are experience goods or credence goods, an adequate assessment of their quality may only be possible in the long term, mainly by repeat buyers of these services, or not possible at all. Since consumers cannot assess the truthfulness of advertising of credence qualities, regulating advertising on non-price issues may be necessary to prevent abuse. For these reasons, it is argued, regulation of the contents of advertising may be advisable.

But advertising restrictions do have negative effects. Advertising informs consumers about different types of services and the conditions under which they are being provided. In doing so, it allows consumers to make better informed decisions. While it cannot be excluded that consumers could gather the relevant information themselves, Stigler (1961) has argued that advertising by the providers of services can substitute for a large amount of searching efforts by a large group of consumers. That way, advertising may lead to a considerable reduction in searching costs. By better informing consumers at a reduced cost, advertising can contribute to enhancing competition in markets. Furthermore, advertising can also inform consumers of new services or the existence of new service providers and thus stimulate innovation and entry into the market. Advertising restrictions threaten to reduce or eliminate these potentially positive effects. By making it more difficult to quickly generate goodwill, restrictions on advertising can, as Stephen and Love indicate (2000, p. 994), raise the cost of entry in a market and thus constitute an entry barrier.

The arguments in favour of advertising restrictions have to be put into perspective. First, these arguments offer no justification for prohibiting advertising that is relevant, truthful and not misleading.

Second, one of the main arguments against fee advertising (the adverse selection problem) is only relevant when this type of advertising is mainly or exclusively used by the providers of low quality services. When advertising on fees is allowed and high-quality providers also advertise on fees, it cannot be excluded that consumers may interpret low fees as corresponding to low quality services and, inversely, higher advertised fees as a sign of high quality. This may then mitigate the effects of the adverse selection problem (Rogerson 1988 and Rizzo and Zeckhauser 1992).

3.2.2 Empirical studies

Empirical studies on fee restrictions and advertising restrictions will be highlighted in sequence.

a. Fee restrictions

The available empirical work on fee restrictions deals either with the effects of recommended fees on prices or the consequences of deregulation. The results of the former studies are summarized below. For a survey of the studies on the effects of deregulation measures, the reader is referred to the empirical studies of the conveyancing services markets (see section 3.1.2 and Box 3) and the liberalization of the Dutch notary profession (see Box 4).

Several empirical papers focus on the effects of recommended fees and on the existence of cheating or chiselling. Arnauld and Friedland (1977) investigated the effects of recommended fee schedules in the lawyers' profession in the U.S.. They analysed the relationship between the existence of recommended fees and the income of lawyers for a standard transaction. They concluded that the income of lawyers was positively related to the recommended fee in that the income rose with the recommended fee. However, this research does not allow the conclusion that there is also a clear relationship between the existence of a recommended fee schedule and the actual fees that are being charged by lawyers. As Stephen and Love (2000, p. 1000) point out, drawing this conclusion from Arnauld and Friedman's research would only be possible if the demand for the standard transaction is inelastic.

In the United Kingdom research has been done into the existence of cheating or chiselling in the lawyers' profession. The results suggest that cheating or chiselling on recommended fee schedules for lawyers does indeed exist. An investigation by Stephen (1993) into the effects of recommended fees for conveyancing services in Scotland showed that the fee schedule did not prevent a large number of the solicitors from charging a fee that was considerably lower than the fee recommended by the relevant professional association. Although only a limited number of professionals took part in this study, its results show that a cautious approach of the effects of fee regulation is justified. Later research by Shinnick[60] confirmed these conclusions. He undertook research among Irish solicitors on the fees charged for conveyancing services and found that a large number of solicitors charged fees that were considerably lower than the recommended fee. His findings were once more confirmed by the research of Shinnick and Stephen (2000) who also undertook a survey among Irish solicitors. They found that the recommended fee was disregarded on a large scale and that a large number of solicitors were charging fees considerably lower than the recommended fee. Also research on recommended fees in the architects' profession showed that competition authorities may too easily assimilate recommended fees with price cartels.[61]

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60 Shinnick, E. (1995), The Market for Legal Services in Ireland, paper presented at Irish Economic Association conference, quoted by Love and Stephen 2000, p. 1001.

61 Button and Fleming (1992) undertook a research into the consequences of the replacement of a mandatory fee schedule by a recommended fee schedule in 1982. Their research shows that, following this regulatory change, the fees charged by architects were slightly lower. However, the researchers point out that this effect may have been caused by circumstances presenting themselves before the regulatory change and

Box 4. The deregulation of the notary profession in the Netherlands

The 1999 Dutch Notary Act has been the most ambitious deregulation initiative in the sector of the notary profession. Its objectives are to increase competition and improve the quality of the notarial services. Whereas there was a *numerus clausus* under the old Act, in the new regime the total number of notaries in the Netherlands is no longer capped. The most innovative element of the new Notary Act is the change from fixed to unregulated notary fees. The fees for family services and corporate services became free immediately after the entry into force of the new Notary Act, whereas the fees for real property services were gradually liberalized. As of July 2003, all notary fees in the Netherlands are free[62]. The liberalization of the notary profession is regularly evaluated in order to check whether the new law reaches its goals.

1. Impact of the liberalisation on entry, prices and accessibility of services

It must be stressed that entry into the Dutch notary profession is not fully liberalized. Even though quantitative entry barriers based on demographic criteria have been abolished, entry into the notary profession remains regulated. Junior notaries must submit a business plan to a supervisory committee of the public notarial oversight body for approval. Compared to the pre-liberalization period, the mandatory work placement for junior notaries *doubled* from three to six years. Evaluations of the reform of the Dutch notary profession indicate that the new Act does not really foster entry into the profession (Commissie Monitoring Notariaat 2003). The new Notary Act was meant to speed up the appointment of junior notaries into notary positions, but the number of such appointments did not markedly increase. Junior notaries also preferred to join existing offices rather than to open a new independent practice. This trend increases the size of incumbent notary offices and the resulting concentration runs counter to the goals of increasing competition (Nahuis and Noailly 2005) but is not surprising in light of some of the new barriers to entry, such as the business plan approval requirement and the doubled period for work placement, that were put in place even as older barriers were dismantled.

In the Netherlands, services in family practice had long been subject to fixed tariffs. Following legislative changes in 1999, these tariffs were liberalized so that Latin notaries were henceforth free to establish their tariffs for these services (they only had to take account of certain price ceilings for low-income clients). One could have expected that tariffs would decrease. Strikingly, however, this liberalization was associated with a substantial increase in fees for services relating to wills, while the consumers' perception on the quality of services remained basically the same (EIM 2002). Empirical data show that the price of a will almost doubled (increase of 97%) whereas the prices of a marriage contract and a partnership agreement increased by 60% and 39%, respectively (Commissie Evaluatie Wet op het notarisambt 2005).

Aalbers and Dykstra (2002) searched for possible explanations for this increase in prices. According to these authors, two possible explanations could be given: i) either Latin notaries using their market power started charging supra-competitive prices, or ii) the increased tariffs were nothing more than the reflection of the normal cost-based price level. The latter explanation implies that the previously fixed tariffs did not cover the cost of services in family practice and that family practice was unprofitable. To assess these explanations, Aalbers and Dykstra undertook examined whether Latin notaries were either operating inefficiently, or whether they had been cross-subsidizing. Their analysis showed that Latin notaries' efficiency did not differ from the efficiency of other professions. While some Latin notaries had very high costs, this was not caused by inefficiency but rather by the fact that some Latin notaries, especially the ones established in the countryside, were not able, due to external circumstances, to operate on a larger scale. On the other hand, Aalbers and Dykstra found that a substantial number of Latin notaries had indeed been cross-subsidizing. This supports the view that family practice was unprofitable, but could also be interpreted as notaries acting to raise prices to equate marginal profits with still high fees from conveyancing and fees from other services.

may thus not have been caused thereby. This leads them to the conclusion that "with regard to fees and competition, self-regulation would appear to have been, in practice, marginally detrimental".

62 There are two exceptions to this rule : (1) maximum fees apply in case of family services for low-income households; (2) the competent Minister may intervene whenever necessary to guarantee accessibility of notarial services.

The prices for real estate transactions (conveyancing services) were fully liberalized in 2003. A report by the Netherlands Bureau for Economic Policy Analysis (CPB) shows that average fees for real estate services have gone down. In the period between 2002-2004 notary fees decreased proportionate to the transaction value: for a property value of 113.500€ fees went down by 7%; more substantial price reductions were observed for transfers of more valuable real estate: 13% for a property value of 245.000 €, and 21 % for a property value of 363000€. While average fees have declined, the dispersion of fees between the cheapest and most expensive notaries increased.
Consumers searching for low fees find price information on two internet sites and are able to reduce their costs substantially compared with the pre-liberalization period. The CPB study also reports that Latin notaries reacted differently to the liberalization: 45% of notary offices did not change their pricing strategy, 28% became price fighters, 23% based their fees on costs and 2% charged very high fees (Kuypers et al. 2005).

2. Impact of the liberalisation on quality

Early evaluations of the reform of the Dutch notary profession indicated that compliance with ethical rules is diminishing (Commissie Monitoring Notariaat 2003). A recent survey conducted among 310 notaries and 193 junior notaries reveals that a large majority (68%) is of the opinion that in practice profit making is preferred to the quality of the notarial act. According to 64% of the respondents, the interests of clients dominate the public interest. The majority of notaries (59%) consider having good contacts with large clients more important than the protection of weak parties, who may be economically inferior and lack sufficient legal knowledge (Laclé 2005). These results give some support to concerns that survival in the competitive struggle may dominate ethical considerations and jeopardize the quality of the notarial services.

The most recent assessments of the liberalization show varying results: it is interesting to contrast the Report of the Commission on Evaluation of the 1999 Notary Act (Hammerstein Commission) and the Report of the Netherlands Bureau for Economic Policy Analysis (CPB), both published in September 2005. The Report of the Commission on Evaluation of the 1999 Notary Act (Commissie Evaluatie Wet op het notarisambt 2005) mentions a number of benefits resulting from competition between notaries: increased cost efficiency, innovation (increased use of ICT), cost-oriented fees and price differentiation. The Hammerstein Commission did not find hard evidence to support the claim that competition has led to a substantial loss of quality and reduction of professional integrity[63], but nevertheless admits that there may be a reduced offer of services in particular market segments. After the liberalization of fees in the family practice, some notaries try to save on costs by spending less time on information and advice to clients. The Hammerstein Commission concludes that "The role of the notary in providing information is particularly at risk". The Hammerstein Commission asked the Research Bureau EIM to investigate whether the fear that price competition lowers quality is justified. To this end, information on the number of corrections in the Land Register for the year 2004 was collected in order to compare the measurable aspects of the legal quality (i.e. notaries' craftsmanship) provided by so-called price fighters and notary offices charging higher prices. It was found that errors (lack of registration or mistakes requiring corrections) were made in 1.2 percent of all acts authenticating transfer of property and creating mortgages. Differences appeared to be great across notary offices and regions, but price fighters did not perform worse than other notaries. The EIM also conducted interviews with large commercial clients (real estate agents, mortgage agents and real estate project managers) and found that customer satisfaction has increased. Half of the respondents experienced an improvement of customer service. In the view of the large commercial clients, the prices of the notarial acts have decreased and the quality has remained constant (Vogels 2005).

The Report by the Netherlands Bureau for Economic Policy Analysis is more critical (Nahuis and Noailly 2005). This study casts serious doubts about the effectiveness and desirability of the reform. The authors of the CPB Report found no significant difference between the level of competition in 1996 (three years before the liberalization) and 2002 (three years after the liberalization) on local markets for family services and small scale real estate transactions[64]. On the national market for professional consumers (market for corporate services and large scale real

63 "There are no clear indications of an unacceptable reduction in the quality of services", translation by the Koninklijke Notariële Beroepsorganisatie, *Evaluation of the Dutch Notaries Act*, (2005), p. 5

64 The report uses two different indicators for measuring the level of competition before and after the liberalization: a relative-profit indicator and a variation of the Bresnahan-Reiss indicator. The first method

estate transactions), the results were mixed and the researchers found some evidence of increased competition. As to the effects on quality, the researchers found support for the fear that competition may deteriorate quality. Two different aspects of quality were investigated: service satisfaction as measured in consumer surveys and quality aspects that are not observable by consumers. Consumer surveys indicated that competition has a negative effect on quality, notably on the friendliness and the time spent to carry on the transaction. A comparison of the number of corrections in notarial acts at the Land Register for the years 1995 and 2003 showed that in the former year notaries in more competitive areas had a lower rate of corrections compared to notaries in concentrated areas. This was no longer the case in 1995 and it suggests that competition leads to a deterioration of quality. This result seems different from the above mentioned study by the Research Bureau EIM, commissioned by the Hammerstein Commission, in which it was found that notaries charging very low tariffs do not make more mistakes than notaries charging higher prices. However, the different results may be explained by the fact that the EIM study compares quality across different regions in the liberalized market and not quality before and after the deregulation of the Dutch notary profession.[65]

3. *Conclusion*

According to the preliminary findings of the ongoing study on conveyancing services regulation, "the deregulated Dutch system delivers an impressive proof that deregulated notary systems may work very efficiently". The above discussion shows that this appraisal may be too optimistic. Empirical work on the effects of the 1999 Dutch Notary Act shows that the number of notaries did not increase as was expected and that there is a continuing concentration of notaries' offices. Prices have decreased in some market segments (particularly conveyancing services for high- value real estate) but gone up in other market segments (family practice). There are some indications about lower quality, in particular less provision of information and integrity issues. Proponents of the deregulation stress that competition has led to cost-based prices and innovation. Sceptics argue that competition tends to benefit above all larger clients, whereas small consumers suffering from information asymmetries in the market for notary services may be worse off. Since the liberalization has also put an end to cross-subsidization, accessibility of notarial services for low-income groups may also be endangered. However, it must be emphasized that the deregulation of the notarial prices, while permitting markedly better deals for some housing transactions, was accompanied by the creation of entry barriers that do not appear designed to ensure quality of service and, not surprisingly, entry has not markedly increased. Given that the quantity of providers cannot freely adjust, the Dutch reform cannot be considered complete.

b. Advertising restrictions

There have been numerous studies into the effects of advertising restrictions on prices and they largely show the same results. The majority of these studies lead to the conclusion that restrictions on advertising result in consumers paying higher prices. For example, the results of a U.S. study show that advertising increases competition among providers of three routine legal services: drafting of a will, an uncontested personal bankruptcy and an uncontested dissolution of marriage (Schroeter, Smith and Cox 1987). The authors used data on attorney fees and advertising practices in seventeen metropolitan areas across the U.S. to estimate the effect of advertising intensity on firm demand elasticities, holding other possible influencing factors constant. The results obtained for all three routine legal services are consistent with the hypothesis that advertising increases competition among attorneys. An overview of the empirical studies investigating the positive relationship between the intensity of advertising and the degree of price competition related to both the legal profession and other regulated professions can be found in Stephen and Love (2000) and in a report by Indecon (2003). Besides one notable exception, which relates to the medical profession (Rizzo and Zeckhauser 1992), the empirical evidence on the effects of restricted advertising on prices for professional services suggests that advertising is associated with lower prices.

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is based on the idea that an increase in firms' efficiency reflects an increase in competition. The second indicator measures by how much profit margins decrease as new competitors enter the local market.

65 Also the variables to measure quality were not completely identical in both studies.

By contrast, the number of studies focusing on the effects of advertising restrictions on quality is more limited and the conclusions less unanimous. As put by Stephen and Love (2000, p. 998) in relation to the legal profession: "empirical work on the quality of legal services in the presence of lawyer advertising does not present such a clear-cut view as that on fees". In an earlier study, Muris and Mc Chesney (1979) show that advertising by legal clinics does not necessarily result in lower quality services. The quality indicators in this study were both objective and subjective. A random sample of public records in divorce case revealed that clinic representation of the wife significantly increased the size of the child support award. Moreover, in answering questionnaires the clinics' customers who had also used traditional legal services rated the legal clinic significantly better on four of seven quality measures. By contrast, a study of Murdock and White (1985) seems to confirm, to a certain extent, the adverse selection argument. They undertook a study into the quality of services provided by lawyers, based on the perception of that quality by their peers and by judges. The variable 'quality of lawyers' was operationalized as the rating information contained in the 'Martindale-Hubbell's Directory', which is based upon confidential recommendations from lawyers and judges in the area where the lawyers practice. Murdock and White found that lower quality lawyers are more prone to advertise in the Yellow pages. Hence, there appears to be a justified concern that legal services advertising may be related to quality, even though the limitations of the study do not allow strong policy conclusions (see also the criticisms by Thomas 1985).[66]

3.3 Restrictions on partnerships and business organization

The legal professions are subject to (self-)regulatory rules which govern the business organization of providing legal advice. These rules prevent the formation of certain types of partnerships, notably legal disciplinary partnerships (LDPs) composed of different legal professionals, such as solicitors and barristers[67], or multi-disciplinary practices (MDPs) composed of lawyers and other professionals. In addition, there are restrictions with respect to the organization and financing of legal businesses. Generally, cooperation through unlimited liability partnerships is allowed, but the formation of limited liability corporations is excluded. There exist also restrictions with respect to ownership, which exclude non-regulated legal professionals from running, owning or being shareholders in law firms.

66 In other studies, the research by Cox, Schroeter and Smith (1986) on the effects of advertising by lawyers in different U.S. regions shows that in regions where advertising is widespread, the quality seems to be lower. However, their conclusion is mitigated by the fact that they found no significant difference in quality between advertising and non-advertising lawyers within the same region. Domberger and Sherr (1989) come to the opposite conclusion in their research on the effects of the liberalization of conveyancing services in England and Wales in the 1980s. This liberalization included, among others, a relaxation of advertising restrictions. While the main focus of their research was the evolution of fees after this liberalization, they also tried to gain insight into consumer's perception on the quality of the services rendered. In their research, quality was represented by the time the transaction took, the quantity and quality of information provided by solicitors, the access to the solicitor and the overall perception of the fact whether the consumers obtained 'value for money'. They found that there was a clear improvement of the perceived quality in later years, which seems to suggest that the liberalization, including the lowering of the advertising restrictions, enhanced the quality of the services.

67 This distinction is typical of common law countries. Solicitors provide services directly to the public; these include conveyancing, legal advice and legal representation. Barristers specialize in advocacy. Clients have no direct access to barristers, but must go through a solicitor. Even though both solicitors and barristers have rights of audience in courts, it is common that solicitors plead in the lower courts whereas barristers represent clients in the higher courts.

3.3.1 Theory

a. Prohibition of partnerships

The prohibition of LDPs and MDPs is clearly anti-competitive and may cause harm to consumers. The prohibition on LDPs prevents barristers and solicitors from working together in one business entity. As a consequence the consumers will face a double mark-up on the services they receive, assuming the barrister does not have a direct billing relationship with the client, whereas there would be only a single mark-up in the case of a bundled service offered by a single business entity. In addition, consumers cannot profit from 'one-stop shopping' since they must go through a solicitor to hire a barrister.

MDPs may prove beneficial to consumers for a number of reasons. By bringing together the know-how of members of different professions within the same partnership professionals can offer 'full service' to consumers. The supply of interrelated services may also generate economies of scope. Professionals can exchange information on specific problems related to a multidisciplinary case internally, which may save on transaction costs by reducing the number of individual contacts between consumers and professionals. An important further benefit of MDPs is that they allow internal risk spreading. Different professions may face different business cycles and fluctuations in income. MDPs allow spreading the related risks amongst the partnership, and as a result professionals facing risks will be guaranteed a share of the MDP's other activities (Stephen and Love, 2000, p. 1005). All these benefits may lead to lower prices for consumers. Finally, MDPs may also promote innovation. Easing restrictions on MDPs may provide easier access to capital which may be needed to invest in equipment and infrastructure to improve consumer services.

To justify bans on LDPs in common law countries, the legal professions argue that barristers are more likely to give independent advice if they remain separate from solicitors. Moreover, LDPs would lead to mergers, implying that fewer barristers will be available to provide services to smaller solicitor firms.

To justify bans of MDPs, the legal professions argue that these partnerships threaten the lawyer-client privilege when regulated lawyers cooperate with other professionals who are not bound by a similar duty of professional secrecy. Also, the professions argue that MDPs may cause conflicts of interest to the detriment of the consumers.[68]

Given the benefits of MDPs, one may wonder whether adaptations of the regulatory environment would be able to achieve the aims of guarding professional secrecy and preventing conflicts of interest by less restrictive means. In the first place, one could think of information remedies which require informing the client that the duty of confidentiality of one MDP member conflicts with the duty of disclosure of another MDP member. One could also imagine measures which prevent a flow of information from professionals in the partnership who are bound by professional secrecy to other members in the partnership who are not (so-called 'Chinese walls'). Finally, professional secrecy could be guaranteed by imposing similar obligations on all partners in an MDP (Deards 2002, p. 625).

A prohibition on the formation of limited liability partnerships is most commonly justified by the argument that unlimited liability has a strong disciplinary function towards the professionals grouped in the partnership. Since members in the partnership may potentially face unlimited personal liability claims, so it is argued, they will be inclined to exercise control over the services provided by their partners. This mutual

[68] In this respect, it must be recalled that the European Court of Justice decided in *Wouters* that restrictions on MDPs in the legal profession may be justified in the light of their "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".

control mechanism would then help guaranteeing the quality of the services being provided. A counterfactual is that this mechanism did not seem to work in the case of Arthur Anderson with Enron In any case the restriction of the commercial freedom of professionals is unnecessary since the interest of consumers may be adequately protected by imposing mandatory liability insurance or by measures which ensure an adequate capitalisation of the partnership.

b. Restrictions on ownership and management.

The ethical rules of the legal profession may prohibit that law firms are owned and/or managed by non-lawyers. The restriction on ownership limits the achievement of economies of scale and may serve as a barrier to expansion by potentially limiting the available sources of capital for a law firm. By allowing non-lawyer ownership it becomes possible to spread risk among a larger group of persons that may enable projects which could reduce prices. Also, the law firm will be able to retain high quality non-lawyer staff by the possibility of rewarding them in the same way as the lawyers in the firm. The prohibition on hiring non-lawyer managers may stifle more efficient and innovative methods of delivering legal services to consumers (Irish Competition Authority 2006, p. 104-105).

The legal profession defends the restrictions on ownership and management by stressing the risk of undue influence non-lawyers may have over lawyers. When firms are financially controlled by non-lawyers the independence of lawyers would be at risk, since the latter may be pressured into acting in the commercial interests of the owners rather than in the best interests of the clients. This argument is difficult to understand, since lawyers are not less driven by profits than their commercial counterparts. A flat prohibition seems hard to justify; at least one could consider minority participations held by other professionals.[69]

3.3.2 Empirical evidence

There is very little empirical evidence confirming any of the arguments presented in favour or against the restrictions on business organisation as discussed above.

The argument in favour of prohibiting limited liability partnerships is put into perspective by a study by Stephen and Gillanders (1993), referred to by Stephen and Love (2000, p. 1009). They present evidence on mutual control within law firms in the United Kingdom. They find that such control mainly takes place *ex ante*, i.e. when partners in the firm are screening prospective partners, rather than *ex post*, i.e. under the form of control on professionals already in the partnership. This seems to undermine the main argument in favour of the existing restrictions.

Carr and Matthewson (1990) compared law firms in US states where limited liability is permitted with those in which it is not. They found that the average size of law firms was larger in states where limited liability partnerships were allowed. They see this as a possible indication of efficiency gains, which pleads against maintaining restrictions on the formation of limited liability partnerships. A similar conclusion was drawn from the study by Button and Fleming (1992) into the effects of the partial liberalisation of the professions of architects in the United Kingdom in the 1980ies. They found that the abolition of the rule preventing practice under limited liability led to a considerable growth in this form of organisation.

[69] The 'Legal Practice Plus' – model presented by the English Law Society may serve as an example. According to this model "a limited form of multi-disciplinary practice […] would supply all the range of services normally provided by solicitors in practice, and would be open to non-solicitor partners or directors. Solicitors would remain in majority control, although a partnership with one solicitor and one non-solicitor partner (NSP) would be allowed". The only limitation would be that "an accountant NSP could not audit statutory accounts". See Lord Chancellor's Department (2002)

Furthermore, this change also influenced the average size of architectural practices in that it lead to an increase of the number of large size architectural associations.

As far as restrictions of MDPs are concerned, Indecon (2003, p. 47) reports a study by the US Federal Trade Commission on the effect of MDP between dentists and dental hygienists. This study focused on differences between states where such cooperation was allowed and states where this was prohibited. They found that, in states where cooperation was allowed, the costs of individual treatments was 6 to 30 % lower than in other states. This seems to suggest that MDP can indeed lead to lower prices to the benefit of consumers.

4. Policy guidelines and options

Several guidelines for policy makers emerge from the previous parts of this paper. The comparative analysis of different rules and institutions across countries helps identify 'best practices' in the field of regulation of the legal services markets. Given the existence of market failures (asymmetric information, externalities, public goods) and the desire to achieve non-economic policy goals (in particular access to justice on equal terms for all citizens and paternalistic motives), an across-the-board deregulation of the legal professions is not an option. Moreover, in markets characterized by asymmetric information, price competition may entail the risk of enhancing adverse selection rather than generating efficient outcomes as long as mechanisms to assess and guarantee quality are not in place. The previous parts of this paper have also made clear that taking regulatory powers away from the professional regulatory bodies and vesting them in public authorities is not an ideal option either. Self-regulation carries several advantages, such as better information on the side of the regulated professions and lower enforcement costs. In sum, policy makers face the following two challenges:

- To develop 'better regulation', not necessarily less regulation; and
- To create a regulatory framework in which the anti-competitive consequences of self-regulation are minimized while at the same time its advantages are preserved.

A major challenge is removing the current disproportionate restrictions on competition. Even though the proportionality criterion has been firmly established in some jurisdictions – subject to the *caveat* that its applicability to state measures remains debated in the legal literature (see Annex 1) – its implementation in practice is far from easy. From an economic perspective, a cost-benefit analysis should allow assessing whether less restrictive regulatory measures, including self-regulatory measures, are more efficient. In designing an appropriate institutional framework, minor amendments to the existing self-regulatory structures (for example, establishing an advisory board within existing self-regulatory bodies) do not seem sufficient to guarantee an optimal use of self-regulatory powers. In EU jurisdictions where the discussion on the reform of the legal profession is most advanced (England and Wales, Ireland, Netherlands) it has been envisaged – or already decided – to create a new independent Regulatory Authority for the legal services' markets. This new Authority may delegate regulatory powers to the existing self-regulatory bodies of legal professionals, subject to its oversight. In this way the net advantages of self-regulation may be maximized.

4.1 Guidelines for better regulation

The formulation of policy guidelines for a better regulation of the legal professions should take account of the following insights.

- First, the current regulation may be criticized because it causes unnecessary and disproportionate restrictions of competition. But the focus on the anti-competitive

consequences should not divert the attention of policy makers away from the fact that in some cases there may be too little regulation rather than too much regulation.

- Second, current regulation, including self-regulation, is focused on professions and not on markets. The major ensuing problem of the current policy debate is that the discussion does not always carefully differentiate the legal services markets in which information asymmetries exist from those where competition may function relatively well.

- Third, the widely accepted criterion that restrictions of competition may not be disproportional (implying that restrictions of competition should not go further than necessary to cure market imperfections) could be made operational by way of a cost-benefit analysis. Even though one should fully acknowledge the difficulties of measuring the benefits of regulation, including self-regulation, in particular the quality of the professional services offered, such an analysis – even if partly conducted in qualitative terms– would be highly informative and may improve the quality of the political decision-making.

- Finally, a public interest assessment of regulatory and self-regulatory rules may include non-economic objectives reflecting different policy choices used across jurisdictions and draw on methods of financing non-commercial service obligations in other liberalized sectors.

4.1.1 Regulate when necessary to cure the problem of asymmetric information

A completely free market carries the risk of poor quality legal services. Information asymmetries may cause quality deterioration and this in turn will initiate demands for regulation, as is illustrated by the experience in Nordic countries. Scandinavian countries (Finland /Sweden) present the lowest level of regulation but this does not seem to be the optimal model. There is no solution for the problem of asymmetric information if legal services may be provided by individuals who do not have a law degree. In Finland, non-lawyers could represent clients in court but since 2002 a law degree is required to perform those services. This regulatory change may still be insufficient to avoid adverse selection. Members of the Bar are subjected to ethical rules guaranteeing their integrity; they have the duty to permanently educate themselves and must buy indemnity insurance. In the absence of similar requirements imposed on other service providers, a large group of consumers and third parties[70] may not be protected from poor quality legal services. For activities that do not involve exclusive rights, serious problems of asymmetric information and moral hazard may manifest themselves. The White Paper of the British government mentions that damage occurs often on the markets of non regulated services and mentions explicitly the practice of claims managers (Department for Constitutional Affairs 2005, p. 52). In the Netherlands concerns about adverse selection seem justified with respect to the non regulated market for legal advice and the fields of law (administrative law, labour law) where representation in court is not required. The regulatory deficit may be cured by requiring representation by legally qualified professionals in all areas of law where citizens lack sufficient expertise to assess quality.

4.1.2 Regulate markets and not a profession

Asymmetric information is not a problem which can be generalized with respect to the entire legal profession. The need to regulate exists only for particular markets for legal services. From this perspective there may be both too little and too much regulation. The existing regulation is also inconsistent. Uniform rules relating to entry and conduct are imposed upon professionals (advocates, solicitors/barristers), irrespective of the existence of information asymmetries in the markets where they offer their services.

[70] It is interesting to add that Finnish providers of legal expenses insurance decided in the early 1980s to impose a duty upon the insured to engage a qualified lawyer (Scassellati-Sforzolini 2006, p. 6)

From an economic perspective, regulation, including self-regulation, should be adapted to the seriousness of the information asymmetries and disproportionate rules should be avoided in markets where the reputation mechanism sufficiently guarantees quality. The problem of too little regulation should be cured in all areas of law where laymen lack sufficient expertise and legal representation is not yet required. The problem of too much regulation should be cured by abolishing certain legal representation obligations or the duty to buy services from licensed legal professionals in markets for standard transactions where there is a sufficiently large group of informed consumers. In such markets, competition from non lawyers may reduce prices and benefit consumers.

4.1.3 Investigate the proportionality of regulation, including self-regulation, by means of a cost-benefit analysis

The requirement of proportionality has been firmly established in many jurisdictions, but its implementation in practice still causes problems. How can it be assessed that self-regulatory rules do not go further than necessary to achieve a goal of public interest, in particular correction of market failures? A first indication may be the co-existence of several restrictions which are all justified by the same public interest motive. In such cases, one might conclude that the cumulative effect of existing restrictions makes the achievement of the public interest goal too costly. An example is the combination of title protection, reserved tasks and compulsory membership of a monopolist self-regulatory body having full control over entry, which is limited in numerical terms, and regulation of modes of conduct in a particular legal services market. It is unlikely that all these restrictions must be imposed simultaneously to cure a potential problem of asymmetric information.

Besides the cumulative effect of restrictions, the proportionality of regulation, including self-regulation, may be assessed on the basis of a cost-benefit analysis. A recurrent problem is that costs are relatively easy to quantify but that benefits (in particular, the quality of services offered) are much more difficult to capture in economic terms. However, in many cases a rough assessment of the benefits in qualitative terms (either high or low) may be possible. As a guideline for policy making one could then adopt a rule of thumb according to which regulation, including self-regulation, with high costs and low benefits should be removed, regulation with low costs and high benefits should be kept and other regulation should be modified (Copenhagen Economics 2006). Below, a number of illustrations are provided focusing successively on the different forms of regulation, including self-regulation, discussed in section 3 of this paper.

a. Reserved tasks

In some markets for legal services it may be possible to remove exclusive rights and to guarantee quality through less restrictive means. Under title protection, the regulated legal profession enjoys protection of its title but is not able to exclude competing providers of services. For example, the title of advocate may be used only by individuals who are member of the professional body but other providers of legal services may become active on the market. Depending on their education and the fields of their activities each group of professionals will use a different title. Since title protection functions as a quality signal it mitigates the problem of information asymmetry. At the same time it possesses the advantage of preserving freedom of choice, which gets lost if quality is regulated. Title protection may be a viable alternative to the current system of exclusive rights in legal markets involving standardized and less complex legal services. Title protection may be made dependent on the fulfilment of education requirements which guarantee a minimum level of legal knowledge. In this way, some legal services markets may be opened up to para-professionals who have a limited legal training (for example, one or two years including a period of apprenticeship) sufficient for executing standardized tasks. An example is the market for conveyancing services, where real estate agents could be allowed to compete under their

professional title with Latin notaries[71] and licensed conveyancers (see the analysis of the Nordic conveyancing markets in Box 3).

Conversely, reserved tasks should be kept for complex legal services. In that case the requirement of legal representation in court generates high benefits since it cures three market failures: it is a remedy to severe problems of asymmetric information and the ensuing risk of adverse selection, it prevents negative externalities for judges who will not be burdened by inadequate advocacy and contributes to a better administration of justice (supply of a public good). At the same time, the costs of exclusive rights are low since beneficial competition is not restricted by the exclusion of unqualified providers.

b. Regulation of conduct (fees, advertising and forms of business organization)

Competition authorities regard price agreements as self-regulatory restrictions having the most detrimental effects on competition. The concern extends not only to fixed prices and minimum prices but also includes recommended prices. In the view of the European Commission, recommended prices facilitate the co-ordination of prices between service providers and harm consumers.[72] A cost-benefit reappraisal of current competition law may profit from the following insights.

Even though a theoretical argument can be made in favour of minimum prices to guarantee quality, such a remedy seems disproportionate given the substantial negative effects on competition and the availability of alternative measures to prevent quality deterioration.

By contrast, maximum prices deserve a more benign treatment since they may be method to overcome the double monopoly mark-up problem (Spengler 1950). For example, maximum fee schedules may reduce prices paid by English and Irish consumers who cannot buy services from legal disciplinary practices and have to pay solicitors and barristers separately. In addition, a maximum fee schedule may be helpful in dealing with the problem of moral hazard. Since a consumer of professional services, lacking complete information, cannot estimate the desired price/quality level, a professional may be inclined to provide services of too high a quality and charge excessive fees, even if the client would be adequately served with a lower quality at a lower price. A maximum fee schedule may protect consumers against such excessive charges.

Finally, a more lenient approach toward recommended fee schedules seems advisable. Economic analysis has shown that competition authorities too easily assimilate recommended fees with fixed fees. There is empirical evidence showing that there can be considerable 'cheating' on recommended prices (see section 4.2.2). In addition, recommended fees can be a useful tool to inform consumers of the average costs of certain services and they can also alleviate the burden of drafting offers and/or negotiating individual fees, particularly if the recommended fees are developed by a diverse regulatory panel that includes consumers. That way, recommended fees may reduce transaction costs and thus lead to lower fees. This is especially true in markets where search costs are high and where it may be useful for consumers to have information readily available. In a cost-benefit analysis, the savings in transaction costs should not be neglected and a serious enquiry is necessary as to whether the recommended fees are charged in practice. In such instances recommended fees should not be based on the input cost (fee per hour or per legal act), but on the output actually achieved (a non-litigated divorce or conveyancing servicces etc.)

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71 It must be added that states may decide to keep the monopoly of Latin notaries intact for what they consider to be important non-economic reasons. See below: section 5.1.4

72 See, for example: European Commission, Decision COMP/A.38549 of 24 June 2004, *Belgian Architects' Association*, O.J. L 4/10 of 6 January 2005; Nederlandse Mededingingsautoriteit (Dutch Competition Authority), Decision 3309 of 26 April 2004, *Dutch Psychologists' and Psychotherapists' Associations*, available at http://www.nmanet.nl/

Advertising restrictions (excluding the prohibition of deception) are very costly since they generally lead to higher prices and the offsetting benefits seem low (see section 4.2). Therefore, cost-benefit analysis provides arguments to remove those restrictions, in particular total advertising bans.

The proportionality of restrictions on the form of business organization can be assessed economically. The restriction on non-lawyer ownership of law firms has low costs, since the loss of lawyers' independence under non-lawyer ownership is not likely to have large impacts. At the same time, the benefits resulting from the entry of more efficient law firms may be low. Therefore, it could be argued that the best policy option is to modify the restriction by requiring that the majority of owners should be lawyers and making it possible for employees to become owners (Copenhagen Economics 2006). The above examples show how cost-benefit analysis may be a useful way to implement the proportionality criterion in practice.

4.1.4 Investigate whether restrictions are needed to reach non-economic goals of public interest

As explained in previous parts of this paper, the notion of public interest is broader than the need to correct market failures. It also encompasses non-economic goals, such as equal access to justice and paternalistic motives. Given the broad range of concerns which fall under the public interest test, it seems that competition authorities are not always the best placed oversight body to perform the test and that the establishment of an independent regulator of the legal profession may be considered (see section 5.2.)

The inclusion of non-economic reasons (equal access to justice, paternalism) may necessitate a re-assessment of the restrictions that seem disproportionate for curing market imperfections. For example, criticisms of the Finnish system stress that use of an attorney is necessary in criminal proceedings to protect 'weak' parties and guarantee effective representation (Sforzolini 2006). Fee regulations may also be re-assessed as an instrument to guarantee equal access to justice.

Finally, paternalistic motives may support mandatory intervention by legal professionals. Governments may deem it appropriate to force uninformed laymen to consult a legal professional even if they would not voluntarily ask for legal assistance.

4.2 The desirability of an independent Regulatory Authority for the Legal Services Markets

Self-regulation is criticized for two main reasons. First, it lacks legitimacy due to the absence of representation of consumers and stakeholders in the self-regulatory bodies of the legal professions. In some jurisdictions (for example, Ireland, England and Wales) this problem is exacerbated since the body representing the professionals' interests also acts as a regulator. While self-regulatory rules are often subject to approval by the competent Minister, this form of co-regulation usually does not include powers to repeal existing rules or require the enactment and implementation of new rules. Second, self-regulation enables the legal profession to restrict competition and harm the consumers' interests. High prices for legal services may also harm the competitiveness and dynamism of a knowledge-based economy. In spite of these criticisms, it is important to preserve the valuable input of experienced, knowledgeable legal professionals into the regulatory process and keep the benefits of better compliance with self-regulatory rules (lower enforcement costs).

Is it possible to design an institutional legal framework which overcomes the problems relating to legitimacy and supra-competitive prices and at the same time preserves most of the benefits of self-regulation? Such a potential may be contained in reform proposals in the United Kingdom (the Draft Legal

Services Bill based on the Clementi report[73]) and the recommendations in the recent report of the Irish Competition Authority (2006).

The basic features of such a new regulatory framework for the legal professions can be sketched as follows:

- New legislation establishes a new independent statutory body which will be responsible for the regulation of all markets for legal services. It may be called Legal Services Board (England/Wales), Legal Services Commission (Ireland) or Authority for the Legal Services Markets (as suggested in the Netherlands74). Hereafter we refer to the Authority.

- The Head of the Authority and also a majority of its members may not be practicing members of the legal profession.

- The Authority may enact new regulations relating to the provision of legal services (for example, minimum quality requirements).

- The Authority may delegate regulatory functions to already existing self-regulatory bodies. Regulatory functions may also be vested in newly created self-regulatory bodies when new professions enter legal services' markets. These self- regulatory bodies are called Front Line Regulators (FLRs).

- The Front Line Regulators are not permitted to exercise representative functions.

- The Authority has the power to issue regulatory guidance to the FLRs, to direct an FLR to take a specific regulatory action, to amend or to veto rules of FLRs and to remove the authorization of an FLR in a particular area or areas of regulation.

The advantages of this institutional framework seem considerable. Day-to-day regulation is left in the hands of the FLRs, such as the existing self-regulatory bodies, which can fully profit from their information advantages in formulating rules which should guarantee the optimal quality of legal services. At the same time, the risk of anti-competitive practices is reduced since the FLRs remain subject to constant oversight by the Authority, which has the power to veto rules, ask for the enactment of new rules and even withdraw the authorization to regulate a specific legal services market. Moreover, legitimacy is guaranteed by creating an independent, transparent and accountable oversight body which is composed of a majority of non-lawyers. In this way, the net benefits of self-regulation may be maximized.

A major advantage of this model is that it allows competitive self-regulation, i.e. competition between different groups of qualified legal professionals which each decide their own rules of conduct.[75] Self-regulation only becomes problematic at the stage where the government delegates the power to restrict

73 Report of the Review of the Regulatory Framework for Legal Services in England and Wales, 2004, available at www.legal-services-review-org.uk/content/report.

74 It must be added that the proposal to establish such an Authority for the Legal Services Markets has not been rejected by the Committee van Wijmen, which was asked to give an advice on the reform of the legal profession to the Dutch government.

75 Currently, states delegate tasks conferring on the self-regulatory bodies a monopoly power to restrict supply in the markets for legal services. The delegation of regulatory powers to professional bodies can be analyzed as a principal-agent problem. Self-regulation in the sector of the professions has been characterized as an institution of trust: a social contract between society and the profession that mitigates the moral hazard problem arising from the information asymmetry (Dingwall and Fenn, 1987).

supply to professional bodies. Here lies the crucial difference between efficient and inefficient forms of self-regulation. It is precisely the monopolistic control of supply that may enable the liberal professions to charge super-competitive prices. The logical answer to this problem is to eliminate the monopolies of the self-regulatory bodies and to force them to compete with each other (Ogus 1995, Van den Bergh 2006).

Competitive self-regulation is in essence no different from competition between national public regulatory regimes. In spite of the important benefits such competition may bring about in terms of more efficient and innovative legal rules, it is heavily debated whether regulatory competition will lead to a 'race to the bottom' rather than a 'race to the top' (see, for example, Van den Bergh 2000, Kerber 2000). However, the proposed Regulatory Authority may counter the potential risk of quality deterioration in the markets for legal services by making the delegation of regulatory powers dependent on the respect for certain minimum quality standards. Under traditional forms of co-regulation, a central regulator (usually the competent Minister) approves the rules, practices and procedures of the professional bodies *ex post*. Under competitive self-regulation, the role for the state is to organize the competition between the different professional self-regulatory bodies and, if necessary, subject this competition to a set of minimum quality standards (*ex ante* control). The model of competing FLRs, which are subject to oversight by an independent Regulatory Authority, combines traditional co-regulation with modern competitive-self-regulation.

Policy makers should fully investigate the potential advantages of competitive self-regulation for overcoming harmful restrictions on competition.

- Existing FLRs may decide diverging rules on fees: some FLRs may retain the traditional method of calculating fees based on hours spent, whereas other FLRs may opt in favour of flat fees (in particular for standardized transactions) and different types of contingent-fee contracts ('no cure no pay', pars quota litis, mark-up if the case is won).

- Regulatory competition may also emerge in other areas of self-regulation, such as rules on business organization (companies with limited liability, law firms owned and/or managed by non-lawyers) and legal or interdisciplinary partnerships.

- Moreover, the proposed regulatory framework allows delegation of regulatory powers to new entrants in the legal services markets, who can establish their own self-regulatory bodies.

- The new FLRs may enhance the competition by adopting innovative ways of doing business: for example, new methods of calculating fees, new forms of multi-disciplinary partnerships or hiring non-lawyers as managers of the law firm.

The advantages of competitive self-regulation will increase as competing self-regulatory bodies become active in the different segments of the broad legal services markets. Different FLRs could compete in the markets for legal advice in different areas of law, representation in courts (again further divided based on the field of law), and conveyancing services.

In the past, forms of inter-professional competition have already been stimulated by dismantling existing monopolies. Examples include the removal of the barristers' monopoly on higher court advocacy (Courts and Legal Services Act 1990) and the abolishment of the monopoly for conveyancing services held by solicitors (see section 4.1). In both cases, entry by new competitors (respectively solicitors and licensed conveyancers) has been limited. However, the number of potential competitors is quite large. For example, business lawyers, legal employees of insurance companies, trade union lawyers, and patent agents may all be granted the right to conduct litigation, subject to the 'accreditation' of their self-regulatory bodies (FLRs) by the Regulatory Authority. The number of competing FLRs might be further increased by

breaking-up existing self-regulatory bodies, such as the 'Orders of Advocates', to enable intra-professional competition. One should acknowledge that the current group of advocates is very diverse, ranging from one-person enterprises active in many areas of law to mid-size firms and large international law firms specialized in particular fields of law. It is by no means evident that this large and diverse group of lawyers should be regulated by a single regulatory body. By allowing both inter-professional competition (between different legal and para-legal professions) and intra-professional competition (within a single profession, such as advocates) a large number of FLRs each deciding their own rules of conduct might be established.

A final remark seems appropriate. The creation of a new Authority will necessitate rethinking the role currently played by competition authorities in scrutinizing anti-competitive rules of self-regulatory bodies. A full-blown public interest test implies not only an analysis of anti-competitive effects but also concerns about market failures and distributional justice (including the accessibility of legal services for disadvantaged and geographically remote groups). Since the competition authorities have an established experience in performing the first part of the public interest test, it may be unwise that this comparative advantage be eliminated if a new Regulatory Authority is established as the sole supervisor. Conversely, the assessment of the need for market regulation from a broad public interest test perspective includes concerns which are not a regular part of the control conducted by competition authorities.[76] In addition, joint control by the competition authorities and the new Regulatory Authority will create additional administrative costs and one should ascertain that the comparative advantage of competition authorities in screening agreements is not outweighed by increased costs of coordination with the newly established Regulatory Authority.

5. Conclusions

This paper has confronted the main economic arguments in favour of regulation, including self-regulation, of the legal professions with the current criticisms relating to its anti-competitive effects. On the one hand, research has shown that free markets for professional services may not produce efficient outcomes. There are three market failures which may impede a full satisfaction of consumers' wishes: asymmetric information, negative externalities and undersupply of public goods. Regulation which adequately copes with these problems can be justified from a public interest perspective. Besides market failures, other considerations may play a role in a public interest analysis. The demand for equal access to the justice system does not only include concerns about inadequate supply of public goods but also protection of economically disadvantaged groups. Paternalistic concerns can imply that uninformed laymen should sometimes be obliged to hire legal advice or be legally represented. On the other hand, rules regarding entry into the market for legal services, conduct on that market and forms of business organization may create unnecessary and disproportionate restrictions of competition.

The risk of disproportionate restrictions on competition is particularly serious if professional associations are awarded public law status, which enables them to enact rules limiting market entry and prohibiting beneficial competitive behaviour. In spite of the deficiencies of self-regulation (anti-competitive effects and the absence of a consumer input in the decision-making), it must be acknowledged that the legal professions enjoy information advantages compared to the state and may be thus better placed to take measures guaranteeing quality. Self-regulatory rules may be more efficient and flexible and more easily complied with, so that enforcement costs are reduced. The major challenge for policy making is to create an institutional framework under which it becomes possible to profit from the advantages of self-regulation whilst at the same time minimizing its disadvantages. The delegation of regulatory powers

[76] In EU countries this is exacerbated by the *Wouters* judgement, which implies that a full efficiency analysis (Article 81 (3) EC) is not conducted when the rules escape the cartel prohibition (Article 81 (1) EC) since they are deemed necessary for the proper practice of the profession as organised in the Member State concerned (Van den Bergh 2006, p. 167).

to self-regulatory bodies in markets for professional services should allow them to adequately cure the existing market imperfections, without at the same time giving them scope to reduce economic welfare again by creating disproportionate distortions of competition. At the same time, the lack of legitimacy due to absence of consumer representation should be remedied.

Economic analysis is helpful in understanding the rationale for governmental regulation and self-regulation of legal professions and also sheds light on restrictions which are unnecessary or disproportionate to the relevant policy goals. Each type of restriction (exclusive rights and regulation of entry, regulation of fees and advertising, restrictions on free choice of business structure and multi-disciplinary partnerships) may generate both positive and negative effects on social welfare. Since theoretical explanations point into different directions, the magnitude of the costs and benefits of regulation, including self-regulation, is ultimately an empirical issue. In spite of its limitations, particularly the difficulty in measuring quality, cost-benefit analysis may substantially improve the quality of political decision making. Policy changes which have already taken place in some OECD Member countries also provide very useful information about the expected results of deregulation.

On an empirical level, studies of the real-life effects of regulation, including self-regulation, in the legal professions show mixed results. There is large support for the view that advertising restrictions lead to price increases but evidence on their impact on quality is mixed. The results of the empirical work on qualitative entry restrictions are even more ambiguous. Whereas these restrictions do not seem to put a halt to the growing number of professionals (in the absence of geographical restrictions), a positive impact on quality is hard to establish. To some extent, empirical studies also show surprising results with respect to fees. Contrary to dominant views of competition authorities, recommended fees can be subject to chiselling and liberalization of fees does not always lead to stable price competition, as shown by the empirical work on the deregulation of the solicitors' monopoly for conveyancing services in England and Wales. Studies on the deregulation of the Dutch notary profession show that prices decreased in particular market segments but increased in others (see Box 4). Recently, two cross-country studies requested by the European Commission seem to provide more convincing evidence that self-regulation enables super-competitive prices and harms consumers (see Boxes 1 and 5).[77]

A comparative legal and economic analysis reveals a number of 'best practices' and allows the formulation of policy guidelines:

- First, the emphasis on the undesirable welfare effects of restrictions on competition should not divert the attention of policy-makers away from the problem that additional regulation may be required to guarantee quality in segments of the legal services markets that are plagued by market failures.

- Second, regulation should not be profession-focused but targeted at markets where information asymmetries are most serious.

- Third, cost-benefit analysis may be helpful in assessing whether restrictions of competition do not go further than necessary to cure market failures. Among the different policy options

[77] Since theoretical explanations point into different directions and the available empirical studies sometimes reveal ambiguous results or are criticized for their lack of scientific rigour, further empirical analysis is crucial for enabling informed policy making related to the market for legal services. This research should focus on the real-life effects of particular restrictions in separate segments of the legal services markets. Next to comparative studies, which try to establish a correlation between levels of regulation and market outcomes, alternative approaches are to be welcomed.

suggested by such an analysis, the following regulatory strategies seem to deserve particular attention:

- Replacing exclusive rights by title protection, thus allowing non lawyers to provide less complex services;

- Abolishing fixed fees and total bans on advertising, since these measures are likely to be disproportionate, especially if they exist cumulatively with other restrictions;

- Making the prohibition of recommended fees dependent on proof of anti-competitive effects, while at the same time allowing an efficiency defence (reduction of transaction costs); and

- Modifying bans of alternative business organization by allowing at least a minority of non lawyers to own or manage law firms.

- Fourth, non-economic goals may provide alternative justifications for existing restrictions on competition.

- Fifth, the debate on the advantages and disadvantages of self-regulation has inspired proposals to establish a new independent and accountable Regulatory Authority for the legal professions, having a majority of non lawyers as members. Such a reform may allow maximizing the net benefits of self-regulation. While the information advantages of the legal professions are kept intact, disproportionate restrictions of competition may be prevented by granting a veto power to the new Regulatory Authority, which can also direct the self-regulatory bodies to enact new specific rules to improve market outcomes.

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Annex 1. Conformity of self-regulation and state regulation in the sector of the legal professions with European law

This box discusses the conformity of the regulation of the legal professions in the EU Member States with European law. Article 81(1) of the EC Treaty prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market". Self-regulatory rules enacted by professional associations of the legal professions, which restrict price competition, advertising or free choice of business structure, may come within the scope of this prohibition. Next to the potential liability of the (associations of) legal professionals, Member States may be held jointly liable for infringement of the European competition rules if they enact regulations which require, strengthen or facilitate anti-competitive conduct. Moreover, EU Member States may infringe the rules of the EC Treaty on the right of establishment and the freedom to provide services if they enact laws which restrict competition in the legal services markets.

1. Infringements of the cartel prohibition of Article 81 EC Treaty

In several decisions, the European Commission has confirmed that rules adopted by professional bodies are decisions of associations of undertakings capable of infringing the prohibition of Article 81 EC. It is settled case law that the concept of undertaking encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[1] The lawyers' activity consists of offering legal services against remuneration. Insofar as lawyers are not employees and carry themselves the financial risks of their activities, they are undertakings for the purposes of Article 81 EC. The complexity of the lawyers' activity or the fact that the profession is regulated cannot change this conclusion. Since lawyers are to be qualified as undertakings, it logically follows that the professional body representing independent members of the legal profession is to be considered as an association of undertakings. It makes no difference that the professional body enjoys public law status, as long as it regulates the economic behaviour of its members and does not carry out typical governmental prerogatives or social tasks based on the principle of solidarity.[2] However, a professional body regulating professional conduct is not an association of undertakings if it is composed of a majority of representatives of public authorities and it is required to observe pre-defined public interest criteria. If the public authorities define the rules with which the professions need to comply and retain the power to adopt decisions in the last resort, the professional bodies may escape the qualification as association of undertakings, so that Article 81 EC no longer applies.[3] With respect to notaries the above reasoning equally applies, subject to one *caveat*. The exercise of public authority is not to be seen as an economic activity. Hence, an additional legal analysis is required to assess if and in how far services provided by Latin notaries can be regarded as being part of the exercise of public authority. The competition rules will be applicable only in so far as Latin notaries are engaged in an economic activity.

As mentioned in the text, the European Court of Justice has formulated an exception to the general applicability of the European competition rules to the sector of the professions by holding that a professional regulation which is necessary for the proper practice of the profession does not infringe Article 81 EC, despite the effects restrictive of competition that are inherent in it.[4] Apart from this exception, Article 81 EC Treaty fully applies to the legal professions. The *Wouters* exception applies to regulations which are objectively necessary to guarantee the proper practice of the profession, as organized in the Member State concerned. This seems to include prohibitions of interdisciplinary practices of lawyers and accountants (as illustrated by the facts of the *Wouters* case) but also other restrictions such as limitations on ownership if it can be reasonably argued that such restrictions are necessary for a proper practice of the legal professions, taking into account the particular characteristics of legal services markets in

1 Cases C-41/90, *Höfner* [1991] ECR I-1979 and joined cases C-159 and 160/91, *Poucet* [1993] ECR I-637.

2 Joined cases C-159 and 160/91, *Poucet* [1993] ECR I-637; joined case C-264/01, C-306/01,C-354/01 and C-355/01, AOK [2004] ECR I-2493.

3 Case C-309/99, *Wouters* [2002] I- 1577, at 58-64 and 68-69.

4 Judgement in the *Wouters* case; see: case C-309/99 [2002] ECR I- 1577.

the EU Member States.

2. Liability of EU Member States which facilitate cartel agreements and the 'state compulsion defence'

When EU Member States approve professional rules that limit competition, the question emerges whether the State rather than the professions will bear ultimate responsibility for infringing Article 81 of the EC Treaty. There exist two possible outcomes: i) either the professions and the State are jointly liable or ii) only the State bears responsibility for the infringement of rules of European law and the professions can rely on a 'state compulsion defence'. Member States may infringe the EC Treaty if they assist (associations of) undertakings to enter into anti-competitive agreements and make their implementation more effective. Allowing such State conduct would undermine the effective application of the competition rules ('*effet utile*'-doctrine). It is settled case law that a Member State infringes Articles 3 (1)(g), 10(2) and 81 (1) of the EC Treaty if it requires or favours the adoption of agreements, decisions or concerted practices, which violate the competition provisions of the Treaty, 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.[5] A 'state compulsion defence' operates where the State by measures of public authority requires certain anti-competitive behaviour. Undertakings cannot be held accountable for infringement of Article 81 EC if the anti-competitive conduct is required by State regulation. If the State requires undertakings to engage in anti-competitive conduct and if the undertakings remain at least partially capable to autonomously restrict competition, both the State and the undertakings can be held liable.[6]

Member States do not violate the rules of the Treaty if they exercise effective control over self-regulatory measures. The *Arduino* judgement states that a Member State does not infringe Articles 3(1)(g), 10 (2) and 81(1) of the Treaty by adopting a law or regulation which approves, 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.[7] In the view of the European Commission "State measures delegating regulatory powers which do not clearly define the public interest objectives to be pursued by the regulation and/or by which the State effectively waives its power to take decisions of last resort or to control implementation" can be challenged. This includes 'rubberstamp approvals' or practices that entitle the Member State only to reject or endorse the proposals of professional bodies, without being able to change the contents of the proposals or substitute its own decisions for these proposals. In addition, the Commission states that a proportionality test would seem appropriate to assess to what extent an anticompetitive professional regulation truly serves the public interest.[8] Legal commentators have questioned this interpretation and have emphasized that there is no mention in the Court's case-law of the need of State measures to pursue legitimate public interest objectives, nor of the proportionality of those measures (compare the contributions of Siragusa 2006 and Gilliams 2006).

3. Violations of the right of establishment and the principle of free movement of services.

State measures of a legislative or regulatory nature do not come within the scope of Article 81 EC Treaty, which is concerned solely with the conduct of undertakings. However, Member States which enact such rules are not totally immune from liability since State laws and regulations may be challenged on the ground that they have restrictive effects on the freedom of establishment and/or the freedom to provide services. Article 43 of the EC Treaty ensures the freedom of establishment. Rules which limit access to the legal profession infringe the Treaty if they discriminate on grounds of nationality: either directly by entry barriers based on nationality or indirectly through measures which make it more difficult for professionals from other Member States to practice a regulated profession. The latter may include prohibitions to open a second office[9] or the duty to be registered with a professional body.[10]

5 Case 13/77, *Inno/ATAB* [1977] ECR 2115; case 267/86, *Van Eycke* [1988] ECR 4769; case C-2/91 *Meng* [1993] I-5751, case C-245/91, *Ohra* [1993] I-5851; case T-513/93, *CNSD* [2001] ECR II-1807.

6 Communication from the Commission on Competition in Professional Services, p. 20

7 Case C-35/99 *Arduino et al*. [2002] ECR I-1529.

8 Communication from the Commission, p. 21-22, at 86-88.

9 Case 107/83, *Klopp* [1984] ECR 2971.

10 Case C-55/94, *Gebhard* [1995] ECR I-4165.

However, national legislative or regulatory rules may be justified if they satisfy four conditions: i) foreign professionals and domestic professionals must be treated equally; ii) the rules must be justified by reasons of public interest (such as protection of consumers); iii) the rules must be necessary to attain the public interest goal aimed at; and iv) they must be proportionate to that objective.[11] In the recent *Cipolla* case, the European Court of Justice decided that a minimum fee scale for in-court services reserved to licensed lawyers constitutes a restriction on the freedom to provide services (Article 49 EC Treaty). However, such restriction may be justified by overriding requirements relating to the public interest, including the protection of recipients of legal services provided by persons concerned in the administration of justice and the safeguarding of the proper administration of justice. It is for the national courts to decide whether a minimum fee scale is necessary to protect the public interest and does not go further than necessary to reach that goal. In their appreciation of the proportionality criterion, national judges should take into account that minimum fees may prevent price competition in a market characterized by an extremely large number of lawyers from leading to quality deterioration. However, the national court will also have to determine whether education requirements, rules of professional ethics and liability suffice in themselves to attain the objectives of consumer protection and the proper administration of justice.[12]

Free movement of lawyers within the European Union is guaranteed by a number of legislative measures. Since the 1970s foreign lawyers may offer services (legal advice and representation of clients in court) under their home title. If representation of clients in court is mandatory, foreign lawyers must act in conjunction with national lawyers entitled to provide the service. [13] As far as the right of establishment is concerned, the relevant EC Directive allows lawyers to practice abroad on a permanent basis, using the professional title gained in the home Member State (for example, 'avvocato' for an Italian national). These lawyers may give legal advice on their own but may be required to work in conjunction with local lawyers when representing clients in legal proceedings. An aptitude test is required before the title of the host country can be used. The latter may take the form of an examination or a proof of effective and regular practice in the law of the host Member State during a period of at least three years.[14]

The recent general Services Directive[15] met fierce opposition from a number of Member States. As a consequence, the principle of free movement has been subjected to a long list of derogations and exceptions. This is also the case for the legal professions. The Directive does not apply to services provided by notaries, who are appointed by an official act of government [Art. 2 (2)(l)] and acts requiring by law the involvement of a notary [Art. 17 (12)]. With respect to rules of professional ethics (also in the legal professions) the Directive requires Member States to remove all total prohibitions on commercial communications. However, limitations as to the form and contents of commercial communications remain possible if they relate to the independence, dignity and integrity of the profession as well as to professional secrecy, and if they are non-discriminatory, justified by an overriding reason of public interest and proportionate. In line with the *Wouters* judgement, Article 25 (1)(a) of the Services Directive states that Member States may maintain restrictions on multidisciplinary activities in the regulated professions, "in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality'". As a consequence of these broad formulations, Member States have retained a large margin of discretion to decide which kinds of restrictions on commercial communications (excluding a total ban) and multidisciplinary partnerships they deem adequate for the practice of the legal professions in their respective territories.

11 Case C-55/94 *Gebhard* [1995] ECR I-4165 at para 37.

12 Joined cases C-94/04 and C-202/04, *Cipolla*, judgement of 5 December 2006, not yet published at paras 55-70.

13 Art. 4 (2) Directive 77/249, OJ 26.3.77, L 78/17.

14 Directive 98/5, OJ 14.3. 1998 L 77/36.

15 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. 27.12.2006, L 376/36.

Annex 2. The state action defence in the US

According to the U.S. Supreme Court's 'state action' doctrine, anti-competitive state measures are, in principle, immune from the application of the Sherman Act, even if they frustrate the latter's objectives. Restrictions of competition may not only be contained in state laws or decrees. In the US attorneys are regulated by the supreme court of each state which may promulgate anti-competitive disciplinary rules. To be immune under the 'state action defence', the rules must satisfy two criteria: i) they must reflect 'a clear articulation of the state's policy with regard to professional behaviour', and ii) they must have been subject to 'active state supervision' if conduct of private undertakings is involved in the implementation of the state policy. The first requirement is nicely illustrated by comparing the landmark *Goldfarb* case with the later *Bates* case. In the first case, the Supreme Court denied the applicability of the state action defence, since the minimum fee schedules for attorneys in Virginia were based on a general mandate to the state supreme court to regulate the practice of law and the court had further delegated this power to the state bar association.[1] By contrast, in the second case restrictions on advertising for attorneys were contained in a disciplinary rule imposed by the supreme court of Arizona, so that they reflected a clear articulation of Arizona's policy with respect to professional conduct in the attorney's profession. [2] The active supervision test "requires that state officials have and exercise power to review particular anti-competitive acts of private parties and disapprove those that fail to accord with state policy". In the *Ticor* case, the Supreme Court clarified that the mere potential for state supervision is not an adequate substitute for a decision by the state. When prices are initially set by private companies, subject only to a veto if the state chooses to exercise it, and the state authorities do a poor job in supervising the rate proposals, the state action defence does not apply. In the European Union, it took until the *Arduino* case (see Annex 1) for the European Court of Justice to set a standard which comes close to the two-pronged immunity test in the US. It must be added, though, that it is uncertain whether the Italian authorities in *Arduino* would meet the American supervision test (Gyselen 2006, p. 383).

Clearly, the state action doctrine restricts the power of the US competition authorities to impose sanctions for infringements of the Sherman Act if the highest courts of US states decide to restrict competition in a clearly articulated way and exercise effective supervision on legal professionals. Contrary to EU law, there are no 'negative integration' provisions in the American Constitution that prohibit state measures interfering with free establishment or free provision of services. It must be added that restrictions on advertising may be contrary to the First Amendment which protects freedom of commercial speech and that discriminatory measures may violate the so-called dormant Commerce Clause.[3] However, these possibilities of coping with anti-competitive state measures are not equivalent to the proportionality test as advocated by the European Commission (see Annex 1). Given their limited possibilities to prevent anti-competitive state measures, American antitrust authorities may try to prevent the enactment of new restrictions in an informal way, by sending comments or *amicus curiae* briefs to state and self-regulatory entities on competition issues. An example is the recent letter of the FTC and the Department of Justice addressed to the American Bar Association, in which the antitrust authorities formulate a number of objections against the proposed definition of the practice of law.

The scope of the exclusive rights of attorneys (and their potential negative effects on economic welfare) is

1 *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)

2 See, for example, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). This case concerns restrictions on attorney advertising imposed by the Supreme Court of Arizona. The federal Supreme Court decided that these restrictions constituted state action not subject to attack under the Sherman Act, but that they were nevertheless illegal since they violated the First Amendment which protects the freedom of both political and commercial speech.

3 The dormant Commerce Clause is a judicial creation of the American Supreme Court, according to which discriminating state measures are unconstitutional if they impose burdens upon interstate commerce that are incommensurate with alleged local state gains. In contrast with the protection of the four economic freedoms by the EC Treaty, there is no basis for this doctrine in the American Constitution and the case law is very limited and shows intense debate about the Supreme Court's Justices (Gyselen 2006, p. 360-361)

determined by the definition of the practice of law. The American Bar Association has proposed the following model definition:

> A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
>
> 1. Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
> 2. Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
> 3. Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
> 4. Negotiating legal rights or responsibilities on behalf of a person.
>
> Whether or not they constitute the practice of law, the following activities are excluded from the above definition:
>
> 5. Practicing law authorized by a limited license to practice;
> 6. Pro se representation, i.e. representation by an authorized non-lawyer agent in jurisdictions that permit such representation;
> 7. Serving as a mediator, arbitrator, conciliator or facilitator; and
> 8. Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.

This model definition can be understood as a proposed statute, regulation or court rule to be decided by the US state authorities. In US states where the proposed definition is adopted, non-lawyers will no longer be able to provide a wide range of services. These include: real estate closings by real estate agents; drafting of wills, in particular will writing software packages made available on the internet; legal advice given by tenants' associations on landlord-tenant problems; advice given by employees on labor laws or safety regulations the employer has to comply with; interpretation of federal and state tax codes by income tax preparers and accountants; and legal advice given by investment bankers and other business planners. In their joint letter, the U.S. antitrust authorities stress that rules regarding the unauthorized practice of law should protect the public interest and not be construed in a manner inconsistent with that purpose. The definition should be narrowly drawn to minimize its anti-competitive impact. The model definition proposed by the American Bar Association is considered overly broad. Consequently, consumers will be confronted with higher prices and face a smaller range of service options, also in less complex areas of law. Rather than an outright ban, less restrictive alternatives for protecting the public interest should be considered. For example, the quality of lay closing services may be protected through licensure, registration, imposition of financial responsibility and rules for handling settlement funds. In sum, the American antitrust authorities try to prevent restrictions of competition that in their view cannot be justified by public interest motives (Joint Agencies [US FTC and US DOJ] 2002). However, sending letters may not be a very effective instrument to reach this goal and proportionality requirements seem a more effective remedy to prevent anti-competitive state action. The state-action defense has often been interpreted loosely by courts in ways that provide antitrust immunity to undue restrictions on competition currently protected by state-based regulation. The Antitrust Modernization Commission Report (2007) calls for increasing rigor in such analysis that examines whether (1) the state has clearly authorized the actions in question with intent to displace competition in the manner it is displaced and (2) the state provides "supervision sufficient to ensure that that the conduct is not the result of private actors pursuing their private interests, rather than state policy."

MIEUX RÉGLEMENTER LES PROFESSIONS JURIDIQUES*

Note de référence préparée par le Secrétariat

1. Introduction

Jusqu'à présent, les professions juridiques n'ont pas été soumises aux forces de la concurrence qui sont à l'œuvre dans les secteurs commerciaux. La réglementation de ces professions résulte de dispositions directement imposées par les pouvoirs publics et, dans une large mesure, de règles adoptées par les organes professionnels d'autoréglementation. Le présent document présente la justification économique et les effets de cette réglementation et définit les moyens qui s'offrent aux pouvoirs publics pour l'améliorer. Il porte sur les professions d'avocat[1] et de notaire latin dans les pays de droit romano-germanique (la plupart des États membres de l'Union européenne), de *solicitor/barrister* dans certains pays de *common law* (Angleterre/Pays de Galles et Irlande) et d'*attorney*. La profession de notaire latin occupe une place singulière au sein du groupe des professions juridiques, le notaire étant à la fois titulaire d'une charge publique et professionnel libéral. Dans tous les pays de l'OCDE, les aspirants à l'exercice d'une profession juridique doivent satisfaire des conditions de formation et respecter des règles de conduite professionnelle. Dans certains pays, certains services juridiques ne peuvent être rendus que par des professionnels agréés. Le périmètre exact des tâches réservées aux praticiens du droit, l'importance des restrictions à l'entrée et les règles de conduite professionnelle varient de manière significative d'un pays de l'OCDE à l'autre.

La qualité et le caractère concurrentiel des services professionnels ont d'importantes retombées, puisqu'ils ont une incidence sur le coût des moyens, tant pour l'économie que pour les entreprises. La réglementation relative à l'entrée dans les professions juridiques et les règles de conduite professionnelle qui restreignent la concurrence peuvent être de nature à entraîner une hausse injustifiée du coût des services juridiques.

Les restrictions à la concurrence imputables à la réglementation, y compris à l'autoréglementation, peuvent revêtir différentes formes. Théoriquement, certaines d'entre elles peuvent être pleinement justifiées. En ce qui concerne les services fournis par les avocats, *solicitors/barristers* et *attorneys*, les restrictions suivantes existent :

- restrictions qualitatives à l'entrée (durée d'études minimum, examens professionnels, expérience professionnelle minimum) ;
- obligation d'être membre d'un organe professionnel de droit public2;

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1 En Europe, selon la langue, ces titres sont les suivants : avocat (France), avvocato (Italie) abogado (Espagne), advocaat (Pays-Bas), asinajaja (Finlande).

2 Par exemple : « Ordre des avocats » en France, « Orde van Advocaten » aux Pays-Bas, « Ordine degli Avvocati » en Italie ou « Anwaltskammer » en Allemagne.

- protection des titres professionnels qui laissent entendre que leur titulaire a des compétences en droit ;

- tâches réservées : conseil juridique (du moins dans certains pays), droits exclusifs en matière de représentation judiciaire, couplés à l'obligation de représentation ;

- limites légales appliquées à la tarification des services juridiques (dans de nombreux pays ; en Italie, il y a peu de temps encore, les honoraires subordonnés au résultat obtenu étaient interdits) ;

- règles adoptées par les organes professionnels d'autoréglementation (parmi lesquelles certaines sont soumises à l'approbation ou à l'examen du ministre compétent) en matière : d'honoraires minima[3], ii) de publicité et iii) de structure d'exercice et de partenariats multidisciplinaires.

1. La réglementation relative aux services fournis par les notaires latins revêt les formes suivantes :

- restrictions qualitatives à l'entrée (durée d'études minimum, examens professionnels, expérience professionnelle minimum) ;

- restrictions quantitatives à l'entrée selon des critères démographiques et géographiques ;

- protection du titre professionnel de notaire latin ;

- tâches réservées, en particulier droits exclusifs d'autoriser le transfert de propriété d'un bien immobilier à prendre pleinement effet vis-à-vis de tiers (services liés au transfert de propriété)4, droits exclusifs en matière de constitution de sociétés et, dans certains pays, en matière familiale (contrats de mariage, contrats d'union libre, testaments) ;

- prix imposés pour certains services spécifiques ;

- règles supplémentaires adoptées par les organes professionnels d'autoréglementation (parfois soumises à l'approbation ou à l'examen du ministre compétent) en matière de publicité, de structure d'exercice et d'exercice en partenariat.

Depuis quelques années, certains aspects de la réglementation et de l'autoréglementation des professions juridiques font l'objet de critiques de plus en plus nombreuses en raison de leurs effets anticoncurrentiels et de leur manque de légitimité. Depuis lors, les autorités de la concurrence ont remis en cause le bien-fondé de certains types de règles (en particulier les restrictions relatives aux tarifs et les règles qui interdisent les partenariats multidisciplinaires).[5]

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3 Dans certains pays (comme l'Allemagne), les honoraires dus pour les services de représentation judiciaire sont fixés par la loi.

4 Dans les pays de *common law*, les services liés au transfert de propriété immobilière sont fournis par les *solicitors* ou, en Angleterre et au Pays de Galles, par des rédacteurs agréés d'actes de transfert de propriété *(« licensed conveyancers »)*, en concurrence avec les *solicitors*. En République tchèque et en Hongrie, les notaires latins n'ont pas de droits exclusifs en ce qui concerne le transfert de propriété de biens immobiliers et sont en concurrence avec les autres juristes.

5 La Commission européenne a entrepris un exercice d'inventaire pour mieux appréhender les effets négatifs potentiels et la justification économique éventuelle de la réglementation des professions. Dans le cadre de ce travail, la Direction générale de la concurrence a publié une étude indépendante sur la réglementation des professions (Paterson, Fink et Ogus 2003 ; voir encadré 1), qui, elle aussi, plaide en faveur d'un

La plupart des commentateurs reconnaissent désormais que les spécificités du marché des services juridiques exigent une forme de réglementation mais soulignent qu'on ne peut écarter le risque que la réglementation (y compris l'autoréglementation) ne restreigne trop la concurrence et ne promeuve les intérêts des professions sans avoir d'effets positifs pour la population en général. L'analyse économique permet de mieux comprendre les raisons qui motivent la réglementation des professions juridiques, qu'il s'agisse de celle imposée par les pouvoirs publics ou de l'autoréglementation, et d'identifier les restrictions superflues ou disproportionnées au regard des objectifs de politique publique poursuivis. Ce document présente une synthèse des principaux enseignements de l'analyse économique en matière de réglementation des professions juridiques. Il vise à éclairer les débats de politique publique sur les entraves à la concurrence potentiellement injustifiées et autres problèmes posés par le mode d'organisation actuel des professions du droit. Enfin, il propose des lignes directrices en matière de politiques publiques.

La suite du document est organisée comme suit :

- la deuxième partie présente les principaux arguments économiques en faveur de la réglementation, y compris de l'autoréglementation, et propose une réflexion sur les effets anticoncurrentiels qui peuvent en découler ;

- la troisième partie décrit de manière plus précise les différents types de réglementation des services professionnels et présente un aperçu de travaux empiriques[6] sur :

  - les droits exclusifs ;

  - la réglementation de l'entrée (restrictions qualitatives et quantitatives à l'entrée) ;

  - la réglementation relative aux honoraires et à la publicité ; et

  - le choix de la structure d'exercice et les restrictions relatives aux partenariats multidisciplinaires.

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réexamen critique de la réglementation des services professionnels. En 2004 et 2005, la Commission européenne a publié deux communications sur ce sujet (Rapport sur la concurrence dans le secteur des professions libérales COM (2004) 83 final ; Services professionnels – Poursuivre la réforme COM 2005 (405) final). Le Parlement européen a adopté deux résolutions qui soutiennent la Commission dans sa volonté d'éliminer les règles trop restrictives qui entravent la concurrence et portent préjudice à l'économie et aux consommateurs de l'Union européenne. Toutefois, dans sa dernière résolution, le Parlement européen insiste également sur la nécessité de mener des travaux de recherche économique indépendants sur les effets de la réglementation (y compris de l'autoréglementation) des professions juridiques. Dans l'intervalle, ces initiatives ont favorisé un examen critique des règles existantes et plusieurs modifications du cadre réglementaire ont été introduites à l'échelle des États membres (Résolution du Parlement européen sur l'organisation de marché et les règles de concurrence pour les professions libérales, JO C 91 E du 15 avril 2004, pp. 126-128 ; Résolution du Parlement européen sur le suivi du rapport sur la concurrence dans le secteur des professions libérales, 12 octobre 2006). Aux États-Unis, les autorités de la concurrence sont également préoccupées par les effets anticoncurrentiels de l'autoréglementation de la profession juridique (services proposés par les *attorneys*). Elles ont adressé à l'American Bar Association un courrier détaillé dans lequel elles expriment leur inquiétude face à une récente proposition de définition de la pratique du droit, qui exclut les services rendus par des non-professionnels et risque d'être préjudiciable aux consommateurs (Organismes conjoints [US FTC et ministère de la Justice] 2002).

6 Ces travaux sont encore relativement limités, même si ceux qui portent sur l'Europe sont relativement plus nombreux que ceux qui concernent d'autres régions du monde. Les travaux empiriques concernant les services médicaux sont plus nombreux (voir OCDE 2005).

- la quatrième partie du document propose, à partir des enseignements de l'analyse économique et de l'analyse juridique présentés dans les parties précédentes, des lignes directrices pour l'adoption des politiques publiques.

- la cinquième partie fait office de conclusion.

2. Réglementation des marchés des services juridiques : intérêt général, intérêts particuliers et droit de la concurrence.

L'amélioration de la qualité de la réglementation des marchés des services juridiques suppose d'apporter une réponse à deux séries de questions :

- D'une part, la réglementation est-elle nécessaire du point de vue de l'intérêt général ? Y a-t-il un risque que le contenu de la réglementation imposée par les pouvoirs publics ou de l'autoréglementation serve des intérêts particuliers plutôt que des objectifs d'intérêt général ?

- D'autre part, comment le système juridique, en particulier les principes qui sous-tendent la politique de la concurrence, peut-il limiter les possibilités d'adopter une réglementation servant des intérêts particuliers et renforcer la concurrence si cela va dans le sens de l'intérêt général ?

Telles sont les deux séries de questions sur lesquelles porte cette partie.

Une abondante littérature économique montre que, dans le domaine des services juridiques, la liberté des marchés n'aboutit pas systématiquement à des résultats efficients.[7] Trois types de défaillances du marché sont possibles :

- une asymétrie d'information ;

- l'existence d'externalités ; et

- une insuffisance de l'offre de biens publics.

Dans le secteur des services juridiques, il arrive également que la réglementation dictée par l'intérêt général soit motivée, non seulement par la volonté de corriger ces défaillances, mais aussi par des objectifs redistributifs ou par un certain paternalisme.

Aux théories selon lesquelles la réglementation des services professionnels est motivée par des objectifs d'intérêt général, s'opposent les théories fondées sur la notion d'intérêts particuliers, selon lesquelles les mesures réglementaires pourraient être motivées par la volonté de réduire la concurrence et d'augmenter les bénéfices des professionnels, sans que cela soit contrebalancé par de réels effets positifs pour la société dans son ensemble. Ce risque est particulièrement élevé lorsque le pouvoir réglementaire est délégué aux organes professionnels. Une autoréglementation anticoncurrentielle peut enfreindre le droit de la concurrence, être invalidée et sanctionnée par des amendes (pénales ou administratives). Le droit de la concurrence s'applique uniquement aux pratiques anticoncurrentielles introduites, de manière autonome, par les membres des professions juridiques et leurs organes professionnels, pas aux mesures réglementaires adoptées par les pouvoirs publics. Cette partie s'achève par une réflexion sur la responsabilité potentielle des organes professionnels d'une part et des pouvoirs publics d'autre part en matière de restrictions de la concurrence non justifiées par des considérations d'intérêt général.

[7] Voir, concernant les services professionnels en général, Noll 1989 et, concernant les services juridiques, Arrunada 1996, Faure et al. 1993 ou Ehlermann et Atanasiu 2006.

2.1 Théories de la réglementation fondées sur l'intérêt général

2.1.1 Asymétrie d'information

Nombre de consommateurs ne sont pas en mesure d'évaluer la qualité des services proposés par les professionnels avant de les acheter. La littérature économique fait une distinction entre :

- les biens de recherche ;
- les biens d'expérience ; et
- les biens de croyance.[8]

Un bien de recherche est un bien dont le consommateur peut évaluer la qualité avant l'achat (la couleur d'un vêtement par exemple). Un bien d'expérience est un bien dont le consommateur ne peut évaluer la qualité qu'après achat et consommation (aliments en boîte par exemple).[9] Sur les marchés de produits ordinaires, la réputation d'une marque, les sondages menés auprès des consommateurs et les règles de la responsabilité délictuelle et quasi-délictuelle peuvent fournir d'importants signaux de qualité et lutter efficacement contre la dégradation de la qualité. Ces mécanismes sont toutefois plus difficiles à mettre en œuvre sur les marchés des services professionnels. De surcroît, ces services sont souvent des biens de croyance, dont le consommateur ne peut quasiment jamais apprécier la qualité. L'acquisition de l'information nécessaire n'étant possible ni avant, ni après l'achat, il doit, pour s'assurer que la qualité est suffisante, se fier à des garanties extérieures. S'il ne peut pas apprécier la qualité du service qu'il veut acquérir, il n'est pas prêt à payer un prix supérieur en contrepartie d'un niveau de qualité élevé.[10]

L'asymétrie d'information est à l'origine d'un autre phénomène : l'aléa moral. L'aléa moral se rencontre fréquemment dans les relations d'agence caractérisées par l'existence de problèmes d'information dus à un écart entre les objectifs du prestataire de services (mandataire) et le client (mandant). Le prestataire de services est censé agir dans l'intérêt du client mais, ce dernier ne pouvant exprimer le rapport qualité-prix qu'il souhaite, le mandataire est incité à fournir une qualité excessive pour pouvoir appliquer des tarifs plus élevés, même si un service de moindre qualité à un prix plus raisonnable servirait mieux les intérêts du client.[11]

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8 Nelson a été le premier à distinguer les biens de recherche des biens d'expérience (1970). À propos des biens de croyance, voir Darby et Karni 1973.

9 S'ils achètent des biens d'expérience régulièrement, les consommateurs peuvent obtenir des informations sur leur qualité à travers le « jeu des achats répétés ». Les joueurs, à savoir les consommateurs qui achètent des services régulièrement, peuvent ainsi accumuler une certaine connaissance et expérience qui réduit l'asymétrie d'information. Dans ce cas, les fournisseurs intéressés par ce marché des achats répétés ont intérêt à se forger une réputation de prestataires de services de qualité supérieure, ce qui empêche la dégradation de la qualité des caractéristiques visibles pour les consommateurs.

10 Dans un premier temps, les prestataires qui proposent la qualité la plus élevée (et pratiquent les tarifs les plus hauts) sont exclus du marché, les consommateurs n'étant pas prêts à payer un prix supérieur à la moyenne pour une qualité qu'ils jugent (du fait de l'asymétrie d'information) moyenne. Dans un second temps, cette qualité moyenne va continuer de se dégrader et, *in fine*, seuls des services bon marché, de qualité médiocre, seront vendus. Ce processus de « sélection adverse » se solde par une dégradation générale de la qualité, donnant naissance à un marché opportunément qualifié de *« market for lemons »*, ou marché des mauvais produits (Akerlof 1970).

11 L'autre risque et que le mandataire fournisse des services dont le client n'a pas besoin (demande induite par le fournisseur).

Les facteurs décrits ci-dessus s'appliquent directement au fonctionnement du marché des services juridiques.[12] La qualité de ces services se décline en trois dimensions (voir Plug et al. 2003, p. 29) :

- intégrité (service rendu de manière impartiale et inspirant la confiance) ;
- qualité juridique (qualité du conseil donné, caractère adapté de la représentation en justice, qualité des actes notariés) ; et
- qualité commerciale (traitement perçu par le consommateur).

Seule cette dernière dimension est facile à observer par le consommateur. La qualité commerciale recouvre certaines caractéristiques du service proposé, par exemple l'emplacement du cabinet juridique, la possibilité ou non de se garer gratuitement et l'amabilité du personnel. La qualité juridique revêt une importance beaucoup plus grande pour les clients, mais est difficile à apprécier.[13]

Sur certains marchés des services juridiques, ces problèmes d'information peuvent être atténués par le « jeu des achats répétés ». Les consommateurs pouvant être des acheteurs professionnels qui acquièrent régulièrement des services juridiques, il arrive que les marchés fonctionnent de manière efficiente.[14] Alors que les grandes entreprises acheteuses de services juridiques peuvent être en mesure de juger de la qualité, ce n'est pas toujours le cas des petites entreprises ou des individus qui ont besoin d'un juriste de manière occasionnelle. Il s'ensuit que les marchés des services juridiques peuvent fonctionner relativement bien dans les domaines du droit de la concurrence et du droit commercial, tandis que les marchés des services de conseil et de représentation dans le domaine du droit de la famille et du droit du travail peuvent pâtir d'importantes asymétries d'information. Le même problème se pose sur les marchés des services notariaux.[15]

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12 Par exemple, les avocats/ *solicitors* proposent des prestations de conseil sur un large éventail de questions juridiques et représentent les parties au tribunal en cas de litige. Les notaires latins proposent des prestations de conseil juridique sur un nombre limité de problèmes juridiques, liés à l'immobilier, au mariage, aux testaments et à la constitution de sociétés. Ils authentifient ce que les clients veulent et dont ils ont convenu, garantissant ainsi la validité juridique des transactions.

13 Concernant la qualité des prestations de conseil juridique, le client ne sait pas si le juriste a investi le maximum d'efforts dans son dossier et si le conseil qu'il lui a donné est judicieux. Concernant la représentation des intérêts des clients devant les tribunaux, il est difficile d'évaluer si un avocat a utilisé tous les arguments qui auraient pu avoir un effet favorable sur l'issue de l'affaire. En ce qui concerne les notaires latins, la qualité juridique est plus ou moins grande selon que les préférences des parties au contrat sont plus ou moins prises en compte dans l'acte notarié. Il est difficile de déterminer si le notaire a demandé à son client toutes les informations nécessaires et s'il les a obtenues. En outre, vérifier si le notaire a dûment fait les recherches nécessaires (par exemple pour savoir si le bien immobilier vendu est grevé d'une hypothèque) prend du temps (Nahuis et Noailly 2005, p. 30).

14 Par exemple, lorsque l'acheteur de services juridiques est une entreprise, il est possible qu'elle ait des conseillers juridiques en interne, aptes à juger de la qualité des services proposés dans certains domaines spécialisés comme le droit commercial, le droit de la concurrence ou le droit fiscal.

15 Nombre d'actes notariés sont soit des biens d'expérience, achetés de manière occasionnelle, soit des biens de croyance. Aux Pays-Bas par exemple, un bien immobilier est vendu en moyenne tous les sept ans (Baarsma, Mulder et Teulings 2004, p. 4). Il s'ensuit que toute erreur peut rester cachée pendant sept ans. Même lorsque les consommateurs achètent des services notariaux à plusieurs reprises, ils ne peuvent en apprécier la qualité juridique qu'au terme d'un délai relativement long. Ce constat vaut également pour l'appréciation de l'intégrité du notaire. En ce qui concerne les services notariaux présentant des attributs de croyance, les acheteurs ne seront jamais en mesure de porter un jugement fiable sur la qualité. L'exemple d'un testament dont la mauvaise qualité de rédaction nuit au testateur fournit une illustration de ce

Par conséquent, sur les marchés des services juridiques, du fait de l'asymétrie d'information, il peut être justifié de réglementer pour empêcher une dégradation de la qualité et garantir l'intégrité des professionnels. Plusieurs règles juridiques favorisent la fourniture de services juridiques de bonne qualité :

- l'obligation d'avoir suivi des études universitaires ;
- l'obligation d'effectuer un stage ;
- la formation professionnelle, y compris l'obligation de suivre des études universitaires supérieures ;
- l'exercice d'une surveillance réglementaire par les organes professionnels, habilités à imposer des sanctions disciplinaires.

Selon les membres des professions juridiques, l'existence d'un monopole légal pour la fourniture de certains services, les restrictions en matière de publicité et les tarifs imposés sont aussi des moyens de garantir la qualité. Toutefois, le risque de défaillances du marché ne justifie pas l'adoption d'une réglementation indifférenciée de l'ensemble de la profession juridique. Certains marchés, en particulier ceux des services juridiques qui s'adressent à des consommateurs bien informés et effectuant des achats répétés, sont dynamiques, peuvent fonctionner de manière relativement satisfaisante et ne pas nécessiter d'intervention réglementaire.

2.1.2 L'existence d'externalités négatives

Sur les marchés des services professionnels, la gravité des défaillances de marché prenant la forme d'externalités négatives dépend de leur ampleur, en d'autres termes des préjudices causés aux tiers ou à la société dans son ensemble par la fourniture de services de mauvaise qualité. La fourniture de services juridiques de qualité inférieure au niveau optimal, peut nuire non seulement au consommateur du service, mais aussi à d'autres individus impliqués dans la transaction. Par exemple, la mauvaise qualité de conseils juridiques relatifs à la légalité des stipulations d'un contrat lèse l'acheteur du service juridique, mais aussi ses clients, aux étapes ultérieures de la chaîne de production et de distribution.[16] Sur un marché libre, ces externalités négatives ne sont pas internalisées dans le processus de décision du prestataire de services juridiques.

Le droit de la responsabilité civile constitue une première solution face aux externalités négatives. La perspective d'être tenu pour responsable de dommages est de nature à inciter les prestataires potentiellement fautifs à modifier leur comportement. L'analyse économique du droit a cependant démontré que les règles de la responsabilité peuvent contribuer de manière optimale à empêcher les agissements répréhensibles dans le cadre d'un nombre limité d'hypothèses seulement (Shavell 1987,

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phénomène, puisque le testateur ne sera jamais en mesure de s'apercevoir de la mauvaise qualité juridique de l'acte. Là aussi, la situation est différente lorsque les clients sont des entreprises, par exemple des agents immobiliers, des banques et des sociétés. Ces clients effectuent en effet des achats répétés et le mécanisme de réputation (associé aux menaces d'actions en responsabilité) peut constituer une motivation suffisante pour inciter à offrir des services de qualité sur des segments de marché spécifiques (services liés au transfert de propriété immobilière, constitution de sociétés).

16 De même, la mauvaise rédaction d'un testament lèse les héritiers du défunt.

Schäfer et Ott 2004, pp. 107-269).[17] Les lacunes du droit de la responsabilité civile semble donc justifier la réglementation.

La réglementation est susceptible d'empêcher la dégradation de la qualité imputable aux externalités négatives. Contrairement au droit de la responsabilité civile, qui intervient a posteriori, une fois que le préjudice a été causé, la réglementation définit des normes de qualité a priori, ce qui peut empêcher des professionnels non qualifiés d'accéder au marché. L'analyse économique du droit permet d'avancer différentes raisons pour lesquelles la réglementation est parfois préférable à l'application du droit de la responsabilité civile :

- les pouvoirs publics disposent parfois d'informations plus pertinentes que celles dont disposent les juges pour fixer le niveau optimal de précaution ;

- il est possible de faire appliquer la réglementation à l'aide de sanctions pénales, susceptibles d'avoir un effet dissuasif plus fort que la simple obligation d'indemnisation, en particulier lorsque le défendeur est à l'abri de toute sanction (« judgement proof »)18 ; et

- il n'est pas possible d'engager une action en responsabilité lorsque le préjudice est réparti entre un grand nombre d'individus (phénomène d'apathie rationnelle) ou lorsque la causalité ne peut pas être établie (Shavell 1984).

Toutefois, dans le secteur des services juridiques, il peut également y avoir des défaillances de l'information du côté de la puissance publique et les coûts administratifs liés à l'établissement de normes de qualité peuvent être élevés. Les pouvoirs publics n'ont pas à leur disposition immédiate les connaissances spécifiques nécessaires pour fixer des normes de qualité qui permettront d'apprécier les résultats des prestataires de services juridiques.[19] Par conséquent, les mesures réglementaires relatives aux

17 Si l'on applique la règle de la responsabilité civile stricte, la réparation est due s'il y a un lien de cause à effet entre l'acte fautif et le préjudice subi. Cette règle n'incite à prendre les précautions requises que si le montant de l'indemnisation est égal à l'ampleur réelle du préjudice, ce qui n'est pas le cas lorsque le juge n'est pas en mesure d'apprécier avec précision l'ampleur des externalités. Si l'on est dans le cadre du principe de négligence, le juge doit décider si l'auteur de la faute a pris les précautions requises par la loi. Dans ce cas aussi, l'indemnisation doit être égale au préjudice effectivement subi. De surcroît, dans le cadre de l'application du principe de négligence, on ne peut aboutir à un résultat efficient que si le niveau de précaution exigé par la loi est égal au niveau de précaution efficient, ce qui n'est pas le cas si les informations dont dispose le juge ne sont pas suffisantes pour lui permettre d'apprécier l'avantage et le coût marginaux d'un supplément de précaution (à noter toutefois que ce problème d'information semble moins grave que dans les cas d'erreur médicale (voir Danzon 1985), les juges étant également, du fait de leur formation, des experts juridiques). Quoi qu'il en soit, que l'on applique le principe de négligence ou la responsabilité civile stricte, l'existence d'un lien de cause à effet peut être difficile à prouver, de sorte que le droit de la responsabilité civile ne permet pas d'internaliser totalement les externalités négatives imputables à la mauvaise qualité des prestations fournies par les professionnels (les critères à appliquer pour prouver la causalité varient selon les systèmes juridiques : ainsi, de nombreux régimes de responsabilité délictuelle appliquent le critère de prépondérance de la preuve et rares sont les systèmes qui acceptent le principe de responsabilité proportionnelle (responsabilité proportionnelle à la part de marché, voir Spier 2005).

18 Ce concept désigne une situation dans laquelle le montant de l'indemnisation due dépasse les actifs du défendeur. Si ce dernier est alors dans l'incapacité de verser la totalité de l'indemnisation, il se fonde, pour décider de respecter ou non la loi, sur l'ampleur des externalités et n'est pas suffisamment dissuadé d'agir de manière répréhensible. Les sanctions pénales, en particulier les peines d'emprisonnement, peuvent résoudre ce problème d'insuffisance de dissuasion. Voir Shavell 1986.

19 Pour fixer des niveaux de qualité, le législateur doit savoir comment mesurer la qualité, ce qui peut être aussi difficile que l'est, pour le juge, l'instruction d'affaires d'erreurs professionnelles.

moyens, par exemple celles qui exigent une formation adaptée ou un stage, peuvent être préférables à des normes de qualité portant sur les résultats. En outre, la menace d'actions en responsabilité doit coexister avec la réglementation sur la qualité pour corriger les insuffisances de cette dernière en tant qu'instrument d'élimination des externalités.

2.1.3 Insuffisance de l'offre de biens publics

La troisième défaillance du marché est le problème dit du « bien public ». Un bien public présente deux caractéristiques qui le distinguent d'un bien privé : le principe de non-rivalité, selon lequel sa consommation par un individu ne diminue pas son utilité pour un autre et le principe de non-exclusion, selon lequel il est impossible d'exclure de la consommation les individus qui ne paient pas (Pindyck et Rubinfeld 1998, pp. 672-678). Les biens publics créent donc des externalités positives, en d'autres termes, ils ont des effets positifs pour des parties non impliquées dans la transaction. Un bien public est un bien qui peut être consommé simultanément par tous, même par des personnes qui ne demandent pas à le consommer et ne paient pas pour cela. Sur un marché libre, on tend à observer une sous-production des biens publics, puisque le producteur n'est pas en mesure d'exclure les consommateurs qui ne paient pas. Les pouvoirs publics peuvent, pour garantir l'offre de biens publics, adopter des réglementations dans ce domaine. Les prestataires de services juridiques sont à l'origine d'importantes externalités positives, qui ont beaucoup de valeur pour la société en général. Les juristes jouent un rôle crucial dans la bonne administration de la justice et les notaires contribuent à la sécurité juridique en permettant que le transfert de propriété d'un bien immobilier prenne pleinement effet vis-à-vis de tiers.

À noter, parmi les externalités positives importantes des droits exclusifs, le fait qu'ils abaissent le coût de l'administration de la justice. Le fait que des affaires puissent être plaidées par des non-juristes peut faire porter une lourde responsabilité au juge (en particulier dans les affaires complexes) ; en revanche, des professionnels qualifiés peuvent présenter une meilleure argumentation et être à l'origine de précédents valables (Bishop 1989).

De même, la réglementation relative au transfert de propriété (services liés au transfert de propriété immobilière) est jugée nécessaire parce que garantir que les droits de propriété sont bien définis et mis en œuvre à moindre coût répond à un objectif d'intérêt général fort.[20] Il est essentiel, pour le bon fonctionnement de l'économie, que les droits de propriété soient bien définis et efficacement mis en œuvre dans la mesure où ils déterminent la propriété des biens de valeur et les responsabilités correspondantes.[21]

2.1.4 Autres arguments fondés sur l'intérêt général

La réglementation des marchés des services juridiques peut poursuivre d'autres objectifs que la correction des défaillances de marché (asymétrie d'information, externalités, offre insuffisante de biens publics). Les pouvoirs publics peuvent également être mus par des objectifs de justice redistributive ou par

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[20] Le notaire latin exerce un contrôle *ex ante* de la qualité des transactions (notamment en recherchant si l'acheteur a des dettes et en s'assurant que les permis de construire peuvent être délivrés). De ce fait, les coûts *ex post* d'une transaction, par exemple les frais de procédure en cas de litige, sont réduits, voire totalement éliminés (voir aussi Arruñada 1996). L'intervention du notaire a des avantages non seulement pour les parties au contrat, mais aussi pour les tiers (les banques qui consentent les prêts, les acheteurs ultérieurs) et la société en général (sécurité juridique), ce qui explique qu'elle soit considérée comme une fonction publique.

[21] Selon un argument avancé par Hernando de Soto (2000), la pauvreté en Europe orientale et en Amérique latine n'est en réalité pas imputable à un manque d'argent mais à l'absence de système fiable d'enregistrement de la propriété foncière, absence qui fait obstacle au financement des transactions immobilières.

un certain paternalisme. La réglementation des prix (le fait d'imposer des honoraires maxima) peut garantir l'accès des citoyens à faible revenu aux services juridiques et la protection de droits constitutionnels. Le fait d'imposer des honoraires minima peut, quant à lui, être motivé par la volonté de garantir la qualité des services. Outre les raisons de justice redistributive, les pouvoirs publics peuvent également juger nécessaire de faire en sorte que les citoyens non spécialistes du droit soient contraints de recourir à une assistance juridique pour réaliser des transactions importantes.[22] Ils peuvent rejeter les approches économiques lorsqu'ils craignent que la liberté des marchés compromette la sécurité juridique, voire remette en cause le maintien du principe de primauté du droit. Les économistes pourraient répondre à ces craintes en arguant que la sécurité juridique et la bonne administration de la justice peuvent être redéfinies en langage économique.[23]

2.2 Les théories de la réglementation, en particulier de l'autoréglementation, fondées sur les intérêts particuliers

Nombre de commentateurs, prenant le contre-pied des théories de l'intérêt général, avancent que la réglementation des services professionnels s'analyse davantage en termes de recherche de rente, de lobbying et de détournement de la réglementation au profit d'intérêts particuliers. Dans une célèbre étude, Friedman et Kuznets (1945) ont estimé qu'aux États-Unis, les professionnels ont perçu des rentes économiques élevées (entre 15 et 110 %) au cours de la période 1929-1936. D'après les enseignements de cette étude séminale, la réglementation des services professionnels est mise en place et maintenue parce qu'elle sert les intérêts particuliers des membres de la profession. Les professionnels étant nombreux, il est difficile de conclure des ententes et de les suivre. La réglementation garantit la stabilité de ces ententes et est à l'origine de rentes économiques.[24]

Ce raisonnement a été appliqué à la profession juridique (Arnauld et Friedland 1977). Les ententes ne peuvent pas perdurer en l'absence de barrières à l'entrée, mais la réglementation professionnelle empêche de nouvelles entreprises ou des entreprises opérant dans d'autres secteurs d'accéder au marché. Cette situation peut être préjudiciable parce que :

- les restrictions à l'entrée entraînent une baisse du nombre de professionnels, qui s'établit à un niveau inférieur à l'optimum social ; et

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22 Il est possible que les États membres de l'Union européenne souhaitent trouver un compromis entre les facteurs économiques (éviter les entraves à la concurrence) et ce qu'ils considèrent comme des facteurs non économiques. Les membres des professions juridiques jouent un rôle capital dans l'administration de la justice et le maintien de la primauté du droit, deux éléments qui sont des fondements essentiels de la démocratie (Sforzolini 2006, p. 3). Le Parlement européen souligne aussi, dans sa dernière résolution, que la réforme de la profession juridique a non seulement une incidence sur la concurrence, mais aussi sur la liberté, la sécurité et la justice et, plus largement, sur la protection de la primauté du droit au sein de l'Union européenne.

23 Ces deux notions peuvent être considérées comme des biens publics dont l'offre est insuffisante sur un marché libre, de sorte que la réglementation peut aussi se justifier d'un point de vue économique (voir 2.3). Toutefois, dans le débat de politique publique contemporain, les arguments fondés sur la bonne administration de la justice et le besoin de sécurité juridique sont souvent présentés comme des principes non économiques, qui, dans certains cas, devraient l'emporter sur les inquiétudes suscitées par les restrictions à la concurrence.

24 Cet argument a été développé pour la première fois par Stigler (1971). Le lien entre la théorie des ententes et le détournement de la réglementation au profit d'intérêts particuliers a été fait par Posner (1974). Voir aussi McChesney (1987), Van den Bergh (1993) et Hadfield (2000).

- les règles relatives au comportement (honoraires réglementés, interdiction de la publicité) entraînent une hausse du prix des services professionnels.

D'après les théories du « choix public », les professions peuvent se révéler des groupes de pression efficaces et les hommes politiques, soucieux d'être réélus, ne se montrent alors pas prêts à effectuer des réformes éliminant les rentes économiques des membres de ces professions.[25] Selon la théorie du détournement de la réglementation au profit d'intérêts particuliers, les instances chargées de la réglementation tendent à être sensibles aux intérêts du secteur réglementé, davantage qu'à l'intérêt général (Posner 1974). Ce phénomène n'est pas dû à une corruption des responsables de l'action publique, mais plutôt au fait qu'ils doivent se fier, pour réglementer, aux informations fournies par les professionnels. Ces derniers peuvent exploiter indûment leur avantage en termes d'information pour empêcher les pouvoirs publics, qui exercent une surveillance réglementaire, d'éliminer les règles trop anticoncurrentielles. L'autoréglementation a été décrite comme la forme ultime de détournement de la réglementation au profit d'intérêts particuliers (Kay 1998). Enfin, lorsque des mesures réglementaires discutables de ce type sont en place depuis des décennies, toute libéralisation (fût-elle minime) se heurte à la résistance des intérêts particuliers qu'elle affecte.

Lorsque de solides arguments fondés sur l'intérêt général plaident en faveur d'une réglementation, le risque de détournement de cette réglementation au profit d'intérêts particuliers augmente puisqu'il devient difficile de détecter un comportement de recherche de rente et, parfois, plus facile d'adopter des restrictions à la concurrence servant des intérêts particuliers. À l'inverse, le simple fait que les restrictions à la concurrence résultent de l'autoréglementation ne signifie pas que les professionnels bénéficient de rentes économiques excessives ; en effet, il est possible que ces restrictions aillent également dans le sens de l'intérêt général (qu'elles corrigent l'asymétrie d'information par exemple). Par conséquent, la recherche de rente est difficile à détecter, de sorte qu'un détournement de la réglementation par des organisations professionnelles puissantes devient plus vraisemblable. En somme, en matière de réglementation des services professionnels, la théorie de l'intérêt général et celle fondée sur les intérêts particuliers ne s'excluent pas mutuellement. Pour comprendre pleinement le cadre réglementaire actuel dans toute sa complexité, il est indispensable d'associer les deux approches.

La troisième partie de ce document présente des arguments pour et contre divers types de réglementation des marchés des services juridiques. Une grande partie de ce travail a été effectuée pour confirmer ou infirmer l'existence d'un comportement de recherche de rente. À ce stade, il convient déjà de préciser que les données empiriques disponibles ne confirment pas toujours les hypothèses théoriques reposant sur l'argument selon lequel la réglementation est dictée par des intérêts particuliers ; il est possible que des conclusions fortes, résultant d'un raisonnement théorique *a priori* des autorités de la concurrence, ne soient pas corroborées par les données empiriques (Stephen et Love 2000, p. 1001). Dans

[25] Les professions juridiques remplissent tous les critères pour être qualifiées de groupes d'intérêts puissants : il s'agit d'un petit milieu, bien organisé et capable de faire face au problème du passager clandestin en rendant obligatoire l'adhésion aux organisations professionnelles (sur le problème du passager clandestin – situation dans laquelle des personnes extérieures, qui n'ont pas à supporter le coût du lobbying, profitent également de ses effets positifs –, voir Olson 1965). Ces petits groupes peuvent devenir des groupes de pression efficaces si les intérêts financiers sont suffisamment concentrés pour que les frais d'organisation et de lobbying à engager pour obtenir des faveurs des pouvoirs publics soient inférieurs aux fruits récoltés. Bien souvent, les organisations professonnelles parviennent à obtenir des transferts de richesse aux dépens de la population. Les intérêts des consommateurs sont moins concentrés, et organiser les consommateurs pour empêcher les transferts de richesse est une entreprise qui a un coût relativement élevé, supérieur aux gains potentiels attendus. Tant que le nombre de nouveaux entrants dans une profession permet l'obtention de rentes politiques, induites par les restrictions à la concurrence, supérieures aux gains ponctuels qui découleraient de l'élimination de ces restrictions, les hommes politiques n'auront aucun intérêt à modifier les règles relatives à l'entrée et au comportement.

le débat de politique publique, il est régulièrement question de l'étude réalisée pour la Commission européenne par l'Institut für Höhere Studien (IHS) (Paterson, Fink et Ogus 2003). Les auteurs de cette étude font état d'une corrélation positive entre le degré de réglementation et le volume d'affaires individuel des professionnels en exercice, ce qui laisse entendre qu'une réglementation plus importante induit des bénéfices plus élevés et plaide en faveur de la théorie fondée sur les intérêts particuliers. Toutefois, cette conclusion du rapport, entre autres, a été critiquée et considérée comme ne pouvant pas constituer une base fiable pour la prise de décisions de politique publique (encadré 1).

Encadré 1. Rapport de l'IHS sur la réglementation relative aux professions libérales (2003)

Le rapport de l'IHS sur la réglementation des professions libérales (Paterson, Fink et Ogus 2003) couvre un large éventail de professions (libérales) : avocats, comptables, architectes, ingénieurs et pharmaciens. Compte tenu du tableau complexe auquel les diverses formes de réglementation en vigueur dans les différents États de l'Union européenne donnent naissance, les chercheurs ont, par souci de simplification et pour obtenir des données comparables, calculé des indices de la réglementation. Ils ont construit trois indices différents : un relatif à l'entrée sur le marché (qui couvre les règles sur les systèmes d'autorisation, les obligations d'études, les quotas ou l'examen des besoins économiques) un relatif à la conduite (qui couvre les règles sur les prix/honoraires, la publicité, le lieu d'établissement, la diversification, la structure d'exercice et la coopération interprofessionnelle) et un indice global. Chaque catégorie de réglementation (examen des besoins économiques ou restrictions appliquées à la publicité par exemple) a été pondérée en fonction de son importance relative par rapport à la situation du marché. Pour l'indice de réglementation de l'entrée sur le marché, les notes attribuées vont de 0 (réglementation la moins restrictive) à 6 (réglementation la plus restrictive), ce qui conduit à un indice global compris entre 0 et 12. Plus la note attribuée à l'indice est élevée, plus la réglementation de la profession concernée est restrictive. D'après ces indices, le degré de réglementation varie indéniablement d'un État membre à l'autre et d'une profession à l'autre. Les auteurs de l'étude ont ensuite cherché à déterminer si les différents degrés de réglementation ont également une incidence sur la situation du marché. Ils se sont basés sur des études de cas comparant des États membres qui affichent d'importants écarts en termes de degré de réglementation. Les indices pertinents ont ensuite été reliés à des variables économiques susceptibles d'indiquer si une réglementation importante sert les intérêts particuliers des professions qu'elle vise. Ces variables sont le nombre d'entreprises, de salariés et de professionnels libéraux et le chiffre d'affaires total de la profession. Il apparaît que dans les pays où le degré de réglementation est le plus élevé, le chiffre d'affaires est relativement élevé par rapport au nombre de professionnels en exercice. Lorsque le degré de réglementation est élevé, le nombre de professionnels est proportionnellement plus faible et le chiffre d'affaires par professionnel plus important. Dans les pays où le degré de réglementation est faible, le chiffre d'affaires est plus faible également, mais seulement lorsqu'il est rapporté au nombre de professionnels en exercice (ce constat vaut donc également lorsque le volume d'activité global est plus élevé). En supposant qu'il existe un lien entre le volume d'activité par professionnel et la réalisation d'un superbénéfice, l'existence d'une corrélation positive entre le degré de réglementation et le chiffre d'affaires par professionnel semble corroborer la théorie selon laquelle la réglementation vise à servir des intérêts particuliers.

En ce qui concerne plus spécifiquement la profession juridique, le rapport révèle des écarts notables de degré de réglementation entre les pays (Paterson, Fink et Ogus 2003, pp. 50 et 57). Pour les avocats, l'indice varie entre 0.3 (Finlande) et 9.5 (Grèce). Les pays où la réglementation est faible sont, après la Finlande, la Suède (2.4), le Danemark (3), les Pays-Bas (3.9) et l'Angleterre/Pays de Galles. Les pays où elle est élevée sont, après la Grèce, l'Autriche (7.3), la France (6.6), le Luxembourg (6.6), l'Allemagne et l'Espagne (6.5 dans les deux cas) et l'Italie (6.4). L'Irlande (4.5), la Belgique (4.6) et le Portugal (5.7) se situent entre ces deux extrêmes. Pour les notaires latins, l'indice global varie entre 6.3 (Pays-Bas) et 11 (Allemagne). L'indice est également élevé en Italie (10.7), France (10), Autriche (9.6), Espagne (9.4) et Belgique (9.3). Les études de cas consacrées aux avocats montrent que l'Autriche et la France, qui affichent un indice de réglementation élevé (respectivement 7.34 et 6.61), enregistrent des résultats moyens en termes de chiffre d'affaires (compte tenu de la taille du pays) et comptent peu de prestataires de services juridiques (avocats inscrits au Barreau et notaires), ce qui se traduit par un chiffre d'affaires par professionnel élevé. À l'inverse, un groupe de pays (Pays-Bas, Danemark, Finlande et Suède) affiche un nombre de professionnels relativement faible, mais, contrairement à l'Autriche et à la France, un chiffre d'affaires par professionnel moyen. Par conséquent, un degré de réglementation plus élevé se traduit par un chiffre d'affaires par professionnel plus élevé également. Les auteurs constatent également que le niveau d'emploi est bas en Autriche et relativement élevé aux

Pays-Bas et au Danemark.[26] Il ressort donc de l'étude de l'IHS qu'une forte réglementation de la profession juridique va de pair avec un niveau d'emploi plus faible.

L'étude de l'IHS aboutit à la conclusion que « les stratégies visant à instaurer un faible niveau de réglementation qui fonctionnent dans un État membre pourraient également fonctionner dans un autre, sans que la qualité des services professionnels n'en soit réduite et pour le plus grand profit des consommateurs » (Paterson, Fink et Ogus, 2003, p. 8). Toutefois, cette conclusion est peut-être un peu catégorique, et ce pour trois raisons.[27] Premièrement, on ne peut exclure que l'hypothèse selon laquelle un chiffre d'affaires plus élevé est synonyme de bénéfices plus élevés soit erronée – dans les professions très réglementées, un chiffre d'affaires plus élevé peut s'expliquer par des coûts administratifs, et par conséquent des prix, plus élevés également. Un chiffre d'affaires élevé pourrait également être dû au fait que les professionnels, moins nombreux dans ces États membres, travaillent davantage et réalisent ainsi un chiffre d'affaires supérieur malgré des tarifs plus faibles. Le niveau élevé du chiffre d'affaires pourrait également être lié au fait que les prix pratiqués sont supérieurs, non pas parce que les professionnels dégagent un superbénéfice, mais parce que les services sont de meilleure qualité. On pourrait également avancer que, sous l'effet de la concurrence, le surplus de qualité entraîne une érosion des bénéfices. Deuxièmement, l'étude ne neutralise pas totalement le risque de corrélation fallacieuse. La corrélation entre le degré de réglementation (mesuré par les indices) et les variables économiques peut en effet s'expliquer par une troisième variable, liée aux deux autres, qui n'est pas neutralisée. Il aurait fallu, pour isoler les effets de chacune des variables, procéder à une analyse de régression. Troisièmement, l'étude présuppose une certaine homogénéité de la qualité des services juridiques dans les différents États membres. Il s'agit d'une hypothèse très forte, compte tenu de l'hétérogénéité des préférences (concernant les rapports qualité/prix et les opinions sur le périmètre des biens publics qui doivent être fournis par les professions juridiques) et des différences concomitantes en ce qui concerne le périmètre du monopole professionnel. Des revenus élevés peuvent également refléter des rentes de qualité justifiées. Tant que les travaux empiriques ne comportent pas des mesures de qualité fiables, il risque d'être difficile de tirer des conclusions catégoriques pour éclairer les politiques publiques. Enfin, l'étude de l'IHS se borne à brosser un tableau très général de la réglementation, y compris de l'autoréglementation, et ne tient pas suffisamment compte des différents effets que peuvent avoir différentes formes de réglementation, applicables à différentes professions dans différents États membres présentant chacun des singularités.

2.3 Réglementation publique ou autoréglementation ?

Il ressort des arguments avancés dans les parties 2.1 à 2.4 que la réglementation des marchés des services juridiques est nécessaire. En revanche, apporter une réponse aux séries de questions suivantes est un exercice plus complexe.

La première série de questions porte sur le point de savoir quelle est l'instance appropriée pour arrêter des décisions en matière de réglementation.

- Quelle est l'instance de réglementation la plus appropriée ?
- Est-il judicieux de confier cette tâche aux organes professionnels ou faut-il préférer une réglementation imposée par les pouvoirs publics à l'autoréglementation ?

Dans cette partie du document, les avantages et inconvénients de l'autoréglementation sont comparés aux avantages et inconvénients de la réglementation publique.

La deuxième série de questions porte sur la forme que doit prendre la réglementation et sera traitée dans la troisième partie du document.

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[26] Pour plus d'informations sur cet aspect et sur d'autres constatations, voir Patterson, Fink et Ogus 2003, pp. 95-96.

[27] Pour une analyse critique détaillée, voir RBB Economics (2003).

2.3.1 Avantages de l'autoréglementation

Plusieurs arguments ont été avancés pour démontrer la supériorité de l'autoréglementation par rapport à la réglementation publique.[28]

Premièrement, un régime reposant sur l'autoréglementation exploite le fait que les membres d'une profession possèdent des avantages significatifs en termes d'information, ce qui réduit à leur minimum les coûts d'acquisition de l'information nécessaire à la définition et à l'interprétation des normes de qualité.[29]

Deuxièmement, les coûts d'application de l'autoréglementation sont susceptibles d'être inférieurs aux coûts d'application de la réglementation imposée par les pouvoirs publics.[30]

Troisièmement, l'autoréglementation est préférée à l'intervention réglementaire des pouvoirs publics parce qu'elle offre davantage de souplesse que cette dernière, du fait qu'elle est moins administrative et qu'il est possible de la définir et de la modifier plus rapidement et avec plus de souplesse.[31]

Le quatrième argument en faveur de l'autoréglementation a trait au fait que son coût administratif est plus faible.[32]

2.3.2 Inconvénients de l'autoréglementation

Le fait que les instances d'autoréglementation n'ont en principe pas à rendre compte de leurs décisions via les circuits habituels et que les tiers ne participent généralement pas à la définition des règles est au nombre des inconvénients de l'autoréglementation. À cela s'ajoute que les règles adoptées par ces

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28 La référence classique à cet égard est Miller, 1985. Voir également Ogus 1995 et Van den Bergh 2006.

29 Les instances d'autoréglementation ont généralement davantage de compétence et de connaissances techniques que les pouvoirs publics. Ce sont les organes professionnels qui sont les mieux placés pour contrôler la qualité et repérer la mauvaise qualité. Ils ont une meilleure connaissance que les pouvoirs publics des moyens de garantir la qualité et sont davantage en mesure de veiller à la conformité et de faire appliquer les règles nécessaires. Il peut être difficile à une autorité réglementaire d'acquérir des connaissances spécialisées dans chaque profession et d'entretenir ces connaissances.

30 Les avantages des instances d'autoréglementation en termes d'information entraînent une réduction des coûts liés au suivi et à l'application des règles. Cet aspect est particulièrement important en ce qui concerne les domaines où il est difficile de donner une définition précise du comportement attendu, comme celui de la publicité. Dans de telles circonstances, en plus de réduire les coûts d'acquisition de l'information à leur minimum, l'autoréglementation peut également éviter les résultats contre-productifs qui peuvent découler de relations conflictuelles entre les professions et les pouvoirs publics (Baggott et Harrison 1986). Plus généralement, l'autoréglementation se traduit par une baisse des coûts d'application, les professionnels se sentant plus engagés vis-à-vis de règles qu'ils ont eux-mêmes adoptées pour protéger le niveau de leur profession que vis-à-vis de dispositions légales sur la qualité.

31 Cette souplesse revêt une importance particulière sur des marchés dynamiques où les préférences des consommateurs changent régulièrement. Il existe un argument selon lequel les règles adoptées par les organes professionnels sont plus souples et, par conséquent, risquent moins d'empêcher l'innovation ou de limiter de manière excessive le choix du consommateur.

32 La réglementation publique est coûteuse pour les contribuables, parmi lesquels certains ne sont pas consommateurs du produit. En cas d'autoréglementation, les coûts sont supportés par les secteurs réglementés. Les organes professionnels peuvent les financer grâce aux cotisations payées par leurs membres. En outre, les instances d'autoréglementation ont intérêt à réduire le plus possible les coûts liés à l'application et au respect de la réglementation.

instances peuvent créer des barrières à l'entrée et permettre aux membres des professions visées de réaliser des bénéfices extrêmement élevés.

Il n'est pas nécessairement justifié que les membres d'une profession puissent adopter des règles relatives à l'entrée sur le marché et à la conduite des entreprises sans être soumis à une quelconque forme de contrôle par des parlements démocratiquement élus. En outre, l'absence de réelle participation de non-spécialistes/de consommateurs au processus décisionnel ne fait qu'ajouter à l'acuité du problème. Si les consommateurs ne sont pas suffisamment organisés et s'il n'existe pas de contre-pouvoir du côté des acheteurs, l'avis des consommateurs n'est pas suffisamment pris en compte. Pour remédier à ce problème, les associations de consommateurs préconisent une représentation importante des consommateurs au sein des conseils d'administration des organes professionnels.[33]

Pour que les avantages de l'autoréglementation décrits dans le paragraphe 2.3.1 se concrétisent, il ne faut pas que les instances d'autoréglementation utilisent leurs pouvoirs de manière abusive, à des fins de restriction de la concurrence.[34] Dans le passé, ces instances se préoccupaient presque exclusivement des pratiques portant atteinte à la dignité des professions qu'elles représentaient ainsi qu'au comportement « non professionnel » des membres de ces professions dans leurs relations avec leurs confrères, et avaient tendance à négliger la question de l'assurance qualité vis-à-vis de la clientèle. Le scepticisme que suscite l'efficience de l'autoréglementation a été alimenté par des données démontrant que davantage de sanctions sont prononcées en cas de conduite non professionnelle à l'égard de confrères qu'en cas de manquement professionnel vis-à-vis d'acheteurs des services. De même, les organes professionnels ont cherché à empêcher toute concurrence en donnant aux consommateurs l'impression que tous les professionnels offrent des services de même qualité (Van den Bergh et Faure 1991). Ces dernières années, beaucoup d'organes professionnels se sont davantage mobilisés pour améliorer la qualité, ce qui ne signifie pas pour autant qu'ils aient apporté une réponse suffisante au problème posé par l'asymétrie d'information.

Les arguments qui mettent en avant la plus grande souplesse de l'autoréglementation ne sont recevables que si l'autoréglementation n'est pas utilisée à mauvais escient, pour restreindre la concurrence. Si les professions peuvent limiter la concurrence, elles risquent de parvenir à empêcher l'entrée de nouveaux concurrents favorables à des règles plus libérales. Il est possible que cette résistance au changement soit plus efficace lorsque les règles sont adoptées dans le cadre de l'autoréglementation que lorsqu'elles sont imposées par les pouvoirs publics. Les rentes peuvent être utilisées pour résister à la concurrence d'acteurs proposant des règles plus efficientes (Curran 1993). Même si les rentes ont été érodées par la concurrence entre les acteurs en place et par les nouveaux arrivants, les restrictions

33 Le débat de politique publique actuel s'intéresse également à une question liée à ce problème, en l'occurrence celle de savoir s'il est judicieux qu'un organe professionnel cumule des fonctions réglementaires et des fonctions de représentation (Review of the Regulatory Framework for Legal Services in England and Wales 2004). Dans une démocratie, il est parfaitement légitime que les organisations professionnelles défendent les intérêts de leurs membres. En revanche, la réponse à la question de savoir s'il est justifié que ces mêmes organisations soient habilitées à réglementer une profession, ne va pas de soi. Dès lors qu'une profession est investie du pouvoir de servir l'intérêt général, il semble logique, au nom de la légitimité démocratique, que l'organe professionnel soit supervisé par une autorité publique indépendante, et que les règles qu'il adopte soient soumises à l'approbation de ladite autorité. La volonté de rendre le cadre actuel plus démocratique justifie la recherche de dispositifs institutionnels appropriés, de nature à éliminer les inconvénients éventuels de l'autoréglementation dans le secteur des professions juridiques, sans remettre en cause ses avantages.

34 L'autoréglementation a été décrite comme un contrat social, passé entre la société et la profession concernée et atténuant les problèmes posés par l'asymétrie d'information (Dingwall et Fenn 1987). Toutefois, la réduction des coûts d'acquisition de l'information n'est possible que si les instances d'autoréglementation ont suffisamment intérêt à contrôler la qualité et à faire appliquer des normes de qualité.

artificielles à la production sont à l'origine de ce que Tullock (1975) a qualifié de « piège des gains transitoires » *(« transitional gains trap »)*. Il est politiquement difficile de supprimer un dispositif qui est inefficient du point de vue tant des consommateurs, qui paient des prix artificiellement élevés, que du point de vue des acteurs en place, qui ne réalisent plus des bénéfices aussi exceptionnels qu'avant. Les perdants sont en effet réticents à compenser les moins-values que subissent ceux qu'ils considèrent comme les gagnants, même si ces moins-values restent inférieures aux effets positifs de la suppression des restrictions à la production en termes de bien-être social.[35]

Enfin, l'argument selon lequel les coûts de la réglementation sont intégralement assumés par le marché réglementé ne tient pas si des restrictions à la concurrence subsistent. Il reste difficile de comprendre pourquoi, sur des marchés non concurrentiels, les coûts de la réglementation ne seraient pas répartis de manière efficiente entre les vendeurs et les acheteurs. Les organes professionnels peuvent fort bien répercuter une partie substantielle des coûts sur le consommateur final. Lorsque la demande n'est pas élastique (ce qui peut être le cas pour les services professionnels répondant à une nécessité impérieuse), les professionnels peuvent « externaliser » la majeure partie des coûts.

2.4 Règles du droit de la concurrence

Dans l'idéal, pour être optimal, un système juridique devrait pouvoir garantir que les restrictions à la concurrence sont justifiées par l'intérêt général et que les pratiques anticoncurrentielles qui créent des rentes économiques en faveur des professionnels sans aucune retombée positive pour la société dans son ensemble sont interdites. Le droit de la concurrence joue un rôle essentiel, dans le sens où il interdit les restrictions exclusivement dictées par la défense d'intérêts particuliers. Toutefois, cette interdiction ne s'applique pas aux mesures adoptées par les pouvoirs publics. Il s'ensuit que des entraves injustifiées et disproportionnées à la concurrence peuvent subsister au niveau des règles juridiques. Il appartient *in fine* aux pouvoirs publics d'analyser avec soin les règles existantes et toutes nouvelles règles proposées. Une évaluation d'impact précise de la réglementation devrait leur permettre d'adopter des règles dont les coûts (prix supérieurs au niveau concurrentiel) excèdent les avantages (élimination des imperfections du marché ou réalisation d'autres objectifs d'intérêt général).

Dans de nombreux pays de l'OCDE, les autorités de la concurrence ont préconisé un renforcement de la concurrence sur les marchés des services professionnels (OCDE 2000, p. 29). Les membres des professions juridiques ont essayé de se soustraire aux interdictions légales visant les pratiques anticoncurrentielles en arguant que les services juridiques ne sont pas assimilables à un commerce. Dès 1975, la Cour suprême des États-Unis a considéré que la Section 1 de la Loi Sherman ne contenait pas d'exception visant les professionnels qui vendent leurs services à titre onéreux.[36] Après la célèbre affaire *Goldfarb*, qui concernait un barème d'honoraires minima publié par le Barreau du comté de Fairfax, les juges ont, dans sept autres affaires (voir Kolasky 2006 pour un tour d'horizon), confirmé l'applicabilité de la législation antitrust. La Cour suprême fait une distinction entre des accords d'entente dits purs sur les prix, qu'elle juge illicites en soi, et les restrictions à la publicité qui peuvent être favorables à la

35 Dans bien des cas, il faudrait une « révolution » pour supprimer la réglementation inefficiente. À ce stade, il convient de souligner que les restrictions les plus flagrantes à la concurrence ont été supprimées à la suite d'arrêts dans laquelle la Cour de justice des Communautés européennes (CJCE) a estimé que des mesures d'autoréglementation étaient contraires à la liberté d'établissement et de prestation de services et d'initiatives prises par la Commission européenne en matière de déréglementation, dans le cadre du programme du marché intérieur et de la politique de la concurrence (voir Van den Bergh 1999 et partie 4 du présent document).

36 La Cour suprême a ajouté que « le fait qu'une restriction concerne une profession et non un secteur d'activité doit, évidemment, être pris en compte pour déterminer si cette restriction spécifique est en infraction avec la Loi Sherman » (*Goldfarb contre Virginia State Bar*, 421 U.S. 773 (1975), 788-89).

concurrence parce qu'elles protègent les consommateurs d'affirmations mensongères ou trompeuses. Dans une affaire concernant la profession médicale, la Cour suprême a considéré que ce risque était particulièrement grave pour les affirmations ayant trait à la qualité et au confort des patients et que les juges de première instance auraient par conséquent dû faire une enquête plus approfondie.[37] Cette position pourrait être interprétée comme signifiant que les théories selon lesquelles la réglementation sert des intérêts particuliers doivent être étayées par des éléments objectifs.

En Europe, l'applicabilité du droit de la concurrence aux professions libérales a également été confirmée. En outre, les juridictions européennes ont étendu leur appréciation fondée sur le droit de la concurrence au comportement d'organes professionnels qui respectent d'autres règles juridiques. En particulier, dans l'affaire *Wouters*, la Cour de justice des Communautés européennes (CJCE) a considéré que les décisions restrictives de concurrence édictées par une organisation professionnelle n'étaient pas toutes systématiquement contraires à l'Article 81 (1) du Traité CE. L'interdiction de coopération interprofessionnelle entre avocats et comptables a ainsi été jugée « nécessaire au bon exercice de la profession d'avocat, telle qu'elle est organisée dans l'État membre concerné », malgré les effets restrictifs de la concurrence qui lui sont inhérents.[38] La CJCE a estimé que le fait qu'un avocat soit également membre d'une structure professionnelle chargée de contrôler et de vérifier les comptes d'un client pouvait mettre en péril son indépendance, son devoir d'agir dans l'intérêt de son client et le respect du secret professionnel. Elle a par conséquent considéré que l'interdiction de collaboration multidisciplinaire entre avocats et comptables (qui fait partie des règles déontologiques de l'ordre néerlandais des avocats) n'était pas contraire à l'Article 81 du Traité CE, puisqu'elle était conforme aux objectifs de la loi qui a investi l'ordre des avocats du pouvoir d'autoréglementation. Dans sa Communication intitulée Rapport sur la concurrence dans le secteur des professions libérales, la Commission européenne précise comment elle entend appliquer les critères définis dans l'arrêt *Wouters* :

- il faut tenir compte des objectifs de la règle professionnelle qui sont liés à des objectifs d'intérêt général ;

- il faut examiner si les effets restrictifs de la concurrence sont inhérents à la poursuite des objectifs d'intérêt général (critère de nécessité) ; et

- les restrictions de concurrence ne peuvent aller au-delà de ce qui est nécessaire pour garantir le bon exercice de la profession (critère de proportionnalité).

La Commission européenne a appliqué ces critères dans une affaire belge et est parvenue à la conclusion qu'un système de prix recommandés n'est pas nécessaire pour garantir le bon exercice de la profession d'architecte.[39] Cette position ouvre la voie à une appréciation des critères de nécessité et de proportionnalité fondée sur l'analyse économique des raisons relevant de l'intérêt général et d'intérêts particuliers qui motivent l'autoréglementation. L'annexe 1 présente des informations complémentaires sur l'application des règles du droit communautaire aux restrictions à la concurrence dans les professions juridiques.

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37 *California Dental Association contre FTC*, 526 U.S. 756 (1999), 781.

38 Affaire C-309/99, *J. C. J. Wouters, J. W. Savelbergh et Price Waterhouse Belastingadviseurs BV contre Algemene Raad van de Nederlandse Orde van Advocaten, en présence de Raad van de Balies van de Europese Gemeenschap*, Recueil de jurisprudence 2002 page I-01577.

39 Décision de la Commission du 24 juin 2004 concernant une décision d'application de l'article 81, assortie d'amendes concernant l'affaire COMP/A.38549 — Ordre des architectes belge, Journal officiel n° L 004 du 6 janvier 2005.

Dans certains secteurs économiques, les interventions des pouvoirs publics nuisent parfois davantage à la concurrence que celles des entreprises privées. Dans les pays de l'OCDE, il est fréquent que les pouvoirs publics portent préjudice aux consommateurs et réduisent le bien-être général en intégrant des restrictions à la concurrence dans leurs textes législatifs ou réglementaires. Aux États-Unis et au Canada, les États et les Provinces peuvent adopter des lois qui exemptent certains secteurs d'activité des règles générales du droit de la concurrence. Les conflits qui en résultent relèvent, aux États-Unis, du moyen de défense fondé sur la doctrine de l'intervention de l'État (« *State action doctrine* »), qui confère une immunité aux interventions des États et, au Canada, du « moyen de défense fondé sur une conduite réglementée » *(« regulated conduct defence »)*. L'annexe 2 présente une réflexion sur les problèmes posés par les restrictions à la concurrence résultant de l'intervention des pouvoirs publics aux États-Unis. Au Canada, le principal mécanisme juridique qui permet de résoudre les conflits entre les règles générales du droit de la concurrence et les règles obligatoires qui ont des effets restrictifs de la concurrence est le « moyen de défense fondé sur une conduite réglementée ». À cet égard, dans le domaine des professions juridiques, l'affaire qui a valeur de référence est l'affaire *Jabour*, dans laquelle la Cour suprême du Canada a considéré que le mandat général dont est investie la Law Society of British Columbia, en l'occurrence celui de fixer des normes de bonne conduite, lui conférait une légitimité suffisante pour interdire aux avocats de faire de la publicité pour leurs services.[40] Alors que le Bureau de la concurrence a opté pour une interprétation étroite du moyen de défense fondé sur une conduite réglementée, estimant qu'il ne s'appliquait qu'aux conduites réglementées contraires à la Loi sur la concurrence et résultant d'un mandat ou d'une obligation imposée par l'autorité de réglementation, le jugement *Jabour* en étend le champ d'application, qui ne recouvre plus seulement les mesures restrictives expressément autorisées par la législation provinciale, mais aussi celles autorisées de manière globale ou générale. Malheureusement, le champ d'application de ce moyen de défense reste flou à bien des égards (voir Goldman et Little 2006). La comparaison de la pratique canadienne avec celle des États-Unis et de l'Union européenne apporte un éclairage intéressant : le moyen de défense fondé sur une pratique réglementée peut faire sortir du champ d'application de la Loi canadienne sur la concurrence la majorité des mesures anticoncurrentielles décidées par les autorités provinciales ; en revanche, aux États-Unis, le moyen de défense fondé sur la *« State action doctrine »* a une portée plus limitée, parce qu'il exige que les règles concernées répondent à deux critères, en l'occurrence qu'elles soient l'expression claire d'une politique de l'État (*« clear articulation »*) et fassent l'objet d'un contrôle actif *(« active supervision »)* (voir annexe 2). Dans l'Union européenne, les États disposent d'une marge de manœuvre encore plus étroite pour adopter des mesures anti-concurrentielles, du fait que les règles relatives aux quatre libertés économiques permettent de disposer d'un mécanisme de contrôle, qui s'ajoute au principe de responsabilité (conjointe) des États membres en cas d'infraction aux dispositions du Traité CE (voir annexe 1).

3. Éléments théoriques et données objectives sur les effets de certaines formes de réglementation en vigueur sur les marchés des services juridiques

Cette partie du document présente les principaux arguments avancés en faveur et en défaveur des formes de réglementation professionnelle les plus couramment utilisées sur les marchés des services juridiques. Certains aspects de cette réglementation sont souvent considérés comme ayant un fort impact négatif sur la concurrence et comme très préjudiciables aux consommateurs. Il s'agit :

- des droits exclusifs et autres restrictions quantitatives ou qualitatives à l'entrée ;
- des mesures restrictives portant sur les honoraires et la publicité ; et
- des mesures restrictives concernant la structure d'exercice et les partenariats multidisciplinaires.

[40] *Procureur général du Canada et autres contre Law Society of British Columbia et autre*, [1982] 2 RCS 307.

Il n'en reste pas moins possible que les effets positifs plus larges, en termes de politique publique, des mesures restrictives de la concurrence peuvent l'emporter sur leurs effets négatifs. La question de savoir si la réglementation des services professionnels peut être justifiée par des raisons d'intérêt général est au centre des recherches sur la réglementation professionnelle et à la base des décisions prises par les autorités de la concurrence. Cette partie présente également un tour d'horizon des travaux empiriques effectués sur les effets concrets de différents types de réglementation, y compris d'autoréglementation, en vigueur sur les marchés des services juridiques. Les travaux dont il est question apportent un éclairage intéressant pour l'évaluation de la nécessité et de la proportionnalité des mesures restrictives de la concurrence actuellement en vigueur dans le secteur des professions juridiques.[41]

3.1 Droits exclusifs et autres barrières à l'entrée

Divers obstacles limitent l'accès à la profession juridique : droits exclusifs accordés à certains professionnels pour la fourniture de services spécifiques ; accès à la profession réservé aux personnes satisfaisant certains critères de qualité et application de restrictions quantitatives. Ainsi, dans certaines juridictions, seuls les *solicitors/barristers* ou les avocats ont le droit de représenter les parties en justice. Dans certains pays de l'Union européenne, la rédaction et l'authentification de certains documents juridiques est un domaine réservé aux notaires latins ; leur monopole professionnel couvre les services immobiliers, dès lors qu'un acte doit être enregistré dans un registre public (transfert de la propriété d'un bien immobilier, création et annulation d'hypothèques), certains services en matière de droit des sociétés (constitution de sociétés, création d'associations et de fondations) et, dans certains pays, certains services en matière familiale (établissement ou modification de contrats de mariage ou d'union libre, rédaction ou modification de testaments et donations).

En dehors des tâches réservées, il existe des barrières à l'entrée de nature qualitative ou quantitative. Les restrictions qualitatives peuvent prendre la forme :

- de conditions de niveau et de durée d'études et de formation (obligation d'être titulaire de diplômes particuliers par exemple) ;
- de conditions de niveau ou de durée d'expérience professionnelle (obligation d'avoir fait un stage dans un cabinet par exemple) ;
- d'obligation de se soumettre à des examens professionnels après avoir suivi une formation professionnelle ; et
- de conditions liées à des facteurs personnels, par exemple conditions de résidence et de nationalité, compétences linguistiques, absence d'antécédents de condamnations civiles ou pénales.

Dans certains pays et pour certaines professions, des restrictions quantitatives à l'entrée viennent s'ajouter à ces restrictions qualitatives. L'exemple le plus connu est celui de la profession de notaire latin : la réglementation limite en effet le nombre de professionnels en fonction de la population, autorise l'installation d'un nombre limité de notaires par zone géographique ou limite leur nombre en fonction de la population d'une zone géographique.

[41] À ce stade, il convient déjà de signaler que les travaux empiriques consacrés aux professions juridiques sont encore relativement peu nombreux (comparativement à ceux qui portent sur la profession médicale, voir OCDE 2005). Il sera parfois fait référence à des travaux concernant d'autres professions, s'ils présentent un intérêt pour la profession juridique.

Le droit exclusif le plus débattu actuellement en Europe concerne les services liés au transfert de propriété de biens immobiliers. Dans plusieurs juridictions, les citoyens et les entreprises sont tenus de faire appel à un ou plusieurs professionnels du secteur juridique pour vendre un bien immobilier. Dans les États membres de l'Union européenne, il existe quatre modèles réglementaires différents, depuis le système très réglementé organisé autour du notaire latin jusqu'au système moins réglementé reposant sur les avocats (droits exclusifs des *solicitors*, parfois en concurrence avec des rédacteurs agréés d'actes de transfert de propriété) ; il existe également un autre régime reposant sur le notaire latin mais légèrement moins réglementé (aux Pays-Bas) et un modèle dans lequel les agents immobiliers fournissent des services juridiques. À cet égard, les États-Unis se démarquent nettement des États membres de l'Union européenne, puisque l'intervention d'un juriste agréé n'y est pas obligatoire. Aux États-Unis, ces services juridiques sont fournis par des courtiers immobiliers, des avocats représentant soit le vendeur soit l'acheteur, des compagnies d'assurance du titre de propriété, des agences dépositaires de comptes séquestres *(« escrow company »)*, qui acceptent le dépôt de documents ou de fonds de la part des deux parties à la transaction, et des notaires publics.[42] Récemment, l'American Bar Association a proposé une nouvelle définition de la pratique du droit, qui a, entre autres, pour effet d'empêcher que les services de finalisation de transactions immobilières puissent être fournis par des non-juristes. Les autorités fédérales de la concurrence ont formulé des objections à l'encontre de cette proposition, estimant que réserver certaines tâches à la profession juridique est contraire aux intérêts des consommateurs. Selon elles, rien ne saurait justifier la suppression totale des prestataires de services non-juristes puisqu'il n'existe aucun élément prouvant que les consommateurs sont lésés lorsque certains actes (par exemple la finalisation des transactions immobilières) sont exécutés par des non-juristes (Organismes conjoints [US FTC et US DOJ] 2002, p. 11).

3.1.1 Éléments de théorie économique

Les droits exclusifs et leurs possibles effets négatifs ou positifs ont fait l'objet de nombreux commentaires théoriques. Le reproche classique fait aux monopoles est qu'ils sont à l'origine d'une perte de bien-être. Comme le démontre la théorie des prix, un monopole entraîne deux problèmes :

- les consommateurs doivent payer plus pour obtenir le produit, le monopoleur étant en mesure de pratiquer un prix supérieur au niveau concurrentiel (effet prix) ; et

- les consommateurs risquent de diminuer leurs achats du produit, même si les augmenter serait maximisateur d'utilité pour eux (effet allocatif).

Si les droits exclusifs sont associés à des restrictions quantitatives à l'entrée, les prestataires de services risquent de réduire leur production et de maximiser leurs bénéfices au détriment des

[42] À noter que le notaire public tel qu'il existe aux États-Unis n'a rien à voir avec le notaire latin. Le notaire public n'a pas à être un professionnel du droit très qualifié. Sa mission consiste à vérifier l'identité des signataires de documents juridiques et, en matière de transfert de propriété d'un bien immobilier, à authentifier la signature du vendeur. Le notaire latin cumule plusieurs fonctions qui, aux États-Unis, sont remplies par divers professionnels, juristes ou non. Comme il se doit d'être impartial et neutre, il représente à la fois les intérêts des vendeurs et ceux des acheteurs. Aux États-Unis, chaque partie peut choisir son propre avocat. Le notaire latin est parfois aussi dépositaire de fonds (rôle qui, aux États-Unis, est dévolu aux agences dépositaires de comptes séquestres *(« escrow companies »)*, et vérifie la signature des parties à la transaction (fonction remplie par les notaires publics). En outre, le système du notaire latin peut être comparé à une assurance obligatoire, les parties n'étant pas libres de choisir de souscrire ou non une assurance du titre de propriété. De toute évidence, le système américain laisse beaucoup plus de place aux choix individuels, les parties pouvant décider par elles-mêmes des services professionnels qu'elles veulent acheter. À noter toutefois qu'il est fréquent que les banques exigent la souscription d'une assurance du titre de propriété si l'acheteur veut financer l'acquisition de son bien immobilier par le biais d'un prêt hypothécaire.

consommateurs (Stephen et Love 2000, p. 993). Si les droits exclusifs portent sur des services standardisés, qui peuvent être fournis à moindre coût par des prestataires non réglementés (membres de professions parajuridiques), les pertes de bien-être peuvent être particulièrement importantes. À l'inverse, un des arguments qui plaident en faveur des tâches réservées, est qu'attribuer des droits de monopole pour la fourniture de certains services peut accroître la spécialisation, ce qui est susceptible d'améliorer la qualité des services fournis aux consommateurs.[43] Comme expliqué ci-après, les droits de monopole associés à des restrictions quantitatives à l'entrée sont parfois considérées comme un moyen de garantir la fourniture de services dits universels ; à noter toutefois que l'OCDE (2004) exprime un certain scepticisme vis-à-vis de cet argument, soulignant qu'il concerne des produits qui seraient de toute façon offerts, même en l'absence de protection.

C'est lorsqu'ils portent sur des services juridiques que les individus et entreprises sont obligés d'acheter que les droits exclusifs ont les effets anticoncurrentiels les plus forts. Dans le cas du notariat latin, les arguments avancés pour justifier les limites imposées à la liberté des consommateurs et les effets anticoncurrentiels qui en découlent sont les suivants :

- le système du notaire latin offre peut-être une plus grande sécurité juridique que le système non règlementé en vigueur aux États-Unis pour le transfert de la propriété de biens immobiliers ;

- le système du notaire latin permet aussi de faire respecter les droits de propriété à moindre coût puisque les notaires dressent des « actes authentiques », qui ont une valeur probante absolue (eu égard aux observations du notaire) et sont exécutoires sans intervention judiciaire, ce qui permet d'éviter des frais de procédure judiciaire. Ce système permet d'éviter que des transactions invalides ne se soldent par des externalités négatives substantielles pour les tiers et de réduire les coûts d'application à leur minimum ;

- ce système a également des retombées positives sur la société dans son ensemble, la sécurité juridique pouvant être considérée comme un bien public (voir 2.3) ;

- en outre, il peut entraîner des gains d'efficience via une standardisation des services, et des économies de gamme (du fait que le notaire latin remplit des fonctions diverses qui, aux États-Unis, supposent l'intervention de plusieurs prestataires différents) et une amélioration de la qualité du registre du cadastre, grâce au professionnalisme des notaires latins.

En revanche, le système du notaire latin restreint considérablement la liberté de choix des consommateurs ; en outre, les (effets cumulés des) restrictions à la concurrence en vigueur dans certains pays vont peut-être au-delà de ce qui serait nécessaire pour protéger les consommateurs. Au final, l'ampleur de ces coûts et de ces avantages est une question empirique et les choix de politique publique restent difficiles à faire en l'absence d'analyse coûts-avantages reposant sur une quantité de données suffisante (Van den Bergh et Montangie 2006).

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[43] Bishop (1989) avance, à propos de la profession juridique en Angleterre et au Pays de Galles, que les consommateurs de services juridiques bénéficient peut-être d'un meilleur service lorsque la préparation du dossier et la plaidoirie devant le tribunal sont confiées à deux professionnels différents (*solicitor/barrister*) en fonction de leurs compétences respectives. En outre, dans un système où les fonctions sont ainsi séparées, les *barristers* qui obtiennent de mauvais résultats ne peuvent pas se maintenir sur le marché. Toutefois, comme le font observer Stephen et Love (2000, p. 1007), il conviendrait également de tenir compte de ce que cette séparation risque d'entraîner une hausse des coûts de transaction si le fait que deux professionnels du secteur juridique travaillent dans le même lieu permet de réaliser des économies de gamme.

Les restrictions qualitatives à l'entrée qui réglementent la qualité des services avant qu'ils soient offerts sur le marché sont censées garantir une qualité optimale et éviter la sélection adverse (voir 2.1). L'exclusion des prestataires offrant des services de qualité médiocre tire le niveau moyen de la qualité vers le haut et atténue l'asymétrie d'information entre les professionnels du secteur juridique et les consommateurs. On peut avancer qu'il est difficile de trouver des moyens d'améliorer la qualité des services ayant moins d'effets restrictifs de concurrence. La réglementation relative à l'information (obligations déclaratives) n'est pas efficace sur des marchés caractérisés par de fortes asymétries d'information. Quant à la responsabilité civile, elle peut certes être engagée en cas de préjudices résultant de la mauvaise qualité des services (contrôle *ex post*) mais, pour les raisons évoquées ci-dessus (voir 2.2.), elle risque de ne pas être un moyen suffisant pour empêcher la sélection adverse si les juges ont des difficultés à apprécier les erreurs professionnelles. En outre, ce principe risque de ne pas offrir une protection adaptée si les préjudices liés à la mauvaise qualité sont considérables ou répartis entre un grand nombre de consommateurs individuels.

Il peut donc être nécessaire d'établir des restrictions qualitatives à l'entrée, le risque étant toutefois qu'elles soient disproportionnées. On ne peut par exemple pas exclure que les professionnels placent le niveau de ces restrictions trop haut, dans le but de maximiser leurs revenus (recherche de rente). L'autre risque, lié au premier, est de voir la profession acquérir un pouvoir de monopole sur l'organisation de la formation exigée et freiner ainsi l'innovation en matière de formation (Irish Competition Authority 2006, pp. 52-53). Enfin, ces restrictions peuvent avoir pour effet de limiter le nombre de professionnels présents sur le marché et de services offerts (Leland 1979, p. 1338), a fortiori quand existent également des tâches réservées à la profession réglementée.

La pratique consistant à subordonner l'exercice de la profession à des conditions de nationalité et de citoyenneté ou de résidence suscite des réactions partagées. D'un côté, certains soutiennent que ces conditions peuvent se justifier lorsque l'on juge nécessaire que les professionnels connaissent les lois et coutumes nationales. Cet argument revêt une importance particulière pour les professions juridiques. Les conditions de résidence sont jugées nécessaires à l'établissement d'une relation de confiance entre les professionnels et les consommateurs et sont censées donner la possibilité aux consommateurs victimes d'une erreur professionnelle de faire jouer les voies de recours légales (Indecon 2003, pp. 19-20). Toutefois, il a également été avancé que les restrictions reposant sur la nationalité, la citoyenneté ou la résidence sont difficiles à justifier dans la mesure où elles ont surtout pour effet d'empêcher la fourniture transfrontalière de services et constituent une mesure disproportionnée par rapport à l'objectif consistant à garantir que les professionnels connaissent bien le système juridique national (Irish Competition Authority 2006, pp. 66-68). Les discriminations en raison de la nationalité constituent, du fait de leurs retombées négatives sur les échanges entre États, une violation du droit communautaire (voir annexe 1).

L'établissement de restrictions quantitatives à l'entrée réduit le nombre de prestataires de services, augmentant ainsi le risque de voir l'offre diminuer et les prix augmenter. En outre, lorsque ces restrictions ont une composante géographique, elles peuvent être à l'origine de monopoles locaux. Les limitations quantitatives empêchent que de nouveaux entrants dans la profession produisent des services supplémentaires. Un des arguments parfois avancés pour justifier les restrictions quantitatives concerne la nécessité de garantir la fourniture de services universels. Les services universels sont des services considérés comme tellement essentiels que tous les consommateurs devraient pouvoir les acquérir à un prix raisonnable. Or, il est parfois peu rentable pour les professionnels de fournir certains services dans des régions éloignées ou à certaines catégories de consommateurs. Selon cet argument, les restrictions quantitatives, du fait qu'elles augmentent la rentabilité globale, favorisent l'offre de services qui, en leur absence, ne seraient pas rentables, par exemple les services en zone rurale. De toute évidence, cet argument ne peut pas justifier l'existence de restrictions quantitatives dans des régions à forte densité de population, où il n'existe pas de risques d'insuffisance de l'offre. En outre, il faudrait aussi prouver que, même dans les régions peu peuplées, il n'est pas possible d'adopter d'autres mesures, moins restrictives, par exemple

d'offrir une petite rémunération en contrepartie de services d'intérêt général. Selon l'OCDE (2004), il faut se montrer très vigilant quand on accorde des subventions croisées implicites, ces dernières dissimulant aux consommateurs les coûts réels et faussant l'allocation des ressources. Souvent, les services qui bénéficient de subventions croisées seraient fournis, éventuellement d'une autre manière, même si ces subventions n'existaient pas. Par exemple, si les testaments bénéficient de subventions croisées sous forme d'honoraires payés pour d'autres services, il faut commencer par prouver que le nombre de testaments serait nettement différent en l'absence de subventions croisées. Ces services n'étant pas fournis fréquemment, la raison pour laquelle il convient, en termes d'objectifs de politique publique, de favoriser une production très locale, n'est pas évidente.

3.1.2 Données empiriques

Il ressort de la réflexion ci-dessus que plusieurs arguments théoriques ont été avancés en faveur et en défaveur de l'existence de droits exclusifs et de restrictions à l'entrée sur le marché des services professionnels. Ces arguments n'allant pas tous dans le même sens, la question de savoir si ces mesures réglementaires sont, ou non, souhaitables doit, *in fine*, être examinée sur la base de données empiriques. Malheureusement, les données empiriques sur les effets concrets de la réglementation de ces marchés restent peu nombreuses.[44] La déréglementation se prête particulièrement bien à la réalisation d'études empiriques qui comparent la situation du marché avant et après la libéralisation, à l'instar des études qui effectuent des comparaisons entre pays. Les études et données pertinentes sont notamment :

- les études sur la suppression du monopole des solicitors pour les services de transfert de propriété immobilière en Angleterre et au Pays de Galles (encadré 2) ;45
- les données sur la déréglementation limitée de la profession de notaire aux Pays-Bas (encadré 4) ;46
- des études comparatives des différents États des États-Unis et ;
- une étude comparative sur les services de transfert de propriété immobilière, comparant la situation sur des marchés (plus ou moins) réglementés et sur des marchés libéralisés en Europe (étude commandée par la Commission européenne) (encadré 3).[47]

Les principales questions empiriques concernent :

- les effets de la réglementation à l'entrée sur le nombre de professionnels ;
- le rapport qualité/prix des services offerts.

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44 L'adoption de mesures de déréglementation se heurtant encore à une forte résistance politique dans certains pays, les occasions d'effectuer ce type de travaux empiriques restent rares. Il convient également de noter que des hypothèses comme celles avancées par Bishop (1989), à savoir que la spécialisation est un gage d'efficience, sont difficiles à tester empiriquement. Olsen (2000, p. 1027) souligne que « les études portant sur la qualité pâtissent presque toutes d'une faiblesse majeure : la qualité est difficile à mesurer ».

45 Une synthèse des travaux empiriques sur le marché anglais des services de transfert de propriété immobilière est présentée dans l'encadré 2.

46 Le législateur néerlandais n'a pas remis en cause les droits exclusifs des notaires, mais a réduit les restrictions à l'entrée et déréglementé le calcul des honoraires. La partie 3.2. (encadré 4) passe en revue les travaux empiriques portant sur les mesures de déréglementation de la profession de notaire aux Pays-Bas.

47 Les résultats préliminaires de cette étude sont résumés dans l'encadré 3.

Par définition, les restrictions quantitatives ont pour effet de limiter le nombre de professionnels. En revanche, on dispose de peu de données empiriques démontrant que les restrictions qualitatives à l'entrée vont également de pair avec un nombre de praticiens plus limité. L'existence de telles restrictions n'empêche en effet pas les professionnels d'être nombreux, ce qui semble indiquer qu'en elles-mêmes, elles n'ont pas d'incidence sur le nombre de professionnels et ne limitent pas la concurrence de cette manière. Aux États-Unis, le nombre de professionnels qui accèdent à la profession juridique ne cesse de croître, malgré l'existence de restrictions qualitatives (voir la synthèse de la littérature réalisée par Stephen et Love, 2000, pp. 993-994). D'après une étude empirique de la profession juridique dans différents États des États-Unis (Lueck, Olsen et Ransom, 1995), les restrictions qualitatives semblent même avoir l'effet inverse. Les auteurs ont examiné le lien entre la densité de juristes dans un État, les taux de réussite aux examens du Barreau de l'État, et l'application d'une condition rendant obligatoire un diplôme reconnu par l'American Bar Association (ABA). Leur recherche montre que la densité de juristes est plus faible dans les États où le taux de réussite est plus bas et dans ceux où un diplôme reconnu par l'ABA est exigé.[48] Les données empiriques ne semblent toutefois pas corroborer la théorie, qui repose sur l'idée que la réglementation est motivée par la défense d'intérêts particuliers, selon laquelle l'association de barrières qualitatives à l'entrée et de restrictions géographiques a un effet négatif sur le nombre de professionnels. Ceci semble confirmé par plusieurs études consacrées à l'effet des restrictions sur la mobilité des juristes entre États. Selon Stephen et Love (2000, p. 994), la plupart de ces analyses montrent que ces obstacles à la mobilité conduisent à un scénario dans lequel les professionnels sont moins nombreux et ont des revenus plus élevés.

Les travaux empiriques sur l'impact des restrictions à l'entrée sur les prix et la qualité sont restés rares pendant longtemps. Lueck, Olsen et Ransom (1995) ont trouvé peu d'éléments accréditant l'idée que les restrictions à l'entrée ont une incidence sur le prix des services juridiques aux États-Unis, ce qui porte à croire que l'augmentation du nombre de juristes ne va pas nécessairement de pair avec un renforcement de la concurrence par le biais d'une réduction des honoraires. Dans sa Communication sur la concurrence dans les professions libérales (2004. p. 13), la Commission européenne fait référence à un rapport interne de la Federal Trade Commission (FTC) aux États-Unis. Les auteurs de ce rapport (Cox et Foster, 1990) ont passé en revue plusieurs études empiriques sur les effets des restrictions à l'entrée et sont parvenus à la conclusion que, d'après ces études, les restrictions portant sur l'octroi d'autorisations n'ont guère d'incidence sur la qualité des services. En ce qui concerne l'impact des droits exclusifs sur les prix, l'expérience la plus intéressante en Europe est la suppression des droits exclusifs en matière de services de transfert de propriété immobilière[49] en Angleterre et au Pays de Galles.

48 D'autres variables, par exemple le fait que la qualité de vie perçue varie selon les États, pourraient expliquer la plus forte densité d'avocats constatée dans les États où les restrictions sont plus fortes. De ce point de vue, les flux d'avocats vers ces États, par exemple vers la Californie, seraient même plus élevés si les taux de réussite aux examens étaient moyens.

49 Les services de transfert de propriété immobilière regroupent un ensemble de services juridiques liés à l'achat et à la cession de biens immobiliers, des investigations sur le titre de propriété au transfert de la propriété en passant par l'accomplissement de formalités juridiques liées aux prêts hypothécaires.

Encadré 2. Impact de la suppression du monopole des *solicitors* sur les services de transfert de propriété immobilière en Angleterre et au Pays de Galles

En Angleterre et au Pays de Galles, les *solicitors* avaient le monopole des services de transfert de propriété immobilière depuis 1804. La loi portant sur l'administration de la justice *(Administration of Justice Act)* a créé une profession parajuridique, dont les membres, appelés *« licensed conveyancers »* (rédacteurs agréés d'actes de transfert de propriété), ont été autorisés à proposer, en concurrence avec les *solicitors,* des services de transfert de propriété immobilière. Ces rédacteurs agréés sont réellement arrivés sur le marché à partir du 1er mai 1987. Cette libéralisation a été au centre d'un certain nombre d'études sur les évolutions du marché entre 1985 et 1992. Une première étude, menée par Farmer, Love, Paterson et Stephen (1988), portait sur le marché des services de transfert de propriété vers la fin de 1986, c'est-à-dire après la décision de mettre fin au monopole des *solicitors* mais avant l'arrivée effective sur le marché des premiers rédacteurs agréés. Les auteurs ont effectué une enquête auprès d'un échantillon représentatif de *solicitors* en Angleterre et au Pays de Galles pour évaluer quelle serait leur réaction à un renforcement de la concurrence sur le marché des services de transfert de propriété immobilière. Ils ont notamment constaté qu'à cette époque, les honoraires des *solicitors* ont eu tendance à diminuer. Cette baisse pourrait s'expliquer par le fait que les *solicitors* avaient déjà abaissé leurs tarifs en prévision de l'arrivée des rédacteurs agréés. Par la suite, Gillanders, Love, Paterson et Stephen (1992) ont mené une autre enquête, portant (entre autres) sur les honoraires pratiqués en novembre et décembre 1989, c'est-à-dire après l'arrivée sur le marché des rédacteurs, par un échantillon représentatif de *solicitors* pour des services de transfert de propriété courants. Ils ont recueilli des données dans 27 zones géographiques représentatives et ont constaté que les honoraires pratiqués étaient plus faibles dans les régions où l'intervention des rédacteurs agréés avait été la plus importante. Cette constatation semble accréditer l'hypothèse inverse selon laquelle un monopole entraîne une hausse des prix et est défavorable aux clients.[50] Toutefois, les chercheurs eux-mêmes relativisent leurs résultats. Ils soulignent d'une part que leurs travaux étaient basés sur les honoraires indiqués par les *solicitors*, non sur ceux réellement payés par les clients. Ils font d'autre part observer que les tarifs pratiqués dans les régions où les rédacteurs sont présents (en l'occurrence les marchés les plus grands) étaient déjà plus faibles en 1986, avant la suppression du monopole des *solicitors*. Ce constat porte à croire que le niveau plus faible des honoraires pourrait (en partie) s'expliquer par d'autres facteurs que l'arrivée sur le marché des rédacteurs agréés.

En 1992, Stephen, Love et Paterson ont entrepris une étude analogue, couvrant les mêmes zones géographiques que celle de 1989 et reposant sur des données similaires, à savoir les honoraires indiqués pour les services de transfert de propriété immobilière (Love, Paterson et Stephen 1994). Les chercheurs ont constaté que les honoraires indiqués par les *solicitors* étaient, en moyenne, plus élevés que ceux indiqués par les rédacteurs agréés. En outre, les honoraires des *solicitors* ont en général augmenté, et ce plus rapidement sur les marchés où il n'y avait pas de concurrence de la part des rédacteurs agréés. L'étude a toutefois révélé un résultat surprenant, à savoir que les honoraires des rédacteurs ont également augmenté entre 1989 et 1992. De surcroît, ils ont crû plus vite que ceux des *solicitors* sur les marchés où les deux professions étaient en concurrence, d'où un rapprochement des honoraires pratiqués par les deux catégories de professionnels. Ce dernier constat semble infirmer l'hypothèse selon laquelle la suppression de droits de monopole entraîne une baisse des tarifs, favorable aux consommateurs. Tout en reconnaissant que les résultats qu'ils ont obtenu ne permettent pas, en eux-mêmes, d'apprécier l'impact du changement réglementaire sur les honoraires, les chercheurs notent qu'il semble y avoir eu concertation entre les *solicitors* et les rédacteurs après l'arrivée de ces derniers sur le marché. Par la suite, Stephen et Love (1996), ont réexaminé ces résultats avec le recul du temps et ont cherché à les expliquer. Ils avancent plusieurs raisons pour expliquer que l'arrivée sur le marché des rédacteurs agréés ne se soit pas traduite, comme prévu, par une baisse des honoraires liée à l'introduction d'une certaine concurrence sur le marché des services de transfert de propriété immobilière. Un de ces facteurs d'explication pourrait être que les honoraires ont été, dans une large mesure,

50 L'Indecon (2003) cite une autre étude comportant des données sur l'introduction de la profession parajuridique de rédacteur d'actes de transfert de propriété en Nouvelle-Galles-du-Sud (Australie). Cette étude semble confirmer qu'un certain degré de concurrence, couplé à un assouplissement des restrictions portant sur la publicité des honoraires, peut se traduire par une baisse des tarifs pratiqués par les *solicitors* pour les services de transfert de propriété immobilière.

influencés par le degré de concentration des *solicitors* sur les marchés locaux. En outre, globalement, les rédacteurs agréés ont été assez peu nombreux à entrer sur le marché, en particulier dans les zones rurales. Plusieurs facteurs pourraient concourir à expliquer ce phénomène : la chute du marché immobilier intervenue à cette période, le fait que les rédacteurs ont moins de possibilités de développement de leur activité et de répartition des risques entre différents services, puisqu'ils n'offrent qu'un éventail de services limité. Le fait qu'ils ont à assumer des risques plus élevés pourrait en outre expliquer qu'ils pratiquent, en compensation, des honoraires supérieurs à ce qui était prévu. Les auteurs pensent que des effets positifs pourraient se manifester lorsque d'autres prestataires multiservices (les banques et les sociétés de crédit immobilier par exemple) seront autorisés à accéder au marché des services de transfert de propriété immobilière. Comme il n'existe pas de données sur cette entrée, la question reste ouverte. Toutefois, globalement, les données semblent indiquer que les honoraires pratiqués par les *solicitors* pour ces services étaient plus faibles lorsque la concurrence des membres de professions parajuridiques était plus intense.

La Commission européenne a commandé une étude comparative du degré de réglementation et des prix des services de transfert de propriété immobilière dans les États membres. Les résultats préliminaires de cette étude sont présentés dans l'encadré 3.

Encadré 3. Résultats préliminaires de l'étude sur la réglementation des services de transfert de propriété immobilière en Europe (2007)

En 2006, la Commission européenne a commandé une étude indépendante sur les différents degrés de réglementation prévalant sur les marchés des services de transfert de propriété immobilière et sur leurs effets économiques. L'étude démontre d'importants écarts entre les pays[51]. Ses résultats préliminaires ont été publiés en décembre 2006. À ce jour (début avril 2007), le rapport final n'est pas encore disponible mais les résultats préliminaires sur le degré de réglementation et les coûts de transaction sont déjà publiés sur le site de la Commission

[51] L'intervention des notaires latins est obligatoire dans la plupart des pays européens, mais leur champ de compétence matérielle précis diffère d'un pays à l'autre. Dans certains pays (Allemagne et Pologne par exemple), l'intervention d'un notaire est indispensable à la validité des contrats de vente ; dans d'autres, l'intervention du notaire n'est obligatoire que pour l'inscription au cadastre, qui rend le titre de propriété opposable vis-à-vis de tiers (Italie et Belgique par exemple), ou pour l'authentification des signatures (République slovaque, Slovénie par exemple). La situation est d'autant plus complexe que dans certains pays, plusieurs professionnels agréés sont en principe impliqués dans les transferts de propriété : notaire et juriste représentant l'acquéreur (Portugal), notaire et « *gestores administraivos* » – intermédiaires affiliés à la banque prêteuse et chargés des formalités d'enregistrement nécessaires – (Espagne). Dans quelques pays, moins nombreux, l'intervention d'un praticien du droit n'est pas obligatoire, mais seuls les professionnels agréés sont habilités à proposer des services de transfert de propriété immobilière (les *solicitors* et les rédacteurs agréés d'actes de transfert de propriété en Angleterre, par exemple). Enfin, seuls deux pays (Danemark et Suède) n'appliquent ni droits exclusifs, ni obligation de recourir à un notaire. Dans la pratique, dans la majorité des cas, les agents immobiliers, qui mettent en relation vendeurs et acquéreurs, se chargent également des formalités juridiques. Le degré de réglementation varie nettement d'un groupe de pays à l'autre. À l'exception des Pays-Bas, qui ont pris des mesures de libéralisation d'ampleur (voir encadré 4 sur la déréglementation de la profession de notaire aux Pays-Bas), le notariat latin est très réglementé : restrictions quantitatives à l'entrée, honoraires imposés (sauf aux Pays-Bas et, dans ce domaine, en Autriche et en Italie[51]) et clauses de compétence territoriale. Les *solicitors* sont visés par une réglementation moins restrictive que les notaires latins : il n'existe pas de restrictions quantitatives, seules des conditions de qualification étant appliquées ; les honoraires se négocient et la réglementation relative à la conduite a été libéralisée. En Angleterre, les rédacteurs agréés d'actes de transfert de propriété sont soumis à un régime réglementaire similaire. Enfin, en Scandinavie, la profession d'agent immobilier agréé est très peu réglementée. En Suède par exemple, l'accès à la profession est subordonné à un enregistrement après réussite à un examen (deux années d'études et dix semaines de stage) et à la présentation d'une attestation d'assurance professionnelle.

européenne (http://ec.europa.eu/comm/competition/index_fr.html, lien « Services professionnels »).

Comme dans l'étude de l'IHS (encadré 1), les chercheurs ont calculé des indices de réglementation et les ont mis en relation avec des indicateurs de la situation du marché. Quatre indices ont été construits : un indice de la réglementation de l'entrée sur le marché (MERI), un indice de la réglementation de la conduite sur le marché (MCRI), un indice du caractère obligatoire de l'intervention d'un prestataire de services juridiques (MII) et un indice de la protection des consommateurs (CPI). Chaque indice varie sur une échelle allant de 0 (le moins restrictif) à 6 (le plus restrictif), qui aboutit à un indice global MERI+MCRI+MII de 18. Pour calculer les indices, les chercheurs ont utilisé un coefficient de pondération rendant compte des impacts les plus directs de différentes formes de réglementation sur la structure et la situation du marché. La réglementation à l'entrée (MERI) recouvre les quotas ou l'examen des besoins économiques (coefficient de pondération : 50 %), les droits exclusifs (25 %) et les conditions de qualification (25 %). La réglementation de la conduite sur le marché (MCRI) regroupe les restrictions portant sur les prix et honoraires (50 %), ainsi que sur la publicité (17 %), les clauses de compétence territoriale (11 %), la structure d'exercice (11 %) et la coopération interprofessionnelle (11 %). L'indice MII varie de 0 (absence d'obligation de faire intervenir un prestataire de services juridiques), 2 (obligation d'intervention pour l'authentification des signatures), 4 (obligation d'intervention d'un professionnel) à 6 (obligation d'intervention de plusieurs professionnels). L'indice CPI tient compte de l'existence d'une assurance responsabilité obligatoire (38 %), du contrôle de la conduite et de la qualité (25 %), de la formation continue (25 %) et de l'obligation de prestation des services (12 %).

Il ressort de l'étude que l'indice MERI est élevé dans tous les pays dont le système est organisé autour des notaires latins, à l'exception des Pays-Bas, où un important processus de libéralisation des honoraires a été engagé (voir encadré 4 sur la déréglementation de la profession de notaire aux Pays-Bas). Le résultat est le même pour l'indice MCRI (à l'exception des Pays-Bas et de l'Autriche). En outre, le CPI est relativement élevé dans les pays dont le système repose sur le notaire latin. En ce qui concerne l'indice global (MERI+MCRI+MII), les résultats varient sur une échelle de 18 (Grèce) à 7.1 (Pays-Bas). Dans beaucoup de pays (Allemagne, Belgique, Espagne, France, Italie, Pologne, Portugal), l'indice global est compris entre 15 et 14. Il est un peu plus faible en Slovénie (11.9), en Autriche (11) et en Hongrie (9.6). Les pays où la libéralisation est la plus marquée sont la République tchèque (7.4) et les Pays-Bas (7.1). À noter que le CPI atteint son niveau maximum (6) sur des marchés déréglementés, en l'occurrence les marchés néerlandais et autrichien (mais aussi en Italie), tandis qu'il baisse jusqu'à un niveau préoccupant de 2.6 (très mauvaise protection des consommateurs) sur le marché des services notariaux en Grèce, caractérisé par une forte réglementation. Le CPI est élevé (entre 5.3 et 4.1) en France, Allemagne, Slovénie, Belgique, Espagne et République tchèque. Il est plus faible (entre 3.5 et 3.1) en Hongrie, au Portugal et en Pologne. Les résultats concernant l'indice global contrastent avec les constatations ci-dessus, puisque l'indice MERI+MCRI+MII est très bas dans les pays où les notaires latins n'interviennent pas.

Concernant la situation du marché, les résultats préliminaires renseignent uniquement sur les prix. Ainsi, pour une transaction d'un montant de 250 000 €, financée par un prêt hypothécaire[52], c'est dans les pays nordiques (où l'intervention d'un professionnel n'est pas obligatoire et où les services peuvent être fournis par les agents immobiliers) et dans le système notarial déréglementé adopté par les Pays-Bas que les frais juridiques sont les plus faibles, puisqu'ils s'élèvent respectivement à 0.56 et 0.54 % du montant de l'opération. Les systèmes qui affichent les coûts les plus élevés sont ceux qui reposent sur le modèle notarial traditionnel : 0.89 % du montant de l'opération en moyenne (de 0.6 en Allemagne à 1.5 % en Italie et 2.7 % en Grèce). Les chercheurs ont également constaté que dans les pays qui ont opté pour ce système, les tarifs sont progressifs en fonction de la valeur de l'opération, tandis qu'ils sont forfaitaires ou quasi forfaitaires dans les pays scandinaves et en Angleterre. Selon eux, les tarifs forfaitaires constituent une solution orientée vers le marché et plus juste puisqu'un transfert de propriété suppose en général la même quantité de travail, quel que soit le montant de l'opération. Les chercheurs reconnaissent qu'on ne peut exclure des subventions croisées (limitées) entre les honoraires plus élevés et plus faibles, mais que dans le cadre d'un système d'honoraires imposés il existe de fortes rentes de monopole en cas d'opérations d'un montant élevé. Enfin, globalement, l'étude révèle une corrélation statistique positive entre des indices de réglementation élevés et des coûts de transaction onéreux (frais juridiques exprimés en pourcentage du montant de l'opération), ce qui semble corroborer la théorie selon laquelle la réglementation répond à une volonté de servir des intérêts particuliers (voir 2.5). Certains pays (Espagne, Danemark, Portugal) affichent néanmoins des indices de réglementation élevés et des coûts de

52 Cette comparaison peut ne pas être exacte lorsque le montant réel d'une opération n'est pas le même que son montant déclaré.

transaction relativement faibles, tandis que d'autres pays très réglementés affichent des coûts de transaction élevés, voire très élevés (Belgique, France, Italie). À noter surtout qu'aucun pays n'a à la fois des indices de réglementation faibles et des coûts de transaction élevés. Globalement, une forte réglementation va de pair avec des coûts de transaction élevés, tandis qu'une réglementation faible est associée à des coûts faibles également

3.2 Restrictions portant sur les honoraires et la publicité

Parmi les règles sur le comportement des professions juridiques sur le marché, celles qui sont susceptibles de préoccuper les responsables de l'action publique favorables à la concurrence sont notamment les restrictions visant les honoraires et la publicité.[53]

Concernant les honoraires, les restrictions qui existent ou existaient récemment dans les pays de l'OCDE sont notamment :

- les honoraires imposés ;
- les honoraires minima et maxima ;54
- les honoraires recommandés ;55 et
- les restrictions limitant la possibilité de subordonner les honoraires au résultat obtenu dans une affaire.[56]

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53 Les honoraires dus par un consommateur de services juridiques peuvent être calculés selon diverses modalités : tarification horaire, honoraires subordonnés au résultat obtenu, honoraires correspondant à des prestations spécifiques ou correspondant à un pourcentage du montant d'une transaction.

54 Les barèmes d'honoraires imposés par les pouvoirs publics ou par les règles « déontologiques » de la profession ont longtemps constitué une forme de réglementation répandue. Ces dernières années, ces barèmes ont été remis en cause par les autorités de la concurrence, qui leur ont reproché d'être anticoncurrentielles et contraires à l'intérêt général. En réaction à ces critiques, la réglementation imposée par les pouvoirs publics a été abrogée pour les services fournis par les avocats (avec quelques exceptions, comme l'Allemagne, où cette libéralisation ne vise pas les services de représentation judiciaire) mais maintenue pour les services fournis par les notaires latins (les Pays-Bas constituant l'exception la plus notable).

55 Les instances d'autoréglementation ont transformé les barèmes d'honoraires imposés en barèmes d'honoraires recommandés. Ces derniers ne s'imposent pas de manière contraignante aux prestataires de services, mais peuvent leur servir de référence pour calculer leurs honoraires. Les prestataires qui pratiquent des honoraires différents des niveaux recommandés s'exposent à des sanctions disciplinaires parce qu'ils discréditent la profession ou manquent à ses règles « déontologiques ». Certaines autorités de la concurrence estiment que les honoraires recommandés ont les mêmes effets que les honoraires imposés. Elles pensent qu'il y a peu de chances que les professionnels s'écartent des tarifs recommandés, de sorte que dans la pratique, ces barèmes ont les mêmes effets qu'une entente illicite sur les prix.

56 Dans beaucoup de pays, les règles « déontologiques » appliquées par les juristes (avocats/*solicitors/barristers*) continuent de limiter la possibilité, pour les parties, de subordonner le montant des honoraires au résultat obtenu dans une affaire. Dans de nombreuses juridictions des États-Unis, il est courant que l'avocat convienne de renoncer à ses honoraires si son client perd (absence d'honoraires en cas d'échec) et de percevoir un pourcentage de la somme attribuée à ce dernier s'il obtient gain de cause (pacte *« quota litis »*). Dans la plupart des pays européens, ce type de conventions est interdit par les règles déontologiques de la profession. Les autorités de la concurrence ont également contesté l'interdiction des honoraires subordonnés au résultat, mais les tentatives de réforme effectuées dans ce domaine se sont heurtées à une forte opposition, même dans les juridictions les plus libérales. L'Angleterre

Dans le secteur juridique, le recours à la publicité et au marketing peut également être réglementé. Autrefois, la réglementation, y compris l'autoréglementation, pouvait aller d'une interdiction totale de la publicité à un encadrement de certains de ses aspects. Les interdictions totales ont été sérieusement remises en cause par les organisations de consommateurs et les autorités de la concurrence. La Commission européenne s'est récemment prononcée en faveur d'une autorisation de la publicité, qui constitue un moyen de concurrence légitime dès lors qu'elle repose sur des informations vérifiables et représentatives[57]. Ces interdictions n'ont toutefois pas totalement disparu (elles subsistent pour les *barristers* en Irlande par exemple) et des restrictions relatives au contenu de la publicité restent en vigueur dans plusieurs États membres de l'Union européenne. Les règles restrictives peuvent viser des formes particulières de publicité (par exemple la publicité télévisée ou le démarchage téléphonique), le contenu (par exemple, la publicité pour des compétences particulières) ou les moyens auxquels les consommateurs peuvent recourir pour demander de l'aide (par exemple, la possibilité de demander de l'aide concernant un certain type d'affaire sur un secteur géographique donné, en déposant une requête sur un site Internet qui la diffuse aux avocats membres, comme l'a récemment décrit la FTC dans un courrier adressé au président du Comité de déontologie du Barreau du Texas[58]). Par ailleurs, les membres des professions juridiques ne sont généralement pas autorisés à recourir à la publicité comparative.

3.2.1 Théorie relative aux restrictions visant les honoraires et la publicité

a. Restrictions visant les honoraires

Selon leurs partisans, les restrictions appliquées aux honoraires peuvent être bénéfiques aux consommateurs de services juridiques et avoir des retombées positives en termes de bien-être social :

- Le premier argument est que les réglementations relatives aux honoraires constituent un bon moyen d'empêcher la « sélection adverse » (voir 2.1.). Faute de pouvoir juger de la qualité des services juridiques, les consommateurs basent essentiellement leurs décisions d'achat sur les prix et ne sont pas prêts à payer plus en contrepartie d'un service de meilleure qualité. Il s'ensuit que les prestataires qui offrent des services de qualité supérieure sont évincés du marché. Les honoraires imposés ou les honoraires minima sont censés régler ce problème et préserver la qualité des services. Il ressort des travaux de théorie économique qu'en l'absence de restrictions à l'entrée, les prix imposés se traduisent par une amélioration de la qualité, la concurrence se jouant alors sur la qualité. En revanche, les prix imposés sont contre-productifs lorsqu'ils sont associés à des restrictions à l'entrée (Graf von der Schulenburg 1986). Mais en réalité, les autorités réglementaires publiques ne sont peut-être pas suffisamment informées pour réglementer les prix (une telle réglementation nécessitant des informations sur les coûts marginaux) et il peut être politiquement inenvisageable de supprimer simultanément les restrictions à l'entrée en place.

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et le Pays de Galles ont introduit une version réglementée de ce système : les avocats peuvent majorer leurs honoraires (qui continuent d'être calculés sur la base du nombre d'heures consacrées au dossier) si leur client obtient gain de cause. Aux Pays-Bas, le nouveau gouvernement a proposé de transformer la règle déontologique qui interdit actuellement les honoraires subordonnés en une interdiction légale.

57 1999/267/CE : Décision de la Commission du 7 avril 1999 relative à une procédure d'application de l'article 85 du traité CE - [IV/36147 - Code de conduite de l'IMA (EPI)], JO n° L106/14 du 23 avril 1999, 41.

58 Voir la lettre des directeurs de la FTC à John Glancy, Président du Comité de déontologie du Barreau du Texas, 26 mai 2006 http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf

- Le deuxième argument est qu'imposer des honoraires maxima permet de pallier plus facilement le problème de « l'aléa moral ». Un consommateur de services professionnels risquant, par manque d'information, de ne pas pouvoir estimer le rapport qualité/prix qu'il désire, le professionnel peut être tenté de lui fournir des services d'une qualité trop élevée à un prix excessif, alors que le client se satisferait d'une qualité moindre, à un prix moindre. La fixation d'honoraires maxima protège le consommateur contre ces prix trop élevés.

- Le troisième argument est que les honoraires recommandés peuvent servir à renseigner les consommateurs sur les honoraires moyens demandés pour certaines prestations. Ce système permet également d'éviter d'avoir à faire des offres et/ou à négocier des honoraires individuels. Les honoraires recommandés entraînent ainsi une réduction des coûts de transaction et, par conséquent une baisse des prix. Ceci est particulièrement vrai sur les marchés où les coûts de recherche sont élevés et où les consommateurs peuvent avoir intérêt à avoir facilement accès à des informations.

- Enfin, les honoraires subordonnés au résultat méritent une analyse spécifique. La théorie économique permet de comprendre un élément important, à savoir que lier la rémunération des juristes au résultat qu'ils obtiennent est un moyen de régler le problème de la relation d'agence et d'inciter les juristes à fournir un effort maximum (voir par exemple, Danzon 1983 et Rickman 1994). Dans les débats de politique publique, deux arguments majeurs s'opposent. D'un côté, les honoraires subordonnés au résultat obtenu (en particulier les conventions qui prévoient l'absence d'honoraires en cas d'échec) seraient susceptibles d'améliorer l'accès à la justice parce qu'ils suppriment la barrière financière. La victime d'un grave préjudice à la personne risque en effet d'hésiter à engager une procédure en dommages et intérêts si elle sait qu'elle sera obligée de payer des frais juridiques élevés (y compris des frais d'expertise médicale) même si elle n'obtient pas gain de cause. D'un autre côté, les pouvoirs publics craignent que les honoraires subordonnés au résultat obtenu entraînent le volume des litiges à la hausse et aient pour résultat une « judiciarisation de la société ».59 De plus, certains professionnels avancent que les honoraires subordonnés au résultat obtenu menacent l'indépendance et l'intégrité des juristes, ces derniers ayant alors un intérêt personnel dans les affaires qu'ils traitent. Une telle situation peut donner naissance à un conflit d'intérêts entre clients et juristes sur la date à laquelle il convient de régler le litige. Si le juriste reçoit un pourcentage prédéfini des dommages et intérêts accordés à son client en cas de succès, mais assume l'intégralité des coûts en cas d'échec, il risque d'avoir intérêt à accepter la transaction extrajudiciaire proposée par le défendeur, le cas échéant, même si l'intérêt de son client voudrait qu'il continue à travailler sur l'affaire. Cet argument occulte toutefois le fait qu'un conflit d'intérêts peut également survenir dans le cadre des modes de tarification traditionnels. Rémunérer les avocats en fonction du nombre d'heures qu'ils consacrent à une affaire, risque de les inciter à passer plus de temps que nécessaire pour réaliser des bénéfices supérieurs à la normale. Globalement, il ressort des travaux théoriques qu'autoriser les honoraires subordonnés au résultat obtenu est vraisemblablement avantageux pour le consommateur, même si les effets de ce mode de tarification restent équivoques en termes de bien-être.

Toutefois, les restrictions visant les honoraires peuvent aussi avoir de graves retombées négatives sur le bien-être social. Elles réduisent l'incertitude du côté de l'offre et limitent, voire empêchent, la concurrence entre professionnels. Ceci vaut particulièrement pour les honoraires imposés et les honoraires minima, qui excluent toute concurrence sur les prix et risquent de priver les consommateurs des baisses de prix qui se produisent sur un marché concurrentiel. La suppression des barèmes aurait donc des effets

59 À ce jour, aucune preuve théorique irréfutable ne vient accréditer cette crainte ; voir, par exemple Gravelle et Waterson 1993 et Miceli 1994.

positifs pour les consommateurs, en particulier en ce qui concerne certains services standardisés, faciles à comparer (OCDE 2000, p. 20). En plus d'améliorer la concurrence sur les prix, la suppression des barèmes, quelle que soit leur nature, peut également induire des progrès en termes d'efficience dynamique et d'innovation sur les marchés des services juridiques. Alors qu'à première vue les honoraires maxima semblent ne profiter qu'aux consommateurs, ils peuvent également tirer les prix vers la limite maximale et avoir ainsi le même effet qu'un prix imposé. Les honoraires recommandés peuvent produire les mêmes effets et sont susceptibles de faciliter la coordination du comportement concurrentiel des professionnels, entraînant ainsi une hausse des prix au détriment du consommateur. Il n'est toutefois pas exclu que certains praticiens soient enclins à ignorer les tarifs recommandés et à proposer leurs services à un prix inférieur au niveau imposé ou recommandé. Ce comportement est décrit comme une forme de tricherie. Il est reconnu qu'il n'est pas toujours possible d'empêcher ces agissements, et ce d'autant moins qu'une profession compte un grand nombre de membres.

Enfin, il convient d'examiner les restrictions visant les honoraires en termes de proportionnalité. Bien que ces restrictions puissent parfois être justifiées d'un point de vue théorique, elles n'en restent pas moins une intervention règlementaire lourde de conséquences. Il est possible, pour garantir la qualité, de recourir à des moyens moins restrictifs. De ce point de vue, la réglementation des honoraires est peut-être disproportionnée, en particulier lorsqu'elle coexiste avec d'autres mesures restrictives de concurrence, comme les tâches réservées ou les restrictions quantitatives à l'entrée. Les effets cumulés de cette association de restrictions sont vraisemblablement disproportionnés.

b. Restrictions visant la publicité

Plusieurs arguments ont été avancés en faveur des restrictions visant la publicité. Ces restrictions sont susceptibles :

- d'éviter que les consommateurs soient encouragés à prendre des décisions qu'ils ne sont pas qualifiés pour prendre ;
- d'éviter que des prestataires amateurs parviennent à rester sur le marché ;
- de réduire les coûts assumés par les prestataires de services.

L'interdiction de la publicité mensongère et potentiellement trompeuse peut être nécessaire à des fins de protection des consommateurs. Les services professionnels étant des biens d'expérience ou de croyance, leur qualité ne peut être appréciée qu'à long terme, généralement par des consommateurs effectuant des achats répétés, lorsqu'elle n'est pas tout simplement impossible à évaluer. Les consommateurs n'étant pas en mesure de mesurer la véracité de la publicité portant sur des attributs de croyance, il peut être nécessaire, pour éviter les abus, d'adopter des règles portant sur d'autres aspects de la publicité que le prix. De ce point de vue, la réglementation du contenu de la publicité serait souhaitable.

Cependant, les restrictions en matière de publicité ont réellement des effets négatifs. La publicité renseigne les consommateurs sur les différents types de prestations proposées et sur les conditions dans lesquelles elles sont fournies. Elle leur permet ainsi de prendre des décisions plus éclairées. S'il est vrai que les consommateurs pourraient rechercher eux-mêmes les informations, selon Stigler (1961), la publicité effectuée par les prestataires peut remplacer une grande partie des efforts de recherche effectués par un grand nombre de consommateurs. Elle conduit donc à une réduction substantielle des coûts de recherche. En permettant aux consommateurs d'être mieux informés à moindre coût, elle est susceptible de contribuer à renforcer la concurrence sur les marchés. En outre, la publicité peut également prévenir les consommateurs de l'apparition de nouveaux services ou prestataires de services, stimulant ainsi l'innovation et l'entrée sur le marché. Les restrictions visant la publicité risquent donc de réduire, voire

d'éliminer ces effets potentiellement positifs. En rendant l'acquisition de notoriété plus difficile, elles risquent, comme le font observer Stephen et Love (2000, p. 994), d'entraîner une hausse du coût d'entrée sur un marché et, de ce fait, de constituer une barrière à l'entrée.

Les arguments en faveur d'une réglementation restrictive de la publicité doivent être relativisés. En premier lieu, ils ne justifient pas l'interdiction de la publicité lorsqu'elle est pertinente, digne de foi et non trompeuse. En deuxième lieu, l'un des principaux arguments contre la publicité sur les honoraires (le problème de la sélection adverse) n'est valable que lorsque cette publicité est surtout ou exclusivement utilisée par des prestataires offrant des services de mauvaise qualité. Lorsqu'elle est autorisée et également utilisée par des prestataires de services de qualité, il n'est pas exclu que les consommateurs interprètent des honoraires faibles comme un signe de qualité médiocre et les honoraires élevés comme un gage de qualité, ce qui atténue les effets de la sélection adverse (Rogerson 1988 ; Rizzo et Zeckhauser 1992).

3.2.2 Études empiriques

Cette partie présente successivement les études empiriques sur les restrictions en matière d'honoraires, puis celles consacrées aux restrictions en matière de publicité.

a. Restrictions en matière d'honoraires

Les travaux empiriques consacrés aux restrictions en matière d'honoraires sont axés soit sur les effets sur les prix des honoraires recommandés, soit sur les conséquences de la déréglementation. Les résultats des études entrant dans la première catégorie sont synthétisés ci-après. En ce qui concerne les travaux consacrés aux effets de la déréglementation, le lecteur est invité à se reporter aux études empiriques portant sur les marchés des services liés au transfert de propriété immobilière (partie 3.1.2, encadré 3) et sur la libéralisation de la profession de notaire aux Pays-Bas (encadré 4).

Plusieurs études empiriques s'intéressent aux effets des honoraires recommandés sur l'existence d'un comportement de tricherie. Arnauld et Friedland (1977) ont examiné les effets des barèmes d'honoraires recommandés pour les juristes aux États-Unis. Ils ont analysé le lien entre l'existence d'honoraires recommandés et le revenu des juristes pour une prestation courante et ont observé une corrélation positive, le revenu étant plus élevé lorsque des honoraires recommandés existent. Cette recherche ne permet toutefois pas de conclure qu'il existe une corrélation univoque entre l'existence d'un barème d'honoraires recommandés et les honoraires réellement pratiqués par les juristes. Comme le font observer Stephen et Love (2000, p. 1000), pour tirer une telle conclusion des travaux d'Arnauld et Friedland il faut supposer que la demande de cette prestation courante est inélastique.

Au Royaume-Uni, des travaux ont été consacrés à l'existence de tricherie dans la profession de juriste. Il en ressort que ce comportement existe effectivement. Ainsi, une étude de Stephen (1993) sur les effets des honoraires recommandés pour les prestations liées au transfert de propriété immobilière en Écosse montre que malgré les barèmes, les *solicitors* sont nombreux à pratiquer des honoraires très inférieurs au niveau recommandé par l'organisation professionnelle compétente. Bien que l'étude porte sur un nombre limité de prestataires, ses résultats montrent qu'il convient d'adopter une approche prudente vis-à-vis des effets de la réglementation des honoraires. Par la suite, une recherche conduite par Shinnick[60] est venue confirmer ces conclusions. Shinnick a étudié les honoraires facturés par les *solicitors* irlandais pour les services liés au transfert de propriété immobilière et a constaté que les *solicitors* étaient très nombreux à pratiquer des honoraires beaucoup plus faibles que le niveau recommandé. Ces constatations ont de nouveau été confirmées par les recherches de Shinnick et Stephen (2000), également consacrées aux

60 Shinnick, E. (1995), The Market for Legal Services in Ireland, communication présentée à la conférence de l'Irish Economic Association, citée par Love et Stephen 2000, p. 1001.

solicitors irlandais. Les auteurs ont constaté que beaucoup de *solicitors* ne tenaient pas compte des honoraires recommandés et pratiquaient des tarifs très inférieurs. En outre, des travaux sur les honoraires recommandés dans la profession d'architecte ont démontré que les autorités de la concurrence assimilent peut-être trop rapidement honoraires recommandés et ententes sur les prix.[61]

Encadré 4. La déréglementation de la profession de notaire aux Pays-Bas

La loi néerlandaise sur le notariat, adoptée en 1999, est l'initiative la plus ambitieuse qui ait jamais été prise pour déréglementer la profession de notaire. Elle vise à renforcer la concurrence et à améliorer la qualité des services notariaux. La nouvelle loi a supprimé le système de *numerus clausus* qui existait dans l'ancienne législation, de sorte que le nombre total de notaires pouvant exercer aux Pays-Bas n'est plus plafonné. Le principal changement introduit par la loi est le passage d'un système d'honoraires imposés à un système d'honoraires libres. Les honoraires ont été libérés dès l'entrée en vigueur de la loi pour les prestations liées au droit de la famille et au droit commercial, tandis qu'ils l'ont été progressivement en ce qui concerne les services fournis dans le domaine de l'immobilier. Depuis juillet 2003, les honoraires des notaires sont totalement libres aux Pays-Bas[62]. Cette libéralisation de la profession fait l'objet d'une évaluation régulière, destinée à vérifier si la loi atteint ses objectifs.

1. Impact de la libéralisation sur l'accès à la profession, les prix et l'accessibilité des services

Il convient de préciser que l'accès à la profession de notaire n'a pas été totalement libéralisé. Les barrières quantitatives reposant sur des critères démographiques ont certes été supprimées, mais une réglementation de l'entrée subsiste. Les notaires stagiaires doivent soumettre un plan d'affaires à l'approbation du comité de supervision de l'organisme public de surveillance du notariat. La durée du stage pratique obligatoire que doivent suivre les notaires stagiaires a *doublé* par rapport à la législation antérieure, passant de trois à six ans. D'après les évaluations de cette réforme, la nouvelle loi ne favorise pas réellement l'accès à la profession (Commissie Monitoring Notariaat 2003). Alors qu'elle était censée accélérer la nomination des notaires stagiaires en qualité de notaires, le nombre de nominations n'a pas progressé de manière notable. Les notaires stagiaires préfèrent en outre intégrer une étude existante plutôt que de créer leur propre affaire. Ce phénomène, qui se traduit par une augmentation de la taille des études notariales présentes sur le marché et, partant, par une concentration contraire à l'objectif poursuivi à travers le renforcement de la concurrence (Nahuis et Noailly 2005), n'a toutefois rien de surprenant compte tenu que la loi, tout en supprimant les anciennes barrières à l'entrée, en a instauré de nouvelles, telles que l'obligation de faire approuver un plan d'affaires et le doublement de la durée du stage.

Aux Pays-Bas, depuis longtemps, les tarifs appliqués aux services rendus dans le domaine du droit de la famille étaient imposés. La réforme législative de 1999 les a libéralisés, laissant les notaires libres de fixer leurs honoraires pour ces prestations (ils sont uniquement tenus de tenir compte de plafonds applicables aux clients à faibles revenus). Alors que les prix auraient logiquement dû diminuer, curieusement, la libéralisation est allée de pair avec une hausse substantielle des honoraires pratiqués pour la rédaction de testaments, tandis que la perception de la qualité des services par les consommateurs est restée globalement stable (EIM 2002). Les données empiriques révèlent que les honoraires demandés pour la rédaction d'un testament ont presque doublé (hausse de 9 %) tandis que le prix exigé pour établir un contrat de mariage ou une convention d'union libre ont respectivement augmenté de 60 % et 39 % (Commissie Evaluatie Wet op het notarisambt 2005).

61 Button et Fleming (1992) ont effectué une recherche sur les conséquences du remplacement, en 1992, du barème d'honoraires imposés par un barème d'honoraires recommandés. Il en ressort que cette réforme réglementaire a été suivie d'une légère baisse des honoraires pratiqués par les architectes. Toutefois, les auteurs font observer que cette baisse peut être due à des facteurs antérieurs à la réforme réglementaire, et ne pas être une conséquence de la réforme. Ils en déduisent « qu'en ce qui concerne les honoraires et la concurrence, l'autoréglementation semble n'avoir eu, dans la pratique, que peu d'effets négatifs. »

62 Il y a deux exceptions à cette règle : (1) des honoraires maxima s'appliquent aux services fournis en matière familiale à des clients à faibles revenus ; (2) le ministre compétent peut intervenir en cas de nécessité pour garantir l'accessibilité des services notariaux.

Aalbers et Dykstra (2002) ont recherché les facteurs susceptibles d'expliquer cette hausse. Ils proposent deux explications : i) les notaires latins, utilisant leur pouvoir de marché, ont commencé à pratiquer des tarifs supérieurs au prix concurrentiel ou ii) la hausse des prix est tout simplement le reflet du prix normal, calculé sur la base des coûts réels. Cette seconde explication implique que les honoraires imposés auparavant ne couvraient pas l'intégralité du coût des services rendus dans le domaine de la famille et que ces services n'étaient pas rentables. Pour évaluer ces hypothèses, Aalbers et Dykstra ont cherché à savoir si les notaires latins avaient travaillé de manière inefficiente ou s'ils avaient eu recours à des subventions croisées. Leur analyse ne révèle pas de différence d'efficience entre les notaires et d'autres professionnels. S'il est vrai que certains notaires assumaient des coûts très élevés, ce phénomène n'était pas lié à un manque d'efficience mais au fait que des raisons externes les empêchaient d'opérer à plus grande échelle, en particulier lorsqu'ils étaient installés en zone rurale. Par ailleurs, Aalbers et Dykstra ont également constaté que de nombreux notaires avaient effectivement pratiqué un subventionnement croisé. Cette constatation corrobore l'hypothèse selon laquelle les services rendus dans le domaine de la famille n'étaient pas rentables, mais pourrait aussi s'interpréter comme une stratégie consistant, pour les notaires, à augmenter les prix pour égaliser le bénéfice marginal avec les honoraires, encore élevés, pratiqués pour les services liés à l'immobilier et autres prestations.

Les tarifs pratiqués pour les transactions immobilières (services liés au transfert de propriété immobilière) ont été totalement libéralisés en 2003. D'après un rapport du Bureau néerlandais d'analyse de la politique économique (CPB), les honoraires moyens pratiqués pour ces services ont diminué ; entre 2002 et 2004, les honoraires des notaires ont diminué proportionnellement au montant de la transaction : les honoraires demandés pour une transaction portant sur un bien immobilier de 113 500 € ont décru de 7 % ; des baisses plus marquées ont été observées pour des cessions de biens immobiliers d'un montant plus élevé : 13 % pour un bien de 245 000 €, et 21 % pour un bien de 363 000 €. Alors que les honoraires moyens ont baissé, l'écart entre les notaires pratiquant les prix les plus élevés et ceux pratiquant les prix les plus faibles s'est creusé.
Les consommateurs qui cherchent un notaire pratiquant des honoraires peu élevés peuvent trouver des informations sur les prix sur deux sites Internet, ce qui leur permet de réduire substantiellement leurs coûts par rapport à la période antérieure à la libéralisation D'après l'étude du CPB, les notaires n'ont pas tous réagi de la même manière à la réforme : 45 % des études notariales n'ont pas modifié leur politique de tarification, 28 % ont mené une politique de prix offensive, 23 % ont opté pour des honoraires basés sur les coûts réels et 2 % ont facturé des honoraires très élevés (Kuypers et al. 2005).

2. Impact de la libéralisation sur la qualité

D'après les premières évaluations de la réforme du notariat, le respect des règles déontologiques est en recul (Commissie Monitoring Notariaat 2003). Une récente étude conduite auprès de 310 notaires et 193 notaires stagiaires montre qu'une large majorité (68 %) d'entre eux privilégient dans la pratique la réalisation de bénéfices par rapport à la qualité des services. Les intérêts des clients l'emportent sur l'intérêt général pour 64 % des répondants. 59 % des notaires jugent plus important d'entretenir de bonnes relations avec les gros clients que de protéger les parties les plus faibles, souvent plus défavorisées sur le plan économique et dépourvues de connaissances juridiques (Laclé 2005). Ces résultats donnent un fondement aux craintes selon lesquelles la volonté de survivre à la concurrence pourrait l'emporter sur les considérations déontologiques et mettre en péril la qualité des services notariaux.

Les évaluations les plus récentes de la libéralisation aboutissent à des résultats contrastés. Ainsi la comparaison de deux rapports publiés en septembre 2005, l'un par la Commission Hammerstein, chargée de l'évaluation de la loi de 1999 sur les notaires (Commissie Evaluatie Wet op het notarisambt 2005) et l'autre par le CPB, est édifiante. Le rapport de la Commission Hammerstein insiste sur certains effets positifs de la loi de 1999 : amélioration du rapport coût-efficacité, innovation (utilisation accrue des nouvelles technologies de l'information et de la communication), honoraires reposant sur les coûts et différenciation des prix. Bien que n'ayant pas trouvé d'éléments probants à l'appui de l'argument selon lequel la concurrence est à l'origine d'une dégradation substantielle de la qualité des services et de l'intégrité professionnelle[63], la Commission Hammerstein reconnaît qu'une baisse de qualité sur certains segments du marché ne peut être exclue. Après la libéralisation des honoraires dans le domaine familial, certains notaires ont tenté de faire des économies en consacrant moins de temps à

63 « On ne constate pas de signes manifestes d'une baisse inacceptable de la qualité des services », traduction de la *Koninklijke Notariële Beroepsorganisatie, Evaluation of the Dutch Notaries Act*, (2005), p. 5

l'information et au conseil à la clientèle. La Commission Hammerstein conclut que « le rôle d'information du notaire est particulièrement menacé ». La Commission a demandé à l'institut de recherche EIM d'étudier si la crainte de voir la concurrence sur les prix se solder par une baisse de la qualité était fondée. À cette fin, l'institut a recueilli des informations sur le nombre de corrections apportées au registre cadastral au cours de l'année 2004, pour comparer les aspects mesurables de la qualité juridique (en d'autres termes le savoir-faire du notaire) des services fournis par les notaires pratiquant des prix inférieurs au prix du marché et par ceux pratiquant des tarifs très élevés. Des erreurs (absence d'enregistrement ou erreurs nécessitant des corrections) ont été détectées dans 1,2 % de l'ensemble des actes authentifiant le transfert de propriété ou créant des hypothèques. Des écarts importants ont été constatés entre les études et les régions, mais il est apparu que la qualité des services proposés par les notaires pratiquant des prix bas n'était pas inférieure à celle des services de leurs confrères. L'EIM a également mené des entretiens auprès de gros clients commerciaux (agents immobiliers, courtiers en crédit hypothécaire et chefs de projet immobiliers) et a constaté que la satisfaction de la clientèle s'était améliorée. La moitié des répondants a déclaré avoir constaté une amélioration du service à la clientèle. Du point de vue des gros clients commerciaux, les prix des services notariaux ont connu une baisse, à qualité constante (Vogels 2005).

Le rapport du CPB est plus critique (Nahuis et Noailly 2005) et met sérieusement en doute l'efficacité et le bien-fondé de la réforme. Les auteurs n'ont pas constaté d'évolution nette du degré de concurrence entre 1996 (trois ans avant la libéralisation) et 2002 (trois ans après) sur les marchés locaux dans le domaine des affaires familiales et des petites transactions immobilières[64]. Sur le marché national des services destinés aux professionnels (services aux entreprises et grosses transactions immobilières), les résultats sont apparus contrastés et les chercheurs ont observé des signes de renforcement de la concurrence. Concernant les retombées de la réforme sur la qualité, certains éléments accréditent l'idée que la concurrence risque d'entraîner une dégradation de la qualité. Deux aspects différents de la qualité ont été examinés : la satisfaction vis-à-vis du service, mesurée par des sondages auprès des consommateurs, et des aspects de la qualité non observables par les consommateurs. Les sondages ont démontré que la concurrence avait un impact négatif sur la qualité, en particulier en termes de qualité de l'accueil et de délai de traitement des transactions. En outre, il est ressorti de la comparaison du nombre de corrections apportées aux actes notariés enregistrés au registre cadastral pour les années 1995 et 2003 qu'en 1995, les actes établis par des notaires installés dans des régions plus concurrentielles avaient fait l'objet de moins de corrections que ceux établis par leurs confrères exerçant dans des régions où la concentration était plus forte. Cela n'était plus vrai en 2003, ce qui semble indiquer que la concurrence va de pair avec une dégradation de la qualité. Ces résultats ne vont apparemment pas dans le même sens que ceux de l'étude, évoquée ci-dessus, conduite par l'institut EIM sur demande de la Commission Hammerstein, selon laquelle les notaires pratiquant des tarifs très faibles ne faisaient pas davantage d'erreurs que ceux appliquant des prix plus élevés. Toutefois, cette différence pourrait s'expliquer par le fait que l'EIM a comparé la qualité entre différentes régions sur le marché libéralisé, et non la qualité avant et après la déréglementation de la profession de notaire.[65]

3. *Conclusion*

D'après les résultats préliminaires de l'étude en cours sur la réglementation des services, « la déréglementation mise en œuvre par les Pays-Bas prouve de manière flagrante qu'un système notarial déréglementé peut être très efficient. » Les éléments ci-dessus démontrent que cette affirmation est peut-être trop optimiste. Les travaux empiriques sur les effets de la loi néerlandaise sur le notariat, adoptée en 1999, démontrent que, contrairement à ce qui était attendu, le nombre de notaires n'a pas augmenté et que la concentration des études s'est poursuivie. Les prix ont baissé sur certains segments du marché (en particulier celui des services liés au transfert de propriété immobilière) mais augmenté sur d'autres (affaires familiales). Certains signes indiquent que la qualité s'est dégradée, en particulier sur le plan de l'information et de l'intégrité. Les partisans de la déréglementation font observer que la concurrence a conduit à calculer les honoraires sur la base des coûts et a stimulé l'innovation. En revanche, ceux qui

64 Dans ce rapport, deux indicateurs différents ont été utilisés pour mesurer le degré de concurrence avant et après la libéralisation : le bénéfice relatif et la variation de l'indicateur de Bresnahan et Reiss. La première méthode repose sur l'idée que toute augmentation de l'efficience des entreprises reflète un renforcement de la concurrence. Le second indicateur mesure l'ampleur de la baisse des marges bénéficiaires induite par l'entrée de nouveaux concurrents sur le marché local.

65 En outre, les variables utilisées pour mesurer la qualité n'étaient pas exactement les mêmes dans les deux études.

doute de son bien-fondé avancent que la concurrence tend à profiter avant tout aux gros clients, et pourrait avoir des effets négatifs sur les petits consommateurs qui pâtissent des asymétries d'information. Il est également possible qu'en mettant un terme aux subventions croisées, la libéralisation ait remis en cause l'accessibilité des services notariaux pour les publics à faible revenu. Il convient toutefois de souligner que la déréglementation des tarifs peut certes être très avantageuse pour certaines grosses transactions immobilières, mais s'est accompagnée de la création de barrières à l'entrée qui ne semblent pas de nature à assurer la qualité des services ; il n'est donc pas surprenant que l'entrée sur le marché ait peu progressé. Le nombre de prestataires ne pouvant s'ajuster librement, la réforme néerlandaise ne peut être considérée comme totale.

b. Restrictions en matière de publicité

Les effets sur les prix des restrictions visant la publicité ont fait l'objet de nombreuses études, dont les conclusions vont, pour l'essentiel, toutes dans le même sens. Il ressort de la majorité de ces travaux que les restrictions visant la publicité entraînent une hausse des prix pour les consommateurs. Par exemple, une étude sur les États-Unis démontre que la publicité entraîne en renforcement de la concurrence entre prestataires de services juridiques courants, en l'occurrence rédaction de testaments, procédures de faillite personnelle volontaire et de divorce par consentement mutuel (Schroeter, Smith et Cox 1987). Les auteurs ont utilisé des données sur les honoraires des avocats de dix-sept zones urbaines des États-Unis et sur leurs pratiques en matière de publicité pour apprécier les effets de l'intensité de la publicité sur les élasticités de la demande, en maintenant constants les autres facteurs susceptibles d'influer sur la demande. Les résultats obtenus pour les trois types de prestations courantes confirment l'hypothèse selon laquelle la publicité se traduit par un renforcement de la concurrence entre avocats. Stephen et Love (2000) et un rapport de l'Indecon (2003) présentent un panorama des études empiriques sur la corrélation positive entre l'intensité de la publicité et le degré de concurrence sur les prix dans les professions juridiques et dans d'autres professions réglementées. En dehors d'une exception notable, qui concerne la profession médicale (Rizzo et Zeckhauser 1992), les données empiriques concernant les effets sur les prix des services professionnels des restrictions visant la publicité indiquent que la publicité va de pair avec une baisse des prix.

En revanche, les études portant sur les effets de ces restrictions sur la qualité sont moins nombreuses et aboutissent à des conclusions moins homogènes. Comme le soulignent Stephen et Love (2000, p. 998) concernant la profession juridique, « les travaux empiriques sur la qualité des services juridiques rendus dans un contexte où la publicité est possible n'aboutissent pas à des conclusions aussi tranchées que celles portant sur les prix ». Dans une étude antérieure, Muris et Mc Chesney (1979) ont constaté que les centres d'aide juridique qui font de la publicité ne fournissent pas nécessairement des services de moindre qualité. Dans cette étude, les auteurs ont utilisé à la fois des indicateurs de qualité objectifs et des indicateurs subjectifs.. L'examen d'un échantillon aléatoire de dossiers de divorce conservés dans les archives publiques révèle que les femmes représentées par un centre d'aide juridique ont obtenu une pension alimentaire nettement plus élevée. En outre, les clients de ces centres qui ont également eu recours à des prestataires de services juridiques classiques ont, dans leurs réponses aux questionnaires, porté une appréciation beaucoup plus positive sur les centres d'aide juridique pour quatre indicateurs de qualité sur sept. Au contraire, une étude de Murdock et White (1985) semble confirmer, dans une certaine mesure, l'hypothèse de la sélection adverse. Murdock et White ont étudié la qualité des services fournis par des juristes en se basant sur la perception de cette qualité par des pairs et par des juges. La variable « qualité des juristes » était la note figurant dans le registre du barreau Martindale-Hubbell, établi à partir de recommandations confidentielles de juristes et de juges de la région où exerce le juriste concerné. Murdock et White ont constaté que les juristes de moins bonne qualité faisaient davantage appel que les autres à la publicité dans l'annuaire professionnel *(Yellow Pages)*. Il semble donc justifié de craindre l'existence d'un lien entre la publicité concernant les services juridiques et la qualité, même si l'étude présente des limites

qui empêchent d'en tirer une conclusion probante (voir également les critiques formulées par Thomas 1985).[66]

3.3 Restrictions relatives aux partenariats et à la structure d'exercice

Dans le secteur juridique, il existe une réglementation (ou une autoréglementation) concernant la structure de l'entreprise qui fournit les prestations de conseil juridique. Ces règles s'opposent à la constitution de certains types de partenariats, en particulier de cabinets juridiques disciplinaires *(legal disciplinary partnerships, LDPs)*, qui regroupent différents professionnels du droit, par exemple des *solicitors* et des *barristers*[67], ou de cabinets multidisciplinaires *(multidisciplinary practices, MDP)*, qui regroupent des juristes et d'autres types de professionnels. À cela s'ajoutent des restrictions relatives à l'organisation et au financement des entreprises de services juridiques. En général, la coopération sous forme d'entités à responsabilité illimitée est autorisée, mais il est interdit de constituer des sociétés à responsabilité limitée. Il existe également des restrictions en matière de propriété, qui interdisent à des professionnels n'appartenant pas à des professions juridiques réglementées de gérer ou de posséder un cabinet juridique ou d'y détenir des participations.

3.3.1 Théorie

a. Interdiction des partenariats

L'interdiction des cabinets juridiques disciplinaires et des cabinets multidisciplinaires est de toute évidence anticoncurrentielle et peut être préjudiciable au consommateur. L'interdiction des partenariats entre juristes empêche *solicitors* et *barristers* de travailler ensemble au sein d'une même structure. De ce fait, en supposant que le *barrister* n'ait pas de relation de facturation directe avec le client, les consommateurs sont confrontés à un phénomène de double marge, alors que le prix n'intègrerait qu'une marge si une seule entité leur fournissait un service complet. En outre, les consommateurs ne bénéficient pas des avantages du « guichet unique », puisqu'ils doivent passer par un *solicitor* pour faire appel à un *barrister*.

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66 Les travaux de Cox, Schroeter et Smith (1986) sur les effets de la publicité effectuée par les juristes dans différentes régions des États-Unis montrent que dans les régions où cette publicité est répandue, la qualité des services semble plus faible. Toutefois, ces résultats sont à relativiser car les auteurs n'ont pas constaté de différence de qualité significative entre les avocats exerçant dans une même région selon qu'ils font ou non de la publicité. Domberger et Sherr (1989) parviennent à la conclusion inverse dans leur recherche sur les effets de la libéralisation des services liés au transfert de propriété immobière en Angleterre et au Pays de Galles dans les années quatre-vingt. Cette libéralisation a notamment pris la forme d'un assouplissement des règles restreignant la publicité. L'étude portait essentiellement sur l'évolution des honoraires après la libéralisation, mais les auteurs ont également essayé d'apprécier la perception, par les consommateurs, de la qualité des services. Dans leur recherche, la qualité était représentée par le temps pris par la transaction, la quantité et la qualité des informations fournies par les *solicitors*, la facilité d'accès au *solicitor*, et la perception globale du client quant à savoir s'il « en avait eu pour son argent ». Les auteurs ont constaté une nette amélioration de la qualité perçue au cours des dernières années concernées par l'étude, ce qui semble indiquer que la libéralisation, y compris l'assouplissement des règles restreignant la publicité, a eu des répercussions positives sur la qualité.

67 Cette distinction est caractéristique des pays de *common law*. Les *solicitors* fournissent des services directement aux usagers : transfert de propriété immobilière, conseil juridique et représentation judiciaire. Les *barristers* sont spécialisés dans la défense. Les clients n'entrent pas directement en contact avec le *barrister*, mais doivent passer par un *solicitor*. Bien que le *solicitor* et le *barrister* aient l'un comme l'autre le droit de plaider, il est plus courant que les *solicitors* plaident devant les juridictions inférieures et que les *barristers* représentent leurs clients devant les juridictions supérieures.

Quant aux partenariats multidisciplinaires, ils peuvent être bénéfiques aux consommateurs pour plusieurs raisons. Regrouper le savoir-faire de praticiens appartenant à des professions différentes dans le cadre d'une même entité permet d'offrir un « service complet ». Par ailleurs, la fourniture de services en lien les uns avec les autres est parfois à l'origine d'économies de gamme. Lorsqu'ils travaillent sur un même dossier, les professionnels peuvent échanger en interne des informations sur certains aspects, ce qui est de nature à réduire les coûts de transaction, les contacts individuels entre consommateurs et praticiens étant moins nombreux. En outre, les cabinets multidisciplinaires présentent également l'intérêt notable de permettre une répartition interne des risques. Les différentes professions ne sont pas nécessairement confrontées aux mêmes cycles économiques ni aux mêmes fluctuations de revenu. Les cabinets multidisciplinaires permettent de répartir les risques qui en découlent entre les associés, de sorte que les professionnels exposés à des risques ont l'assurance de percevoir une partie des fruits des autres activités de l'entité (Stephen et Love, 2000, p. 1005). Tous ces avantages sont susceptibles de s'accompagner d'une baisse des prix pour les consommateurs. Enfin, les partenariats multidisciplinaires peuvent également promouvoir l'innovation. Assouplir les règles restrictives dans ce domaine pourrait faciliter l'accès aux capitaux nécessaires, le cas échéant, pour investir dans des équipements et infrastructures destinés à améliorer la qualité des services.

Pour justifier les interdictions qui visent les partenariats entre praticiens du droit dans les pays de *common law*, les professionnels avancent que les *barristers* ont plus de chances de fournir leurs prestations de conseil en toute indépendance s'ils exercent séparément des *solicitors*. Ils ajoutent que de tels partenariats conduiraient à des fusions, de sorte qu'il y aurait moins de *barristers* pour fournir des services aux petits cabinets de *solicitors*.

Pour justifier les interdictions qui visent les partenariats multidisciplinaires, les professionnels avancent que la coopération de juristes appartenant à une profession réglementée et de professionnels qui n'ont pas la même obligation de secret professionnel est de nature à mettre en péril la confidentialité des rapports entre le juriste et son client. Ils affirment également que les partenariats multidisciplinaires peuvent donner naissance à des conflits d'intérêts préjudiciables aux consommateurs.[68]

Compte tenu des avantages que présentent les cabinets multidisciplinaires, il y a lieu de se demander s'il serait possible d'adapter l'environnement réglementaire de manière à préserver le secret professionnel et à prévenir les conflits d'intérêts par des moyens moins restrictifs. Il pourrait être envisagé de recourir à des obligations d'information, qui imposeraient que le client soit informé de l'existence d'un conflit entre le devoir de confidentialité d'un membre de l'entité et l'obligation de divulgation d'information d'un autre. On pourrait également envisager des mesures pour éviter que les membres du partenariat soumis au secret professionnel communiquent des informations à ceux, parmi les autres membres, qui n'y sont pas soumis *(« Chinese walls »)*. Enfin, il serait envisageable de garantir le respect du secret professionnel en l'imposant à tous les membres d'un partenariat (Deards 2002, p. 625).

L'argument le plus communément avancé pour justifier l'interdiction de constituer une société à responsabilité limitée est que la responsabilité illimitée incite fortement les associés au respect de la discipline professionnelle : le risque de voir leur responsabilité personnelle engagée de manière illimitée les motive pour exercer un contrôle sur les activités de leurs associés. Ce mécanisme de contrôle mutuel pourrait ainsi contribuer à garantir la qualité des prestations. On peut objecter à cela que ce mécanisme semble ne pas avoir fonctionné dans le cas d'Arthur Andersen dans l'affaire Enron. Quoi qu'il en soit, la

[68] À cet égard, il convient de rappeler que dans l'affaire *Wouters*, la CJCE a considéré que les restrictions relatives aux partenariats multidisciplinaires dans la profession juridique pouvaient être justifiées par leurs « objectifs, liés en l'occurrence à la nécessité de concevoir des règles d'organisation, de qualification, de déontologie, de contrôle et de responsabilité, qui procurent la nécessaire garantie d'intégrité et d'expérience aux consommateurs finaux des services juridiques, et à la bonne administration de la justice. »

restriction de la liberté commerciale des professionnels ne se justifie pas, puisqu'il est possible de protéger correctement les intérêts des consommateurs en rendant obligatoire la souscription d'une assurance responsabilité ou en adoptant des mesures qui garantissent une capitalisation adéquate de l'entité.

b. Restrictions relatives à la propriété et à la gestion

Les règles déontologiques des professions juridiques peuvent interdire la détention ou la gestion de cabinets par des non-juristes. Les restrictions qui portent sur la propriété entravent la réalisation d'économies d'échelle et peuvent empêcher la croissance de l'activité du fait qu'elles risquent de limiter les sources de capital dont peut disposer un cabinet. Si l'on autorise la détention de cabinets par des non-juristes, il devient possible de répartir les risques au sein d'un groupe de personnes plus large, susceptible de mettre en œuvre des projets de nature à entraîner une baisse des prix. D'autre part, le cabinet juridique est alors en mesure de s'attacher les services de non-juristes très compétents parce qu'il peut les rétribuer de la même manière que les juristes. L'interdiction de recruter des non-juristes pour diriger le cabinet risque d'empêcher le recours à des modes de prestation de services plus efficients et plus innovants (Irish Competition Authority 2006, pp. 104-105).

Les membres de la profession juridique défendent les restrictions visant la détention et la gestion en insistant sur l'influence indue que les non-juristes risqueraient d'exercer sur les juristes. Le fait que des non-juristes contrôlent le capital d'un cabinet risque de menacer l'indépendance des juristes, ces derniers pouvant se trouver contraints d'agir dans le sens des intérêts commerciaux des propriétaires plutôt que dans celui des intérêts de leurs clients. Il s'agit là d'un argument difficile à comprendre, les juristes n'étant pas moins motivés par la volonté de réaliser des bénéfices que les membres de professions commerciales. Une interdiction pure et simple semble dont difficile à justifier ; à tout le moins faudrait-il envisager d'autoriser des non-juristes à détenir une participation minoritaire.[69]

3.3.2 Données empiriques

Comme indiqué ci-dessus, il existe très peu de données empiriques à l'appui des arguments pour ou contre les restrictions relatives à la structure d'exercice.

Une étude de Stephen et Gillanders (1993), citée par Stephen et Love (2000, p. 1009) vient relativiser les arguments avancés en faveur de l'interdiction des entités à responsabilité limitée. Les auteurs présentent des données sur l'exercice d'un contrôle mutuel au sein des cabinets juridiques au Royaume-Uni. Ils constatent que ce contrôle a beaucoup plus souvent lieu *ex ante*, au moment où les membres du cabinet sélectionnent des associés potentiels, qu'*ex post*, via un contrôle des professionnels déjà associés. Ce constat remet a priori en cause le principal argument avancé en faveur des restrictions actuelles.

Carr et Matthewson (1990) ont conduit une étude sur les États-Unis et comparé des cabinets selon qu'ils sont situés dans des États où les entités à responsabilité limitée sont autorisées et dans des États où elles ne le sont pas. Ils ont constaté qu'en moyenne les cabinets situés dans des États où ces entités sont autorisées étaient plus grands. Ils interprètent ce phénomène comme une indication possible de gains d'efficience, ce qui plaide en défaveur du maintien des restrictions empêchant la constitution d'entités à responsabilité limitée. Button et Fleming (1992) parviennent à la même conclusion dans une étude sur la

[69] Le schéma « Legal Practice Plus », présenté par la Law Society anglaise pourrait servir de modèle. Il repose sur l'idée « qu'une forme d'association multidisciplinaire limitée […] permettrait d'offrir l'ensemble des services normalement proposés par les *solicitors*, et serait ouverte à des associés ou dirigeants non juristes. Les *solicitors* continueraient de détenir la majorité du capital, en dépit du fait qu'un partenariat regroupant un *solicitor* et un autre professionnel serait autorisé ». La seule réserve serait qu'un « comptable ne pourrait pas auditer les comptes réglementaires ». Voir Lord Chancellor's Department (2002)

libéralisation partielle de la profession d'architecte intervenue aux Royaume-Uni dans les années quatre-vingt. Ils constatent que la suppression de la règle empêchant d'exercer dans le cadre d'entités à responsabilité limitée a entraîné une forte croissance de ce mode d'exercice. Cette réforme a également eu une incidence sur la taille moyenne des cabinets d'architectes parce qu'elle a entraîné une augmentation du nombre de grosses associations d'architectes.

En ce qui concerne les restrictions visant les partenariats multidisciplinaires, l'Indecon (2003, p. 47) évoque une étude conduite par la FTC sur les effets des partenariats multidisciplinaires entre dentistes et hygiénistes dentaires aux États-Unis. Cette étude compare les États où ils sont autorisés avec ceux où il ne le sont pas et constatent que dans les États où ils sont autorisés, le coût par traitement est inférieur de 6 à 30 %. Ce constat porte à croire que les partenariats multidisciplinaires peuvent réellement se traduire par une baisse des prix à l'avantage des consommateurs.

4. Lignes directrices et options de politique publique

Plusieurs lignes directrices pouvant constituer des pistes à suivre par les responsables de l'action publique se dégagent des premières parties du présent document. L'analyse comparative des règles et institutions existant dans les différents pays est utile à la définition de « bonnes pratiques » en matière de réglementation des marchés des services juridiques. Une déréglementation généralisée des professions du droit n'est pas envisageable parce qu'il existe des défaillances du marché (asymétrie d'information, externalités, biens publics) et que des objectifs non économiques de politique publique (la volonté de garantir l'égalité d'accès de tous les citoyens à la justice et des motivations paternalistes, en particulier) sont également poursuivis. En outre, sur des marchés où l'information est asymétrique, la concurrence sur les prix risque d'induire un phénomène de sélection adverse au lieu de favoriser l'efficience tant que des mécanismes permettant de mesurer et de garantir la qualité ne sont pas en place. Les parties précédentes montrent également qu'il n'est pas non plus souhaitable de déchoir les instances professionnelles de leurs pouvoirs réglementaires pour les confier à la puissance publique. L'autoréglementation présente en effet plusieurs avantages, notamment parce que les professions réglementées sont mieux informées et que les coûts liés à l'application des règles sont plus faibles. En somme, les responsables de l'action publique doivent relever les deux défis suivants :

- « mieux réglementer », ce qui ne signifie pas nécessairement « moins réglementer » ; et
- mettre en place un cadre réglementaire de nature à réduire à leur minimum les effets anticoncurrentiels de l'autoréglementation tout en préservant ses avantages.

L'un des enjeux majeurs consiste à éliminer les mesures qui restreignent actuellement la concurrence de manière disproportionnée. Bien que le critère de proportionnalité soit désormais bien établi dans certaines juridictions – à la réserve près que la question de son applicabilité aux mesures adoptées par les pouvoirs publics reste controversée dans la littérature juridique (voir annexe 1) –, il reste difficile à mettre en œuvre dans la pratique. D'un point de vue économique, une analyse coûts-avantages permettrait d'apprécier si une réglementation, y compris une autoréglementation, moins restrictive serait plus efficiente. Apporter des modifications mineures aux structures d'autoréglementation actuelles (par exemple en établissant un comité consultatif au sein des instances d'autoréglementation) ne serait a priori pas suffisant pour définir un cadre institutionnel adapté, garantissant une utilisation optimale des pouvoirs d'autoréglementation. Dans les États membres de l'Union européenne où la réflexion sur la réforme des professions juridiques est la plus avancée (Angleterre et Pays de Galles, Irlande et Pays-Bas) il a été envisagé – voire déjà décidé – d'instituer une nouvelle autorité réglementaire indépendante pour le marché des services juridiques. Cette autorité peut déléguer ses pouvoirs réglementaires aux instances d'autoréglementation dont relèvent actuellement les membres des professions juridiques, à condition d'exercer un contrôle. Cette solution est de nature à maximiser les avantages nets de l'autoréglementation.

4.1 Lignes directrices pour mieux réglementer

Pour élaborer des lignes directrices susceptibles de servir de référence à la définition de politiques visant à améliorer la réglementation des professions juridiques, il convient de tenir compte des éléments suivants :

- d'une part, bien que la réglementation actuelle mérite d'être critiquée parce qu'elle restreint la concurrence de manière injustifiée et disproportionnée, l'intérêt porté à ses effets anticoncurrentiels ne doit pas amener les responsables de l'action publique à oublier que dans certains cas, elle est peut-être insuffisante plutôt qu'excessive ;

- deuxièmement, la réglementation actuelle, y compris l'autoréglementation, est axée sur les professions, non sur les marchés. De ce fait, le débat de politique publique contemporain se heurte à un problème majeur, à savoir que la distinction n'est pas toujours clairement faite entre les marchés des services juridiques qui présentent des asymétries d'information et ceux où la concurrence peut fonctionner relativement bien ;

- troisièmement, le critère largement reconnu, selon lequel les restrictions à la concurrence ne doivent pas être disproportionnées (ce qui sous-entend que ces restrictions ne devraient pas aller au-delà de ce qui est nécessaire pour remédier aux imperfections du marché) pourrait être rendu opérationnel à l'aide d'une analyse coûts-avantages. Malgré les difficultés rencontrées pour mesurer les avantages de la réglementation, y compris de l'autoréglementation, en particulier en manière de qualité des services, une telle analyse – fût-elle partielle en termes qualitatifs – serait certainement très édifiante et propre à améliorer la qualité de la prise de décision politique ;

- enfin, l'évaluation de la réglementation et de l'autoréglementation au regard du critère de l'intérêt général pourrait se faire en tenant également compte d'objectifs non économiques reflétant les diverses orientations suivies dans les différents pays et s'inspirer de méthodes de financement des obligations de services non commerciaux utilisées dans d'autres secteurs libéralisés.

4.1.1 Réglementer en cas de nécessité pour pallier l'asymétrie d'information

Une libéralisation totale du marché comporte un risque pour la qualité des services juridiques. Les asymétries d'information peuvent entraîner une dégradation de la qualité, qui, elle-même suscite des demandes de réglementation, comme le montre l'exemple des pays scandinaves. Ces pays (Finlande/Suède), qui affichent le degré de réglementation le plus faible, ne semblent pas pour autant constituer un modèle idéal. Le problème de l'asymétrie d'information ne peut pas être réglé si les services juridiques peuvent être fournis par des personnes qui ne sont pas titulaires d'un diplôme de droit. En Finlande, jusqu'en 2002, des non-juristes pouvaient représenter un client au tribunal, mais depuis 2002, un diplôme de droit est exigé. Cette réforme réglementaire n'a peut-être toutefois pas suffi à éliminer la sélection adverse. Les membres du Barreau doivent respecter des règles de déontologie qui garantissent leur intégrité, sont soumis à une obligation de formation continue et doivent souscrire une assurance responsabilité professionnelle. En l'absence d'obligations similaires imposées à d'autres prestataires de services, une forte proportion de consommateurs et de tierces parties[70] risque de ne pas être protégés contre le risque de mauvaise qualité des services juridiques. En outre, pour les services ne relevant pas de droits exclusifs, de graves problèmes d'asymétrie d'information et d'aléa moral sont susceptibles de survenir. Le Livre blanc publié par le gouvernement britannique souligne que les préjudices sont fréquents sur les marchés des services non réglementés et fait spécifiquement référence aux activités des gestionnaires de

[70] À noter qu'en Finlande, les prestataires d'assurance frais juridiques ont décidé, aux débuts des années quatre-vingt, de rendre obligatoire le recours à un juriste qualifié (Scassellati-Sforzolini 2006, p. 6)

sinistres (Department for Constitutional Affairs 2005, p. 52). Aux Pays-Bas, les inquiétudes suscitées par le risque de sélection adverse semble justifiées en ce qui concerne le marché du conseil juridique, non réglementé, et les domaines du droit dans lesquels la représentation judiciaire n'est pas obligatoire (droit administratif, droit du travail). Pour pallier ces lacunes réglementaires, il serait envisageable de rendre la représentation par des professionnels qualifiés obligatoire dans les domaines du droit où les citoyens ne disposent pas de compétences suffisantes pour apprécier la qualité.

4.1.2 Réglementer les marchés plutôt que les professions

Le problème de l'asymétrie d'information ne se pose pas pour l'ensemble de la profession juridique, de sorte que la réglementation n'est nécessaire que sur des marchés spécifiques. De ce point de vue, peut-être y a-t-il à la fois trop et trop peu de réglementation. En outre, la réglementation existante n'est pas cohérente. En matière de réglementation de l'entrée et de la conduite sur le marché, les mêmes règles s'appliquent à tous les professionnels (avocats, *solicitors/barristers*), qu'il y ait, ou non, des asymétries d'information sur le marché où ils opèrent. D'un point de vue économique, il conviendrait d'aménager la réglementation, y compris l'autoréglementation, en fonction de l'importance des asymétries d'information et d'éviter d'imposer des règles disproportionnées sur des marchés où le mécanisme de réputation est un gage de qualité suffisant. C'est sur les marchés où les consommateurs, non-spécialistes, n'ont pas les compétences suffisantes et où il n'est pas obligatoire d'être représenté par un juriste qu'il faudrait rechercher des solutions pour pallier les carences réglementaires. Pour remédier à l'excès de réglementation, il faudrait supprimer certaines obligation de représentation où certaines règles qui imposent de s'adresser à des professionnels agréés pour acheter des services sur le marché des services courants, où les consommateurs bien informés sont suffisamment nombreux. Sur ces marchés l'exercice d'une concurrence par des non-juristes entraînerait une baisse des prix et serait favorable aux consommateurs.

4.1.3 Apprécier la proportionnalité de la réglementation, y compris de l'autoréglementation, au moyen d'une analyse coûts-avantages

Le critère de proportionnalité est reconnu dans de nombreux pays mais sa mise en œuvre concrète reste difficile. La question se pose en effet de savoir comment établir qu'une mesure d'autoréglementation va au-delà de ce qui est nécessaire pour atteindre un objectif d'intérêt général, en particulier pour corriger une défaillance de marché. À cet égard, la coexistence de plusieurs restrictions poursuivant le même objectif d'intérêt général pourrait constituer un premier indice. Dans ce cas, il y a en effet tout lieu de penser que la réalisation des objectifs d'intérêt général poursuivis est trop coûteuse au regard des effets cumulés de ces restrictions. L'association de la protection du titre, de tâches réservées et de l'obligation d'être membre d'une instance professionnelle d'autoréglementation exerçant un contrôle total de l'accès à la profession et appliquant des limites quantitatives et d'une réglementation de la conduite sur un segment spécifique du marché des services juridiques constitue un exemple de cette situation. Il est peu vraisemblable qu'il soit nécessaire d'imposer toutes ces restrictions simultanément pour pallier une éventuelle asymétrie d'information.

Outre les effets cumulés des restrictions, il est possible, pour apprécier la proportionnalité de la réglementation, de recourir à une analyse coûts-avantages. Cette analyse se heurte toutefois à un problème récurrent, à savoir que si les coûts sont relativement faciles à évaluer, les avantages (en particulier la qualité des services) sont beaucoup plus difficile à apprécier en termes économiques. Il est toutefois souvent envisageable de procéder à une évaluation approximative en termes qualitatifs (avantages élevés ou faibles), puis de partir du principe, pour guider les politiques publiques, qu'une réglementation ou mesure d'autoréglementation doit être supprimée lorsqu'elle a un coût élevé et des avantages faibles, conservée lorsqu'elle a des coûts faibles et des avantages élevés et aménagée dans tous les autres cas

(Copenhagen Economics 2006). Plusieurs exemples, illustrant successivement les différentes formes de réglementation ou d'autoréglementation évoquées dans la partie 3, sont présentés ci-après.

a. Tâches réservées

Sur certains marchés, il serait possible de supprimer les droits exclusifs et de garantir la qualité par des moyens moins restrictifs. La protection du titre protège, par exemple, le titre des membres d'une profession juridique réglementée, sans pour autant exclure la concurrence d'autres prestataires de services. Ainsi, il faut être membre d'un ordre professionnel pour faire usage du titre d'avocat, mais d'autres prestataires de services juridiques peuvent entrer sur le marché. Chaque catégorie de prestataires utilise un titre différent selon sa qualification et son domaine d'activité. Du fait qu'elle joue le rôle d'un signal de qualité, la protection du titre atténue l'asymétrie d'information. Elle présente également l'avantage de préserver la liberté de choix, qui n'existe plus si la qualité est réglementée. La protection du titre pourrait donc être une solution envisageable pour remplacer, pour les services standardisés ou relativement peu complexes, le régime de droits exclusifs actuellement en vigueur. Elle pourrait être subordonnée à des conditions de qualification garantissant un niveau de connaissances en droit minimum. Une telle solution permettrait d'ouvrir certains marchés des services juridiques aux membres de professions parajuridiques qui ont une formation en droit limitée (par exemple une ou deux années d'étude, dont une période de stage) mais suffisante pour accomplir des tâches standardisées. À titre d'exemple, sur le marché des services liés au transfert de propriété, il serait possible d'autoriser les agents immobiliers à faire concurrence, sous leur titre professionnel, aux notaires latins[71] et aux rédacteurs agréés d'actes de transfert de propriété (voir l'analyse du marché nordique des services liés au transfert de propriété immobilière, encadré 3).

En revanche, il serait envisageable de maintenir les tâches réservées pour les services juridiques complexes. Ainsi, dans le cas de l'obligation de représentation judiciaire, elles ont des effets très positifs, car elles remédient à trois défaillances du marché : elles pallient de graves problèmes d'asymétrie d'information et le risque de sélection adverse qui en découle ; elles empêchent les juges de subir des externalités négatives puisqu'elles leur évitent d'avoir affaire à une défense de mauvaise qualité et contribuent à améliorer l'administration de la justice (fourniture d'un bien public). De surcroît, ces droits exclusifs sont peu coûteux puisque l'exclusion de prestataires non qualifiés n'a pas pour effet de réduire la concurrence positive.

b. Réglementation de la conduite (honoraires, publicité, structure d'exercice)

Aux yeux des autorités de la concurrence, les accords sur les prix constituent la forme d'autoréglementation la plus dommageable pour la concurrence. Ce jugement porte non seulement sur les honoraires imposés et les honoraires minima, mais aussi les barèmes recommandés. Selon la Commission européenne, les honoraires recommandés favorisent la coordination des prix entre prestataires de services et sont préjudiciables aux consommateurs.[72] Il serait intéressant de réexaminer le droit de la concurrence actuel à la lumière d'une analyse coûts-avantages tenant compte des éléments exposés ci-après.

Même si, en théorie, l'existence d'honoraires minima peut être justifiée par la volonté de garantir la qualité, elle constitue a priori une mesure disproportionnée au regard de l'ampleur de ses effets négatifs sur

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71 Il convient de préciser que les pouvoirs publics peuvent décider ne ne pas modifier le monopole des notaires latins pour des raisons économiques qu'ils jugent importantes. Voir 5.1.4 ci-après.

72 Voir par exemple, Décision de la Commission du 24 juin 2004 concernant une décision d'application de l'article 81, assortie d'amendes concernant l'affaire COMP/A.38549 – *Ordre des architectes belge*, JO n° L 004 du 06 janvier 2005 p. 0010 – 0011 *;* Nederlandse Mededingingsautoriteit (autorité néerlandaise de la concurrence), Décision 3309 du 26 avril 2004, *Dutch Psychologists' and Psychotherapists' Associations*, disponible à l'adresse http://www.nmanet.nl/

la concurrence et compte tenu que d'autres mesures pourraient être utilisées pour empêcher une dégradation de la qualité.

En revanche, les honoraires maxima méritent d'être traités moins sévèrement parce qu'ils peuvent constituer une solution au problème de la double marge de monopole (Spengler 1950). Par exemple, en Angleterre et en Irlande, les barèmes d'honoraires maxima peuvent entraîner une baisse des prix pour les consommateurs qui ne sont pas en mesure de s'adresser à des cabinets regroupant *barristers* et *solicitors* et doivent payer chacun de ces professionnels séparément. En outre, ces barèmes peuvent faciliter le traitement du problème de l'aléa moral : du fait qu'un consommateur de services professionnels ne peut pas, faute d'informations suffisantes, évaluer le rapport qualité/prix qu'il recherche, les professionnels peuvent être tentés d'offrir des services d'une qualité excessive à un prix trop élevé, alors que les intérêts du client auraient été correctement servis par un service de qualité moindre, à un prix inférieur. Les honoraires maxima sont donc susceptibles de protéger les clients contre ces prix excessifs.

Enfin, il semble également souhaitable de porter un regard plus conciliant sur les barèmes d'honoraires recommandés. L'analyse économique montre que les autorités de la concurrence assimilent trop facilement honoraires recommandés et honoraires imposés. Certaines données empiriques prouvent que la « tricherie » vis-à-vis des honoraires recommandés peut-être très importante (voir 4.2.2). En outre, les honoraires recommandés peuvent être un moyen de renseigner les consommateurs sur les coûts moyens de certains services et d'éviter d'avoir à rédiger des offres et/ou à négocier des honoraires individuels, en particulier s'ils sont définis par un comité de réglementation multipartite comprenant des consommateurs. Ces barèmes peuvent ainsi réduire les coûts de transaction et tirer les honoraires à la baisse, en particulier sur les marchés où les coûts de recherche sont élevés et où les consommateurs pourraient avoir intérêt à accéder facilement à l'information. Il convient donc de ne pas négliger, dans l'analyse coûts-avantages, les économies de coûts de transaction réalisées et de chercher à savoir si les honoraires recommandés sont ou non appliqués dans la pratique. Dans ce cas, il faudrait que leur montant soit basé, non pas sur le coût des moyens investis (honoraire horaire ou rémunération par prestation), mais sur le résultat effectivement obtenu (divorce à l'amiable ou transfert de propriété immobilière etc.)

Les restrictions visant la publicité sont très coûteuses (exception faite de l'interdiction de la publicité mensongère) parce qu'elles vont généralement de pair avec des prix plus élevés et semblent n'avoir, en contrepartie, que peu d'avantages (voir 4.2). Par conséquent, l'analyse coûts-avantages offre des arguments en faveur d'une élimination de ces restrictions, en particulier de celles qui interdisent totalement la publicité.

La proportionnalité des restrictions visant la structure d'exercice peut être évaluée d'un point de vue économique. Les règles qui interdisent la détention de cabinets par des non-juristes ont un coût faible, du fait que la perte d'indépendance des juristes dans un cabinet dont le capital appartient à un non-juriste n'a vraisemblablement qu'un faible impact. De surcroît, les effets positifs induits par l'entrée sur le marché de cabinets juridiques plus efficients seraient sans doute limités. Par conséquent, la meilleure option, en termes de politique publique, serait peut-être d'aménager la restriction en exigeant que les cabinets soient détenus en majorité par des juristes tout en permettant que les salariés détiennent des parts du capital (Copenhagen Economics 2006). Les exemples ci-dessus montrent que l'analyse coûts-avantages pourrait être un bon moyen pour appliquer le critère de proportionnalité dans la pratique.

4.1.4 Examiner si les restrictions sont nécessaires pour atteindre des objectifs non économiques d'intérêt général

Comme expliqué dans les parties précédentes de ce document, la notion d'intérêt général ne se résume pas à la nécessité de corriger les défaillances du marché. Elle englobe également des objectifs non économiques, comme l'égalité d'accès à la justice et le paternalisme. Les objectifs susceptibles d'entrer

dans le champ de l'intérêt général étant très divers, une autorité de la concurrence n'est peut-être pas toujours l'organe de contrôle le mieux placé pour appliquer ce critère, de sorte que la mise en place d'un organe de réglementation indépendant pourrait être envisagée (voir 5.2.).

La prise en compte d'objectifs non économiques (égalité d'accès à la justice, paternalisme) peut imposer un réexamen des restrictions qui semblent aller au-delà de ce qui est nécessaire pour corriger les imperfections du marché. Ainsi, les reproches faits au système finlandais portaient notamment sur le fait que le recours à un avocat est nécessaire dans les procédures pénales pour protéger les parties « faibles » et garantir une représentation efficace (Sforzolini 2006). La réglementation visant les honoraires pourrait également être réexaminée, en tant qu'instrument de nature à garantir l'égalité d'accès à la justice.

Enfin, l'obligation de se faire assister par un professionnel du droit peut être justifiée par des motivations paternalistes, les pouvoirs publics jugeant bon de contraindre les non-spécialistes, dépourvus de connaissances, à consulter des praticiens du droit, quand bien même ils n'auraient pas demandé, de leur plein gré, une assistance juridique.

4.2 Bien-fondé d'une autorité de régulation indépendante pour les marchés des services juridiques

Deux grands reproches sont faits à l'autoréglementation. Le premier est son manque de légitimité, lié à l'absence de représentation des consommateurs et parties prenantes dans les instances d'autoréglementation. Dans certains pays (en Irlande, en Angleterre et au Pays de Galles par exemple), ce problème se pose avec d'autant plus d'acuité que l'organisation représentative des intérêts professionnels agit également comme organe de réglementation. Souvent, les règles adoptées dans le cadre de l'autoréglementation sont soumises à l'approbation du ministre compétent, mais cette forme de coréglementation ne prévoit généralement pas le pouvoir d'abroger les règles existantes ou d'exiger l'adoption et la mise en œuvre de nouvelles dispositions. Par ailleurs, l'autoréglementation permet à la profession juridique de restreindre la concurrence et porte préjudice aux consommateurs. Les prix élevés des services juridiques peuvent également nuire à la compétitivité et au dynamisme d'une économie basée sur la connaissance. Malgré ces critiques, il n'en reste pas moins que l'apport de professionnels du droit expérimentés et compétents au processus règlementaire est précieux et qu'il convient de le préserver et de conserver les avantages tenant au fait que l'autoréglementation est mieux respectée par les professionnels (coûts d'application moins élevés).

La question se pose de savoir s'il est possible de concevoir un cadre institutionnel juridique propre à résoudre les problèmes liés à la légitimité et à l'existence de prix supérieurs au prix concurrentiel tout en préservant la majorité des avantages de l'autoréglementation. Les propositions de réformes formulées au Royaume-Uni (le projet de loi sur les services juridiques élaboré sur la base du Rapport Clementi[73]) et les recommandations de l'autorité irlandaise de la concurrence (2006) ont peut-être ce potentiel.

Schématiquement, ce nouveau cadre réglementaire présente les caractéristiques suivantes :

- une nouvelle législation institue un nouvel organe indépendant, chargé de la réglementation de tous les marchés des services juridiques. Ce nouvel organe peut avoir diverses dénominations : *Legal Services Board* (Angleterre/Pays de Galles), *Legal Services Commission* (Irlande) or

[73] Report of the Review of the Regulatory Framework for Legal Services in England and Wales, 2004, disponible à l'adresse : www.legal-services-review-org.uk/content/report.

Authority for the *Legal Services Markets* (comme l'envisagent les Pays-Bas[74]). Dans la suite du texte, il sera dénommé « l'Autorité » ;

- l'Autorité ne peut être ni dirigée par un membre d'une profession juridique en exercice, ni composée en majorité de tels membres ;

- l'Autorité peut adopter de nouvelles règles en matière de fourniture de services juridiques (critères de qualité minimum par exemple) ;

- l'Autorité peut déléguer ses fonctions réglementaires à des organes d'autoréglementation existants. Les nouveaux organes de réglementation créés en cas d'entrée sur le marché de nouvelles professions peuvent également être investis de ces prérogatives. Ces organes d'autoréglementation sont dénommés « Front Line Regulators » (FLR).

- les FLR ne sont pas autorisés à exercer des fonctions de représentation.

- l'Autorité est habilitée à définir des directives réglementaires à l'intention des FLR, à ordonner à un FLR une intervention réglementaire spécifique, à modifier les règles adoptées par les FLR ou à y opposer un veto ou à déchoir un FLR de l'autorisation de réglementer dans un domaine particulier.

Les avantages de ce cadre institutionnel semblent considérables : la réglementation courante reste du ressort des FLR, par exemple des instances d'autoréglementation existantes, qui peuvent exploiter leur avantage d'information pour définir des règles propres à garantir une qualité optimale des services juridiques. De plus, le risque de pratiques anticoncurrentielles est réduit, puisque les FLR restent en permanence soumis au contrôle de l'Autorité, qui a le pouvoir de s'opposer à l'adoption de règles, de demander l'adoption de nouvelles règles, voire de déchoir une instance d'autoréglementation de l'autorisation de réglementer dans un secteur particulier. En outre, la création d'une autorité de contrôle indépendante, transparente et comptable de ses actes, composée en majorité de non-juristes est un gage de légitimité. Un tel dispositif maximise les avantages nets de l'autoréglementation.

Ce modèle a en outre un atout majeur : il permet une autoréglementation concurrentielle, en d'autres termes une concurrence entre différents groupes de professionnels du droit qualifiés, parmi lesquels chacun définit ses propres règles de conduite.[75] L'autoréglementation ne pose un problème que lorsque les pouvoirs publics délèguent leur pouvoir de restreindre l'offre aux organes professionnels. C'est ce qui fait la différence capitale entre les formes d'autoréglementation efficientes et celles qui ne le sont pas. C'est précisément le contrôle monopolistique de l'offre qui est susceptible de permettre aux professionnels libéraux de pratiquer des prix supérieurs au niveau concurrentiel. En toute logique, pour résoudre ce problème il faudrait éliminer les monopoles des instances d'autoréglementation et les contraindre à être en concurrence les unes avec les autres (Ogus 1995, Van den Bergh 2006).

74 Il convient de préciser que la proposition d'établir une telle Autorité pour les marchés des services juridiques n'a pas été rejetée par le Committee van Wijmen, chargé d'émettre un avis sur la réforme des professions juridiques à l'intention du gouvernement néerlandais.

75 La délégation des tâches telle qu'elle est actuellement opérée par les pouvoirs publics confère aux organes d'autoréglementation un pouvoir de monopole en ce qui concerne la restriction de l'offre de services juridiques. La délégation des pouvoirs réglementaires aux organes professionnels peut s'analyser sous l'angle de la relation d'agence. L'autoréglementation dans le secteur des professions libérales a été qualifiée d'institution fiduciaire : c'est un contrat social entre la société et la profession, qui atténue le problème de l'aléa moral lié à l'asymétrie d'information (Dingwall et Fenn, 1987).

La concurrence entre instances d'autoréglementation (autoréglementation concurrentielle) n'est, en substance, pas différente d'une concurrence entre régimes nationaux de réglementation publique. Bien que cette concurrence réglementaire puisse avoir de nombreux effets positifs en ce qu'elle peut déboucher sur des règles juridiques plus efficientes et plus innovantes, la question de savoir si elle ne risque pas de conduire à une « course vers le bas » plutôt qu'à une « course vers le haut » est très controversée (voir, par exemple, Van den Bergh 2000, Kerber 2000). Toutefois, l'Autorité réglementaire qu'il est proposé de créer peut, en subordonnant la délégation de ses pouvoirs réglementaires au respect de certaines normes de qualité minimales, contrer le risque potentiel de dégradation de la qualité sur les marchés des services juridiques. Dans le cadre des formes classiques de coréglementation, une instance centrale de réglementation (généralement le ministère compétent) approuve *ex post* les règles, pratiques et procédures des organes professionnels. Dans le cadre de l'autoréglementation concurrentielle, les pouvoirs publics ont pour rôle d'organiser la concurrence entre les différentes instances professionnelles d'autoréglementation et, si nécessaire, d'encadrer cette concurrence par un ensemble de normes de qualité minimales (contrôle *ex ante*). Le modèle reposant sur la mise en concurrence de FLR, soumis au contrôle d'une Autorité de réglementation indépendante, allie le concept traditionnel de coréglementation et le concept moderne d'autoréglementation concurrentielle.

Il conviendrait que les responsables de l'action publique mènent une analyse approfondie pour déterminer si l'autoréglementation concurrentielle pourrait constituer un outil intéressant pour éliminer les restrictions préjudiciables à la concurrence.

- Les FLR existants pourraient adopter d'autres règles sur les honoraires : certains s'en tiendront peut-être à la méthode traditionnelle de calcul des honoraires, à savoir le calcul au temps passé, tandis que d'autres opteront pour des honoraires forfaitaires (en particulier pour les prestations de services standardisées) et différents types de conventions d'honoraires au résultat (absence d'honoraires en cas d'échec, pacte *quota litis*, supplément d'honoraires si le client obtient gain de cause).

- La concurrence réglementaire apparaîtra peut-être également pour d'autres aspects de l'autoréglementation, comme les règles relatives à la structure d'exercice (sociétés à responsabilité limitée, détention ou gestion de cabinets juridiques par des non-juristes) et partenariats entre juristes ou multidisciplinaires.

- En outre, le cadre réglementaire proposé permet la délégation de pouvoirs de réglementation à de nouveaux arrivants sur le marché des services juridiques, qui ont la possibilité d'instituer leurs propres organes d'autoréglementation.

- Les nouveaux FLR adopteront peut-être des méthodes de travail innovantes, ce qui permettra un renforcement de la concurrence : nouveaux modes de calcul des honoraires, nouvelles formes de partenariats multidisciplinaires, gestion des cabinets juridiques par des non-juristes par exemple.

L'autoréglementation concurrentielle aura de plus en plus d'effets positifs, à mesure que des organes d'autoréglementation en concurrence les uns avec les autres seront présents sur les différents segments du marché des services juridiques. Ainsi, plusieurs FLR pourraient se faire concurrence sur le marché du conseil juridique dans différents domaines du droit, sur celui de la représentation judiciaire (qui se subdivise lui aussi selon les différents domaines du droit) et sur celui des services liés au transfert de propriété immobilière.

Dans le passé, on a déjà encouragé différentes formes de concurrence interprofessionnelle en éliminant les monopoles existants : la suppression du droit exclusif de plaider devant les juridictions supérieures dont jouissaient les *barristers (Courts and Legal Services Act 1990)* et du monopole des

solicitors en matière de transactions immobilières (voir 4.1) sont des exemples de ces initiatives. Dans les deux cas, l'entrée de nouveaux concurrents (*solicitors* dans le premier cas et rédacteurs agréés d'actes de transfert de propriété dans le second) est restée limitée. Toutefois, les concurrents potentiels sont nombreux : juristes d'affaires, personnel juridique des compagnies d'assurance, juristes de syndicats, et ingénieurs-brevets peuvent tous se voir octroyer le droit d'agir en matière judiciaire à condition que l'instance d'autoréglementation dont chacun d'entre eux relève soit « accréditée » par l'Autorité de réglementation. Une scission des organes d'autoréglementation actuels, par exemple des « ordres des avocats », visant à stimuler la concurrence au sein d'une même profession, pourrait entraîner une augmentation encore plus marquée du nombre de FLR. Il faut en effet être conscient que les avocats constituent un corps professionnel très diversifié, au sein duquel des entreprises unipersonnelles proposant des services dans de nombreux secteurs du droit coexistent avec des cabinets de taille moyenne et de grands cabinets internationaux spécialisés dans des disciplines spécifiques. Rien ne prouve qu'il soit souhaitable qu'un corps professionnel aussi grand et aussi diversifié soit réglementé par une seule et même instance. Autoriser à la fois la concurrence interprofessionnelle (entre membres de différentes professions juridiques et parajuridiques) et intraprofessionnelle (au sein d'une même profession, comme celle d'avocat), aboutirait à l'instauration d'un grand nombre de FLR, parmi lesquels chacun adopterait des règles de conduite spécifiques.

Une dernière remarque s'impose : l'instauration d'une nouvelle Autorité suppose de repenser le rôle que jouent actuellement les autorités de la concurrence en matière de surveillance des règles anticoncurrentielles édictées par les instances d'autoréglementation. L'application intégrale du critère de l'intérêt général suppose non seulement d'effectuer une analyse des effets anticoncurrentiels de la réglementation, mais aussi de tenir compte des défaillances du marché et de considérations de justice redistributive (notamment d'accessibilité des services juridiques aux publics défavorisés ou géographiquement isolés). Les autorités de la concurrence ayant une solide expérience de l'application du premier aspect du critère de l'intérêt général, il serait peut-être peu judicieux de renoncer à cet avantage comparatif en instaurant une Autorité réglementaire qui serait seule à exercer un contrôle. Il n'en reste pas moins qu'évaluer si la réglementation est nécessaire du point de vue de l'intérêt général au sens large suppose de tenir compte de considérations auxquelles les autorités de la concurrence n'ont en principe pas à s'intéresser dans le cadre de leur activité de contrôle habituelle.[76] En outre, l'exercice d'une surveillance conjointe par les autorités de la concurrence et la nouvelle Autorité de réglementation va entraîner des coûts administratifs supplémentaires ; il serait donc bon de s'assurer que l'avantage comparatif dont disposent les autorités de la concurrence en matière de contrôle des accords n'est pas en deçà des coûts supplémentaires entraînés par leur coordination avec la nouvelle Autorité.

5. Conclusions

Le présent document a décrit les principaux arguments économiques en faveur en la réglementation, y compris de l'autoréglementation, des professions juridiques en les confrontant à ceux qui dénoncent son caractère anticoncurrentiel. D'un côté, la recherche montre que la libéralisation des marchés des services juridiques peut ne pas se révéler efficiente. Trois défaillances du marché sont en effet susceptibles d'empêcher la pleine satisfaction des aspirations des consommateurs : l'asymétrie d'information, les externalités négatives et l'insuffisance de l'offre de biens publics. Une réglementation palliant correctement ces problèmes peut se justifier du point de vue de l'intérêt général. En outre, des considérations autres que les défaillances du marché peuvent devoir être prises en compte pour déterminer

[76] Dans les États membres de l'Union européenne, ceci est démontré avec force par l'arrêt *Wouters*, dont il ressort que le critère d'efficience économique n'est pas appliqué de manière radicale (Article 81 (3) du Traité CE) lorsque les règles en cause échappent à l'interdiction des ententes (Article 81 (1) du Traité CE) parce qu'elles sont jugées nécessaires au bon exercice de la profession telle qu'organisée dans l'État membre concerné (Van den Bergh 2006, p. 167).

si une réglementation est justifiée au nom de l'intérêt général. Ainsi, l'exigence d'égalité d'accès à la justice répond non seulement à des préoccupations liées à l'insuffisance de l'offre de biens publics, mais aussi à la volonté de protéger les publics défavorisés sur le plan économique. Enfin, des motivations paternalistes peuvent conduire à imposer aux non-spécialistes, peu informés, de se faire conseiller ou représenter par un juriste dans certains cas. D'un autre côté, les règles relatives à l'entrée sur le marché des services juridiques, à la conduite sur ce marché et à la structure d'exercice peuvent restreindre la concurrence de manière inutile et disproportionnée.

Le risque que la réglementation ne restreigne la concurrence de manière disproportionnée est particulièrement important lorsque les organisations professionnelles jouissent d'un statut de droit public, qui leur permet de mettre en place des règles limitant l'accès au marché et d'interdire des pratiques concurrentielles qui seraient bénéfiques. Force est de reconnaître que, malgré les limites de l'autoréglementation (effets anticoncurrentiels et absence d'intervention du consommateur dans le processus de décision), les professionnels disposent d'un avantage d'information par rapport aux pouvoirs publics et sont peut-être mieux placés pour adopter des mesures visant à garantir la qualité. De surcroît, l'autoréglementation est peut-être plus efficiente, plus souple et mieux respectée, ce qui se traduit par des coûts d'application moindres. Le principal enjeu pour les responsables de l'action publique est de créer un cadre institutionnel permettant de tirer parti des avantages de l'autoréglementation, tout en réduisant ses effets négatifs à leur minimum. La délégation de pouvoirs réglementaires aux instances d'autoréglementation devrait permettre à ces dernières de remédier aux imperfections actuelles du marché, sans pour autant leur donner la possibilité de réduire le bien-être économique en faussant la concurrence de manière disproportionnée. Il conviendrait également de trouver des solutions à leur manque de légitimité, dû à la non-représentation des consommateurs.

L'analyse économique aide à comprendre les raisons qui justifient la réglementation publique et l'autoréglementation et à repérer les restrictions injustifiées ou disproportionnées au regard de l'objectif de politique publique poursuivi. Chaque type de restriction (droits exclusifs et réglementation de l'entrée, réglementation des honoraires et de la publicité, restrictions limitant le libre choix de la structure d'exercice et les partenariats multidisciplinaires) est susceptible d'avoir à la fois des effets positifs et des effets négatifs sur le bien-être social. Les arguments théoriques n'allant pas tous dans le même sens, l'ampleur des coûts et des avantages de la réglementation et de l'autoréglementation est, *in fine*, une question empirique. Malgré ses limites, liées en particulier au fait que la qualité est difficile à mesurer, l'analyse coûts-avantages est de nature à améliorer considérablement la qualité de la prise de décisions de politique publique. Les réformes qui ont déjà été engagées dans certains pays de l'OCDE apportent également un éclairage intéressant sur les résultats attendus de la déréglementation.

Au niveau empirique, les études sur les effets concrets de la réglementation et de l'autoréglementation des professions juridiques aboutissent à des résultats contrastés. Si de nombreux éléments corroborent l'idée selon laquelle les restrictions limitant la publicité entraînent une hausse des prix, les données relatives à leur impact sur la qualité ne permettent pas de tirer des conclusions tranchées. Les résultats des travaux empiriques sur les restrictions qualitatives à l'entrée sont encore plus équivoques : bien que ces mesures ne semblent pas freiner la hausse du nombre de professionnels (en l'absence de restrictions géographiques), il est difficile de prouver qu'elles ont un effet positif sur la qualité. Dans une certaine mesure, les études empiriques aboutissent également à des résultats surprenants en ce qui concerne les honoraires. Contrairement à ce que pensent le plus souvent les autorités de la concurrence, les honoraires recommandés peuvent donner lieu à un comportement de « tricherie » et la libéralisation des honoraires n'a pas systématiquement pour corollaire une concurrence stable sur les prix, comme en témoignent les travaux empiriques consacrés à la libéralisation du monopole des *solicitors* en matière de services liés aux transactions immobilières en Angleterre et au Pays de Galles. En outre, les études sur la libéralisation de la profession de notaire au Pays-Bas montrent que les prix ont diminué sur certains segments du marché, mais augmenté sur d'autres (encadre 4). Deux études internationales récentes, réalisées à la demande de la

Commission européenne, semblent établir de manière plus convaincante que l'autoréglementation induit des prix supérieurs au niveau concurrentiel et est préjudiciable aux consommateurs (encadrés 1 et 5).[77]

En réalisant une analyse comparative juridique et économique, il est possible de dégager un certain nombre de « bonnes pratiques » et de formuler des lignes directrices pour guider la définition des politiques publiques :

- D'une part, il ne faut pas que l'intérêt que les responsables de l'action publique portent aux effets négatifs des restrictions à la concurrence les empêche de tenir compte du fait que plus de réglementation est peut-être nécessaire pour garantir la qualité sur les segments du marché des services juridiques qui pâtissent de défaillances du marché.

- Deuxièmement, il serait bon qu'au lieu de viser des professions, la réglementation vise les marchés où les asymétries d'information sont les plus marquées.

- Troisièmement, l'analyse coûts-avantages peut contribuer à apprécier si les restrictions à la concurrence ne vont pas au-delà de ce qui serait nécessaire pour remédier aux défaillances du marché. Parmi les différentes options qui se dégagent d'une telle analyse, les stratégies réglementaires suivantes semblent mériter une attention particulière :

  - remplacer les droits exclusifs par une protection du titre, afin de permettre à des non-juristes d'offrir des prestations de services simples ;

  - éliminer les honoraires imposés et les règles interdisant totalement la publicité, ces mesures étant vraisemblablement disproportionnées, en particulier si elles s'ajoutent à d'autres restrictions ;

  - n'interdire les honoraires recommandés que si leurs effets anticoncurrentiels peuvent être prouvés et tenir compte de l'argument selon lequel ils permettent des gains d'efficience (réduction des coûts de transaction) ; et

  - aménager les règles interdisant l'adoption d'autres structures d'exercice, en permettant au moins à des non-juristes d'être minoritaires dans le capital de cabinets juridiques ou de diriger un cabinet.

- Quatrièmement il est possible que les restrictions à la concurrence soient également justifiées par des objectifs non économiques.

- Cinquièmement, le débat sur les avantages et inconvénients de l'autoréglementation est à l'origine de propositions qui prévoient l'instauration d'une nouvelle Autorité de réglementation pour le secteur des professions juridiques, indépendante et comptable de ses actes et composée en majorité de non-juristes. Une telle réforme permettrait peut-être de maximiser les avantages nets de l'autoréglementation. Elle préserverait l'avantage d'information des professions juridiques,

[77] Du fait que les arguments théoriques ne vont pas tous dans le même sens et que parfois, les études empiriques disponibles aboutissent à des résultats équivoques ou sont critiquées pour leur manque de rigueur scientifique, il est indispensable d'effectuer d'autres travaux empiriques pour éclairer les politiques publiques en ce qui concerne le marché des services juridiques. Il faudrait axer ces travaux sur les effets concrets de certaines restrictions sur des segments spécifiques du marché. Il serait bon que d'autres approches viennent compléter les études comparatives qui cherchent à établir une corrélation entre le degré de réglementation et la situation du marché.

mais éliminerait les restrictions à la concurrence disproportionnées, du fait que la nouvelle Autorité réglementaire aurait d'une part un droit de veto et pourrait d'autre part contraindre les instances d'autoréglementation à adopter certaines règles pour améliorer la situation du marché.

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Annexe 1. Conformité au droit communautaire de l'autoréglementation et de la réglementation publique dans le secteur des professions juridiques

Cet encadré analyse la question de la conformité au droit communautaire de la réglementation des professions juridiques en vigueur dans les États membres de l'Union européenne. L'Article 81(1) du Traité CE interdit « tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun ». Les règles d'autoréglementation qu'adoptent les organisations professionnelles du secteur juridique et qui restreignent la publicité, le libre choix de la structure d'exercice et la concurrence sur les prix sont susceptibles de tomber sous le coup de cette interdiction. Les États membres peuvent être tenus conjointement responsables, avec les (organisations dont relèvent les) professions juridiques, pour infraction au droit européen de la concurrence s'ils adoptent des règles qui imposent, renforcent ou facilitent un comportement anticoncurrentiel. En outre, les États membres peuvent également tomber sous le coup d'une violation des règles du Traité sur le droit d'établissement et la liberté de prestation de services s'ils adoptent des dispositions restrictives de la concurrence sur les marchés des services juridiques.

1. Infractions à l'interdiction des ententes prévue par l'Article 81 du Traité CE

La Commission européenne a, dans plusieurs décisions, confirmé que les règles adoptées par les organisations professionnelles devaient être considérées comme des décisions d'associations d'entreprises pouvant être contraires à l'interdiction prévue à l'Article 81 du Traité. Selon une jurisprudence établie, le concept d'entreprise recouvre toute entité exerçant une activité économique, indépendamment de son statut juridique et de son mode de financement.[1] L'activité d'avocat consiste à offrir des services juridiques contre rémunération. Dans la mesure où un avocat n'est pas salarié et assume lui-même les risques financiers liés à ses activités, il est considéré comme une entreprise aux fins d'application de l'Article 81 du Traité CE, sans que la complexité de cette activité ou son caractère réglementé y change quoi que ce soit. Les avocats devant être qualifiés d'entreprises, les organisations professionnelles qui représentent les membres indépendants de la profession juridique doivent, tout à fait logiquement, être considérées comme des associations d'entreprises. Le fait que ces organisations jouissent d'un statut de droit public ne change rien à cette situation, dès lors qu'elles règlementent le comportement économique de leurs membres et n'exercent pas de prérogatives typiques de puissance publique ou ne remplissent pas une mission sociale fondée sur le principe de la solidarité.[2] Toutefois, une organisation professionnelle investie du pouvoir de réglementer le comportement professionnel n'est pas considérée comme une association d'entreprises si elle est composée en majorité de représentants d'autorités publiques et est tenue de respecter des critères d'intérêt général prédéfinis. Si les autorités publiques définissent les règles auxquelles les professions doivent se conformer et conservent leur pouvoir de décision en dernier ressort, les organisations professionnelles peuvent échapper à la qualification d'associations d'entreprises et à l'application de l'Article 81 du Traité.[3] Ce raisonnement s'applique également aux notaires, à une réserve près : l'exercice d'une prérogative publique ne doit pas être considéré comme une activité économique. Il s'ensuit qu'une analyse juridique supplémentaire est nécessaire pour évaluer si et dans quelle mesure les services

1 Affaire C-41/90, *Klaus Höfner et Fritz Elser contre Macrotron GmbH*, Recueil de jurisprudence 1991 page I-01979 et affaires jointes C-159 et 160/91, *Christian Poucet contre Assurances générales de France et Caisse mutuelle régionale du Languedoc-Roussillon*, Recueil de jurisprudence 1993 page I-00637.

2 Affaires jointes C-159 et 160/91, *Christian Poucet contre Assurances générales de France et Caisse mutuelle régionale du Languedoc-Roussillon*, Recueil de jurisprudence 1993 page I-00637 ; affaires jointes C-264/01, C-306/01, C-354/01 et C-355/01, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft et See-Krankenkasse contre Ichthyol-Gesellschaft Cordes, Hermani & Co. (C-264/01), Mundipharma GmbH (C-306/01), Gödecke GmbH (C-354/01) et Intersan, Institut für pharmazeutische und klinische Forschung GmbH (C-355/01*, Recueil de jurisprudence 2004 page I-02493.

3 Affaire C-309/99, *J. C. J. Wouters, J. W. Savelbergh et Price Waterhouse Belastingadviseurs BV contre Algemene Raad van de Nederlandse Orde van Advocaten, en présence de Raad van de Balies van de Europese Gemeenschap*, Recueil de jurisprudence 2002 page I-01577, 58-64 et 68-69.

juridiques fournis par les notaires latins peuvent être considérés comme s'inscrivant dans le cadre de l'exercice d'une prérogative publique. Les règles de la concurrence ne s'appliquent que si les notaires exercent une activité économique.

Comme évoqué dans le corps du document, la Cour de justice des Communautés européennes (CJCE) a formulé une exception à l'applicabilité générale du droit communautaire de la concurrence au secteur des professions juridiques en considérant qu'une réglementation professionnelle nécessaire au bon exercice de la profession n'est pas contraire à l'Article 81 du Traité CE, malgré les effets restrictifs de la concurrence qui lui sont inhérents.[4] En dehors de cette exception, l'Article 81 s'applique pleinement aux professions juridiques. L'exception *Wouters* s'applique aux réglementations objectivement nécessaires pour garantir le bon exercice de la profession, telle qu'elle est organisée par l'État membre concerné. En font apparemment partie les mesures interdisant les associations multidisciplinaires entre avocats et comptables (comme le montre les éléments de l'affaire *Wouters*), mais aussi d'autres restrictions, par exemple celles portant sur la propriété s'il peut être raisonnablement affirmé qu'elles sont nécessaires au bon exercice de la profession juridique, compte tenu des spécificités des marchés des services juridiques des États membres de l'Union européenne.

2. Responsabilité des États membres qui facilitent les ententes et argument de « l'obligation imposée par l'État »

Lorsqu'un État membre approuve des règles professionnelles qui entravent la concurrence, la question se pose de savoir qui, de l'État ou des organisations professionnelles, assumera *in fine* la responsabilité du non respect de l'Article 81. À cet égard, deux scénarios sont possibles : i) les organisations professionnelles et l'État voient leur responsabilité engagée conjointement ; ou ii) l'État assume seul la responsabilité du manquement aux règles du droit communautaire et les organisations professionnelles ont la possibilité d'invoquer l'argument de « l'obligation imposée par l'État ». Les États membres sont susceptibles d'enfreindre le Traité CE en aidant des entreprises (associations d'entreprises) à conclure des accords anticoncurrentiels et en facilitant leur application. Autoriser un tel comportement de la part d'un État compromettrait la bonne application du droit de la concurrence (doctrine de « l'effet utile »). Selon une jurisprudence établie, un État membre qui impose ou favorise la conclusion d'ententes contraires aux dispositions relatives à la concurrence contenues dans le Traité ou renforce les effets de telles ententes ou qui retire à sa propre réglementation son caractère étatique en déléguant à des opérateurs privés la responsabilité de prendre des décisions d'intervention en matière économique enfreint les Articles 3 (1)(g), 10 (2) et 81 (1) du Traité.[5] L'argument de « l'obligation imposée par l'État » est recevable lorsque l'État oblige les entreprises, en exerçant ses prérogatives de puissance publique, à adopter un comportement anticoncurrentiel. Les entreprises ne peuvent pas être considérées comme responsables d'une infraction à l'Article 81 si ce comportement anticoncurrentiel leur est imposé par une réglementation de l'État. Toutefois, même dans ce cas, si elles demeurent au moins partiellement capables de restreindre la concurrence de manière autonome, elles peuvent être tenues responsables conjointement avec l'État.[6]

Les États membres ne violent pas les règles du Traité s'ils exercent un contrôle effectif des mesures d'autoréglementation. Ainsi, il ressort de l'arrêt *Arduino* qu'un État membre ne viole pas les Articles 3 (1)(g), 10 (2) et 81 (1) du Traité en adoptant une mesure législative ou réglementaire qui approuve, sur la base d'un projet établi par

4 Jugement rendu dans l'affaire *Wouters* ; voir affaire C-309/99, *J. C. J. Wouters, J. W. Savelbergh et Price Waterhouse Belastingadviseurs BV contre Algemene Raad van de Nederlandse Orde van Advocaten, en présence de Raad van de Balies van de Europese Gemeenschap*, Recueil de jurisprudence 2002 page I-01577.

5 Affaire 13/77, *SA G.B.-INNO-B.M. contre Association des détaillants en tabac (ATAB)*, Recueil de jurisprudence 1977 page 02115 ; affaire 267/86, *Pascal Van Eycke contre Société anonyme ASPA*, Recueil de jurisprudence 1988 page 04769 *;* affaire C-2/91, *Procédure pénale contre Wolf W. Meng*, Recueil de jurisprudence 1993 page I-05751 , affaire C-245/91, *Procédure pénale contre Ohra Schadeverzekeringen NV.*, Recueil de jurisprudence 1993 page I-05851 ; affaire T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali contre Commission des Communautés européennes*, Recueil de jurisprudence 2000 page II-01807

6 Rapport sur la concurrence dans le secteur des professions libérales, p. 23

une organisation professionnelle de membres du Barreau, un tarif fixant des limites minimales et maximales aux honoraires des membres de la profession..[7] Selon la Commission européenne, « les mesures prises par un État qui délègue ses compétences en matière de réglementation sans définir clairement les objectifs d'intérêt général de la réglementation ou qui abandonne son pouvoir de décision en dernier ressort ou son contrôle de la mise en œuvre » peuvent être contestées. Peuvent notamment être contestées les « approbations automatiques » ou les pratiques qui font qu'un État n'est habilité qu'à rejeter ou approuver les propositions des organisations professionnelles, sans pouvoir modifier leur contenu ni y substituer ses propres décisions. La Commission ajoute qu'un test de proportionnalité semble approprié pour déterminer dans quelle mesure une réglementation professionnelle anticoncurrentielle sert réellement l'intérêt général.[8] Les commentateurs du droit ont remis en cause cette interprétation et souligné qu'il n'était fait aucune référence, dans la jurisprudence de la Cour, à la nécessité que l'État poursuive des objectifs d'intérêt général légitimes, ni à la proportionnalité de ces mesures (voir, pour comparaison, les contributions de Siragusa 2006 et de Gilliams 2006).

3. Violations du droit d'établissement et du principe de libre circulation des services.

Les mesures de nature législative ou réglementaire adoptées par l'État n'entrent pas dans le champ d'application de l'Article 81 du Traité CE, ce dernier ne visant que la conduite des entreprises. Toutefois, les États membres qui adoptent ces mesures ne sont pas totalement exonérés de toute responsabilité, les lois et règlements pouvant être remis en cause dès lors qu'ils restreignent la liberté d'établissement et/ou la liberté de prestation de services. La liberté d'établissement est garantie par l'Article 43 du Traité CE et toute règle limitant l'accès à la profession juridique est contraire au Traité si elle introduit une discrimination à raison de la nationalité, soit directement par le biais de barrières à l'entrée fondées sur la nationalité, soit indirectement à travers des mesures qui rendent l'exercice d'une profession réglementée plus difficile pour les ressortissants d'autres États membres. Ces mesures indirectes peuvent être une interdiction d'ouvrir un deuxième cabinet[9] ou l'obligation d'adhérer à un ordre professionnel.[10] Néanmoins, les mesures nationales de nature législative ou réglementaire peuvent être justifiées si elles satisfont quatre conditions : i) garantir l'égalité de traitement des professionnels étrangers et des ressortissants nationaux ; ii) être dictées par des raisons d'intérêt général (protection des consommateurs par exemple) ; iii) être nécessaires pour atteindre l'objectif d'intérêt général poursuivi ; et iv) être proportionnées à cet objectif.[11] Dans la récente affaire *Cipolla*, la CJCE a estimé qu'un barème fixant une limite minimale pour les honoraires des avocats qui effectuent des prestations de représentation judiciaire restreignait la liberté de prestation de services (Article 49 du Traité CE). Toutefois, une telle restriction peut être justifiée dès lors qu'elle répond à des raisons impérieuses d'intérêt général, telles que la protection des bénéficiaires des services juridiques fournis par les professionnels concernés ou la préservation de la bonne administration de la justice. Il incombe au juge national de décider si la fixation d'honoraires minima est nécessaire à la protection de l'intérêt général et si elle ne va pas au-delà de la mesure nécessaire pour atteindre cet objectif. Pour apprécier le critère de proportionnalité, il conviendra que le juge national tienne compte du fait que la fixation d'honoraires minima peut empêcher que la concurrence sur les prix, sur un marché caractérisé par un nombre extrêmement élevé d'avocats, ne se solde par une dégradation de la qualité. Toutefois, le juge national devra également examiner si les règles de qualification, de déontologie et de responsabilité sont en elles-mêmes suffisantes pour atteindre les objectifs de protection du consommateur et de bonne administration de la justice.[12]

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7 Affaire C-35/99, *Procédure pénale contre Manuele Arduino, en présence de Diego Dessi, Giovanni Bertolotto et Compagnia Assicuratrice RAS SpA.,* Recueil de jurisprudence 2002 page I-01529.

8 Rapport sur la concurrence dans le secteur des professions libérales, p. 21-22, par. 86-88.

9 Affaire 107/83, *Ordre des avocats au barreau de Paris contre Onno Klopp*, Recueil de jurisprudence 1984 page 02971.

10 Affaire C-55/94, *Reinhard Gebhard contre Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Recueil de jurisprudence 1995 page I-04165.

11 Affaire C-55/94, *Reinhard Gebhard contre Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Recueil de jurisprudence 1995 page I-04165, par. 37.

12 Affaires jointes C-94/04 et C-202/04, *Federico Cipolla contre Rosaria Portolese, épouse Fazari et Roberto Meloni*, jugement du 5 décembre 2006, non encore publié, par. 55-70.

Diverses mesures législatives garantissent la libre circulation des avocats au sein de l'Union européenne. Depuis les années soixante-dix, les avocats étrangers peuvent proposer leurs services (conseil juridique et représentation en justice) en utilisant leur titre d'origine. Si la représentation en justice est obligatoire, ils doivent agir de concert avec des avocats nationaux habilités à fournir le service concerné.[13] En ce qui concerne la liberté d'établissement, la directive applicable autorise les avocats à exercer à l'étranger de manière permanente en faisant usage du titre professionnel de leur État membre d'origine (par exemple « avvocato » pour un ressortissant italien). Ces avocats sont autorisés à agir seuls lorsqu'ils offrent des prestations de conseil juridique mais peuvent être obligés d'agir de concert avec des avocats du pays d'accueil pour représenter des clients en justice. Ils ne peuvent faire usage du titre du pays d'accueil qu'après s'être soumis à une épreuve d'aptitude, qui peut être un examen ou la présentation d'une preuve d'exercice effectif et régulier du droit dans l'État membre d'accueil pendant trois ans au minimum.[14]

L'adoption de la récente Directive relative aux services dans le marché intérieur[15] s'est heurtée à une forte opposition de la part de certains États membres, de sorte que le principe de libre circulation des services a été assorti d'une longue liste de dérogations et exceptions. Cela vaut également pour les professions juridiques. Ainsi, la Directive ne s'applique pas aux services des notaires, qui sont nommés par les pouvoirs publics [Article 2 (2)(l)], ni aux actes pour lesquels la loi requiert l'intervention d'un notaire [Article 17 (12)]. En ce qui concerne les règles de déontologie professionnelle (y compris pour les professions juridiques), la Directive impose aux États membres de supprimer toutes les interdictions totales visant les communications commerciales, tout en prévoyant que des restrictions restent possibles quant à la forme et au contenu des communications, dès lors que ces restrictions portent sur l'indépendance, l'intégrité et la dignité de la profession et sur le secret professionnel, et à condition qu'elles soient non discriminatoires, justifiées par une raison impérieuse d'intérêt général et proportionnées. S'inscrivant dans le droit fil de l'arrêt *Wouters*, l'Article 25 (1)(a) de la Directive relative aux services dispose que les États membres peuvent continuer d'appliquer aux professions réglementées des mesures qui limitent les activités multidisciplinaires « dans la mesure où cela est justifié pour garantir le respect de règles de déontologie différentes en raison de la spécificité de chaque profession, et nécessaire pour garantir l'indépendance et l'impartialité de ces professions ». Ces formulations étant larges, les États membres ont conservé une importante marge de manœuvre pour décider des restrictions qu'ils peuvent imposer aux communications commerciales (tant qu'ils ne mes interdisent pas totalement) et aux partenariats multidisciplinaires s'ils jugent que ces restrictions sont utiles à l'exercice des professions juridiques sur leur territoire.

13 Article 4 (2) de la Directive 77/249/CEE du Conseil, du 22 mars 1977, tendant à faciliter l'exercice effectif de la libre prestation de services par les avocats, JO n° L 78/17 du 26 mars 77.

14 Directive 98/5 du Parlement européen et du Conseil du 16 février 1998 visant à faciliter l'exercice permanent de la profession d'avocat dans un État membre autre que celui où la qualification a été acquise, JO n° L 77/36 du 14 mars 1998.

15 Directive 2006/123/CE du Parlement européen et du Conseil du 12 décembre 2006 relative aux services dans le marché intérieur, JO n° L 376/36 du 27 décembre 2006.

Annexe 2. L'argument reposant sur la doctrine de l'intervention de l'État aux États-Unis

La doctrine de l'intervention de l'État (« *State action doctrine »)* de la Cour suprême exempte les mesures anticoncurrentielles adoptées par les États de l'application de la Loi Sherman, même si elles sont en contradiction avec les objectifs de cette dernière. Les restrictions à la concurrence peuvent ne pas être seulement contenues dans les lois et textes adoptés par les États. Aux États-Unis, la profession d'avocat est réglementée par la Cour suprême de chaque État, qui peut promulguer des règles disciplinaires anticoncurrentielles. Pour bénéficier de l'immunité au titre de la *« State action doctrine »*, ces règles doivent satisfaire à deux critères : i) elles doivent être l'expression claire d'une politique de l'État vis-à-vis du comportement des professionnels *(« clear articulation »)* et ; ii) lorsque des opérateurs privés sont impliqués dans la mise en œuvre de la politique de l'État, elles doivent avoir été soumises à un contrôle actif de ce dernier *(« active State supervision »).* Une comparaison du célèbre arrêt *Goldfarb* et de la décision rendue par la suite dans l'affaire *Bates* offre une bonne illustration du premier critère. Dans l'affaire *Goldfarb*, la Cour suprême a rejeté l'argument fondé sur la *« State action doctrine »*, au motif qu'en Virginie, les barèmes d'honoraires minima pour les avocats sont arrêtés sur la base du mandat général de réglementation de la pratique du droit confié à la Cour suprême de l'État et que cette dernière a délégué ce pouvoir au Barreau de l'État.[1] En revanche, dans la deuxième affaire, les restrictions à la publicité sur les avocats étaient contenues dans une règle disciplinaire imposée par la Cour suprême de l'Arizona, de sorte qu'elles étaient l'expression claire d'une politique de l'Arizona eu égard à la conduite professionnelle des avocats. [2] Le critère de contrôle actif « exige que les agents de l'État aient le pouvoir d'examiner certaines pratiques anticoncurrentielles d'opérateurs privés et de désapprouver celles qui ne sont pas conformes à la politique de l'État et qu'ils exercent ce pouvoir ». Dans l'affaire *Ticor*, la Cour suprême a levé toute ambiguïté en considérant qu'une simple possibilité de contrôle par l'État ne pouvait pas remplacer une décision prise par l'État. Quand les prix, d'abord fixés par des entreprises privées, ne peuvent être remis en cause que si l'État choisit d'exercer son droit de veto et quand l'autorité publique joue mal son rôle de contrôle des propositions de prix, la *« State action doctrine »* ne s'applique pas. Dans l'Union européenne, il a fallu attendre l'affaire *Arduino* (voir annexe 1) pour que la CJCE fixe un principe comparable à celui de l'immunité reposant sur deux critères appliqué aux États-Unis. Il convient toutefois de préciser que dans cette affaire, un doute subsiste quant à savoir si les autorités italiennes satisferaient au critère de contrôle actif tel que défini par les États-Unis (Gyselen 2006, p. 383).

La doctrine de la *« State action »* limite indéniablement le pouvoir dont disposent les autorités fédérales de la concurrence pour imposer des sanctions en cas d'infraction à la Loi Sherman, dès lors que les cours suprêmes des États décident de restreindre la concurrence à travers une pratique correspondant à l'expression claire d'une politique de l'État et exercent un contrôle effectif des professionnels du secteur juridique. Contrairement au droit communautaire, la Constitution des États-Unis ne contient pas de disposition comparable au principe « d'intégration négative », qui interdit aux États de faire obstacle à la liberté d'établissement et de prestation de services. À noter en outre que les restrictions visant la publicité peuvent être contraires au Premier amendement de la Constitution, qui protège la liberté d'expression commerciale et que les mesures discriminatoires peuvent violer la doctrine des effets implicites de la clause relative au commerce entre les États *(« dormant Commerce Clause »).*[3] Toutefois, ces moyens de faire face à des mesures anticoncurrentielles adoptées par un État ne sont pas équivalents au critère de

1 *Goldfarb contre Virginia State Bar*, 421 U.S. 773 (1975).

2 Voir par exemple *Bates contre State Bar of Arizona*, 433 U.S. 350 (1977). Cette affaire concerne des restrictions imposées par la Cour suprême de l'Arizona en matière de publicité pour les avocats. La Cour suprême fédérale a estimé que ces restrictions constituaient certes des interventions de l'État bénéficiant d'une exemption d'application de la Loi Sherman, mais qu'elles étaient néanmoins illicites parce qu'elles violaient le Premier amendement de la constitution, qui protège la liberté d'expression politique aussi bien que commerciale.

3 Aux termes de la *« dormant Commerce Clause »*, création judiciaire de la Cour suprême fédérale, les mesures discriminatoires adoptées par un État sont réputées anticonstitutionnelles si elles entravent le commerce entre les États de manière disproportionnée par rapport aux avantages que l'État est censé en retirer. Contrairement à la protection des quatre libertés économiques prévue par le Traité CE, cette doctrine ne trouve pas son fondement dans la Constitution américaine ; en outre, la jurisprudence est très limitée et fait l'objet de vifs débats parmi les juges de la Cour suprême (Gyselen 2006, p. 360-361)

proportionnalité préconisé par la Commission européenne (voir annexe 1). Disposant de moyens limités pour s'opposer à l'adoption de mesures anticoncurrentielles par les États, les autorités fédérales de la concurrence peuvent essayer d'empêcher l'adoption de nouvelles restrictions de manière informelle, en envoyant à l'État et aux institutions d'autoréglementation des commentaires ou des arguments de tiers non parties (*amicus curiae* briefs) sur les questions de concurrence. La lettre récemment adressée à l'American Bar Association par la Federal Trade Commission (FTC) et le ministère de la Justice pour formuler un certain nombre d'objections eu égard à la proposition de définition de la pratique du droit constitue un exemple de cette stratégie informelle.

Le périmètre des droits exclusifs des avocats (et leurs effets négatifs potentiels sur le bien-être économique) est déterminé par la définition de la pratique du droit. L'American Bar Association a proposé la définition type suivante :

> Une personne est présumée pratiquer le droit dès lors qu'elle accomplit, pour une autre, l'un quelconque des actes suivants :
>
> 9. donner à des personnes un avis ou des conseils eu égard à leurs droits et obligations juridiques ou à ceux de tiers ;
> 10. choisir, rédiger ou remplir des documents juridiques ou des accords affectant les droits juridiques d'une personne ;
> 11. représenter une personne devant une instance de décision, notamment, entre autres, préparer des documents et les verser au dossier ou mener des investigations ; ou
> 12. négocier des droits et obligations juridiques au nom d'une personne.
>
> La définition ci-dessus ne vise pas les activités suivantes, qu'elles constituent ou non un acte de pratique de droit :
>
> 13. la pratique du droit dans le cadre d'une autorisation d'exercice limitée ;
> 14. la représentation par soi-même devant la justice, à savoir la représentation par un non-juriste habilité dans les juridictions qui autorisent cette pratique ;
> 15. l'action en qualité de médiateur, arbitre ou conciliateur ; et
> 16. la fourniture de services sous la supervision d'un avocat, conformément aux Règles de conduite professionnelle.

Cette définition type peut s'analyser comme une proposition de loi, de règlement ou de règle de procédure relevant d'une décision des autorités des États fédérés. Dans les États qui l'adoptent, de nombreux services ne peuvent plus être fournis par des non-juristes. Sont notamment visés la finalisation des transactions immobilières par les agents immobiliers, la rédaction de testaments, notamment à l'aide de logiciels proposés sur Internet, la fourniture de conseils juridiques sur les problèmes entre locataires et propriétaires par les associations de locataires, la fourniture, par des salariés, de conseils sur le droit du travail ou les règles de sécurité que doit appliquer l'employeur, l'interprétation des codes fiscaux de l'État fédéral et des États fédérés par les comptables et tiers chargés de préparer les déclarations de revenus, et la fourniture de conseils juridiques par les banquiers d'investissement et autres conseils en affaires. Dans la lettre conjointe, les autorités fédérales de la concurrence soulignent que les règles relatives à l'exercice non autorisé du droit devrait protéger l'intérêt général et ne pas faire l'objet d'une interprétation incompatible avec cette finalité. La définition devrait donc être formulée de manière étroite pour avoir le moins d'effets anticoncurrentiels possible. La définition type proposée par l'American Bar Association est de toute évidence large. Par conséquent, les consommateurs seront confrontés à des prix plus élevés et à une moindre diversité de l'offre de services, même dans des domaines assez peu complexes du droit. Au lieu d'opter pour une interdiction pure et simple, il faudrait envisager des solutions moins restrictives pour protéger l'intérêt général. Ainsi, la qualité des services de finalisation des transactions immobilières proposés par des non-juristes pourraient être garantie par un système d'autorisation, d'enregistrement, de responsabilité financière et de règles relatives à la gestion des fonds nécessaires au règlement de la transaction immobilière. En somme, les autorités fédérales de la concurrence cherchent à empêcher les entraves à la concurrence qui, selon elles, ne sont pas justifiées par des objectifs d'intérêt général (Organismes conjoints [FTC des États-Unis et ministère de la Justice] 2002). Toutefois, l'envoi de lettres risque fort de ne pas être un moyen très probant d'atteindre cet objectif ; il semble plus efficace, pour empêcher les interventions anticoncurrentielles de la puissance publique, d'imposer un critère de proportionnalité. L'argument reposant sur la *« State action doctrine »* a souvent fait l'objet d'une interprétation laxiste de la part des juges, qui ont accordé

l'immunité à des entraves à la concurrence injustifiées actuellement protégées par la réglementation imposée par les États. Le rapport de 2007 sur la modernisation de la législation antitrust (Antitrust Modernization Commission Report, 2007) préconise une plus grande rigueur dans l'analyse visant à déterminer (1) si l'État a autorisé clairement les actions en cause avec l'intention de fausser la concurrence de la manière dont elle est faussée et (2) si l'État exerce un « contrôle suffisant pour garantir que la conduite en cause ne résulte pas d'une tentative effectuée par des opérateurs privés pour servir leurs propres intérêts, plutôt que pour mettre en œuvre la politique de l'État. »

AUSTRALIA

1. Introduction

While Australia's main legislation for promoting competition, the *Trade Practices Act 1974 (TPA)*, applies to all sectors of the economy, including the legal profession, the legal profession is largely regulated by State and Territory Governments and relies on co-regulation with their respective professional bodies.

As part of the national competition policy (NCP) reforms in the 1990s, the Council of Australian Governments (an intergovernmental forum that brings together the Commonwealth, State and Territory Governments in Australia) agreed to review and, if necessary, amend legislation that restricted competition. Included in these reviews were State and Territory legislation on legal professions.

Important reforms were made to promote competition in the legal profession just prior to and following the NCP reforms. These included:

- removing the exclusive right of legal practitioners to provide conveyancing services;
- establishing the National Practising Certificate Scheme;
- deregulating advertising; and
- removing restrictions on the establishment of different business structures other than legal partnerships.

The Standing Committee of Attorney-Generals (SCAG) which consists of State, Territory and Commonwealth Attorney-Generals, has also recently developed a Model Bill for the legal profession. The Model Bill sets a 'template' whereby States and Territories can adopt, either in whole, or in part, for the regulation of the legal profession. The Model Bill seeks to introduce:

- uniform minimum standards for law degrees and practical legal training, and Australia-wide recognition of those qualifications;
- a nationally consistent set of provisions facilitating the establishment of incorporated legal practices and multi-disciplinary practices; and
- a nationally uniform system governing the approval of foreign lawyers to practice the law of their home country in Australia.

Most States and Territories have already fully or partially adopted the Model Bill through legislations.

2. Regulation of entry

To protect consumers from poor quality or unethical legal advice or representation, State and Territory Governments and the relevant professional bodies use a range of laws, regulation and professional rules to co-regulate the admission of legal practitioners. Generally, the relevant professional bodies develop admission rules which are underpinned by State and Territory legislation.

2.1 Quality standards and entry

Generally, to become a legal practitioner in Australia, a person must be admitted to practise in the relevant State or Territory and hold a practising certificate from the body (usually a professional association such as a law institute, law society or bar association) in the relevant jurisdiction.

To be admitted as a legal practitioner, a person must satisfy requirements in regard to legal knowledge, practical training, and be of good character. Admission rules are determined by the relevant professional association and are underpinned by State or Territory legislation. However, in some States and Territories there is legislation limiting the professional body's power to regulate admission by setting maximum training and/ or knowledge requirements.

Although the requirements for legal knowledge and practical training differ between each State and Territory, they typically involve completion of a tertiary academic course and the practical training requirement entails completion of an approved practical legal training course or articles of clerkship.

The SCAG's Model Bill provides for the recognition of nationally agreed minimum standards for academic, practical legal training and Australia-wide recognition of those qualifications. Most States and Territories have implemented legislation based on the Model Bill in relation to minimum standards. The remaining States and Territories are expected to implement this Model Bill provision in their legislation by the end of 2007.

In terms of the requirements needed to obtain a practising certificate, they are specified in State and Territory legislation and administered by the professional association or statutory body. Where pre-conditions are met, the person is eligible for a practising certificate. These pre-conditions generally include being admitted to practise and paying a small fee.

A legal practitioner wishing to practise in another State or Territory on a regular basis may apply for the National Practising Certificate Scheme. This is currently available in all States and Territories and allows a legal practitioner in one State or Territory to practise in another, without having to obtain a practising certificate or be formally admitted in the other jurisdiction. This scheme also negates the need to incur costs associated with registration in the latter jurisdiction.

2. Foreign registered legal professionals who wish to practise Australian law must be admitted to practise and hold a practising certificate from a State or Territory. Foreign registered legal professionals who wish to continue practising the law of their home country in Australia normally require registration as a foreign legal professional. However, this requirement varies across each State and Territory and Australia is working towards uniform State and Territory legislation for regulating foreign legal professionals through the Model Bill.

2.2 Exclusive rights

States and Territories have been active in removing the legal profession's exclusive rights where they prevent suitably trained non-lawyers from performing work that they could undertake without due risk to the community. As a result of the NCP reviews of legislation restricting competition in the legal

profession, most States and Territories considered conveyancing services to be work that non-lawyers could undertake without undue risk to the community. Currently, most States and Territories permit non-lawyers to settle real estate transactions.

The removal of the legal profession's monopoly on conveyancing services has successfully lowered conveyancing service fees.

However, State and Territory laws still reserve certain legal work for registered legal practitioners by making it an offence for unqualified persons to supply the services. The work reserved for lawyers varies across jurisdictions, but generally includes probate work and the preparation of wills or documents that affect rights between parties, affect real or personal property or relate to legal proceedings.

3. Regulation of market conduct

Some of the initiatives undertaken in Australia in the regulation of market conduct include deregulating advertising for the legal profession and allowing greater flexibility in business structures.

3.1 Fees

Most Commonwealth, States and Territory Courts' have item based fee scales where fees are set for particular services (for example, photocopying and phone call charges) and in some cases, charged at a daily or hourly rate. However, the Federal Magistrates Court has adopted fee scales based on events. Event based fee scales allow proportionately higher costs for work done in the early stages of litigation, with recoverable costs decreasing as the case continues. This aims to encourage early settlement of cases.

While court fees are prescribed, there are no restrictions on legal practitioner fees. However, legal practitioners must disclose their costs to their clients, including on what basis costs are calculated.

Disadvantaged members of the community in need of legal assistance can obtain legal services through legal aid. Although some legal aid services are free of charge, most legal representation is subject to means and merits testing, and not all applicants are eligible for a grant of aid. Successful applicants also may be required to contribute towards the cost of resolving their case. This contribution is based on the applicant's financial situation and the cost of the matter.

3.2 Advertising

Legal practitioner legislation and professional conduct rules traditionally contained stringent advertising controls to ensure consumers were not misled by deceptive advertising and did not bring the legal profession into disrepute. Some States and Territories began relaxing legal profession advertising controls in the late 1980s. All States and Territories have now deregulated advertising for legal services.

However, in 2002, some States and Territories introduced restrictions on advertising personal injury services, in response to increased public liability claims and rising premiums.

Legal practitioners are subject to general advertising provisions under the TPA which prohibits false, misleading or deceptive advertising.

3.3 Partnerships and business organisations

Most States and Territories have adopted the Model Bill provisions which allow legal practices to incorporate and form multi-disciplinary partnerships (that is, a partnership between lawyers and other non-legal professionals).

Generally, legal practices can also take the form of a general partnership, incorporated limited partnership or limited liability partnership. In terms of incorporated legal partnerships or limited legal partnerships, at least one partner bears unlimited liability for any debts arising from that partnership.

In contrast, incorporated legal practices have the benefit of limited liability for company members. This may be contrasted with the position of legal practitioners employed by the company who will continue to bear personal liability for their own acts or omissions as a lawyer.

At general law, the personal liability of a lawyer in Australia is unlimited although there is the ability under State and Territory 'professional standards' legislation to approve schemes which involve a limit on liability. Whether or not a lawyer's liability is limited, each State and Territory has minimum requirements for practitioners to be covered by professional indemnity insurance.

Incorporated legal practices can operate provided it has at least one legal practitioner director and complies with the requirements of the relevant State or Territory legal profession legislation and its corresponding regulations. Legal practice directors must also comply with their obligations as a company director under the Australian Corporations Law.

3. The States and Territories which have adopted the Model Bill provisions on incorporated legal practises and multidisciplinary partnerships allow these practices to freely operate across other States and Territories that have also adopted the Model Bill. The Model Bill also allows profits arising from multi-disciplinary partnerships to be shared amongst non-lawyers.

4. Institutional framework of self-regulation

4.1 Application of competition law

Australia's main legislation for promoting competition is the TPA. The TPA applies to all sectors of the economy, including the legal profession. Legal practitioners are subject to the anti-competitive provisions detailed in the TPA and the Australian Competition and Consumer Commission (ACCC) has enforcement powers to ensure compliance with the TPA.

4.2 Regulatory oversight

The ACCC provides the regulatory oversight for the TPA.

Furthermore, in most States and Territories, any complaints regarding a legal professional may be made directly to a professional association or an independent statutory body. Depending on each State or Territory's legislation, the statutory body or professional association may be responsible for the receipt, investigation and resolution of any complaints concerning legal professionals. The statutory body or professional association may also conduct mediation and review professional associations' decisions.

Professional associations and statutory bodies may also assist with disciplinary matters. In some States and Territories, they have the power to issue reprimands and impose minor penalties. State and Territory courts determine serious conduct matters, hear appeals and can review professional associations' decisions.

4.3 Interaction between legal professional privilege and competition enforcement

Australia recognises the application of competition law principles to the legal profession and is implementing them progressively. A pertinent issue is the interaction between legal professional privilege and investigations by regulatory authorities.

Currently, Australia is examining the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies such as the ACCC, Australian Federal Police, the Australian Crime Commission, the Australian Securities and Investments Commission, the Australian Taxation Office and federal royal commissions. The Australian Law Reform Commission is conducting this inquiry.

In Australia, the ACCC has enforcement and regulatory powers under the Trades Practices Act. Section 155 of the Trades Practices Act gives the ACCC information gathering powers that allows it to require a person to provide information, documents or give evidence under oath or by way of affirmation, when investigating possible contraventions. The ACCC also has information gathering powers in connection to some of its adjudicative and telecommunications functions.

The Australian Law Reform Commission's inquiry is of particular interest to the ACCC who have come across the issue of legal professional privilege during the course of its investigations, including the case of *Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission*. In this case, the ACCC sought documents from the Daniels Corporation under section 155 of the TPA, despite these documents being subject to legal professional privilege, as part of its investigation of an alleged tender agreement between Daniels and a competitor that may have breached the Act. The ACCC and Daniels were unable to reach an agreement about the claim of legal professional privilege and accordingly the ACCC moved to resolve the dispute by instituting a proceeding in the Federal Court of Australia.

The Full Court of the Federal Court held that section 155 did authorise notices requiring the production of such documents, relying principally on the High Court decisions in *Pyneboard Pty Ltd v Trade Practices Commission* and *Corporate Affairs Commission (NSW) v Yuill*. Daniels then appealed to the Federal Court's decision to the High Court of Australia.

The High Court allowed the appeal and set aside the orders of the Full Court of the Federal Court made 16 March 2001. In doing so, the High Court declared that section 155 of the Trades Practices Act does not require the production of documents to which legal professional privilege is attached.

The High Court remitted the matter to the Federal Court for the Federal Court to determine which documents, if any, were subject to legal professional privilege. The ACCC was ordered to pay Daniels' costs for the proceedings in the Full Court and High Court. However, the High Court acknowledged that legal professional privilege does not apply to documents brought into existence to further a breach of the law, including the Trades Practices Act.

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BELGIUM

1. Avocats

1.1 L'exercice de la profession d'avocat et le port du titre d'avocat

L'article 428 du Code Judiciaire (CJ) protège le titre d'avocat. Ainsi, nul ne peut porter le titre d'avocat et exercer la profession d'avocat, s'il n'est belge ou ressortissant d'un Etat membre de l'Union européenne[1], porteur du diplôme de docteur ou licencié en droit[2], s'il n'a prêté le serment requis et, s'il n'est inscrit au tableau de l'Ordre ou sur la liste des stagiaires.

1.2 L'organisation de la profession d'avocat

La Belgique compte 27 arrondissements judiciaires. Chaque arrondissement a un barreau. Chaque barreau a un conseil de l'Ordre. Le chef de l'Ordre est appelé le bâtonnier. Bruxelles compte toutefois deux ordres : l'ordre français et l'ordre néerlandais. Les 14 barreaux francophones ressortissent de l'OBFG (l'Ordre des Barreaux Francophones et Germanophones)[3] et les 14 barreaux néerlandophones sont regroupés au sein de l'OVB (l'Orde van Vlaamse Balie)[4]. Autrefois, il existait un ordre national[5].

Les Ordres ont pour mission de veiller à l'honneur, aux droits et aux intérêts professionnels communs de leurs membres. Ils sont compétents notamment en ce qui concerne le stage, et la formation professionnelle des avocats et des avocats stagiaires.

Les Ordres arrêtent à cette fin, les règlements appropriés. Les règlements ainsi adoptés s'imposent aux barreaux qui font partie de l'Ordre concerné. Les Conseils de l'Ordre ont une compétence exclusive en matière disciplinaire.

1.3 Monopole

Les avocats bénéficient du monopole de la plaidoirie et de la représentation. Par ailleurs, en matière civile, seuls les avocats à la Cour de cassation peuvent postuler et conclure devant cette Cour (article 478 CJ)[6].

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1 L'arrêté royal du 24 août 1970 détermine les conditions auxquelles doivent satisfaire les avocats qui ne remplissent pas la condition de nationalité.

2 Actuellement, il n'existe pas de limitation du nombre d'inscriptions à l'université dans les facultés de droit.

3 L'OBFG compte 6690 avocats.

4 L'OVB regroupe 8500 avocats.

5 L'Ordre national a été scindé en 2 ordres distincts et autonomes (OVB et OBFG) en 2001.

6 Les avocats à la Cour de Cassation sont nommés par arrêté royal (après avis de la Cour de cassation). Il y a actuellement 20 avocats à la Cour de cassation.

1.4 Incompatibilités

Certaines professions sont incompatibles avec l'exercice de la profession d'avocat. L'article 437 organise l'incompatibilité avec la profession de magistrat, de notaire, et d'huissiers de justice. Cet article permet en outre, au Conseil de l'Ordre de prononcer l'incompatibilité d'une activité ou d'un emploi public ou privé, lorsque cette activité met en péril l'indépendance, ou la dignité du barreau.

Le règlement du 21 février 2005 de l'OBFG stipule que la profession d'avocat est incompatible avec les professions de juriste, de conseillers fiscal ou juridique, salarié ou indépendant, ainsi qu'avec toute activité professionnelle susceptible d'être exercée par l'avocat en cette qualité. En outre, certains barreaux subordonnent l'exercice d'une activité complémentaire à l'autorisation du bâtonnier (qui peut l'assujettir au respect de conditions[7]) ou du conseil de l'ordre[8]. D'autres barreaux réservent la faculté d'exercer une activité complémentaire à certaines catégories (les jeunes avocats) ou limitent cet exercice dans le temps[9].

1.5 Le stage

Pour être inscrit au tableau de l'Ordre, il est nécessaire d'avoir accompli 3 années de stage au moins pendant lesquelles, le stagiaire devra satisfaire aux obligations de stage[10]. Les obligations de stage sont déterminées par le Conseil de l'Ordre (art. 435 CJ). Dès lors, il existe certaines disparités entre les barreaux. Ainsi, l'ordre néerlandais du barreau de Bruxelles impose aux avocats stagiaires un minimum de 15 dossiers (suffisamment diversifiés) pour être admis au tableau. L'Ordre des avocats de Namur réserve la charge de maître de stage aux avocats inscrits depuis 12 ans au moins, tandis que ceux de Tournai et Neufchâteau imposent un minimum de 10 années. Certains barreaux limitent le nombre de stagiaire par patron[11]. D'autres encore, imposent aux stagiaires de consacrer un minimum d'heures au traitement des affaires du maître de stage[12].

Les règlements de l'OBFG et de l'OVB subordonnent, en outre, l'inscription au tableau de l'Ordre à l'obtention du « CAPA "(certificat d'aptitude à exercer la profession d'avocat), c'est-à-dire à la réussite d'un examen organisé par le C.F.P. (centre de formation professionnelle)[13].

Tant les règlements de l'OVB que de l'OBFG prévoient des clauses de rémunération minimale dans les conventions de stage[14].

1.6 Application du droit de la concurrence

L'application du droit de la concurrence à la profession d'avocat ne fait aucun doute. Le Conseil de la concurrence a déjà eu l'occasion de se prononcer sur cette question.

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7 Neufchâteau.

8 Dinant.

9 Huy.

10 L'article 456 CJ permet à l'Ordre des avocats d'omettre de la liste des stagiaires un avocat qui n'aurait pas satisfait à toutes les obligations (imposées par son barreau) cinq ans après son admission sur la liste.

11 Mons, Dinant.

12 Mons.

13 Règlement de l'OBFG du 28 juin 2004 et règlements de l'Ordre national des avocats du 28 novembre 1991, 14 octobre 1993 et 13 janvier 1994 (ces règlements restent applicables à l'OVB dans la mesures où ils n'ont pas encore été remplacés.

14 Voir infra.

Affaire Tambue :

Me Raphaël Tambue était stagiaire. Il a demandé au Conseil de la concurrence de constater que les règlements de l'Ordre national des avocats relatif au CAPA et les règlements des divers barreaux de Belgique qui limitent le nombre de stagiaires par patron de stage constituent des pratiques restrictives de concurrence au sens de la loi du 5 août 1991 sur la protection de la concurrence économique. Cette demande au fond était assortie d'une demande de mesures provisoires.

Plainte avait aussi été déposée auprès de la Commission européenne. Cette plainte fut rejetée pour défaut d'intérêt communautaire suffisant.

Dans sa décision du 8 janvier 2002, statuant sur la demande de mesures provisoires, le Conseil de la concurrence a dit que l'avocat est une entreprise et que les règlements litigieux sont des décisions d'association d'entreprises au sens de la loi sur la protection de la concurrence économique. Le Conseil de la concurrence a toutefois déclaré la demande non fondée. Me Tambue a fait appel de cette décision. La cour a estimé qu'eu égard au nombre d'échecs par rapport au nombre de personnes inscrites (4/609), le règlement litigieux relatif au CAPA n'a pas pour objet de restreindre de manière sensible la concurrence. Par contre, en ce qui concerne le second règlement attaqué (relatif au nombre de stagiaire par patron de stage), la Cour a estimé qu'il allait au delà de ce qui est nécessaire à la qualification et à la déontologie des avocats[15]. Toutefois, faute de restriction sensible, la Cour a estimé que la mesure ne tombait pas sous le coup de l'interdiction visée dans la loi sur la protection de la concurrence économique.

1.7 Formation permanente

Les avocats et les avocats stagiaires doivent justifier d'une formation permanente. Le non respect de cette obligation peut être sanctionné par les autorités de discipline.

La formation permanente est organisée selon un système de points. Le règlement fixe le nombre de points par année civile ainsi que le nombre de points que vaut chaque type de formation. Les avocats établissent librement le programme de formation qui leur permet de justifier l'obtention du nombre de points requis. Pour être reconnue, la formation doit, au préalable, être agréée par l'Ordre des barreaux, le Conseil de l'Ordre ou le centre de formation professionnelle.

1.8 La rémunération

Le code judiciaire impose aux avocats de faire preuve de modération lors de la taxation de leurs honoraires et interdit en outre, les pactes d'honoraires.

Un règlement de l'OBFG impose aux avocats d'informer leurs clients sur la méthode de calcul de leurs honoraires et frais[16]. Nonobstant ce règlement, une enquête réalisée récemment par l'organisme de défense des consommateurs « Test achats » a révélé que les honoraires des avocats étaient aussi « variés qu'opaques »[17]

15 Arrêt du 4 mai 2004, point 32.

16 Règlement de l'OBFG du 27 novembre 2004.

17 Budget&Droits, septembre/octobre 2006, n° 188.

La ministre de la justice avait l'intention de déposer un projet d'arrêté royal portant tarification indicative des honoraires des avocats.[18]

Tant l'OBFG que l'OVB ont adopté un barème en ce qui concerne la rémunération des stagiaires. La plupart des barreaux locaux ont adopté des dispositions similaires.

Par ailleurs, le Service de la concurrence a constaté que l'OVB et/ou les barreaux locaux établissent des tarifs obligatoires (par exemple, le tarif relatif aux remplacements simples, ou à la nomination d'un séquestre, ou d'un administrateur provisoire).

1.9 Publicité

La loi du 2 août 2002 relative à la publicité trompeuse, à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales permet aux ordres des avocats d'interdire ou de restreindre la publicité comparative dans la mesure nécessaire pour préserver la dignité et la déontologie de l'avocat.

Ni l'OBFG, ni l'OVB n'interdisent la publicité. L'article 2 du règlement du 25 juillet 2001 de l'OBFG sur la publicité interdit le démarchage, c'est-à-dire la sollicitation de clientèle, en ce compris, la mise à disposition sur un site de services juridiques définis. L'article 3 interdit les mentions comparatives.

Certains barreaux interdisent toute publicité[19]. L' ordre néerlandais du barreau de Bruxelles interdit toute publicité comparative. Ces règlements sont caducs dans la mesure où ils contreviennent aux règlements de l'OBFG, de l'OVB et sont contraires à la loi du 2 août précitée.

1.10 La multidisciplinarité

En septembre 2003, la Cour de cassation a annulé 2 articles du règlement de l'OVB relatif à la collaboration entre les avocats qui interdisaient toute collaboration entre avocat et non-avocat. La Cour de cassation a considéré que ces articles introduisaient une limitation trop importante de la possibilité de collaborer et portaient dès lors atteinte à l'article 81.1 du Traité.

L'OBFG adopte une démarche différente. Le principe est l'interdiction de collaboration sauf à collaborer avec des professions au préalable agréées. Le règlement du 26 juin 2003, définit comme suit les professions agréées : *« toute profession agréée par l'Ordre des barreaux francophones et germanophones, légalement organisée et soumise à une déontologie professionnelle compatible avec celle des avocats, respectant, notamment l'indépendance et le secret professionnel »*.

Sur cette base, plusieurs professions ont été agréées par l'OBFG (en mai 2004) :les médecins inscrits à un tableau de l'ordre et les experts comptables et fiscaux appartenant à l'IEC[20] (à l'exclusion de ceux se trouvant dans un lien de subordination) ainsi qu'à l'IPCF[21]. Le 15 mai 2006, un autre groupe de profession s'est vu accordé l'agrément : les notaires, les huissiers de justice, les réviseurs d'entreprise, les architectes, les médecins vétérinaires et les pharmaciens.

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18 Il s'agissait en fait d'un amendement à la proposition de loi relative à la répétibilité des honoraires et frais des avocats.

19 Marche-en-famenne, Huy.

20 Institut des experts comptables).

21 Institut professionnel des comptables et fiscalistes agréés).

2. Huissier de justice

2.1 La fonction d'huissier de justice

L'huissier de justice est un officier public et ministériel (exerçant sous le statut d'indépendant). L'huissier peut également effectuer des missions privées (telles que constat à la demande d'un particulier, médiations, supervision de concours ou recouvrement amiable de dettes).

2.2 Monopole

En tant que fonctionnaire public et mandataire judiciaire, l'huissier jouit d'un monopole. L'article 516 al1 CJ dispose : « les huissiers sont seuls compétents pour dresser et signifier tous exploits et mettre à exécution les décisions de justice ainsi que les actes ou titre en forme exécutoire ».

2.3 Acces

L'article 510 du code judiciaire (CJ) précise qu'il faut être porteur du diplôme de docteur ou licencié en droit[22] et avoir effectué un stage de 2 ans chez un huissier exerçant depuis 3 ans au moins.

2.4 Stage et formation permanente

Contrairement au stage imposé aux avocats stagiaires, les modalités d'organisation du stage sont fixées par arrêté royal et il n'y a pas d'examen à l'issue du stage. De même, la formation permanente de l'huissier ne fait pas l'objet de règles précises, ni de contrôle. Le recueil des règles déontologiques se contente d'inviter « *l'huissier à maintenir à jour les connaissances exigées de la profession et à utiliser les moyens à sa disposition pour le perfectionner* ».

2.5 Application du droit de la concurrence

Lorsque l'huissier intervient en tant qu'organe du pouvoir exécutif et auxiliaire du pouvoir judiciaire (par exemple, lorsqu'il signifie une décision de justice), l'huissier échappe à l'application du droit de la concurrence. En effet, cette activité se rattache à l'exercice de prérogatives de puissance publique. Sous réserve de cette exception, l'huissier reste soumis aux règles et principes de la loi sur la protection de la concurrence économique et aux dispositions similaires du Traité CE. Tel est notamment le cas lorsque l'huissier procède au recouvrement de dettes à l'amiable ou intervient comme médiateur entre des parties.

La Chambre des huissiers (nationale ou d'arrondissement) peut être considérée comme une association d'entreprises et ses décisions peuvent être considérées comme des décisions d'association d'entreprises au sens du droit de la concurrence. En effet, dès lors que la Chambre est exclusivement composée d'huissiers et qu'elle n'est pas tenue de respecter certains critères d'intérêt public, la Chambre apparaît comme l'organe de régulation de la profession d'huissier pour tout ce qui a trait à l'activité économique de ces derniers (soit les missions qui ne relèvent pas des fonctions d'officier public et ministériel).

2.6 L'association et les incompatibilités

L'association des huissiers avec un ou plusieurs huissier(s) ou avec ou un plusieurs titulaire(s) d'autres professions est autorisée dans la mesure où elle ne porte pas atteinte à l'indépendance, au secret professionnel et à l'impartialité de l'huissier.

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[22] Voir aussi note de bas de page 2.

L'article 518 CJ interdit à tout huissier de justice d'exercer toute autre profession.

2.7 Le tarif

L'article 519 du code judiciaire (CJ) dispose : «le Roi fixe le tarif de tous les actes des huissiers de justice et des indemnités pour frais de déplacement ». L'arrêté royal du 30 novembre 1976 fixe le tarif des actes accomplis par les huissiers de justice en matière civile et commerciale ainsi que celui de certaines allocations.

A côté de ce tarif légal, la Chambre nationale a édicté un tarif complémentaire. Il s'agit du tarif applicable aux actes ou aux missions publiques nouvellement prévus suite à l'évolution des lois et dont le coût n'est pas encore fixé par le tarif.

Interrogée à ce sujet, la Chambre justifie ce tarif en invoquant la carence du législateur.

Dans la mesure ou ils ne peuvent se rattacher à des actes qui relèvent de l'exercice de prérogatives de puissance publique, le Service de la concurrence estime que ce tarif complémentaire est en contradiction avec les règles et principes du droit de la concurrence.

2.8 Publicité

Toute démarche à des fins de publicité personnelle ou fonctionnelle doit faire l'objet d'un agrément préalable de la commission de déontologie.

La version antérieure du code de déontologie interdisait toute publicité comparative. La nouvelle version autorise tant la publicité fonctionnelle que personnelle qu'elle soit qualitative ou comparative. Toutefois, la publicité comparative reste soumise à restriction dans la mesure où elle ne peut viser les services de membres ou groupes de membres qui appartiennent aux professions d huissier de justice, d'avocat, de notaire, de réviseur d'entreprise ou de magistrat. En outre, l'offre de service et le démarchage de clientèle reste interdit.

2.9 Limitation territoriale

Au terme de l'article 513 CJ, l'huissier de justice ne peut instrumenter que dans l'arrondissement judiciaire déterminé par l'arrêté royal de nomination. Cette règle est d'ordre public.

Dans une version antérieure du code de déontologie, cette limitation territoriale valait également pour « tous actes et procès verbaux, y compris extrajudiciaires (par exemple : constats, ventes publiques, ou tirage de tombolas) qui requièrent le déplacement de l'Huissier de justice ou de son suppléant.) ». Cette disposition ne figure plus dans la nouvelle version des règles de déontologie.

L'article 67 dispose, toutefois, que l'huissier de justice ne peut outrepasser les limites de son arrondissement pour remplir son mandat légal. Le mandat légal comprend « *les missions organiques de l'Etat, où l'huissier de justice, officier ministériel, assume les fonctions de fonctionnaire public sur réquisition du ministère public ou du justiciable afin de dresser et signifier des exploits et accomplir des actes juridiques qui s'inscrivent dans les procédures judiciaires et/ou administratives* ».

Le Service de la concurrence a invité le SPF justice à réfléchir à cet article du code judiciaire à la lumière des règles et principes du droit de la concurrence.

2.10 Limitation quantitative

Le nombre d'huissier de justice par arrondissement est fixé par arrêté royal (article 515 CJ)[23].

Selon le SPF justice, cette limitation se justifie eu égard au statut particulier de l'huissier en tant que fonctionnaire ministériel dont les actes participent au pouvoir judiciaire et à la force exécutoire.

A l'instar de ce qui a été dit concernant l'article 513 précité, le Service de la concurrence estime qu'il y a lieu de se pencher sur la justification d'une telle disposition (qui se justifiait probablement à l'époque de la rédaction du code) et sur l'application d'éventuels moyens alternatifs moins restrictifs pour la concurrence.

3. Notaires

3.1 Exercice de la fonction

Les notaires sont des fonctionnaires publics. Ils sont nommés par arrêté royal[24] (parmi une liste de 3 candidats établie par la commission de nomination).

Pour être nommé notaire, il faut avoir été candidat notaire. Chaque année, une liste de candidat notaire est arrêtée par arrêté royal (maximum 60). Les candidats notaires doivent notamment être porteurs du certificat de stage et avoir réussi le concours organisé par la Commission de nomination[25]. La Chambre nationale délivre le certificat de stage sur base d'une ou plusieurs attestations de stage.

Le stage est d'une durée de 3 ans au moins. Il doit être effectué dans une étude notariale située en Belgique[26]. A l'issue de la première année de stage, le stagiaire est soumis à évaluation par la commission d'évaluation[27].

Pour être admis au stage, il faut être détenteur du diplôme de licencié en notariat. Celui-ci n'est accessible qu'aux détenteurs d'une licence en droit.

3.2 Organisation de la profession

Il y a une compagnie des notaires dans chaque chef lieu de province[28]. La compagnie des notaires regroupent les notaires dont la résidence est située dans la province et les candidats notaires inscrits au tableau de la compagnie. La compagnie des notaires a notamment pour mission d'établir des règles

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23 Il y a actuellement 496 huissiers répartis sur l'ensemble du territoire (en ce non compris les huissiers devenus surnuméraires par l'effet de l'âge, soit plus de 70 ans).

24 La profession de notaire a connu une importante réforme en 2000[24]. La modification avait pour objectif d'introduire plus de transparence et d'objectivité dans les nominations de notaires. Avant la réforme, les notaires étaient nommés à vie. A présent, la limite d'âge est fixée à 67 ans.

25 Le concours comporte une épreuve écrite et une épreuve orale.

26 Toutefois, le stage peut être accompli au barreau ou dans une étude notariale située hors de Belgique (pour une durée maximale de 1 an).

27 Sauf opposition, les candidats stagiaires font également l'objet d'une évaluation par la commission d'évaluation.

28 La Belgique compte 10 provinces.

relatives à la pratique notariale. Ces règles ne sont toutefois obligatoires qu'après avoir été approuvées par arrêté royal[29].

Il existe une chambre nationale des notaires[30]. Les organes de la chambre nationale sont l'assemblée générale et le comité de direction. L'assemblée générale est composée des représentants élus au sein de chaque compagnie des notaires. La Chambre nationale a pour mission notamment d'établir les règles générales de la déontologie, ainsi que les règles relatives à la prestation du stage. Ces règles doivent être approuvées par arrêté royal.

3.3 Restriction territoriale et quantitative.

L'article 31 de la loi portant organisation du notariat dispose : « le nombre de notaires, leur placement, et leur résidence sont déterminés par arrêté royal ».

3.4 Application du droit de la concurrence

Tout comme l'huissier de justice, le notaire exerce des activités qui ne relèvent pas de son ministère public. Dans ce cas, le notaire peut être considéré comme une entreprise au sens du droit de la concurrence. Tel sera le cas, notamment, lorsque le notaire intervient dans le cadre de la négociation immobilière.

Le Conseil de la concurrence est actuellement saisi d'une demande visant à faire constater que les règles relatives à la négociation immobilière[31] sont contraires à la loi sur la protection de la concurrence économique en ce qu'elles fixent le prix de la négociation et de la publicité.

29 L'arrêté royal du 21 septembre 2005 approuve le code de déontologie de la Chambre nationale des notaires.

30 La Chambre nationale est une institution publique.

31 Il s'agit des règles de la Chambre des Notaires de l'arrondissement de Mons.

CANADA

Before addressing the regulatory framework of the Canadian legal profession, it should be noted that the Canadian Competition Bureau (the "Bureau") is currently involved in a national study of a number of regulated professional groups in Canada. The professions selected are accountants, lawyers, optometrists, pharmacists, real estate agents and associated professions such as paralegals and opticians. The study will examine the extent to which these professions may use restrictive practices to control entry into their profession and/or control the conduct of members. The purpose of the study is to present a comparison of the legislation, regulations and codes of practices governing a range of professional services offered in all ten provinces and the three territories that affect entry and influence professional conduct. Such restrictions would include any bearing on entry, fees, reserved rights, business structure, and advertising. The Bureau will also assess the economic effects on competition of the various types of restrictions.

At this moment, the Bureau has completed its preliminary study and is presently in the process of consulting with the various professional associations, boards and colleges to ensure the veracity of its content. The final study is expected to be released by Fall 2007. Because of the ongoing consultations, the Bureau is not, at this time, in a position to publicly discuss the content of the study. Therefore, the present submission will not address regulations on market conduct but will speak to verified entry regulations as well as the Bureau's previous involvements with the legal profession.

In 2006, there were approximately 72,000 lawyers in Canada, an increase of 13 percent from 2001, with ninety percent of them practising in Ontario, Quebec, Alberta, and British Columbia.[1] Canada's legal system is unique in that it is a bijural one which draws on both English common law and French civil law. Although entry requirements remain similar for all provinces, slight variations exist.

1. Role and Function of the Legal profession

In Canada, the role of lawyers is to advise clients on legal matters, represent clients before administration boards, and draft legal documents such as contracts and wills. Lawyers also plead cases, represent clients before tribunals, and conduct prosecutions in courts of law. These acts are reserved exclusively for lawyers.[2]

In the Province of Quebec, the Legal Profession is divided into two entities: lawyers and notaries. The fundamental distinction between the two resides within their exclusive rights. As a public officer, notaries are authorized by government to authenticate certain documents. Through the governing provincial legislation and regulation, lawyers have been given the exclusive right to appear before the courts. Aside from a lawyer's exclusive rights to appear in court and a notary's exclusive right to draft

1 Statistics Canada. There were 23,484 law offices across the ten provinces and 75 offices in the territories. Note that the FLSC reports total membership in all Canadian law societies of approximately 98,000. This includes notaries in Quebec and may also include double counting of lawyers in the event that a lawyer is a member of more than one provincial society. See http://www.flsc.ca/en/pdf/statistics2005.pdf.

2 http://www23.hrdc-drhc.gc.ca/2001/e/groups/4112.shtml and http://www.jobfutures.ca/noc/411p1.shtml

notarized documents, lawyers and notaries may perform the same tasks. Both groups of professionals may act as legal advisers for their client. [3]

There are a number of related and overlapping service providers that may substitute or complement the services of a lawyer. For instance, mediators substitute for lawyers in cases where the parties to a legal proceeding or transaction choose dispute resolution through mediation instead of litigation. The mediator acts as a neutral third-party to help the parties reach a conclusion without a trial. Apart from lawyers, mediators may be social workers, psychologists, or another type of professional trained in dispute resolution.[4] Like mediators, arbitrators may also offer services that substitute for the services of lawyers. Arbitrators help the parties to a legal proceeding or transaction avoid litigation and reach a settlement. Unlike mediators, arbitrators hear the facts and issues and make a decision.[5] Under the guidance of lawyers, paralegals may complement the services of a lawyer by performing various legal duties, such as preparing legal documents (wills, real estate documents, transactions and affidavits), maintaining records and files, conducting legal research and interviewing clients. However, paralegals are not permitted to give legal advice. Generally, paralegals are qualified through education and/or experience. As for notaries public[6], they provide services such as certifying real estate documents, legalizing documents, and swearing declarations which may also complement the services of a lawyer.[7]

2. Governance of the Legal Profession

2.1 Law Societies

The legal profession in Canada is governed by the laws, rules and regulations of the law society of which a lawyer is a member. Law societies are established by statute of the legislative assembly of its province or territory. There are 14 law societies in Canada. There is one for each of the 9 provinces and one for each of the 3 territories. There are two law societies in the province of Quebec – the *Chambre des notaires* which governs the notarial profession and the *Barreau du Quebec* which governs lawyers. All Canadian provinces, with the exception of Quebec, are governed by the common law tradition from England whereas the province of Quebec is based on the French Napoleonic regime.

Each law society is administered by a board of directors, generally known as Benchers or Members of Council who govern the affairs of the law society. The main responsibilities of the law societies include admissions to practice as lawyers within their society, the setting of professional standards for the legal profession, professional liability insurance, and the discipline of their members. For example, the Law Society of Manitoba, empowered by the Legal Profession Act, has the duty to establish standards for education, professional responsibility, and competence, as well as to discipline members and regulate the practice of law.[8]

Although not a regulatory body, the Federation of Law Societies in Canada ("FLSC") is a national body representing lawyers in Canada. The FLSC has representatives from each of the 14 provincial law societies, and has historically functioned as a "clearing house facilitating the exchange of views and

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3 http://www.cdnq.org/en/notariesInQuebec/areas.html

4 http://www.justice.gc.ca/en/dept/pub/rd/index.html#dispute_resolution

5 http://www.justice.gc.ca/en/dept/pub/rd/index.html#dispute_resolution

6 Notaries public are not to be confused with notaries in Quebec who are licensed members of the legal profession registered with the *Chambre des notaries du Quebec*.

7 http://www.canlaw.com/notaries/notary.htm

8 "The Legal Profession Act" (http://web2.gov.mb.ca/laws/statutes/ccsm/l107e.php).

information of member law societies."[9] The FLSC's mission is to research matters of importance to the legal profession in Canada, further cooperation and uniformity among the provincial governing bodies, improve the public understanding of the legal profession in Canada, and express the views of the provincial governing bodies on national and international issues.[10]

2.2 Discipline and Conduct of Members

All law societies are responsible for making sure that their members practise law competently and ethically. Each law society has its own code of conduct with which member lawyers must comply. The codes set out detailed rules of what constitutes ethical and unethical conduct. Complaints of professional misconduct are investigated and disciplined, when necessary, according to a procedure established by each law society. Any resulting disciplinary action can range from fines, suspension from practicing, imposition of conditions on the member's practice, or disbarment.

3. Entry into the Legal Profession

3.1 Educational and Practical Requirements

In order to become a lawyer in Canada, one must possess an LL.B from a recognized Canadian university.[11] Applicants seeking admission to law school will most likely hold an undergraduate degree, although some law schools will accept applicants with only two years of an undergraduate degree completed.[12] In Quebec, lawyers must have a three-year civil law degree instead of a common law degree. Civil law schools require their applicants to have completed a two-year CEGEP college diploma.

In Canada, there are 15 Common Law schools and 5 Civil Law schools. All Common Law Schools[13] require their applicants to write the Law School Admission Test (LSAT). Acceptance into these Law Schools is based on a combination of the LSAT score and the GPA obtained during the course of the applicant's undergraduate degree. Gaining admission into Law School is quite competitive.

In addition to university education, all provinces require a candidate lawyer to "complete the governing body's professional legal training course",[14] known as the bar admission course, which includes the bar examinations. The duration of the course varies by province. For example, in British Columbia, candidate lawyers must complete a ten-week Professional Legal Training Course and examinations.[15] In Alberta, candidates must complete the six-month Canadian Centre for Professional Legal Education ("CPLED") Program;[16] in Saskatchewan, candidates must complete the eight-week Bar Admission

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9 http://www.flsc.ca/en/about/history.asp.

10 "Mission of the Federation" (http://www.flsc.ca/en/about/mission.asp).

11 http://www.flsc.ca/en/lawSocieties/lawSocieties.asp#admission

12 See, for example: University of Manitoba "Admissions Information" http://www.umanitoba.ca/law/newsite/faq.php and University of New Brunswick "Admission Handbook 2007" http://law.unb.ca/pdf/AdmissionsHandbook2007_001.pdf

13 The French Common Law program at the University of Ottawa is the only exception.

14 "The Practice of Law in Canada" (http://www.flsc.ca/en/lawSocieties/lawSocieties.asp).

15 "Professional Legal Training Course" http://www.lawsociety.bc.ca/licensing_membership/pltc/about.html

16 "CPLED Program Alberta" http://www.lawsocietyalberta.com/files/trends/CPLED_Information%20Circular_2.pdf

Course;[17] and in Nova Scotia, the Bar Admission Course consists of a six-week Skills Training Course and an examination.[18]

Students are also required to complete an articling period for admittance into all of the provincial law societies; this can be done before or after the bar admission course. The minimum required duration of articling varies by province, ranging from six months in Quebec[19] and nine months in British Columbia,[20] to a year in Alberta,[21] Manitoba,[22] Newfoundland,[23] the Northwest Territories,[24] Nova Scotia,[25] Prince Edward Island,[26] Saskatchewan[27] and Yukon.[28]

Upon successfully completing both components of the legal training, the student-at-law may apply to become a member of the law society and be called to the bar of that law society.

Most law societies offer continuing legal education courses on a wide range of substantive law, procedure and legal skills topics. Attendance at these courses is not mandatory, financial incentives are offered by certain law societies in order to encourage attendance. Whether continuing legal education should be mandatory has recently been the subject of studies in a few law societies.[29]

3.2 Entry via Mobility

International

Instead of each law society establishing its own committee to deal with the recognition of foreign legal education and experience, a central organization was created through joint efforts of the Council of Canadian Law Deans and the Federation. Foreign lawyers wishing to practise law in Canada must make an application to the National Committee on Accreditation (NCA) for an evaluation of their legal credentials and experience. The NCA then establishes certain educational and practicing requirements that must be met before an applicant will be considered to be qualified for admission. The NCA evaluates credentials of persons applying from outside Canada for admission to one of the Canadian Law Societies and evaluates degrees from the province of Quebec for the purposes of entry into the bars of the common law provinces. Even if the NCA certifies that a candidate is qualified to practise law in Canada, the candidate still may need to take the provincial bar examination, a bar admission course, or other

17 "The Law Society of Saskatchewan - Programs & Services - Saskatchewan Legal Education Society Inc." http://www.lawsociety.sk.ca/newlook/Programs/sklesi.htm

18 "Bar Admission Course" http://www.nsbs.ns.ca/barcourse.html

19 http://www.ecoledubarreau.qc.ca/stages/admissibilite.php

20 http://www.lawsociety.bc.ca/licensing_membership/becoming_bc_lawyer/new_admissions.html.

21 Rules of the Law Society of Alberta, section 56(1) (a)

22 Law Society Rules of Manitoba, rule 5-14(2)

23 Law Society Rules of Newfoundland, rule 6.05(1)

24 *Legal Profession Act*, section 18(1)

25 Regulations Pursuant to the Legal Professions Act, rule 3.4.1

26 "Law Society of Prince Edward Island: Articling" (http://www.lspei.pe.ca/articling.php).

27 Rules of the Law Society of Saskatchewan, rule 153 (2)

28 Rules of the Law Society of Yukon, rule 84.1 (a) (http://www.lawsocietyyukon.com/forms/rules_aug2005.pdf).

29 "The practice of law in Canada - Continuing Legal Education (CLE)" (http://www.flsc.ca/en/lawSocieties/lawSocieties.asp#legal)

coursework or work experience before gaining acceptance to a provincial law society.[30] The NCA does not evaluate foreign candidates for acceptance into the Quebec law societies. [31]

Interprovincial

For lawyers trying to move between provinces, the jurisdictions of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland have fully implemented the National Mobility Agreement ("NMA"), and Quebec has signed the NMA but has not yet implemented it. This means that lawyers, under certain conditions[32], may provide legal services in or with respect to the law of a reciprocating jurisdiction for up to 100 days in a calendar year without a permit."[33] Lawyers do not have to inform other law societies that they are providing legal services on a temporary basis in or with respect to the law of the societies' jurisdiction.

If a lawyer wishes to provide more than 100 days of legal service in a year, open a public office, open and operate a trust account, or become a resident in a jurisdiction, he or she may apply to transfer to the jurisdiction (permanent mobility). Lawyers transferring permanently are excused from writing transfer examinations or other examinations. "They must still meet any qualifications that ordinarily apply for lawyers to be entitled to practise law in the jurisdiction in question. They must also certify that they have reviewed and understood reading materials required by the jurisdiction."[34]

As of November 3, 2006, the Northwest Territories, Nunavut and Yukon have signed a Territorial Mobility Agreement with the ten provinces, meaning that they will "participate in national mobility as reciprocating governing bodies with respect to the permanent (transfer) mobility provisions of the NMA."[35] The territories have not yet established guidelines for temporary mobility.

Within the ten provinces, lawyers who are not entitled to practise within one of the signatory jurisdictions under the NMA can still practise within the jurisdiction on a temporary basis, although the time frame for practice is typically shorter (around twenty days within a twelve month period).[36]

Foreign Legal Consultants

Foreign lawyers may also have the option of practising as foreign legal consultants[37]; however, Quebec, the Northwest Territories, Yukon, and Nunavut "have not yet adopted rules enabling foreign

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30 See, for example, "Practising in N.S." (http://www.nsbs.ns.ca/foreign.html).

31 "The practice of law in Canada" (http://www.flsc.ca/en/foreignLawyers/foreignLawyers.asp)

32 The lawyer must be entitled to practise in a jurisdiction that has implemented the NMA, have liability insurance and defalcation coverage and have no outstanding criminal or disciplinary proceedings, no discipline record, and no restrictions or limitations on the right to practise

33 "Mobility of Lawyers in Canada" (http://www.flsc.ca/en/committees/mobility.asp).

34 "Mobility of Lawyers in Canada" (http://www.flsc.ca/en/committees/mobility.asp).

35 "Mobility of Lawyers in Canada" (http://www.flsc.ca/en/committees/mobility.asp).

36 See, for example, "The Law Society of New Brunswick," (http://www.lawsociety-barreau.nb.ca/emain.asp?242).

37 A Foreign Legal Consultant means a person qualified to practice law in a country other than Canada or in an internal jurisdiction of that country, who gives legal advice in one Canadian provincial jurisdiction respecting the laws of that country or of the internal jurisdiction in which that person is qualified.

lawyers to act as foreign legal consultants."[38] Furthermore, members of the law societies in Ontario (until May 2007) and Alberta must be permanent residents of Canada.[39]

3.3 Registration with a Law Society

In order to practise law in any Canadian province, a lawyer must either be registered with a province's law society or be eligible to practise under the NMA. The requirements for registering with a law society typically include the educational requirements listed above and payment of an annual practice fee to the Law Society, payment and annual insurance fee to the Law Society or payment of any other mandatory annual fee.

The Law Society of Alberta, The Law Society of Saskatchewan, The Law Society of Upper Canada and The Law Society of Prince Edward Island require that their members be either Canadian citizens or permanent residents, as per the definition of the *Federal Immigration Act*. The Law Society of Newfoundland and Labrador requires that their members be residents of Canada.

4. Previous Bureau Involvement with the Legal Profession

Over the years, the Bureau has had significant interactions with various law associations. Price fixing activities engaged in by local law associations have been the object of the Bureau's attention on several occasions. Furthermore, following the Bureau's inquiries into price-fixing, many written opinions have been requested regarding the use of suggested fee schedules.

The application of the regulated conduct defence was first considered in *Attorney General of Canada* v. *Law Society of British Columbia* (referred to as "the Jabour Case".[40] In 1982, the Jabour case arose as a result of an action taken by the Law Society of British Columbia. The action was taken in response to the commencement of an inquiry by the Director of Investigation and Research (the former Commissioner of Competition) into the Society's enforcement of its regulations restricting advertising against Vancouver lawyer Donald Jabour. Benchers of the Law Society were authorized under valid provincial legislation to define and prohibit lawyers from engaging in conduct deemed unbecoming. Advertising their services was prohibited pursuant to this authority. Mr. Jabour, a lawyer who advertised his fee schedule contrary to the provisions of the Professional Conduct Handbook established by the Benchers of the Law Society, argued that this prohibition constituted an agreement to unduly lessen competition. The court decided that the conspiracy section of the *Combines Investigations Act* (the predecessor of the *Competition Act*) did not apply to the Law Society's activities of restricting advertising for services and disciplining members who contravened such restrictions. Mr. Justice Estey, writing for the court, found that the Benchers were carrying out their duties pursuant to valid provincial legislation, which must be presumed to be in the public interest, consequently any resulting lessening of competition would not be undue within the meaning of the conspiracy provisions. Chief Justice Estey further noted that proceedings in implementing and enforcing the criminal prohibitions would require a demonstration of some conduct contrary to the public interest. The Supreme Court also said the conspiracy section of the *Combines Investigations Act* refers to voluntary agreements, but since the Benchers were acting under provincial legislation, they cannot be said to be voluntarily agreeing to engage in anti-competitive behaviour.

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38 "Trade Policy Review: Report by the Secretariat" World Trade Organization, February 14, 2007.

39 "Trade Policy Review: Report by the Secretariat" World Trade Organization, February 14, 2007.

40 *Attorney* General *of Canada* v. *Law Society of British Columbia*, [1982] 2 S.C.R. 307. Commonly referred to as "the Jabour case".

Price-fixing activities engaged in by local law associations have been examined by the Bureau on a few instances. The Supreme Court of Ontario in 1988 prohibited two Ontario law associations, the Kent County Law Association and the Waterloo Law Association, from agreeing on the fees members would charge the public for legal services related to residential real estate transactions.[41] The orders also specifically prohibited communications among members concerning the fees charged to clients, the promulgation of fee schedules and the formation of committees on fees. The Waterloo Law Association admitted that the Executive of the Association had met to discuss a proposed fee schedule and the sanctions that could be used against members to enforce it. The Executive suggested to members that non-adherence to this schedule would be considered a breach of ethical and professional standards. Subsequently, the fee schedule was unanimously ratified at a meeting of the Association. In the case of the Kent County Law Association, a motion of agreement to adhere to a suggested fee schedule for residential real estate matters was unanimously passed at a meeting. Each member was asked to charge fees only in accordance with the schedule. Failure to adhere to the fee schedule would be considered unprofessional conduct and disciplinary sanctions could be imposed. Both Law Associations admitted that the schedules were designed to prevent widespread discounting. This was the first time that a professional association in Canada had been prevented under the competition legislation from fixing prices on the basis of published fee schedules.

In 2000, the Bureau announced that the Notaries Association of Rivière-du-Loup had pleaded guilty to one count of conspiracy to fix the prices of real estate notary services offered in specific regions in the Province of Quebec.[42] The Notaries Association fixed the prices to be charged for notarized real estate transactions, and the notaries then applied these fees. Consumers were directly impacted by these actions because notaries in Quebec are the only professionals who have the right to draw up real estate transactions. Therefore, consumers buying or selling real estate were obliged to utilize the services of notaries and pay artificially inflated prices. The Association was levied a fine of $25,000 and was subject to a prohibition order whose purpose was to prevent and prohibit the commission of similar new offences.

In 2006, the Bureau was asked to draft a written opinion[43] on the application of sections 45 (conspiracy) and 61 (Price maintenance) of the *Competition Act* to the proposed Residential Real Estate Services Fees Schedule for Ontario Lawyers. At issue was a working group on lawyers and real estate composed of the County and District Law Presidents Association, the Ontario Bar Association and the Ontario Real Estate Lawyers Association which developed a set of practice standards designed to be a guide for Ontario lawyers who conduct residential real estate transactions. As part of the practice standards, the working group drafted the Residential Real Estate Services Fees Schedule for Ontario Lawyers. The suggested fee schedule originally provided to the Bureau was replaced with a version that did not contain phrases such as "minimum fee" "not less than" which are suggestive of a mandatory minimum fee. The Bureau stated in its written opinion that the use of any such suggestions would raise concerns as to whether the fee schedule is a directive and whether non-adherence to the fee schedule would result in lawyers being sanctioned or disciplined. The information provided to the bureau stated that adherence to the proposed fee schedule is not mandatory and that Lawyers will not be sanctioned or punished for refusing to follow the suggested fee schedule. It further stated that the fees are only suggestions and other fee arrangements may be freely negotiated. Based on this information, the Bureau concluded that nothing suggested a conspiracy to fix or control fees nor was there evidence of an effort to

41 Waterloo Law Association v. Attorney General of Canada (1987), 58 O. R. (2d) 275. 22 and R. v. Kent County Law Association et al. (1988), 7 L.W. 738-021 (Ont. S.C.)

42 "Notaries' Association Pleads Guilty To Price Fixing" (http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=556&lg=e).

43 "Real Estate Industry – Suggested Fee Schedule" (http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2204&lg=e).

maintain prices. The voluntary nature of the use of the fee schedule was key in coming to these conclusions. It was determined that the proposed suggested fee schedule would not provide the Commissioner of Competition with sufficient grounds to commence an inquiry. However, it was mentioned the promulgation of the suggested fee schedule could lead to future conduct that might reasonably become the subject of an inquiry under s. 45 and 61 of the *Competition Act*.

5. Conclusion

Despite the increase in the number of lawyers, many Canadians are not using their services to the extent that they should be. Chief Justice Beverly McLachlin recently expressed her concern that due to rising legal fees, the legal system is becoming inaccessible to many Canadians with nearly half of those going to trial representing themselves.[44] As a result of the rise in legal fees, Canadians have turned to alternative means of resolving their legal issues such as arbitration and mediation. Through its professions study, the Bureau hopes to address this issue by identifying areas of regulation which unnecessarily restrict competition and, consequently, raise costs to consumers.

[44] ”Epidemic' of unrepresented in court: McLachlin” (http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060812/legal_costs_060812/20060812?hub=Canada)

CZECH REPUBLIC

1. Introduction

This paper addresses the regulation of three legal professions – advocates, notaries and court executors. We will focus in particular on the barriers to and conditions of entry into these professions, exclusive and other activities, the issue of remuneration and professional self-regulation. All three professions are subject to extensive regulation by the state. The numbers of offices of notaries and executors are determined by the state acting through the justice minister (in accordance with the *numerus clausus* principle). The number of advocates is not restricted. The justice minister is further authorized to appoint notaries and executors to office subject to the satisfaction of statutory conditions. As regards remuneration, remuneration other than contractual is stipulated by a decree of the Ministry of Justice. Instead of remuneration so stipulated, advocates may agree on remuneration by contract, while executors may, in addition to remuneration other than contractual, agree with the obligee on contractual remuneration which does not constitute a cost of execution, and as such is not paid by the obligor. Notary's remuneration must always be in accordance with the decree. Professional self-regulation of all three professions is carried out by professional chambers/associations with mandatory membership. Their powers include supervisions of their members' activities, and the issuance of professional regulations which regulate, rather sporadically, economic competition and advertising in the areas in question.

2. Advocates

2.1 Regulation of entry

The status of an advocate stems from his/her activity as a person versed in the law, and consists of the provision of legal assistance as an independent profession in the provision of advice and instructions, defense of other persons' interests before courts or outside courts (*advocacy sensu largo*), or as a profession involving legal assistance to other persons and requiring special qualifications and formal authorization (*advocacy stricto sensu*).

The terms and conditions on which advocates who are Czech citizens, or other natural persons from EU member states and other counties, may provide legal services, are stipulated by Act No. 85/1996 Coll., on Advocacy, as amended, effective as of July 1, 1996. The said act provided a uniform regulation of provision of legal services previously provided pursuant to separate laws by advocates and commercial lawyers.

An advocate is a person entered in the list maintained by the Czech Bar Association seated in Prague (the "Bar Association"). No maximum number of advocates (numerus clausus) is set with regard to the pursuit of advocacy. Registration is subject in particular to the following conditions: full legal capacity, university degree in law, three-years of practice as a trainee, no criminal record, no employment or other similar relationship, passing the bar examination, taking an oath before the chairman of the Bar Association. Further, a foreign citizen may be registered upon providing evidence of authorization to provide legal services in another state, and passing a nostrification examination. The two examinations are regulated in detail by Examination Rules issued by the Ministry of Justice upon prior consultation with the

Czech Bar Association in the form of a decree (Decree No. 197/1996 Coll., issuing examination rules for bar examinations and nostrification examinations, as amended).

The Act on Advocacy distinguishes between several way in which advocacy may be carried out. The simplest is an independent exercise of advocacy. Other way include the exercise of advocacy jointly with other advocates as a member of an association or as a partner in a business company, or, as the case may be, the exercise of advocacy as an employee.

An association is characterized by its permanent nature, including the fact that it was not established in order to provide legal services in one or several predetermined cases. The parties regulate their mutual relations by a memorandum of association drawn up in accordance with the Civil Code, and such memorandum of association must be in writing. Only advocates may be members of the association, and they are obliged to exercise advocacy under a common name. Advocates-members of an association must further have a common registered seat.

Another way in which advocacy may be exercised is as a partner in a business company. Pursuant to the Act on Advocacy, advocates may exercise advocacy as partners in a general partnership, limited partnership or a limited liability company established in accordance with the Commercial Code, if the purpose of such company is solely the exercise of advocacy, and all its members are advocates. The provisions of the Commercial Code permitting the establishment of a limited liability company by a sole founder do not apply to a limited liability company established for the purpose of exercise of advocacy. If a limited liability company established for the purpose of exercise of advocacy has fewer than 2 members, the Czech Bar Association, upon learning of such fact, immediately files a petition with a court for the dissolution and liquidation of the company pursuant to the Commercial Code; the court may dissolve and order the liquidation of the company even without a motion. The advocate becomes entitled to exercise advocacy in the company only upon his/her registration in the Commercial Register as member, and upon the entry into the Commercial Register of the fact that his/her entire contribution to the company's registered capital has been paid up. That creates no prejudice to the advocate's right to exercise advocacy independently, in an association or other company. Advocates who are company members exercise advocacy in the name and for the account of the company. If in individual cases, separate legal regulations do not permit the exercise of advocacy in the name of the company, advocates exercise advocacy in their own names and for the account of the company. If an advocate is disbarred, his/her participation in the company is extinguished, and the advocate becomes entitled to a settlement share pursuant to the Commercial Code. An advocate who exercises advocacy as a company member cannot concurrently exercise advocacy independently, in an association, as a member of another company or as an employee.

The last option under the Act on Advocacy is the exercise of advocacy under an employment relationship with another advocate or a company. Labor relations of advocates-employees are governed by the Labor Code. An advocate may be employed by one advocate or company only; an employed advocate cannot concurrently exercise advocacy independently or jointly with other advocates. An employed advocate is obliged to indicate its employer next to the designation "advocate" in the exercise of advocacy. An advocate-employee exercises advocacy in the name and for the account of the employer, unless separate legal regulations stipulate otherwise.

2.2 Activities of the advocate

The activity of the advocate consists in the provision of legal services. Pursuant to the Act on Advocacy, legal services are deemed to mean representation in proceedings before courts and other bodies, defense in criminal matters, provision of legal advice, drafting of deeds, preparation of legal analyses and other forms of legal assistance, if conducted independently and for consideration.

In a civil proceeding (civil, business or labor disputes), one may be represented by anyone possessing legal capacity, not necessarily a person with legal education. Such representative must act in person and must not consistently engage in such activity. On the other hand, in a criminal proceeding or in proceedings before the Constitutional Court, one must generally be represented by an advocate. Representation by an advocate, or possibly a notary public, is further necessary in appellate proceedings before the Supreme Court. A notary may represent the appellant to the extent of his/her powers stipulated in the Notarial Code. Representation by an advocate is further required in proceedings addressing cassation complaints before the Supreme Administrative Court. Cassation complaint is an extraordinary remedy against final and enforceable decisions of regional courts in the administrative court system.

In criminal proceedings, there are situations when the accused must have an advocate. In the preparatory proceedings (i.e., when the criminal activity is investigated by the police), the accused must have an advocate if he/she is in custody, serving a prison sentence or being prosecuted as a fugitive from justice. Further, the accused must have counsel if the accused does not possess full legal capacity or is placed in a health care facility for examination of his/her mental state, or, if the state attorney has any doubt that the accused is able to properly defend himself/herself (e.g., because of physical or mental handicaps). In a criminal trial, the accused must have counsel if the accused is charged with a criminal act that carries a potential prison sentence of more than 5 years. Further, there has to be a counsel in a criminal trial in an expedited preparatory proceeding. This is a fairly novel option whereby under certain circumstances, the offender may be sentenced within several days from the commission of the crime. The last situation where a counsel has to be involved in criminal procedure are cases with a foreign element, i.e., extradition proceedings or proceedings for the recognition of a foreign award. Similarly, one needs to have counsel in enforcement proceedings or proceedings concerning extraordinary remedies (motion for post-judgment relief, complaints against violations of the law).

Having an advocate is thus a must in proceedings before the Constitutional Court, in case of motion for post-judgment relief filed with the Supreme Court, in proceedings concerning cassation complaints before the Supreme Administrative Court, and, in defined cases, also for representation in criminal trials. To avail oneself of legal services provided by advocates in the drafting of contracts is useful but not mandatory.

2.3 Remuneration

Advocacy is exercised for consideration as a matter of principle. The determination of remuneration and reimbursement of advocates and the amounts thereof is entrusted by the law to the Ministry of Justice who does so by way of a decree after consultations with the Bar Association. Remuneration due for the exercise of advocacy is currently stipulated in Decree No. 177/1996 Coll., on remuneration and reimbursement of advocates for the provision of legal services (fee tariff - FT), as amended, and Decree No. 484/2000 Coll., stipulating lump-sum payments for representation of parties by advocates or notaries in cost awards in civil proceedings. If the protection of the interests of the party so requires, or if a counsel needs to be appointed in proceedings where representation by counsel is mandatory, the chairman of the court tribunal appoints counsel from among advocates. The fees of a counsel so appointed are paid by the state.

The FT distinguishes between contractual fees and non-contractual fees. The advocate and the client decide at their discretion how they will regulate by contract their relations in the provision of legal services; the issue of amount and payability of remuneration and reimbursement for legal services rendered may be regulated in this manner as well. If the advocate and the client do not avail themselves of this option, the FT's provisions on non-contractual fees are applied. In its provisions on non-contractual fees, FT addresses in particular the issue of setting the amount of the fees; payability is not expressly addressed therein. Even if the advocate and client agree on contractual fees, the court grants to the advocate, in case

of success in the court proceedings, as award of costs only an amount equivalent to remuneration calculated in accordance with the fee tariff.

In addition to remuneration, the advocate is entitled to receive from the client reimbursement for costs incurred in connection with the provision of legal services, in particular reimbursement for out-of-pocket expenses and compensation for lost time.

4. Administrative costs of the advocate are included in the fee, which means that unless the advocate and the client agree otherwise, such costs (e.g., general administrative costs, rent for and furnishings in the office) are included in the advocate's fee.

2.4 Self-regulation

Professional self-regulation is carried out by the Czech Bar Association (Česká advokátní komora), a legal entity with its seat in Prague, as a professional organization, membership being mandatory by law for all advocates in the Czech Republic. The Bar Association exercises public administration with regard to advocacy, procures that uniform rules are applied in the provision of legal services and supervises the quality of legal services, procures professional discipline and provides for the provision of mandatory services in the area of law protection. A three-member disciplinary senate consisting of members of the disciplinary board of the Bar Association decides whether an advocate or trainee advocate committed a disciplinary breach, and decides on the imposition of a disciplinary measure in a disciplinary proceeding. A disciplinary breach is deemed to mean a serious or recurrent breach of duties of the advocate or trainee advocate under this or separate law or professional regulation. The penalties that may be imposed on advocates for disciplinary breaches include disbarment.

The Bar Association further issues professional regulations binding on all of its members. One of the most important regulations is the Code of Ethics which stipulates rules of professional ethics and competition for advocates in the Czech Republic (Code of Ethics).

As regards competition, the regulation stipulates that the advocate must act fairly in competition with other advocates in the interest of both clients and undertakings. For the purposes of competition, the advocate must not consciously use false or misleading information or information downgrading another advocate. For the purposes of this provision, false information is any information capable of eliciting unreasonable expectations of results achievable by the advocate, or any doubt that the result will be attained by means compliant with the law and professional regulations. The advocate may use the designation "advocate" even outside the exercise of advocacy. In competition, the advocate acts in compliance with legal regulations governing economic competition, i.e., for instance, Sections 41 *et seq.* of the Commercial Code, Act No. 143/2001 Coll., on the Protection of Economic Competition and Amendments to Certain Acts (Competition Act), as amended.

The regulation briefly addresses the issue of advertising**.** It stipulates that the advocate is entitled to inform the public about services provided, provided that such information is accurate, is not misleading and respect the confidentiality obligation and other fundamental values of advocacy. Provided such conditions are satisfied, personal publicity of the advocate is permitted in the media, such as the press, radio, television, electronic commercial communication and other media. The advocate is obliged to keep records of such activities.

3. Notaries

3.1 Regulation of entry

The status of notary is currently regulated by Act No. 358/1992 Coll., on Notaries and their Activities (Notarial Code), as amended. The notary public is a specific institution established by the state. The notary public carries the notarial office in which powers are vested in the state, and performs a public activity that cannot be performed by any other body or person. The notarial office is deemed to mean a set of powers to engage in notarial and other activities stipulated by the law, associated firmly with the place of performance of such activity.

The notary public, however, is not employed by the state: the notarial profession is an independent legal profession pursued by a natural person. As the activities of notaries pursue a public interest, the state retains, through the Ministry of Justice, the authority to impose certain measures, e.g., the appointment of notaries, the establishment and termination of notarial offices, suspension of notarial practice, etc. The number of notarial offices, and therefore notaries, is regulated by the state.

The following person may be appointed as notary public: a Czech citizen who possesses full legal capacity, has completed university education in law, has no criminal record, has a minimum of five years of notarial practice, and successfully passed a notarial examination. Notarial practice is deemed to mean practice as notary, candidate notary and trainee notary. Other legal practice may be counted towards the required notarial practice in part or in its entirety (e.g., practice as judge, advocate, commercial lawyer, court executor, etc). As regards the notarial examination, even a person who successfully passed other legal examinations, e.g., a specialized judicial examination, judicial examination, uniform judicial examination, bar examination, etc., is deemed to have passed the notarial examination. A trainee notary is a person employed by the notary and registered in the list of trainee notaries maintained by the relevant chamber of notaries. Candidate notary is a person with notarial practice (a minimum of three years), passed the notarial examination and is entered in the list of candidate notaries.

Notaries are appointed into notarial office by the justice minister on application by the Czech Chamber of Notaries. The Chamber of Notaries makes such application on the basis of results of a selection process it organizes and holds. The Chamber of Notaries includes everyone who applies and meets the prerequisites for appointment as notary in the selection process pertaining to a specific notarial office.

The seat of the notarial office is the seat of the district court in whose circuit the notarial office was established. The minister sets the number of notarial offices in the circuit of each district court in consultation with the Chamber of Notaries. The creation and termination of a notarial office also falls under the province of the minister, in consultation with the Chamber of Notaries, if a notary public appointed to office is removed or dies. The notarial office is thus designated by name and surname of the notary at the district court. With the consent of the relevant Chamber of Notaries, the notary may change the seat of his/her notarial office within the circuit covered by the district court in question.

3.2 Activities of notaries

Notaries engage first and foremost in notarial activities. For the purposes of the law, notarial activities are deemed to mean the drafting of public deeds concerning legal acts, attesting legally significant facts and affidavits, acceptance of deeds into custody, and acceptance of funds and deeds into escrow for the purpose of their release to other parties. Further, in addition to notarial activities, notaries engage in other activities, providing legal assistance in the form of legal advice, representation in dealings with natural and legal entities, state or other bodies, in administrative proceedings, and in certain other cases also in civil

procedure (e.g., probate proceedings). The notary may further draft deeds, manage assets, act as bankruptcy trustee, special trustee, and represent receiver or trustee in bankruptcy and settlement proceedings.

The law lists several cases where the services of notary public must be used:

3.2.1 Post-nuptial and pre-nuptial agreements

In order to depart from the statutory regulation of community property, community property may be restricted or expanded by agreement which must be drafted by a notary public in the form of a notarial deed.

3.2.2 Pledge agreements and pledge registers

A special regulation of pledges pertains to cases where real estate not registered in the property register (e.g., cellar), an aggregate thing (e.g., a business), a set of items (e.g., a collection) or a movable (e.g., a motor vehicle) is subject to pledge, and is not to be delivered to the creditor upon the execution of the pledge agreement. Such pledge agreement must be drawn up in the form of a notarial deed, and pledge is in such case established upon registration in the Register of Pledges maintained by the Chamber of Notaries of the Czech Republic. The notary public shall procure the registration. The Register of Pledges serves not only for mandatory registration of pledges but can be searched as well. Any notary can search records to see if a particular item is pledged for the benefit of a creditor, and thus help eliminate risk of purchase of a pledged item.

3.2.3 Business companies

By law, the constitutive documents for a limited liability or joint stock company must be drawn up in the form of a notarial deed. The notary thus drafts founding deeds, memoranda of association and articles of association of such companies. The law further requires attestation of fundamental changes in companies in the form of notarial deeds.

3.2.4 Cooperatives

The foundation of a cooperative must be attested by a notarial deed. Further, any decision on amendment of articles of association or dissolution of a cooperative must be drawn up in the form of a notarial deed. In a notarial deed on the establishment of a cooperative, the notary public attests fundamental facts concerning the meeting of the cooperative, and draws a notarial deed on the founding meeting approving the articles of association of the cooperative. Further, under the law, the notary public attests the proceedings of the initial meeting of a condominium of owners of residential and non-residential units without legal personality. The bodies of the condominium are elected and its articles of association approved at such meeting.

3.2.5 Inheritance

The notary public acting as court commissioner is authorized by a court to carry out the settlement of an estate. This is the only case when it is impossible to choose a notary for the purpose of notarial service. The estate settlement is assigned to the notary according to a predetermined schedule in order to guarantee impartiality and objectivity of court decisions. Estates are usually settled by agreement between heirs which must be made before a notary public. Any acts taken by the notary acting as court commissioner are deemed to constitute acts taken by court.

3.2.6 Legalization and attestation

The authenticity of a signature (legalization) or certification of an identical copy or copy as a true copy of the original document (vidimus) is attested by a notary or any regional or district office or a registration office, or a municipal office which does not have the status of a registration office but is entitled to carry out legalization and certification by virtue of a decree of the Ministry of Interior. If a certified deed is to be presented in the territory of another state, it needs to be signed by a notary or permanent deputy of a notary, and superlegalized by the Ministry of Justice of the Czech Republic.

In the specific cases outlined below, using a notary is not mandatory but very useful:

3.2.7 Real property transfers

Unlike an agreement drafted by an advocate or real estate agency, a property transfer agreement is a public deed. This means that should a dispute arise, a counterpart of the notarial deed can be used as irrefutable evidence of facts set out therein.

3.2.8 Notarial escrow

In addition to drafting a purchase agreement, the notary may also accept the purchase price into notarial custody in order to guarantee safe payment of the purchase price to both parties. For the seller, this eliminates the risk of not receiving the full amount of the purchase price, while the purchaser avoids the risk of delivering payment prior to registration of title in the property register. Moreover, the purchaser is able to make sure that transfer tax is paid, as the purchaser is liable for the seller for payment of transfer tax under the law. In this context, funds may also be placed in escrow with an advocate, or a bank or real estate agency used for this purpose.

3.2.9 Notarial deed as a basis for execution

The most efficient way of ensuring that monies lent would be returned is for the creditor to obtain a notarial deed in which the debtor consents to direct enforceability of the notarial deed or to execution. The notarial deed contains the debtor's undertaking to duly fulfill its obligations to the creditor within the stipulated term under the threat of subsequent execution upon the debtor's property. In case of default on the loan, it is thus not necessary to undergo a usually lengthy court proceeding wherein the debtor is first ordered to pay, before the execution procedure can be undertaken. A deed drafted by a court executor and containing consent to enforceability carries the same weight as a notarial deed in this case.

3.2.10 Testaments, disinheritance and appointment of estate administrators

By drafting a testament, one can resolve property issues upon one's death, thus preventing subsequent disputes between heirs. If the testament is drafted by a notary in the form of a notarial deed, the original testament remains in the safe custody of the notary, and the existence of the testament is recorded in the electronic Central Register of Testaments maintained by the Czech Chamber of Notaries.

3.2.11 Certified extracts from the property register

You can ask a notary for a certified extract from the property register, i.e., an extract from the list of titles, for any real property in the Czech Republic. Such certified extract is a public deed and has the same force as an extract issued by a cadastral office. In addition to notaries, municipal offices listed in the decree of the Ministry of Interior, postal license holders and the Economic Chamber of the Czech Republic are authorized to issue certified extracts from public information systems.

3.3 Remuneration

As the notary is not a state employee, he/she is not entitled to receive any salary from the state. The remuneration of notaries must be in compliance with Decree of the Ministry of Justice No. 196/2001 Coll., on Remuneration and Reimbursement of Notaries and Estate Administrators, as amended. Remuneration due to a notary for provision of legal assistance is set pursuant to the fee tariff of advocates (Decree No. 177/1996 Coll.). Therefore, unlike an advocate, a notary cannot charge a fee agreed with his/her contractual partner.

Pursuant to Decree No. 196/2001 Coll., a notary is entitled for his/her activities which exhibit the features of business activity to some extent, to remuneration and reimbursement. Compensation for lost time is due to the notary for any acts taken outside the notary's office or the place where the notary conducts his/her official business, for time spent traveling to such other place and back, and for time spent waiting to make the act for reasons on the part of the client.

The amount of remuneration due to the notary is set according to the fee due for the act or set of acts rendered in the course of notarial activity, either as a fixed fee or a percentage of a fee tariff. The decree specifically provides for the fee tariffs. If the act consists of several inter-related legal acts or legal facts, the act or fact associated with the highest fee is decisive. The fee includes legal advice related to the analysis of the matter, provided that the notary makes the act to which the advice pertains.

3.4 Self-regulation

Notarial self-regulation consists of chambers of notaries in the circuit of each regional court, and the Czech Chamber of Notaries (the "Chamber"), with its seat in Prague. Membership of a notary in the chamber within the circuit of the regional court in which an occupied notarial office is located is mandatory. Chambers of notaries in the regions supervise the activities of notaries and the management of notarial offices in their respective circuits, and the Chamber further supervises the activities of chambers of notaries. The Ministry of Justice performs state supervision.

A fairly debate about the abolition of mandatory membership in professional organizations took place recently, both in the House of Deputies and among the professional and general public. The Czech Chamber of Deputies adopted an unequivocally negative position on the issue, in particular with a view to the protection of consumers using legal services. The chamber argues that if mandatory membership of notaries in chambers were to be abolished, the chambers could not effectively supervise the activities of all notaries, and supervision would be left solely to staff members of the Ministry of Justice. The chamber expressed the belief that it would not be realistic to think that the staff members of the Ministry of Justice could exercise effective state supervision in this situation. The chamber believes that it would be very difficult for consumers to obtain relief in specific cases, and that the measure could seriously impair the exercise of the notarial profession as such. The situation remains unchanged at the moment, and membership in the chamber of notaries continues to be mandatory.

As regards competition, notaries are subject to legal regulations governing economic competition, i.e., both the provisions of the Commercial Code, and Act No. 143/2001 Coll., on the Protection of Economic Competition and Amendments to Certain Acts (the Competition Act), as amended. The organizational rules of the Czech Chamber of Notaries and chambers of notaries give notaries an express right to seek protection against unfair competition and conduct capable of impairing the dignity and importance of the notarial profession from the bodies of bodies of the chambers.

4. Court Executor

4.1 Regulation of entry

The status of a court executor as a natural person (non-state body) is regulated by Act No. 120/2001 Coll., on Court Executors and Execution Activities (Execution Code), as amended, and is similar to that of the notary public.

The Execution Code delegates certain judicial powers to independent and impartial executors. The executor pursues his/her activities as an independent profession, and has the status of a public agent heading an executor's office established by the justice minister. The number of executor's offices is set and the offices established by the justice minister in accordance with the numerus clausus principle. The seats of executor's offices are established within the circuit of each district court. The justice minister may increase the number of executor's offices, or terminate the same, and appoint and remove executors upon the motion of the Chamber of Executors (the "Chamber").

The following person may be appointed as executor: a Czech citizen who possesses full legal capacity, has obtained a university degree from a faculty of law of a university seated in the Czech Republic, has no criminal record, has a minimum of three years of practice as an executor, and successfully passed an executor's examination. Executor's practice is deemed to mean the practice of executor, candidate executor and trainee executor, and the Chamber counts other practices stipulated by law towards executor's practice, e.g., the practice of a judge, advocate, notary public, commercial lawyer, public prosecutor, candidate judge, etc. Similarly, the Chamber recognizes the following examinations as an executor's examination: specialized judicial examination, judicial examination, uniform judicial and bar examination, bar examination, notarial examination and other examinations as may be stipulated by law.

The appointment of an executor into office by the justice minister is condition on the completion of a selection process and issuance of a decision by the presidium of the Chamber of Executors, confirming that the candidate satisfied all the prerequisites for appointment. Upon appointment of an executor, the Chamber of Executors appoints, upon the executor's proposal, a deputy from among candidate executors to substitute for the executor in case of illness or on other serious grounds.

The executor may only practice after making an oath before the minister and procuring insurance against liability for damage that may arise in connection with the execution activity.

The exercise of the executor's office terminates upon the executor's death, when the executor is declared dead, removed, loses Czech citizenship, or upon loss or impairment of the executor's legal capacity. The executor may be removed by the justice minister upon the executor's own request or the request of the Chamber.

4.2 Activities of the executor

As mentioned above, in the exercise of the executor's office, the executor enforces execution orders (the "execution activities"). In the exercise of execution activities, the procedural acts taken by a court executor by law are deemed to constitute acts taken by court, and the court executor is entitled to take any and all acts otherwise entrusted by law to the court, judge, executor or other court employee. In that process, the court executor is bound solely by the Constitution, laws, other legal regulations and court decisions issued in enforcement proceedings and execution proceedings. Otherwise, the court executor pursues the execution activities completely independently, and has the status of a public agent.

In addition to the enforcement and recovery of monetary and in-kind performance, as mentioned in the preceding two paragraphs, i.e., the execution activities of the court executor, the court executor may

further engage in other activities consisting in the provision of legal assistance, drafting of deed and performance of other activities in accordance with the Execution Code. Such activities are not reserved by law solely for executors, and may usually be performed also by notaries or advocates. These include namely the following:

4.2.1 Provision of legal assistance

It is based on the act of an applicant with whom the executor must conclude a written agreement on the provision of legal assistance.

4.2.2 Drafting of deeds

Deeds drafted by executors may be divided into three categories:

a) Executor's protocols attesting facts and status of the matter, e.g., performance under a debt, condition of real property, apartments and non-residential premises, if the same can be used in evidence to support claims in proceedings before a court or other government agency, and if the case took place in the executor's presence or if the executor ascertained the status of the matter. The aforesaid executor's protocol has the nature of a public deed.

b) Executor's protocols on an agreement by which the party undertakes to satisfy a receivable or other claim of anther party under an obligational legal relationship, consenting to the order and enforcement of a decision or execution in accordance with such protocol in the event that it fails to satisfy its obligation in a due and timely manner.

c) Other deeds related to the provision of legal assistance, e.g., motions for execution, etc.

As part of other activities, the executor may *take into custody monies, deeds and other movables* in connection with execution, judicial and administrative proceedings.

The executor may also conduct a voluntary auction of a *movable or immovable assets and perform other activities* if a separate legal regulation so stipulates.

4.3 Remuneration

Remuneration for services rendered by a court executor is set by a legal regulation, namely, Decree of the Ministry of Justice of the Czech Republic No. 330/2001 Coll. The decree stipulates the amount of non-contractual remuneration of the executor, and further regulates the right to reimbursement for out-of-pocket expenses incurred in connection with the executor's execution activities and other activities, right to compensation for time lost in the execution, and compensation for service of process. Importantly, both the non-contractual remuneration and other costs referred to above represent costs of the execution, paid to the executor and the obligee by the obligor. The court executor is entitled to demand from the obligee a reasonable prepayment of costs of execution.

In addition to the non-contractual remuneration so stipulated, the Execution Code and the decree permit an agreement on contractual remuneration for the execution, as an agreement between the executor and the obligee in the agreement on execution; the said regulations do not specify the amount of or conditions for the right to such remuneration. The contractual remuneration does not constitute a cost of the execution.

The executor is further entitled to remuneration for the provision of legal assistance, if any, in the amount set in the fee tariff. For the drafting of executor's protocols and custodial services, the executor is

entitled to remuneration pursuant to the decree regulating remuneration and reimbursement due to notaries and estate administrators.

4.4 Self-regulation

The Chamber of Executors of the Czech Republic, seated in Brno, is the professional organization of executors; membership is mandatory. Upon the satisfaction of statutory conditions and appointment to executor's office by the justice minister, each court executor becomes a member of the chamber. The chamber oversees the executor's activities and management of executor's offices; in addition to that, the Ministry of Justice performs state supervision.

The chamber issues professional regulations binding on all the members. The issues of competition and advertising are governed by *Rules of Professional Ethics and Competition Rules of Court Executors*. Pursuant to said rules, the executors may, to a reasonable extent, inform the public about his/her activities in periodicals, non-periodical publications, radio, TV and audio-visual means; any such adverts must be fair, honest and true. Advertising must further respect the principles of fair competition between executors, must not spread false information about execution or other activities of the executor, or other information about executors that the executor is not entitled to perform pursuant to applicable legal regulations. Even information that is true in itself is considered false if it may mislead because of the circumstances or context in which it is presented. An executor must not benefit from advertising to the detriment of another, and adverts must not attack other executors or discredit other executors, whether directly or indirectly. Adverts must not use images or texts in connection with execution activity that could be detrimental to the professional honor and reputation of the profession of executor. The regulation prohibits advertising using in particular billboards, vehicles, posters, leaflets and other communication means for information transmission. Further, an executive must not use anonymous distribution of emails (spamming) or direct–marketing approaches involving the approaching of an unspecified category of persons or using call-center services.

5. Report of the Competition Office on Independent Professions

During 2006, the Office for the Protection of Economic Competition (the "Competition Office") prepared and submitted to the Czech government in March 2007 the Report on necessary restrictions of economic competition under applicable legislation in the sector of independent professions in the Czech Republic (the "Report"). By the end of June 2007, an analysis of internal regulations of professional associations of independent professions from the point of view of competition law will be added to the report. The analysis aims to identify the rules that are not required for the due pursuit of the respective professions, and as such are anticompetitive by definition. It will focus on the regulation of independent professions in general, rather than legal professions only.

As regards the setting of remuneration according to fee tariffs, the Competition Office noted in the Report that the individual categories of legal professions have set the same rules for remuneration, and anyone demanding their services thus must pay fees set in accordance with the same principles. However, the Competition Office has stressed that a general requirement must be that the price of services needs to reflect the quality of service rendered, or rather each market must exhibit a relationship between the quality of services rendered and the prices paid by the consumer. According to the Report, the ratio is largely missing in case of the tariffs.

After a consultation with the Chamber of Notaries, the Competition Office for instance noted that the application of hourly rates, or rather calculation of price on the basis of time spent by the staff members of the notarial office on a task was not quite appropriate (especially since it cannot be checked at all). Similarly, the direct ratio between the price of the matter being tackled (e.g., the value of real estate being

transferred) and the fee amount does not comply with the requirement that the quality of service be reflected in the price.

The Competition Office has proposed in connection with tariff fees whether the relationship between the value of the matter and the fee amount should not be changed *de lege ferenda* from the current, more or less linear system (price brackets) to a gradual digressive system, or a system where the price would at first be progressive and then began to digress once it reaches a certain level.

DENMARK

1. Regulation of Entry

1.1 Quality standards and entry

A law degree from a recognized university is required in order to practice law in Denmark. A law degree obtained in an EU-member state can be used in Denmark. There are limitations on the number of study places. However, these limitations are not actual obstacles as the limitation (approximately 500 students in the first year of law school for each law school) is relatively high.

Additional training to the law degree is required in order to practice law as a lawyer. According to the Danish Administration of Justice Act and an order given hereby it is required that a lawyer, in addition to a law degree, attends a theoretic course consisting of three semesters (3 years) (the pre-lawyer education) and passes a concluding bar examination. "Advokaternes Serviceselskab" a company under the Danish Bar and Law Society administers the education under the supervision of the Ministry of Justice. A trainee can only register for the examination three times. If a trainee does not pass the examination the third time, the trainee will never be able to obtain the right to practice as a lawyer. In addition to the theoretical training it is required that a lawyer has practiced law for three years in a law firm, the courts or the crown in which litigation constitutes an essential part of the work.

There are no requirements relating to ongoing education. However, it follows from the rules of professional and ethical conduct that a lawyer must attend to the clients` interests thoroughly, conscientiously and with sufficient speed. Furthermore, it follows that a lawyer must not undertake cases/duties for which the lawyer has not sufficient competence. These rules provide that a lawyer must keep updated within the scope of his or her field of work.

According to the Danish Administration of Justice Act all lawyers are required to be members of the Danish Bar and Law Society. A lawyer automatically becomes a member of the Danish Bar and Law Society when he/she obtains the appointment as a lawyer. Withdrawal from the Danish Bar and Law Society can only happen if the lawyer voluntarily deposits his/her appointment to practice law as a lawyer, or if the right to practice law as a lawyer is deprived by judgement of the court or the Disciplinary Board of the Danish Bar and Law Society. Membership of the Danish Bar and Law Society is compulsory to ensure the lawyers independence of the governmental powers and is bound up with the Danish Bar and Law Society´s exercise of disciplinary and supervising authority. The General Council of the Danish Bar and Law Society supervises that lawyers comply with the professional and ethical rules of conduct and that lawyers have liability insurance. The Danish Bar and Law Society also manages activities which are typical for professional and industrial organizations.

No quantitative limits regarding the entry into the legal profession exist in Denmark.

Persons from countries outside the EU/EEA and EFTA cannot practice law in Denmark. Thus, persons from countries outside the EU/EEA and EFTA have to obtain a law degree from a Danish university in addition to the law degree from their own country in order to practice law.

Changes are being considered. A bill which changes parts of the Danish Administration of Justice Act was introduced on the 28th of February 2007. The bill intends to clarify that a Danish bachelor degree and master degree in law is a requirement in order to attain appointment as a lawyer. Furthermore, it is proposed that the Danish Bar and Law Society should no longer manage activities which are typical for professional and industrial organizations but focus on ensuring supervision of lawyers´ compliance with the specific duties assigned to lawyers.

1.2 Exclusive rights

According to The Danish Administration of Justice Act the plaintiff and the defendant are entitled to plead before the court themselves without representation from a lawyer. However, the court can order the plaintiff or/and the defendant to let the case be handled by a lawyer if it is not possible to handle the case in a warrantable manner without representation from lawyers.

According to the Danish Administration of Justice Act lawyers have an exclusive right to plead before the courts. This exclusive right only covers representation in the form of pleadings before the courts and signing pleadings. The exclusive right does not cover extrajudicial legal advice for example composing/drawing up pleadings.

The exclusive right rests on the premise that legal assistance in the form of pleadings before the courts must be delivered by independent and expert professionals who have expert knowledge of the legal system. The fact that this exclusive right is given to lawyers rests on the premises that the Danish Administration of Justice Act in combination with the compulsory membership of the Danish Bar and Law Society ensures the requisite qualifications which lawyers have to attain and the supervision of the work of lawyers.

Consumers have direct access to all kinds of legal services. There is no commonly used system of referrals for finding the legal service provider.

Modifications to the exclusive rights mentioned above are proposed in the above mentioned bill which was introduced on the 28th of February 2007. The proposed modifications to the exclusive right entail that others than lawyers will have the right to plead before the courts in some specific cases.

The proposed modifications will only apply to pleadings before the City Courts in specific cases and not before the High Courts, the Maritime and Commercial Court or the Supreme Court. Nor do the modifications apply to non dispositive cases.

The specific cases before the City Courts in which others than lawyers will be allowed to plea before are as follows:

A) Free access to hand in payment claims to the bailiff´s court in relation to the simplified collection proceedings and in that connection free access to plead before the court including before the execution where there is no dispute.

B) Free access to plead before the court in enforcement proceedings in relation to execution/enforcement of judgements, orders, settlements concerning pecuniary claims where there is no dispute.

C) Access for others than lawyers to plead before the court in disputes concerning small claims cases. A small claim case is defined as cases concerning pecuniary claims under 50,000 DKK (approximately 6,600 Euro). In connection to this it is proposed to lay down rules concerning

good practice which apply for representatives (others than lawyers) in the small claim proceedings.

D) Access for others than lawyers to plead before the court in cases of execution before the bailiff´s court/enforcement court.

E) Access for employees in unions, professional and industrial organizations who represent their members in the labour law system on the basis of a permission from the Ministry of Justice to plead before the city courts in cases which deal with wages and conditions of employment e.g. cases which the unions/the professional and industrial organizations as mandatory manage on behalf of their members within the unions´ etc. field of interests

2. Regulation of market conduct

2.1 Fees

Fees are freely negotiated. The amount of fees can be based on the number of hours worked, qualifications of the lawyer, complexity of the case etc.

However, the association of judges fixes recommended fees for work carried out by court-assigned counsels and recommended fees for the use of fixing costs within the fields of civil court/civil law, bailiff´s court/enforcement law and probate court and for costs in ordinary litigations.

In Denmark different types of legal aid exist.

Legal aid at level 1 takes place at the lawyers` office and is free. Legal aid at level 1 consists of fundamental/basic oral advice on legal matters. Everybody irrespective of income is entitled to legal aid at level 1.

Legal aid at level 2 and 3 is only for people with an income under a certain amount currently 248,000 DKK (approximately 33,000 Euro).

Legal aid at level 2 entails that the lawyer can carry out work amounting to 840 DKK (approximately 112 Euro) and that the state pays 630 DKK (84 Euro) and the rest is paid by the person seeking the legal aid. The aid at level 2 consists of legal advice and composition/drawing up letters, simple writs/subpoenas, paper of reply/statement of reply, wills, prenuptials and the like.

Legal aid at level 3 entails that the lawyer can do work amounting to 1,920 DKK (approximately 256 Euro). The state pays half of this amount and the other half is paid by the person seeking legal aid. The legal aid at level 3 is given to people who have a dispute with a counterpart but where reasonable prospects/chances that the dispute will end with a settlement are present.

Furthermore, free legal aid exists in the form that all costs in relation to **certain** cases and legal proceedings are paid by the state. This form of legal aid is for instance given in cases of matrimonial proceedings or custody proceedings. Free legal aid is given to people who fulfil some economic conditions concerning the size of their income and who do not have legal expenses insurance. Thus, free legal aid is given to people who have a yearly income under 300,000 DKK (approximately 40,000 Euro). For singles the yearly income must be under 236,000 DKK (approximately 31,400 Euro). The free legal aid includes exemption form paying court fees, appointment of a lawyer paid by the state to handle the case and litigation, consideration from the state for expenses defrayed in connection with the case, exception from compensating the costs of the counterpart and exemption from giving security for administration costs/probate costs.

2.2 Advertising

Advertising for legal assistance is allowed subject to the same constraints as in any other businesses. Advertisement is regulated by The Danish Marketing Act.

Earlier only lawyers were allowed to advertise their legal services. Thus, jurists who were not lawyers were not allowed to advertise. These rules have now been repealed. Thus, all legal professionals lawyers as well as non-lawyers, are now allowed to advertise their legal services.

The regulatory bodies do not restrict their members` possibilities of advertising.

According to the Danish Marketing Act there are no advertising restrictions in relation to the content of the advertisement. Special expertise can be advertised as well as fee level and cooperation with others including foreign lawyers.

Advertisements for legal services are subject to the general rules of advertisement in the Danish Marketing Act. According to the Danish Marketing Act it is forbidden to use incorrect/wrong, misleading or unreasonably inadequate/faulty statements which are suitable to influence demand for and supply of goods and services. Statements which are improper towards companies and consumers are not allowed. Furthermore, the correctness/accuracy of statements concerning factual circumstances must be able to be proven. Comparative advertisement is allowed under some circumstances.

2.3 Partnerships and business organisation

The formation of legal disciplinary partnerships between lawyers and law firms is allowed. The formation of multidisciplinary partnerships is not allowed.

According to the Danish Administration of Justice Act, practice of law can be performed as one-man businesses, joint ownership or through a law firm which is run as a limited (liability) company or private (limited liability) company. A law firm can only have as its objective to practice law. Shares in law firms can only be owned by 1) lawyers who actively practice law in the firm in question, the parent company or subsidiary company or 2) another law firm. Board members apart from staff-elected board members must be lawyers who actively practice law in the company in question, parent company or subsidiary company. Members of the management/board of directors must be lawyers who actively practice law in the company in question.

Law practice is defined as legal advice (and economic advice in relation to the legal advice) and representation of the interests of the client before courts and before other public authorities.

According to the current regulation it is not possible to convert a law firm to have another objective than the practice of law. A law firm is born and dies as a law firm.

The current regulation on ownership of law companies intends to ensure the independence of the interests of lawyers including the independence of the interests of investors and the lawyers´ loyalty towards their clients.

There are no conflicts of interest with other professions that may be necessary to avoid.

Changes are being considered in the proposed bill mentioned above. This bill intends to relax some of the rules concerning ownership of law firms.

According to the proposed amendment other professions than lawyers, should be allowed to own up to less than 10 % of company shares. This entails that the determining influence in the company will remain with the lawyers.

It is also suggested that only active capital investment in the law firm should be allowed. Moreover, it is proposed that the change of the rules of ownership should be confined only to apply to investment trusts.

In connection to ownership, it is proposed that owners of law firms who are not lawyers must pass an examination concerning the rules which surround the profession of lawyers for instance rules on lawyers duties in relation to handling entrusted funds, duties in relation to the legislation on laundering and lawyers´ rules of professional and ethical conduct.

Finally, it is suggested that permission to convert a law firm into another objective can be given under certain circumstances.

3. Institutional framework of self-regulation

3.1 application of competition law

Rules enacted by self-regulatory bodies (on fees, advertising and forms of business organization) are covered by the prohibitions against anti-competitive practices in The Danish Competition Act.

There is no exemption for certain types of self-regulatory rules. These rules are subject to the general rules of competition law.

The main effects of competition law enforcement in Denmark have been removal of fixed fees and restrictions on advertising. In 1995 recommended fees for legal advice fixed by the Danish Bar and Law Society were revoked by The Danish Competition Council and The Competition Appeal Tribunal. As mentioned above, earlier only lawyers were allowed to advertise for legal services. Thus jurists, who were not lawyers, were not allowed to advertise. These statutory rules have now been repealed.

3.2 Regulatory oversight

Adjudications by the Disciplinary Board of the Danish Bar and Law Society and the General Council of the Danish Bar and Law Society etc. which are Danish self regulatory bodies are not subject to approval by the state.

Decisions by the above mentioned self-regulatory bodies are, however, subject to antitrust scrutiny i.e. so far as they concern the competitive conditions on the market.

The imposition of sanctions for malpractice comes within the jurisdiction of self regulatory body and the ordinary courts. The General Council of the Danish Bar and Law Society has composed a set of lawyers´ rules of professional and ethical conduct. The General Council of the Danish Bar and Law Society supervises that lawyers comply with the duties which the profession entails e.g. compliance with the ordinary legislation which is not directed specifically towards lawyers and compliance with the specific duties which lawyers by virtue of their profession are subject to. If the General Council of the Danish Bar and Law Society finds that a lawyer or a law firm has not complied with the duties which the profession entails, the General Council of the Danish Bar and Law Society can bring a complaint against the lawyer or law firm before the Disciplinary board of the Danish Bar and Law Society.

Fee complaints: A lawyer can freely calculate/charge his/her fee. However, according to The Danish Administration of Justice Act the lawyer is not allowed to charge a fee which is higher than what can be

seen as reasonable. According to The Danish Administration of Justice Act complaints about fees can be brought before the board of one of the Lawyers´ Districts (the local unions/divisions of the Danish Bar and Law Society) where the office of the lawyer or the law firm is situated. The decision made by the local board can be brought before the Danish Bar and Law Society. The adjudication of the Danish Bar and Law society cannot be brought before another administrative authority, however, the adjudication can be brought before the ordinary courts.

Malpractice complaints: According to The Danish Administration of Justice Act complaints about lawyers´ malpractice can be brought before the Disciplinary Board of the Danish Bar and Law Society. The sanctions for malpractice, which can be ordered by the Disciplinary Board of the Danish Bar and Law Society, are: 1) fines amounting to 200,000 DKK (approximately 26,000 Euro), 2) deprive/dispossess the lawyer from his/her case or let another lawyer handle the case in question, 3) deprive/dispossess the lawyer from his/her right to handle cases or businesses of a certain kind/character or deprive/dispossess the lawyer from his/her right to practice law. The adjudication of the Disciplinary Board of the Danish Bar and Law Society can be brought before the ordinary courts by the lawyer or the law firm in question.

Other complaints than complaints about fees and malpractice are handled by the boards of the Lawyers´ districts. Thus, there is no independent Ombudsman for legal services.

There is no independent regulatory Authority (consisting of a majority of non-lawyers) for the legal professions other than the Danish Ministry of Justice.

5. Changes are proposed in the above mentioned bill. It is proposed that uniform rules are laid down for complaints concerning fees and malpractice, implying, that all complaints will be handled by the Disciplinary board of the Danish Bar and Law Society as a first and only instance/tier.

FRANCE

1. Reglementation à l'entrée/Regulation of entry

1.1 Quality standards an entry

1.1.1 Accès à la profession

Le niveau requis pour accéder à la profession d'avocat est la maîtrise en droit ou un titre ou diplôme reconnu comme équivalent. Ce diplôme est exigé quel que soit le type de services fournis (postulation, représentation etc.). Nécessaire, ce niveau n'est toutefois pas suffisant, et doit être complété, :t par une formation spécifique dans un centre régional de formation professionnelle d'avocats (CRFPA)

L'accès à cette profession peut également se faire par un système dit « de passerelle » bénéficiant à certains professionnels justifiant d'une expérience juridique de plusieurs années.

L'accès aux CRFPA n'est soumise à aucun « numerus clausus » mais les impétrants doivent subir un examen d'accès (CRFPA) et un examen de sortie (CAPA – certificat d'aptitude à la profession d'avocat).La formation comprend des éléments théoriques et pratiques et dure 18 mois. Le programme de formation et d'examen est arrêté par le Garde des Sceaux après avis du Conseil National des barreaux (arrêté du 7 décembre 2005 fixant le programme et les modalités de l'examen d'aptitude à la profession d'avocat). Les CRFP ont la qualité d'établissements d'utilité publique dotés de la personnalité morale en application de la loi n°71-1130, article 13 modifié. L'examen final (CAPA) peut être représenté en cas d'échec. En ce qui concerne la formation continue, le Conseil National des barreaux est chargé de définir les principes d'organisation de la formation et d'en harmoniser les programmes. Il coordonne et contrôle les actions de formation des centres régionaux de formation professionnelle, il détermine les conditions générales d'obtention des mentions de spécialisation. La formation continue est obligatoire pour les avocats inscrits au tableau de l'ordre. Un décret en Conseil d'État détermine la durée et la nature des activités susceptibles d'être validées au titre de la formation continue. Le conseil national des barreaux détermine les modalités selon lesquelles elle s'accomplit.

1.1.2 Conditions d'exercice

Hors les cas de prestations occasionnelles effectuées par des avocats établis dans un autre Etat membre de la Communauté européenne, l'exercice de la profession est subordonné à une inscription dans un barreau. Les barreaux, établis auprès des tribunaux de grande instance, ont la faculté de se regrouper. Chaque barreau est présidé par un bâtonnier élu par ses pairs pour deux ans et administré par un conseil de l'ordre.

Une fois leur inscription autorisée par le conseil de l'ordre, les nouveaux avocats prêtent serment.

Le Conseil national des barreaux, instance nationale, est composé de représentants élus de la profession. Il a vocation à harmoniser des règles de formation, unifier les règles et usages de la profession et la représenter auprès des pouvoirs publics.

Il n'existe pas de « numerus clausus » ni local, ni national pour la profession d'avocat. Il en va différemment pour les charges des officiers publics ministériels comme les avocats au Conseil d'Etat et à la Cour de cassation (dont le ministère est obligatoire devant les cours suprêmes et qui dépendent d'un ordre différent) les huissiers, les avoués à la cour d'appel (qui ont le monopole de la postulation devant les cours d'appel), les greffiers des tribunaux de commerce, ou les notaires.

Pour les huissiers le niveau exigé est la maîtrise en droit, suivi d'une formation au département de formation des huissiers (2 années de stage) sanctionnée par un examen professionnel. Il existe aussi l'École nationale de procédure qui forme tous les membres de la profession (huissiers et clercs). Le ministère de tutelle est également celui de la justice et les chambres départementales des huissiers ont une compétence de régulation. Les créations et suppressions des offices d'huissiers sont organisées par la Commission de localisation des offices d'huissiers (CLHU), qui se réunit régulièrement sous la présidence des services du ministère de la Justice. la DGCCRF y participe avec voix délibérative. Le maillage concurrentiel est analysé au cas par cas et la protection du justiciable en matière d'accès à la justice constitue une priorité. Une structure similaire existe aussi pour les offices de notaires (CLON).

Les ressortissants des Etats membres de la Communauté européenne, des autres Etats parties à l'accord sur l'Espace économique européen et de la Confédération suisse peuvent exercer la profession d'avocat dans les mêmes conditions que les nationaux. Les ressortissants des autres Etats sont admis lorsqu'il existe des accords bi-latéraux de réciprocité et peuvent, dans certains cas, subir un examen de contrôle de leurs connaissances En revanche, une condition de nationalité perdure pour les huissiers (décret 75-770 du 14 août 1975 modifié sur condition d'accès à la profession d'huissier), les notaires et les greffiers des tribunaux de commerce, compte tenu de leur qualité d'officiers ministériels.

1.2 Exclusive rights

La profession d'avocat a le monopole de l'assistance et de la représentation des parties en justice (article 4 de la loi de 1971). Les atteintes à ce monopole sont sanctionnées pénalement (loi n°71-1130 du 31 décembre 1971 art 72). Ce monopole comporte quelques exceptions en ce qui concerne notamment la représentation des parties devant les tribunaux de commerce, les tribunaux d'instance, et les conseils des prud'hommes.

La loi ne crée pas de monopole de la consultation juridique et de la rédaction d'actes sous seing privé à leur profit, toutefois l'exercice à titre habituel et rémunéré de cette activité reste strictement encadré tant au niveau des compétences requises que des modalités d'exercice (loi 71-1130 art 54 à 66-3 modifiés). Ainsi les principales autres professions juridiques, avocats aux conseils, avoués, notaires, huissiers, administrateurs et mandataires judiciaires disposent aussi, dans le cadre des activités définies par leurs statuts respectifs, du droit de donner des consultations juridiques et de rédiger des actes sous seing privé pour autrui. De même, les personnes exerçant une activité professionnelle réglementée tels que les architectes, experts comptables, géomètres experts, commissaires aux comptes, , agents immobiliers peuvent dans les limites autorisées par la réglementation qui leur est applicable, donner des consultations juridiques relevant de leur activité principale et rédiger des actes sous seing privé qui constituent l'accessoire direct de la prestation fournie. Pour les professions réglementées cette compétence résulte des textes les régissant, pour les autres professions ou organismes autorisés à exercer à titre accessoire la compétence juridique appropriée résultent d'un agrément ministériel donné après avis d'une commission. Les professions juridiques au sens de l'article 56 à 58 de la loi de 1971 sont réputées posséder cette compétence.

Les huissiers de justice sont les officiers ministériels qui ont seuls qualité pour signifier les actes, faire des notifications prescrites par la loi et les règlements lorsque leur mode de notification n'a pas été précisé et assurer l'exécution des décisions de justice (Nouveau code de procédure civile art 653 et suivants).

Les huissiers peuvent procéder au recouvrement amiable ou judiciaire de toutes créances. En matière de recouvrement amiable ils se trouvent toutefois en concurrence avec les sociétés de recouvrement amiable de créances. Les huissiers de justice peuvent habiliter un clerc à procéder aux constats dressés par les particuliers. Ils peuvent aussi exercer des activités accessoires d'administrateur d'immeuble et d'agent d'assurance après autorisation du procureur général de la cour d'appel. Ils peuvent donner des consultations juridiques (cf. supra).

La pluridisciplinarité et les « one stop shop » sont possibles sous réserve que les règles déontologiques relatives au respect du secret professionnel et des conflits d'intérêts soient respectées.

Le choix d'un avocat est entièrement libre. Il n'existe pas de compétence territoriale pour la plaidoirie. En revanche, selon la loi du 31 décembre 1971 les avocats doivent respecter le principe de territorialité pour les actes de représentations, ce qui peut nécessiter le recours à un avocat postulant.

Les actes de procédure en cause d'appel sont assurés en monopole par les avoués à la cour d'appel qui sont des officiers ministériels nommés par le Garde des Sceaux.

Le Ministère d'un avocat aux Conseils est obligatoire devant la Cour de cassation, sauf dans les cas où la loi en dispose autrement, et devant le Conseil d'Etat en matière de cassation (sauf deux exceptions : les pensions et l'aide sociale).

Les huissiers ont en principe une compétence limitée au ressort du tribunal d'instance mais il existe de nombreuses exceptions, cette situation est en train d'évoluer vers une compétence au niveau du tribunal de grande instance (à compter du 1er janvier 2009), ce qui faciliterait le choix du justiciable et ouvrirait la concurrence.

2. Regulation and market conduct

2.1 Fees

Les prix sont entièrement libres en ce qui concerne la profession d'avocat. La loi pose le principe de la libre fixation par accord entre l'avocat et le client du montant des honoraires. Toute entente corporatiste à cette liberté est contraire à l'ordre public économique. La publication de barème d'honoraires est notamment proscrite comme une entrave à la libre concurrence. Plusieurs décisions du Conseil de la Concurrence ont sanctionné de telles publications constitutives d'ententes. Les instances ordinales n'interviennent plus dans ce domaine.

Il existe toutefois une exception pour les frais de postulation qui font l'objet d'une tarification, ainsi que ceux liés à l'aide juridictionelle.

Les tarifs des huissiers sont réglementés par décret du Ministère de la justice. Pour les activités sous monopole les tarifs sont réglementés par le décret du 12 décembre 96 modifié le 10 mai 2007, pour les autres activités les honoraires sont libres.

Le calcul de la rémunération des avocats se fait principalement selon trois techniques :

- le taux horaire (le temps passé * par prix à l'heure), le forfait, l'abonnement (surtout pour les entreprises) et un pourcentage sur les résultats obtenus, si cet honoraire de résultat est prévu dès le départ.

La convention d'honoraires, discutée préalablement à tout engagement de procédure, est largement encouragée par certains membres de la profession (ex : groupe GESICA – regroupement d'avocats) et par

les organismes de protection des consommateurs (Conseil National de la Consommation, associations de consommateurs et d'usagers). Elle n'est toutefois pas obligatoire.

Le bâtonnier est compétent pour régler les litiges en matière de contentieux d'honoraires. Les chambres départementales d'huissiers sont compétentes pour les litiges de cette nature concernant leur profession.

Il existe un système d'aide juridictionnelle en France, basé sur des conditions maximales de ressources. L'aide juridictionnelle peut être partielle ou totale suivant les ressources du demandeur. Les représentants de la profession d'avocat militent activement pour le relèvement du plafond des ressources afin d'élargir le champ des bénéficiaires, ainsi que pour l'augmentation des tarifs de la rétribution de l'avocat pour son intervention. Cette indemnité est fixée dans son montant et versée par le barreau qui reçoit de l'État une dotation globale. Le montant de la dotation résulte d'une part du nombre de missions d'aide juridictionnelle accomplies par les avocats du barreau et, d'autre part, du produit d'un coefficient par type de procédure et d'une unité de valeur de référence. Les coefficients sont fixés par décrets et l'unité de valeur est déterminée chaque année par la loi de finances. Les prestations fournies avant que le client ait obtenu l'aide juridictionnelle doivent être honorées par le client.

2.2 Advertising

Le décret du 12 juillet 2005 relatif aux règles de déontologie de la profession d'avocat a assoupli les règles de publicité pour la profession d'avocat, même si le démarchage et la sollicitation active restent prohibés. Les règles relatives à la publicité personnelle ont encore été assouplies, sous réserve de respecter « *les principes essentiels de la profession* » (cf. également l'article 10 du règlement intérieur national n°2005-003 érigé par le CNB). Des lignes de conduites sont ainsi préconisées en matière de papier à lettres, cartes de visites, plaquettes, certifications, insertions dans les annuaires, publicité sur Internet etc.

Les mentions professionnelles et les indications sur les spécialités sont encouragées. Il n'y a pas de publicité sur les prix à proprement parler, mais les taux horaires peuvent être mentionnés. La mention de la coopération avec d'autres cabinets extérieurs est possible. La publicité comparative n'est pas admise ni le démarchage actif.

Les huissiers n'ont pas le droit de faire de la publicité directe ou indirecte. Seules sont en principe autorisées les publicités « fonctionnelles », c'est à dire relatives à la profession dans son ensemble. Dans la pratique, un grand nombre d'offices dispose d'un site Internet, ce qui a conduit la Chambre nationale des huissiers de justice à publier des conseils et des avertissements en matière d'information sur les sites Internet : le site Internet doit être conforme aux règles édictées par le règlement intérieur des chambres départementales, et respecter quelques indications d'ordre géographique, pratique et graphique. Le contenu des sites est théoriquement soumis pour approbation à la chambre nationale mais il est difficile de savoir dans quelle mesure cette procédure est effectivement respectée.

Les notaires n'ont pas le droit de faire publicité de leur personne et comme les huissiers ont le droit de faire de la publicité fonctionnelle.

2.3 Partnerships and business organisation

Les avocats comme les huissiers peuvent exercer individuellement ou en sociétés. Ces sociétés peuvent être des sociétés de personnes ou des sociétés de capitaux. Les avocats qui désirent se grouper pour exercer ensemble leur profession peuvent soit conclure « un contrat d'association », soit constituer une société civile professionnelle, soit une société d'exercice libéral (loi du 31 décembre 1990) ou une société en participation d'avocats (loi du 31 décembre 1990). Les avocats peuvent également être membres d'un groupement d'intérêts économique ou d'un groupement européen d'intérêts économique.

La pluridisciplinarité est autorisée dans certaines limites. L'article 16 du règlement intérieur national (RIN) des avocats précité donne la définition des réseaux et autres conventions pluridisciplinaires. Un réseau disciplinaire est constitué par toute organisation structurée ou non, formelle ou non, établie de manière durable entre un ou plusieurs avocats et ou plusieurs membres d'une autre profession libérale, réglementée ou non, ou une entreprise, en vue de favoriser la fourniture de prestations complémentaires à une clientèle développée en commun. Le terme avocat englobe les avocats d'un barreau étranger ou ayant un titre reconnu comme équivalent dans leur pays d'origine. Dans un souci de transparence les avocats membres d'un réseau pluridisciplinaires doivent déposer auprès de l'ordre l'ensemble des accords et des documents sociaux lui permettant de disposer d'une information nécessaire et adéquate sur l'ensemble de la structure juridique économique et financière du réseau.

Trois limites sont toutefois posées à ce principe : l'appartenance au réseau ne doit pas porter atteinte à l'indépendance de l'avocat directement ou indirectement ; elle ne doit pas remettre en cause les règles du secret professionnel ni engendrer des conflits d'intérêts ; les règles relatives aux conflits d'intérêts doivent être appréciées au niveau de l'ensemble du réseau et non au seul niveau du cabinet de l'avocat.

En matière de sociétés d'exercice libéral (loi n°90-1258 du 31 décembre 1990), il est prévu que plus de la moitié du capital social et des droits de vote doit être détenue par les professionnels en exercice au sein de la société. S'il n'est pas détenu par les professionnels exerçant au sein de la société, la loi prévoit que le complément de capital ne peut l'être que par des personnes physiques ou morales exerçant la ou les professions constituant l'objet social de la société, pendant un délai de 10 ans, des personnes physiques qui, ayant cessé toute activité professionnelle, ont exercé cette ou ces professions au sein de la société, les ayants droits de ces personnes pendant un délai de cinq ans suivant leur décès ainsi que par des personnes exerçant l'une quelconque des professions juridiques ou judiciaires.

Par dérogation, plus de la moitié du capital peut aussi être détenu par des personnes physiques ou morales exerçant la profession constituant l'objet social ou par des sociétés de participations financières de professions libérales.

Il convient de souligner que la possibilité de faire entrer au capital des SEL des personnes physiques ou morales tierces est explicitement écartée pour les professions juridiques et judiciaires (art 6 al 4 loi 90-1258), alors qu'elle peut être autorisée à concurrence de 25% du capital pour les autres professions (commissaires aux comptes, architectes, médecins ou vétérinaires par exemple).

Les discussions sur le niveau d'exigence du secret professionnel sont en cours entre les professions du droit et du chiffre mais n'ont pas abouti pour l'instant.

La France s'est employée à définir de nouvelles formes d'exercice des professions libérales en prenant appui sur des structures existantes (association et sociétés en participations) et en s'inspirant des « parternships » anglo-saxons et plus particulièrement des « Limited Liability Parternships ». Ces structures concernent en France les cabinets de grande ampleur, en leur permettant de réagir à la concurrence internationale et de se développer à l'étranger. La loi de finances rectificative pour 2006 a introduit la « Limited Liability Parternships » dans le droit français en modifiant le régime de l'association d' avocats. Lorsqu'une clause de limitation est prévue, la responsabilité des membres de l'association ne s'appliquera qu'à ceux qui ont commis l'acte professionnel fautif Un décret en Conseil d'État est intervenu le 15 mai 2007 pour définir les conditions dans lesquelles la limitation de responsabilité pourra intervenir, au regard notamment de l'information des tiers et de l'Ordre concerné.

Ce même décret a aussi confirmé qu'une association d'avocats peut être constituée entre des personnes physiques et des personnes morales exerçant la profession d'avocat. Cette disposition devrait favoriser le regroupement des cabinets d'avocats.

3. Institutional framework of self-regulation

3.1 Application of competition law

Les professions libérales sont soumises aux règles du droit commun de la concurrence, étant considérées par une jurisprudence constante comme exerçant une activité économique, même si leur singularité par rapport aux professions commerciales est prise en compte. Les ordres professionnels sont considérés, dans leur ensemble comme des associations d'entreprises soumises aux règles nationales et communautaires de la concurrence. Le Conseil de la Concurrence a eu l'occasion de se prononcer à plusieurs reprises sur ce point tant dans le cadre de procédures consultatives que de décisions contentieuses.

Le Conseil de la Concurrence a par exemple rendu un avis le 4 janvier 1990 (Avis n°90-A-01) sur l'avant projet de loi portant réforme des professions judiciaires et juridiques, ainsi qu'un avis du 4 janvier 1990 (Avis 90-A-02) concernant l'avant projet de loi relatif à l'exercice sous forme de sociétés des professions soumises à statut législatif ou réglementaire ou dont le titre est protégé.

Plusieurs ententes en matière de barèmes indicatifs d'honoraires d'avocats ont été condamnées (neuf décisions du Conseil ont sanctionné de telles ententes entre 1996 et 1998 cf. Cons. conc. déc. n°96-D-69, 96-D-78, 96-D-79, 97-D-29, 97-D-30, 98-D-01, 98-D-02, 98-D-05, 98-D-06, 98-D-07). Des amendes parfois lourdes (cf. 1,5 millions de francs pour l'ordre de Marseille Cons. conc., déc. n°98-D-07 du 14 janvier 1998, relative à des pratiques d'honoraires mises en œuvre par le barreau de Marseille) ont été systématiquement prononcées par le Conseil de la concurrence.

En général, le Conseil de la concurrence impose trois types de sanctions lorsqu'une pratique d'organisation professionnelle contrevenant aux règles de concurrence est constatée: une injonction de mettre fin à ladite pratique dans le futur ; une injonction de diffuser la décision du Conseil auprès des membres de l'organisation (membres d'ordres, de syndicats, etc.) ; une sanction pécuniaire est également imposée dans la majorité des cas, évaluée en fonction du dommage causé à l'économie sur la base de l'appréciation de données factuelles, comme par exemple, la plus ou moins importante diffusion de barèmes d'honoraires ou encore, la répétition de hausses de prix intervenues entre les éditions successives dudit barème. Deux décisions plus récentes du Conseil peuvent également être citées à titre d'illustration (décisions n°00-D-23 du 31 mai 2000, Ordre des avocats de Bonneville, n°00-D-52 du 15 janvier 2000, ordre des avocats de Nice).

L'art. L. 420-4 C.com., qui vise les pratiques résultant d'un texte législatif ou réglementaire ou celles qui ont pour effet d'assurer le progrès économique, peut permettre d'exempter la pratique incriminée de l'application de sanctions en droit de la concurrence. Les décisions du Conseil de la concurrence n° 03-D-03 du 16 janvier 2003, relative à des pratiques mises en oeuvre par le barreau des avocats de Marseille en matière d'assurances et n°03-D-04 du 16 janvier 2003, relative à des pratiques mises en œuvre par le barreau d'Albertville en matière d'assurances, illustrent bien la mise en œuvre de cette exemption.

Dans l'affaire du barreau des avocats de Marseille, un avocat membre dudit barreau contestait le caractère obligatoire du contrat collectif souscrit par le barreau pour garantir la responsabilité civile professionnelle de l'ensemble de ses membres. Les griefs notifiés reprochaient au barreau d'avoir mis en œuvre une pratique contraire à l'article L. 420-1 du code de commerce, consistant à obliger ses membres à adhérer au contrat collectif d'assurance sur les risques professionnels des avocats souscrit par lui, ce qui avait pour objet et pour effet de faire obstacle au libre jeu de la concurrence, en empêchant les avocats de faire appel à la société d'assurance de leur choix pour assurer leur risque de responsabilité civile professionnelle et satisfaire à l'obligation d'assurance sur les risques propres à leur activité. Le Conseil de la concurrence a admis que l'obligation d'adhérer au contrat collectif d'assurance couvrant la

responsabilité professionnelle des avocats était une conséquence inéluctable des textes qui confient aux ordres d'avocats une mission de contrôle. La pratique incriminée a ainsi bénéficié, à cet égard, de l'exemption prévue au paragraphe 1 de l'art. L. 420-4 C.com[1]. Il a, en revanche, été considéré que le contrat collectif d'assurance souscrit par le barreau au titre de la garantie de la responsabilité civile exploitation, la garantie des objets et vêtements déposés dans les vestiaires de l'Ordre et les dommages par catastrophes naturelles ne résultait pas de l'application directe et nécessaire d'un texte et qu'elle constituait une pratique prohibée par l'article L. 420-1 du Code de commerce. Le Conseil de la concurrence a en conséquence, enjoint au barreau de Marseille de cesser d'imposer aux avocats d'adhérer à ce dernier contrat et de faire retirer du contrat d'assurance collective souscrit par lui, les clauses relatives à ces garanties. Le Ministre de l'économie, des finances et de l'industrie a ensuite saisi en 2004 le Conseil de la concurrence du non-respect de l'injonction prononcée. Dans une décision n°05-D-37 du 5 juillet 2005, le Conseil a alors infligé au barreau une sanction pécuniaire de 50 000 euros et a renouvelé l'injonction faisant l'objet d'un défaut d'exécution en l'assortissant d'une astreinte de 100 euros par jour de retard à l'expiration d'un délai de quatre mois courant à compter de la date de notification de la décision. Cette décision a été confirmée par la Cour d'appel de Paris.

En matière de tarifs d'huissiers, le Conseil a émis un avis n°00-A 23 du 24 octobre 2000 relatif à un projet de décret portant fixation du tarif des huissiers en matière civile et commerciale.

Par une décision du 6 décembre 2001 (01-D-78) le Conseil de la Concurrence s'est également prononcé sur la concurrence en matière de gestion des fichiers d'informations sur les entreprises, en relation avec l'activité des greffiers des tribunaux de commerce 'registre du commerce et des sociétés).

3.2 Regulatory oversight

Les règles déontologiques de la profession d'avocat sont préparées par les ordres professionnels. La DGCCRF est également consultée pour les sujets qui peuvent avoir un impact sur la concurrence.

Le décret du 12 juillet 2005 a rassemblé les principales règles de la profession d'avocat. Ce décret a été complété par une décision à caractère normatif du Conseil National des Barreaux portant adoption du règlement intérieur de la profession d'avocat.

Parmi les progrès les plus notables enregistrées au cours des dernières années, on peut noter :

- l'assouplissement des règles de publicité pour les avocats dans le cadre du décret du 12 juillet 2005 précité ;

- Pour les huissiers la création au cours de l'année 2005, de la Commission de location des offices et de la restructuration des zones de compétence territoriale ;

- L'extension de la compétence territoriale des huissiers de justice au ressort du tribunal de grande instance, à compter du 1er janvier 2009 (décret n° 2007-813 du 11 mai 2007).

[1] « Considérant qu'il résulte de l'ensemble de ces éléments que l'article 27 de la loi du 31 décembre 1971 ne peut être interprétée que comme excluant la faculté pour les avocats, lorsqu'une assurance collective de responsabilité civile professionnelle a été contractée par le barreau, de ne pas y adhérer et de s'assurer individuellement ; que dans ces conditions, la pratique incriminée, qui résulte directement et nécessairement de l'application de la loi précitée, bénéficie de l'exemption prévue au paragraphe 1 de l'article L. 420-4 du code de commerce. »

A l'exception des pratiques anticoncurrentielles, certains litiges relatifs à l'exercice de la profession d'avocat (honoraires et contrat de travail de l'avocat salarié) sont de la compétence du bâtonnier. Une compétence similaire est exercée par les chambres départementales pour les huissiers et les notaires. Les tribunaux de l'ordre judiciaire sont compétents en appel des décisions des instances ordinales.

HUNGARY

1. Attorneys

1.1 Regulation of entry

1.1.1 Quality standards and entry

In Hungary the undergraduate legal education, which takes 5 years of study is open for anybody who meets the application requirements. After obtaining the law degree a lawyer can choose among several professions, one of them is working for a law firm as an attorney candidate. To become an attorney candidate, one should be the citizen of an EEA country, having a clean ethical record and must be registered at the territorial bar association.

During the work the candidate must take part in some courses organized by the bar preparing for the special legal exam. After 3 years of work, the candidate may apply for the exam. Passing the exam and taking the oath the candidate becomes an attorney. Nevertheless, to become an attorney it is not obligatory to work as an attorney candidate before: anybody who has a law degree and works in any field of the legal profession for 3 years can apply for the same special legal exam without the need to participate in any additional courses.

The special legal exam is organized by the Ministry of Justice, the application fee must be paid for the Ministry (it costs approximately EUR 220) as well.

The attorney profession is regulated partly in the Act on Attorneys (1998:XI.) and partly by self-regulation, namely the Hungarian Bar Association and the territorial bar associations.

In this profession there is no limitation on the number of suppliers.

The membership in a territorial bar association is obligatory. The registration occurs in an administrative procedure where the bar does not have discretional powers, it can only consider whether the requirements ordered by the Act or the bar's rules are met, namely: law degree, special legal exam, citizenship in any EEA country, clean ethical record, liability insurance, suitable office.

Pursuant to the Act, the attorney can be the member of only one of the territorial bars and he can maintain his office and branch offices in the territory of that particular bar. If he wants to re-locate his office to another county he must apply for a re-registration at the territorial bar concerned. The attorney may proceed before any court or authority in Hungary regardless of the location of his office (branch office).

The territorial bar keeps distinct registries for attorneys, candidates, law firms, assistant (or employed) attorneys, European Community jurists and foreign legal counsels. Every kind of registration is against a

fee[1]. Each territorial bar association has the right to determine the amount of the registration fee. The fees are quite considerable, between EUR 800-2500 depending on the decision of the relevant territorial bar (the only exception is the registration fee of the European Community jurists which is determined by the Hungarian Bar Association).

Foreign attorneys may practice in Hungary under different rules. If the person concerned can certify that he is entitled to practise as an attorney in any EEA country he shall practise as a 'European Community jurist' in Hungary. Upon his request he can even be admitted to the territorial bar if he has been practising in Hungary for a minimum of 3 years partly in connection with the Hungarian law and speaks Hungarian at a reasonable level. If he does not want to be the member of the bar he will only be registered in the registry for European Community jurists. The European Community jurist is entitled to pursue any legal activities except the cases of compulsory representation (stipulated in other acts), when he must have a collaboration agreement with an attorney or law firm.

Attorneys not coming from any of the EEA countries have the status 'foreign legal counsel' according to the Act. It means that he cannot be the member of the bar and he must be registered in the registry for foreign legal counsels. He can be engaged in legal activities based on a collaboration agreement with an attorney or law firm, and he can provide legal advice concerning the law of the country where he is a registered attorney, concerning international law and legal practice in connection with these.

1.1.2 Exclusive rights

The attorneys enjoy some exclusive rights. Unless otherwise stipulated by law, only attorneys are entitled to regularly provide the following services:

a) represents clients,

b) provides defence in criminal cases,

c) provides legal counsel,

d) prepares contracts, petitions and other documents,

e) holds valuables deposited with him in connection with the activities stipulated in Paragraphs a)-d).

Beyond these general tasks there are some other fields (i.e. incorporation procedures, conveyance of a real estate, review procedures in civil procedures, some criminal procedures) where other acts make the representation of the client obligatory by an attorney.

Beside the exclusive tasks attorneys may provide the following services in:

a) tax consultancy;

b) social security consultancy;

[1] Considering the fact that the Act on Attorneys does not authorize the bars to adopt these registration fees, the Hungarian competition authority has recently brought an action against one of the territorial bars to examine their compatibility with the competition rules. However the registration procedure is considered to be an administrative procedure which forms a state action excluding the possibility of intervention of the competition authority, the decision of the bar on the registration fees constitutes a decision of an association of undertakings which can be investigated by the competition authority.

c) financial and other business consultancy;

d) real estate agency;

e) patent agency;

f) activities authorized by legal regulation (with the exception of the regulation of local government);

g) mediator activities in mediation proceedings regulated in specific other legislation;

h) converting the instrument of constitution of a company - that he has prepared - and the additional appendices of the company's application for registration (notification of amendments) into electronic format;

i) arbitration in public procurement procedures as governed in specific other legislation, and counseling services related to public procurement procedures;

j) lobbying regulated in specific other legislation.

To ensure the proper proceeding of an attorney the Act determines some conflicts of interest rules and the rule of confidentiality.

1.2 Regulation of market conduct

1.2.1 Fees

The attorney's fee is freely agreed by the parties according to the Act. The Hungarian Bar Association is not entitled to determine obligatory or recommended prices. There are two exemptions when the attorney's fee is not subject to negotiations.

If the representation of the client is obligatory by law and if the client does not entrust an attorney itself (for example because of his financial situation), the court or the authorities appoint an attorney. The appointed attorney's fee (which is relatively low) is determined in a regulation of the Minister of Justice. The territorial bar must compile a registry for appointed attorneys among all attorneys on the basis of the principle of equality.

There is another regulation of the Ministry, which determines the costs of the attorney that can be established in judicial proceedings.

1.2.2 Advertising

The Act does not contain any specific provisions on advertisement, however the Hungarian Bar Association has brought some rules in the ambit of their code of conduct, which significantly restrict the advertising possibilities of attorneys. Considering that it cannot be deduced from the Act that the Bar or any territorial bars are entitled to bring restrictive rules in this field, the Hungarian competition authority has recently investigated the code of conduct of the Hungarian Bar. See below point 3.2.

1.2.3 Partnerships and business organisation

The law firm is a legal person created to practice law established by its registration at a territorial bar. One or several attorney shall establish and be the members of the law firm.

Under the present legislation there is no possibility to establish interprofessional organisations (e.g. integration of law firms and accounting consulting firms), interprofessional cooperation is allowed only in other ways (e.g. involve expert witnesses).

1.3 Institutional framework of self-regulation

1.3.1 Regulatory oversight

The territorial bar associations are public bodies with their representatives, administrative apparatus and independent budget within their operational area (generally all counties have their own territorial bar). The bodies of a territorial bar are the general assembly, which consists of all members of the bar, the presidency, disciplinary committee, conflicts of interest committee and the supervisory board.

The general assembly - among others - adopts the budget and the budgetary report, adopts the statutes of the territorial bar, it may provide regional rules and regulations (i.e. the technical requirements of a suitable office) pertaining to the territorial bar's operational area and regional directives.

The statutes of the territorial bar association, the rules, regulations and directives shall be sent to the Hungarian Bar Association. The statutes of the territorial bar are binding on its members, and regulations are binding on members of the territorial bar, assistant attorneys and candidates who are registered with the territorial bar.

The presidency - among others - decides in the first instance on the admission or registry for attorneys, assistant attorneys, law firms, candidates, European jurists, foreign legal counsels and on the termination of legal practices, determine the amount of the bar association membership fee. Members of the territorial bar associations may appeal decisions of the presidency - by referring to a violation of legal regulation, the statutes or the rules and regulations - to the presidency of the Hungarian Bar Association.

The Hungarian Bar Association is a public body and the national organization of attorneys, which has an independent budget and administrative apparatus with the following bodies: plenary meeting, presidency, disciplinary committee, conflict of interest committee, supervisory board, and election committee.

The plenary meeting which consists of 100 members (the territorial bars' presidents, one member designated by each of the territorial bars, and members who are proportionately elected by the general assembly of the territorial bars in a manner in which the number of members from each territorial bar is compared to the total number of attorneys) is the supreme decision-making body of the Hungarian Bar Association. The plenary meeting - among others - adopts the budget and the budgetary report, adopts the Statutes and may issue regulations and directives, expresses its opinion and makes suggestions in legislative and judicatory matters that affect attorneys. The plenary meeting shall issue regulations regarding the rules of conduct for the legal profession, procedural rules for admission to the bar, the lowest amount of liability insurance and the insurance companies accepted, as well as, detailed rules for disciplinary proceedings. The Statutes are binding on territorial bars, while the rules and regulations are binding on territorial bars, attorneys, assistant attorneys, foreign legal counsels and candidates.

The presidency – among others - decides in the second instance on the admission or registry for attorneys, assistant attorneys, law firms, candidates, European jurists, foreign legal counsels and on the termination of legal practices, determines the financial contributions of territorial bars, overturns decisions of territorial bar presidencies that are in violation of legal regulation, the statutes or the rules and regulations, expresses an opinion and make recommendations in legislative and judicatory matters that affect attorneys.

Both of the territorial bars and the Hungarian Bar are concerned in disciplinary issues. Under the Act an attorney commits a disciplinary infraction if he culpably violates his obligations that derive from practice of the law or are stipulated in legal regulation or the code of conduct or, his culpable behaviour outside the realm of legal practice is an affront to the prestige of the legal profession. As the result of a disciplinary proceeding the bar may impose a sanction which could be a censure, fine or expulsion from the bar. On the first instance the territorial bar, on the second instance The Hungarian Bar may proceed against the attorney, in the last resort the judicial review of the decision is also ensured.

According to the Act the Minister of Justice oversees the rules, decisions of the territorial bars and the Hungarian Bar Association whether these are lawful. If he finds any violation of a legal regulation he calls upon the bar to terminate its practice. If the bar does not comply with the Minister's request he may seek remedy at courts. The oversight does not include cases in which there may be judicial proceedings.

From competition aspects the territorial bar's or the Hungarian Bar's activities can constitute state actions (i.e. at the registration procedure) or economic activities where it acts as an association of undertakings having regard to the fact that the attorney is considered to be an undertaking. In the latter case the decisions and rules of the bars may be subject to antitrust scrutiny.

The Hungarian competition authority consistently articulates that the fact that the Minister of Justice oversees the bar's rules does not entail the inapplicability of competition law, it cannot hinder the proceedings of the competition authority. Moreover the lack of finding of an infringement by the Minister has no influence on the assessment of the competition procedure.

1.3.2 Application of competition law

There were two proceedings against bars up till now. In the first case one of the territorial bar wanted to have a recommended price list exempted which was rejected by the competition authority. In the other case the competition authority investigated the code of conduct of the Hungarian Bar and one of the written positions of the Hungarian Bar's Presidency, which ruled out almost all kind of advertisements for attorneys. The competition authority found that for the purpose of competition law the Bar is an association of undertakings and the code is a decision of association of undertakings. As to the restriction of competition, it took into consideration that advertising represents an important aspect of competition however individual restrictions do not fall by all means under the scope of Article 81(1)[2] therefore examined whether the restriction inherent in the decision is necessarily related to the attainment of the public interest represented by the attorneys and whether they are indispensable and proportionate. The competition authority established that the special characteristics of the profession do not provide an unconditional 'exemption' for attorneys from the application of the competition rules on their behaviour, consequently the concerned provisions infringed Article 81(1), moreover the conditions of 81(3) were not fulfilled, therefore the authority prohibited the almost overall ban on advertisement. Besides imposing a fine (approx. EUR 18.000), the competition authority obliged the Hungarian Bar to eliminate the situation

[2] Wouters exception: In Case C-309/99 the European Court of Justice said: „However, 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 85(1) of the Treaty. For the purposes of application of that provision to a particular case, 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 (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives. (p. 97.)

violating the competition rules until 15 September 2006. The competition authority's decision, of which execution is stayed due to the parties appeal, is now under judicial review. See more on this case annex 1.

2. Notaries

2.1 Regulation of entry

2.1.1 Quality standards and entry

Hungary belongs to the countries where the Latin notary system prevails. This means that notaries are assigned a dual role as holders of a public authority and liberal professionals. Generally the regulatory restrictions in this profession are based on the public authority characterisation that notaries have. According to the Act on notaries (1991: XLI) the notary forms part of the judicature.

To become a notary one shall have a Hungarian citizenship, law degree, special legal exam, clean ethical record, the right to vote and at least 3 years of practice as deputy notary (substitutable with 3 years of practice as a judge, attorney, prosecutor or legal counsel), and at last, shall make a statement on his financial standing.

There is a limitation on the number of suppliers; the number of the notaries are determined by a regulation of the Minister of Justice. The empty positions are filled by notaries chosen by the Minister of Justice. The notary is appointed by the Minister for an undetermined period of time (the relief of his office is made also by the Minister). With the appointment the notary becomes automatically the member of a territorial notary chamber.

2.1.2 Exclusive rights

Only the notary may make certain public deeds. The public deeds made by a notary are directly executable in case of non-compliance. The notary may make authentic deeds about the followings: wills, attestations, abstracts, certificates and copies.

He is authorized to proceed in probate of a will in non-judicial proceedings. In general the decisions brought by the notary in non-judicial proceedings are subject to judicial review in the same manner as the decisions of municipal courts.

The notary is appointed for a specific geographic area. This means that there are activities (i.e. probate of a will) where territorial exclusivity is stipulated by law, however in other cases (i.e. verification of signatures for companies, authentic copies) the client can choose freely among the notaries irrespectively of their geographical competence.

2.2 Regulation of market conduct

Because of the public authority characteristics of the profession, according to the Act the notary shall act for both parties, must be neutral and impartial.

2.2.1 Fees

The fees are fixed by a regulation of the Minister of Justice in accordance with the Minister of Finance, which leaves little room for differentiating the prices.

2.2.2 Advertising

The Act does not contain any rule on advertisement. However, the code of conduct of the notaries prohibits any kind of advertisements stating that the notarial activities cannot be subject to competition.

2.2.3 Partnerships and business organisation

The notary may maintain a notary's office only with other notaries appointed to the same location. The establishment of a notary's office is conditional on the approval of the territorial chamber, where the chamber shall only examine if the office corresponds to the regulatory requirements. The regulation on notary's office, which is a legal person, is similar to the limited liability companies with some exceptions: 50% of the voting rights and the management must be held by notaries, the founders shall be natural persons, the partnership cannot affect the notary's individual services and liability, the notary cannot be instructed. Non-notary person may be the member of a notary's office only if he meets the following criteria: Hungarian citizen, having right to vote and clean ethical record and the approval of the Minister. At last, the notary's office is established by incorporation at the registry court, however it may begin its operation after it was registered by the Hungarian Chamber for Notaries.

2.3 Institutional framework of self-regulation

2.3.1 Regulatory oversight

The territorial chambers are public bodies. Among others the chamber adopts the budget and the budgetary report, determines the amount of the chamber membership fee, expresses its opinion and makes suggestions in legislative and judicatory matters that affect notaries.

The presidency of the chamber shall - among others - oversee the operation and behaviour of the notaries, deputy notaries and candidates operating in the chamber's operational area, initiate disciplinary proceeding against notaries, register and control the notaries' statement of financial standing.

The Hungarian Chamber of Notaries is a public body. Its duties are - among others - initiating legislation and expressing opinions affecting notaries, determining the contributions of the territorial chambers, funding social and charity institutions, keeping registries i.e. on wills and rights of pledge, giving expert opinions if requested, maintenance of archives. It may issue directives regarding the rules of conduct, the operation of the territorial chambers, the application of the order on remuneration of notaries, the examination of the notaries' operation and the professional continuing education.

According to the Act, the Minister of Justice oversees the rules, decisions and constitutions of the chambers and the Hungarian Chamber of Notaries whether these are lawful. If he finds any violation of a legal regulation he calls upon the chamber to terminate its practice. If the chamber does not comply with the Minister's request he may seek remedy at the courts. The oversight does not include cases in which there may be judicial proceedings.

Beyond that it is the president of the county courts who shall oversee the operation of the notary from legal aspects and may request the chamber to investigate the operation of the notary. The disciplinary proceeding may take place before county courts.

2.3.2 Application of competition law

Notaries represent the state in all of their activities, they operate state functions and exercise state authority, therefore their activity – unlike that of many other liberal professions or even government bodies in certain cases – is not regarded as a business or market activity which could fall within the scope of the

competition law in Hungary. They are also regulated in terms of mandatory service providing, exclusive rights, and prices. Therefore currently the Hungarian Competition Authority does not see any possibility to enforce competition law in this field, however it has declared its view repeatedly in order to have the legislation changed several times.

In May 27, 2005 the Hungarian Competition Authority published a recommendation for the Parliament and the concerned parties („Recommendation of the Gazdasági Versenyhivatal concerning the review of the regulation of notarial service")[3]. Regarding to the public authority status the competition authority drew the legislators' attention to think over and as far as possible narrow down the scope of exclusivity (e.g. the necessity of the form of public deeds in certain cases, the obligation of using authentication by notaries). Both in case of regulatory and competing market services the necessity of supply and conduct restrictions should be re-considered, for instance whether the restriction on territorial competence or on the number of notaries is objectively justified and necessary or authenticity and professional integrity could be assured without such restrictions, through other means. As in the present legislation it is not clear what circumstances the Minister should take into consideration when the fixed fees and tariffs are determined, and what is the economic content of the fees, the competition authority recommended to set up a more differentiated price system, in which the primary purpose of the regulation of fees would be to assure that the expenditures on the level of society do not exceed the justified level, that is, the fees should provide incentives for efficient, cost-effective operation, and does not allow the generation of unjustified excess income, monopoly profit in the sector because based on preserved activities and territorial monopoly positions. According to the competition authority the fixed tariffs are justified only in those cases where the notaries have territorial monopoly with mandatory service providing and the clients could not choose among the notaries. In these procedures the fees would be a kind of procedural fee to cover the cost of the procedure on the basis of non-profitability. On the other hand in those cases where the activities of the notary are deemed to be competing, the fees should cover the expenditures of an efficient undertaking and ensure a certain profit. However, such a legislation would face difficulties because it should take into consideration the siginificant differences that can be observed in the conditions of demand and supply, as well as in profitability in the different geographical markets. Another possibility could be to leave a wider scope for the parties to negotiate about the price (parallel to this to give room for the notaries to inform the consumers about the fees), however in case of relatively vulnerable clients (mostly natural persons) the maintenance of maximum fees would be justified to ensure protection of consumer interests.

Unfortunately until now there has been no change in the rules, only that the number of notary posts was raised last year.

[3] http://www.gvh.ionlab.net/index.php?l=e&m=5&id=3877

ANNEX 1

Case Vj-180/2004 Hungarian Bar Association (ECN number 666)

1. Executive summary

The case concerns the ethical code adopted by the Hungarian Bar Association (hereinafter Code of Conduct) in relation to the advertising activity of attorneys and the written position of the Bar Association's presidency in which gives extensive rules on the outlook and content of the websites of an attorney. The Bar Association qualified as an association of undertakings pursuant Article 81 of the Treaty, the Code of Conduct and the written position proved to be a decision of an association of undertakings. Certain provisions of the above mentioned regulations restrict competition as defined in Article 81(1) and do not satisfy the conditions of Article 81(3).

2. The decision

The Competition Council found the following provisions to be restrictive of Article 81 of the EC Treaty and Article 11 of the Hungarian Competition Act:

- Code of Conduct

  - 11.1 The attorney is obliged to abstain from all kind of dishonest acquisition of clients, especially he may not utilize agents and procurers. The attorney may not give any financial or other compensation to anybody else only because he recommended him for the right demanding person.

  - 11.2 The attorney may not produce the reputation of semblance of his own personality, as if he could perform better service in matter with certain authorities than other attorneys so as he could settle the matter quicker.

  - 11.3 The attorney may not way rumour and spread that he may undertake and perform certain cases at more favourable conditions than other lawyers do it. He may not compare his activity to that of other attorneys.

  - The indirect ban on advertising other than allowed in 11.4.

  - 11.4(a) The attorney may not publish the establishment, the transfer of his office or his sub-office, the change of the phone/fax number for more than two months.

  - 11.4(c) second sentence: The form of publication however may not be highlighting in terms of the font type or the size of the advertisement.

- 11.4(e) second sentence: The advertisement may contain exclusively the name, address, phone number of the attorney (of the attorney's office), as well of the time of his availability, furthermore, the activity itself.

- Written position of the Bar Association's presidency

- The content of the attorney's homepage may not serve the popularisation of the attorney or its services, moreover it may not serve as an advertisement.

- It is prohibited to use effective slogans or any other elements qualifying as an advertisement.

- The attorney's homepage cannot contain an offer for legal advising, or any other legal services provided by attorneys, neither a call for offer, nor a fee-offer, it cannot contain any direct or indirect communication or comparison concerning the fees applied by the attorney.

- The attorney's homepage cannot contain a call or offer for a contract of services, any downloadable contract of services or power of attorney.

- Clients represented, cases dealt with cannot be named on the attorney's homepage.

The Competition Council prohibits the Bar Association from applying these rules as of 30 days after receiving the Council's decision. The Competition Council obliged the Bar Association to publish the Competition Council's decision on its homepage and in the Official Journal of the Hungarian Bar Association, furthermore to communicate it to the competent ethical committees. The Competition Council obliges the Bar Association to eliminate the situation violating the competition rules until 15 September 2006. Finally, the Competition Council imposed a fine of HUF 5 million (approx. EUR 18 000).

3. Undertakings involved

The Bar Association is a public body of attorneys with registered members based on the principle of self-government prescribed by law. Acting as an attorney is conditional on registration at the competent local bar's registry. The Bar Association, as the body with national competence, can adopt compulsory regulations and guidelines on attorneys, of which infringement can entail even expulsion from the bar. Consequently the entry to the market of legal services and the exit from it, which can happen due to the infringement of regulations and guidelines, depends on the decisions of the Bar Association.

4. Procedure

In November 2004 the Gazdasági Versenyhivatal initiated proceedings against the Bar Association based on a complaint, which alleged the restrictive nature of the advertising rules contained in the Code of Conduct. According to the complaint, the Code of Conduct and the written position of the Bar Association's presidency on the content of attorneys' websites limits their ability to apply new technologies and in general the possibility to advertise.

5. Facts

Paragraph 11 of regulation 8/1999 of the Bar Association on deontological rules deals with advertising. Written position 1/2001 of the Bar Association's presidency regulates the content of attorneys' websites in relation to advertising. The scope of both the Code of Conduct and the written position of the

presidency covers all registered Hungarian attorneys and since 1 May 2004 European Community lawyers.[1]

The Code of Conduct contains the following provisions on the advertising of attorneys:

- 11. The attorneys' advertisement

- 11.1 The attorney is obliged to abstain from all kind of dishonest acquisition of clients, especially he may not utilize agents and procurers. The attorney may not give any financial or other compensation to anybody else only because he recommended him for the right demanding person.

- 11.2 The attorney may not produce the reputation of semblance of his own personality, as if he could perform better service in matter with certain authorities than other attorneys so as he could settle the matter quicker.

- 11.3 The attorney may not way rumour and spread that he may undertake and perform certain cases at more favourable conditions than other lawyers do it. He may not compare his activity to that of other attorneys.

- 11.4 It is not qualified as prohibited advertisement, when the attorney (the attorney's office):

  a) publishes the establishment, the transfer of his office or his sub-office, the change of the phone/fax number within two months the longest.

  b) Informs his clients that the sphere of his professional activity has changed, it was extended, resp.

  c) Publishes the name, the residence of his office, that of his sub-office, the phone and fax number, his language knowledge, his sphere of activity (for instance in telephone directory, in classified directory, in yellow pages, etc.) on a place giving publicity for everybody. The form of publication however may not be highlighting in terms of the font type or the size of the advertisement.

  d) Publishes as an expert, makes declarations in written and electronic medias.

  e) Carries on other attorney's activity prescribed in the legal rules – among others real estate trade, organization of owner occupied houses, etc. – and he publishes these information in connection with these activities through advertisement. The advertisement may contain exclusively the name, address, phone number of the attorney (of the attorney's office), as well of the time of his availability, furthermore, the activity itself.

The written position of the Bar Association's presidency gives extensive rules on the outlook and content of the websites of an attorney. For example it cannot serve as an advertisement of the attorney, the content is limited to only few information like photo, CV, list of publications, the attorney's practice or language knowledge. The written position prohibits the collection of e-mail addresses, the application of a counter showing visits on the website, the use of banners and hyperlinks. The attorneys' website cannot contain an offer for legal counselling or any other legal service, or a price offer. Attorney should not post on their websites downloadable service agreements and power of attorneys or an offer for service agreements. Finally attorneys are not allowed to list the names of earlier clients on their websites.

[1] 'European Community lawyer' indicates attorneys coming from an EEA country registered at the Bar Association.

6. Legal assessment

The Competition Council assessed the above mentioned decisions of an association of undertakings under the Hungarian Competition Act and in addition, in the period beginning with 1 May 2004 under Article 81(1) since the conduct has an effect on trade between Member States from that date. For the period preceding 1 May 2004 the Competition Council applied only the Hungarian Competition Act, since the effect on trade between the EC and Hungary, required by the implementing rules of the Europe Agreement was not present.

According to the Competition Council, since the members of the Bar Association pursue their activities in an agency relation for remuneration, taking the associated financial risks as well, they qualify as an undertaking. The Competition Council applied the concept to be found in the Höfner, Poucet, CNSD, Albany, Pavlov, Wouters and EPI cases. Consequently any entity that is engaged in economic activity, regardless of its legal status and the way in which it is financed must be regarded as an undertaking. That conclusion is not altered by the complexity and technical nature of services lawyers provide. Among the exclusive activities of attorneys the following are economics activities: client representation, defense in criminal cases, legal counsel, preparation of contracts, petitions and other documents, holding valuables deposited with him in connection to the above mentioned activities.

In addition to the activities pursued exclusively by them, attorneys may provide tax consultancy, social security consultancy, financial and other business consultancy, real estate agency, patent agency and other activities regulated in specific other regulation. In the assessment the Competition Council took into consideration that within the activities of attorneys' there are certain segments of non-market activities (when acting under compulsory appointment before courts as part of the administration of justice), which do not come under the scope of competition law.

The Bar Association, established by attorneys pursuing economic activities, must be regarded as an association of undertakings pursuant Article 81 when it adopts the Code of Conduct. The Bar Association, as an association of undertakings adopts decisions affecting the market of legal services. According to the Competition Council, the fact that the Minister of Justice oversees the Bar Association's decisions does not entail the inapplicability of competition law, it cannot hinder the proceedings of the Gazdasági Versenyhivatal. Moreover the lack of finding of an infringement by the Minister of Justice has no influence on the assessment in the present case.

The main question in relation to "decision of association of undertakings" was whether the Bar Association's decisions (Code of Conduct, Written position) are state actions not infringing competition law or decisions of private entities.

The Act on attorneys provides in Article 121 that the Minister of Justice shall oversee the operations of the Bar Association. The Minister shall, within the scope of his oversight authority, oversee the statutes, rules and regulations, directives and decisions of the bar associations; he shall also oversee their operations as to whether they are in compliance with legal regulation, the statutes and the rules and regulations. Oversight does not include those cases in which there may be judicial proceedings.

The Competition Council examined the following factors when deciding on the issue:

- What is the composition of the Bar Association and its decision-making bodies, what is the status of its members?

- What kind of interests are taken into account when the above-mentioned regulations are adopted, what is the role of public interest?

- What kind of influence can the Minister of Justice (the state) exert on the Bar Association and indirectly on the content of the Code of Conduct or the Written position? Does the state reserve the power to make the decision of last resort?

The Competition Council established that the Bar Association is exclusively composed of members of the profession, namely attorneys. The state can have no influence on the composition of the decision-making bodies, or on the person of the president. As regards the public interest criteria, there is no detailed regulation on it, moreover there are no provisions, which could hinder members from taking into account exclusively their own interest when adopting various regulations of the Bar Association.

With regard to the decision of last resort, the Competition Council established that in its interpretation this would mean an unrestricted power to withdraw, alter the Bar Association's decisions or eventually even replace it with the own decision, when the minister is satisfied with the "result". According to the Competition Council the minister does not exercise such right in relation to the Bar Association's decisions, regulations, since it can object against them only in judicial proceedings. Furthermore even the court has only a right to abrogate the regulation concerned and to oblige the Bar Association to initiate new proceedings. This situation perfectly suits the constitutional requirements of the relation between the state and attorneys.

To sum up, the Competition Council finds that when deciding on the issue of state decision, the above mentioned factors (composition of the self-regulatory body, public interest criteria, decision of last resort) has to be assessed together, their overall effect has to be taken into account. Potentially this could mean that where for example the public interest criteria is determined in detail, then a weaker form of final decision would be sufficient for the decision to qualify as a state decision. On the other hand where the power on final decision is strong, the first two factors can be less decisive. In the case of the Bar Association, members, decision makers are exclusively from the profession, and they are not required to take account of public interest. Furthermore the minister has very weak powers in the final decision category. Consequently neither separately, nor taken together point these factors in the direction that the Bar regulation should be a state decision.

The Competition Council reviewed the particular provisions by noting that advertising represents an important aspect of competition however individual restrictions do not fall by all means under the scope of Article 81(1) (Wouters exception) and thereby do not infringe competition law. On the other hand the Competition Council established that the Wouters exception does not provide an unconditional 'exemption' for attorneys from the application of the competition rules on their behaviour. It has to be examined whether the restriction inherent in the decision is necessarily related to the attainment of the public interest represented by the profession and whether they are indispensable and proportionate. The Competition Council acknowledges the special characteristics of the legal profession, as did the lawmaker as well, nevertheless attorneys are not exempted from competition law.

The Competition Council in its assessment, based partly on the arguments of the Bar Association, took into consideration the following profession related core values: independence of attorneys, confidentiality, the free choice of an attorney, the avoidance of conflict of interests. Occasionally the Competition Council considered separately those activities of attorneys, which they do not perform in the interest of the efficient administration of justice and/or which might have an effect on neighbouring markets as well.

Taking into account the above mentioned aspects, the Competition Council found that paragraph 11.1 restricts competition, since that provision hinders all agency like activities, which includes besides personnel solicitation broader type of activities as well. According to the Competition Council vague

definition of terms can widen the interpretation of the rules at will, which can keep back undertakings from certain type of advertising activities, thereby hindering competition.

Paragraph 11.2 and 11.3 also infringes the competition rules because the general wording of those rules does not make it possible to differentiate comparative advertising according to particular activities. A ban on comparative advertising was partly regarded as justified and proportionate, provided that due to confidentiality rules the objective characteristics needed for a comparison were not at hand. On the other hand the Competition Council considered the ban unjustified and disproportionate when it was not to be connected with attorney activities linked to the rule of law and the core values of the legal profession serving public interest (e.g. the advertising ban on attorney activities other than the exclusively allocated ones). The Code of Conduct prohibited generally all kind of comparison, without any differentiation to prices or certain activities, therefore the Competition Council found these provisions anticompetitive. The general, undifferentiated ban on comparative advertising was unjustified and disproportionate.

In the Competition Council's assessment, paragraphs 11.4 a) proved to be illegal since it limits the publication of a law firm's contact details to two months. Paragraph 11.4 c) restricts competition when due to its wording it unreasonably limits the form and method of attorney advertisings. Paragraph 11.4 e) represent also an unjustified and disproportionate restriction on attorneys' ability to enter other markets.

The Code of Conduct allows particular advertising activities by specifying them as "not prohibited" advertising or by prohibiting them expressly. As a result of this formulation, even in the absence of an express ban, everything else is prohibited including advertising on prices. The Competition Council considered this indirect ban also as a restriction of competition pursuant Article 81(1).

One of the most important indirect restriction is the ban on price advertising. Since price is an important element of competition, even in the case of liberal professions, any rule which limits price advertising is a restriction of competition. When consumers have no price information, may be they are not aware of equally suitable, nonetheless cheaper services, which diminishes the possibility of choosing the right service or changing the service. In the absence of price advertising the search cost of consumers increases, searching becomes more difficult. In the presence of low informed consumers, market players are not induced to compete more vigorously, therefore by prohibiting advertising restriction of competition can be achieved.

In its analysis under Article 81(3) The Competition Council came to the conclusion that paragraphs 11.1, 11.2, and 11.4 do not contribute to improving the distribution of goods, therefore due to the cumulative nature of Article 81(3) conditions, those provision do not satisfy the requirements of that Article.

The Written position of the presidency uses the distinction advertisement/not advertisement, instead of the Code of Conduct's lawful advertisment/unlawful advertisement distinction. The Competition Council did not find the following prohibitions to be restrictive:

- The homepage cannot serve more than the ethical and objective information about the attorney's education, activity.

- The address of the homepage cannot contain any element that would provide an unjustified advantage for the attorney when somebody uses a search engine for finding the right attorney.

- The collection of e-mail addresses, the application of a counter showing visits on the website is prohibited.

- The prohibition of the use of banners and hyperlinks.

- The homepage cannot use works protected by copyright (e.g. music, literary and audiovisual works). The only exceptions are the moderate and proper graphic works used for the construction of the website. According to the Competition Council those requirements can be originated from the professional dignity of attorneys. The restriction can be view as reasonable and justified limitation aiming to achieve a legitimate goal when it tries to hinder the appearance of extreme advertisings.

The Written position prescribes in general that the attorney's homepage cannot serve as an advertisement. Furthermore it expressly prohibits any direct or indirect offers on services, fee offers, downloadable service contracts, power of attorneys, or the list of earlier clients and cases. Based on the above the Competition Council found that these provisions point to the absolute prohibition of advertising, which cannot be justified by the core values of the profession, thereby infringing Article 81(1). The provisions do not satisfy the conditions of Article 81(3).

The Competition Council came to the same conclusion under the national competition rules with regard both to the Code of Conduct and the Written position.

IRELAND

1. Overview

There are two branches of the legal profession in Ireland, solicitors and barristers. There are over 7,000 solicitors and more than 1,600 barristers.

Most solicitors work in private practice, offering services directly to the public such as conveyancing, probate and the provision of legal advice and representation to their clients. Other solicitors are "in-house" solicitors, employed either by the State or by businesses. Solicitors are regulated by the Law Society, which is also the solicitors' representative body. The Society derives its regulatory powers from the Solicitors Acts, and is governed by a 48-person Council, comprising elected and nominated members of the profession. It is unlawful for a person to use the title "solicitor" or to practise as a solicitor without being registered by the Law Society.

Barristers specialise in court advocacy and the provision of legal advice and opinions. Except in limited circumstances, clients cannot access barristers directly but must go through a solicitor. Barristers in private practice may only operate as sole traders and may not incorporate or form partnerships. There are a small number of barristers employed by businesses or the State, but they are prohibited by self-regulatory rules from representing clients in the courts. Barristers are regulated by the Bar Council, which also acts as the barristers' representative body. The Bar Council is a wholly self-regulating body, with no oversight legislation.

The Competition Authority published its Final Report on *Competition in Professional Services: Solicitors and Barristers* in December 2006. The report concluded that the profession was permeated with unnecessary and disproportionate restrictions on competition and was in need of substantial reform, and made a number of recommendations for change. The report can be downloaded from the Competition Authority's website at http://www.tca.ie. The report made a total of 29 Recommendations. 15 of these – including the most important ones – fall to the Minister for Justice, Equality and Law Reform, 14 to the Bar Council, 4 to the Law Society and 3 to others.[1]

2. Regulation of entry

2.1 Quality standards and entry

2.1.1 Entry requirements

The Law Society is both the regulator of training for solicitors and the sole provider of professional training to become a solicitor in Ireland. A potential trainee must first pass the Law Society's entrance examination to its professional practice courses. If the trainee is not a university graduate, or does not hold some equivalent qualification, he or she must pass a preliminary examination before being permitted to sit the entrance examination. Before commencing the professional practice courses, the trainee solicitor must

[1] Some recommendations are directed to more than one body.

obtain a two-year in-office training contract with a qualified solicitor. The number of solicitors who qualify in Ireland each year is determined by the capacity of the Law Society's courses.

The Honorable Society of King's Inns determines the standards for becoming a barrister in Ireland. The Society comprises benchers (including all the judges of the Supreme and High Courts), barristers and students, and is the sole provider of barrister training.

In order to become a barrister, one must pass the Barrister-at-Law degree provided at King's Inn school in Dublin and be called to the Bar by the Chief Justice. To be admitted to the Barrister-at-Law degree course, a potential trainee must hold an approved law degree from a third-level education institution or the Diploma in Legal Studies (the latter is provided only by King's Inns), before he/she can sit the entrance examination for a place on the degree course.

After completing professional training, a new barrister, who intends to practise at the Bar, must undertake a one or two year apprenticeship with an established barrister, during which the apprentice is usually not paid. This is known as "pupilage" or "devilling". The number of barristers who qualify in Ireland each year is determined by the capacity of the King's Inns' school.

2.1.2 Possible and Pending Reforms

In its Final Report on competition in the legal profession, the Competition Authority recommended that standards for solicitor and barrister training should be set by an independent body which would also approve institutions which wished to provide such training.

On a separate matter, the Minister for Justice, Equality and Law Reform has announced the establishment of a Legal Services Ombudsman, primarily to strengthen the mechanisms for dealing with complaints against solicitors and barristers. The Ombudsman will also have responsibility for monitoring access to the legal professions and reporting on the adequacy of numbers admitted annually to each profession.

2.1.3 Continuing professional development (CPD)

A CPD scheme for solicitors came into effect in 2003 and applies to all solicitors holding a practising certificate. The requirement is for 20 hours of CPD over a two-year cycle. The standards for the scheme are set by the Law Society. The scheme is a self-certification scheme and compliance is monitored, on a random sample basis, by the Law Society. Failure to comply with the CPD requirement may amount to professional misconduct.

The Bar Council initiated a CPD scheme for barristers in 2005. The requirement is for 10 hours of CPD per year. Barristers are required to keep a record of their compliance with the Scheme and certify their compliance with the Scheme on an annual basis. The Bar Council monitors compliance and may audit the CPD records of any member of the Bar at any time. The Internal Relations Committee of the Bar Council deals with any issues surrounding compliance with the Scheme by barristers. There are additional requirements for barristers in their first two years of practice.

2.1.4 Entry of foreign legal professionals

Lawyers qualified in non-EEA countries cannot practise in Ireland under their home country designation, nor can they qualify as Irish solicitors or barristers unless they undertake the full professional training provided by the Law Society (in the case of those wishing to practise as solicitors) or King's Inns (in the case of those wishing to practise as barristers). Alternatively, if the country where they received their qualification has reciprocity arrangements with Ireland, they must pass a transfer test.

In the case of solicitors, reciprocal arrangements with other countries can only be concluded with the agreement of the Minister for Justice, Equality and Law Reform, after the Law Society has deemed the legal profession in that country to correspond to the solicitors' profession in Ireland. Only four reciprocal arrangements are in place; three with State Bar Associations in the United States of America: New York, Pennsylvania and California, and one with New Zealand; the Law Society recently announced that its Council had also approved reciprocal recognition with New South Wales in Australia.

In the case of barristers, a reciprocating country is a jurisdiction where the professions of solicitor and barrister are separate and which, in the opinion of Kings' Inns, affords corresponding advantages to members of the Bar of Ireland. Recognition of other countries is entirely at the discretion of the governing body of King's Inns. King's Inns' rules specify that, if the reciprocating country's legal system is not based on common law, the applicant may be required to pass examinations. At present there are no reciprocal arrangements in force with any country.

2.1.5 Possible and Pending Reforms

In its Final Report, the Competition Authority recommended that the current system of reciprocity for non-EEA nationals should be replaced by a system similar to that which applies to EEA nationals.

2.2 Exclusive rights

Apart from a few limited cases, barristers and solicitors are the only persons recognised in the Irish courts as representatives of persons involved in legal cases.[2]

Solicitors have exclusive rights to provide conveyancing[3] and probate services in Ireland although these services can also be self-supplied.

2.2.1 Possible and Pending Reforms

In its Final Report, the Competition Authority recommended that suitably qualified persons other than solicitors should be allowed to provide conveyancing services. Implementation of this recommendation would effectively mean the introduction of a new profession of conveyancers, as has been done in other OECD countries such as the UK and Australia.

3. Regulation of market conduct

3.1 Fees

3.1.1 Regulation of fees

There are three types of client-lawyer relationship involving payment of fees for services:

- clients negotiate directly for services supplied by solicitors (e.g. probate and conveyancing);
- a limited number of (mainly corporate) clients may negotiate directly with barristers for non-contentious matters (i.e. advice rather than litigation services).

2 In certain limited circumstances, other representatives such as family members are permitted in the lower courts.

3 Transferring the ownership of a house, apartment or piece of land from one person to another is known as conveyancing.

- The negotiation of barrister fees is the responsibility of the client's solicitor where direct access is prohibited, as is the case for contentious matters (i.e. litigation).

The calculation of fees for legal services is a matter for negotiation between client and lawyer(s). Fees are not set or recommended by the respective regulatory bodies, i.e. the Law Society or the Bar Council. Nor does the Government regulate the market price for legal fees.[4]

Solicitors are required to provide clients with information on the actual or likely costs of services to be provided.[5] Barristers are under no similar obligation to provide information in advance. Rather, barristers are only required to provide such information on request from either the client directly or from the client's solicitor.

3.1.2 Basis for Charging of Fees

Fees can be set in various ways, most commonly on:

- a percentage basis;
- a costed basis, e.g. hours worked; or
- a flat or 'quoted' fee.

Lawyers generally invoice clients at the completion of a transaction or legal case. The likely cost of services is often uncertain at the outset; in these situations it is not likely that a barrister or solicitor will quote a fixed price.

While percentage fees have been common, particularly for conveyancing or probate services, there is no obligation for consumers to pay in this way. Increased competition among solicitors, who have a statutory monopoly on conveyancing services, has seen the gradual emergence of flat fees for this type of work.

Specifically in regard to litigation, *pro bono* and "no foal no fee" (i.e. fees charged only if the client wins) arrangements are allowed. There is, however, a specific prohibition on contingency fees (i.e. a percentage of the award).[6]

There has long been a practice, of concern to the Competition Authority, whereby a junior barrister in a case marks his or her fee at two-thirds of the senior barrister's fee. The Bar of Ireland amended its rules in 1990 to abolish the rule which endorsed this practice. Nevertheless, the two-thirds practice has tended to persist. The Legal Costs Working Group reported in December 2005 that for junior counsel *"the brief*

4 This discussion focuses on contractual arrangements between clients (including the State) and solicitors and barristers. Accordingly the remuneration of barristers and solicitors employed in State agencies, including for example the Office of the Attorney General, the State Solicitor's Office and the Competition Authority, is not discussed.

5 Section 68 of the Solicitors (Amendment) Act 1994.

6 Section 68(2) of the Solicitors (Amendment) Act 1994 prohibits this practice, although econometric analysis undertaken for the Competition Authority suggests a high correlation between the size of an award and the fees for litigation.

fee was almost always 2/3 the Senior Counsel's fee. The two-thirds rule was violated in only 5% of cases."[7]

3.1.3 Information Asymmetry

Consumers, particularly infrequent purchasers of services, can be at a distinct disadvantage when negotiating fees. This is common in many professional markets where services are complex.

Given asymmetric information in the market for legal and other professional services, it is important that consumers have reliable and relevant information available to them, including information from regulatory agencies. The asymmetry can be exacerbated where there is a lack of transparent information.

Accordingly the Competition Authority has recommended that the regulatory bodies, i.e. the Bar Council and the Law Society, should adopt more proactive approaches to inform consumers. The most obvious medium to do this is the Internet.[8]

3.1.4 Government as Buyer of Legal Services

The Government, as a purchaser of legal services, has established schedules of fees for some services. For example, in many criminal matters, the State is the purchaser of both prosecution and defence services and so in this context sets lawyers fees.[9] More generally, however, there is no schedule of fees dictating a "going rate" for all State Agencies.

3.1.5 Legal Aid and Disadvantage

Criminal Legal Aid is available to ensure that access to justice is not precluded on the basis of income or wealth. Criminal legal aid is provided under the Criminal Justice (Legal Aid) Act, 1962. To be eligible for criminal legal aid, a person must have insufficient means to engage a lawyer. In addition the seriousness or complexity of the case is a relevant criterion. That is, the Court must be satisfied that the charge is serious enough that the interests of justice would require the provision of legal aid.[10]

Civil Legal Aid in Ireland, administered through the Legal Aid Board, deals primarily with family law. More recently, immigration and refugee cases have also been covered by civil legal aid. The provision of civil legal aid is dependent on a means test and a part-contribution by the applicant to the costs of solicitor and barrister fees.[11]

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7 The Working Group on Legal Costs was established in 2004 by the Minister of Justice Equality and Law Reform. Statistical analysis sampled High Court cases from two years: 1984 and 2003. The statistical analysis is contained in Appendix 2 to the Group's report and is available at: http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6KRJSB-en/$File/legalcosts.pdf.

8 To date the Law Society has established a consumer information page on its website but the Bar Council has not. There remains scope to increase the information available to consumers.

9 See for example Statutory Instrument 41 of 2007 at: http://www.justice.ie/80256E010039E882/vWeb/flDOJA6YLK2B-ga/$File/SI041of2007.pdf.

10 For murder cases or appeals from the Court of Appeal to the Supreme Court only the means test is applied. For further information refer to http://www.justice.ie/80256E01003A21A5/vWeb/pcJUSQ5XNLN4-en.

11 Civil legal aid has been available since 1979 and was place on a statutory footing with the Civil Legal Aid Act 1995. A person applying for legal aid and/or advice must also undergo a means test and must make a part payment for services received. For more information refer to http://www.legalaidboard.ie.

3.1.6 Possible and Pending Reforms

In its Final Report, the Competition Authority recommended that:

- the Bar Council advise barristers to cease the anti-competitive practice whereby junior barristers charge a fee calculated at two-thirds of the senior barrister's fee (not yet implemented);
- the Law Society establish a consumer information page on its website (partially implemented);
- the Bar Council establish a consumer information page on its website (not yet implemented);
- solicitors and barristers provide more meaningful fee or fee estimate letters to clients (not yet implemented);
- taxation of costs (i.e. when either party appeals the level of legal costs to pay after litigation) should focus on work undertaken rather than the size of the award (see below).

In March 2007, the Minister for Justice, Equality and Law Reform indicated his intention to introduce legislation and regulations that would, *inter alia*:

- replace the existing Taxing Master system for assessing legal costs; and
- require solicitors and barristers to use time recording in the preparation and compilation of charges to clients, and that bills sent to clients must be supported by such time records.[12]

3.2 Advertising

The Law Society regulates solicitor advertising,[13] and the Bar Council regulates barrister advertising.[14] Both regulatory bodies impose restrictions additional to the general requirements of relevant legislation.[15]

3.2.1 Solicitors

Legislation requires that solicitor advertising provide factual information such as address, contact details, qualifications and experience and on the range of services supplied. Solicitors are also permitted to advertise charges or fees, subject to a prohibition on any terminology that could be interpreted to mean that

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12 For more information refer to: http://www.justice.ie/80256E01003A02CF/vWeb/pcDOJA6YZJLG-en.

13 Solicitor advertising regulations (Statutory Instrument 518 of 2002), pursuant to the Solicitors Act 1954 as amended by the Solicitors Amendment Act 2002, can be viewed at http://www.irishstatutebook.ie

14 Rule 6.1 of the Code of Conduct of the Bar of Ireland states "*Barristers may advertise by placing prescribed information concerning themselves on the website of the Bar Council and subject to such rules and regulations as may be promulgated from time to time by the Bar Council in respect of the content of such an entry. Barristers may advertise by such other means as the Bar Council may prescribe by way of regulations promulgated from time to time, which regulations shall be promulgated for the purposes of protecting the public interest, facilitating competition and maintaining proper professional standards*."

15 Such as the Consumer Protection Act 2007, which updated and consolidated previous consumer legislation, and the Broadcasting Act 2001.

services for litigation would be charged at no, or reduced cost, (e.g. advertising "no foal no fee" or "first consultation free").

In addition under the regulations of the Law Society, the following are prohibited:

- cartoons;
- dramatic or emotive words or pictures;
- references to alarming or calamitous events;
- inappropriate locations (such as hospitals or cemeteries); and,
- advertising on modes of transport.

3.2.2 Barristers

Barrister advertising is significantly more restricted than for solicitors. Barristers are limited to placing their names, contact details, and specialisations on the Bar Council website and in the Law Society's Law Directory.

3.2.3 Possible and Pending Reforms

In its Final Report, the Competition Authority recommended that the Bar Council should remove unnecessary restrictions on barrister advertising, i.e. to limit restrictions to (i) false or misleading information and (ii) advertising that would bring the administration of justice into disrepute, or otherwise be considered in bad taste. To date, the Bar Council has not moved to liberalise barrister advertising, and the current restrictions remain.

The Competition Authority recommended a specific change for solicitor advertising, i.e. to remove the prohibition on solicitors advertising areas of specialist expertise. In January 2007, the Law Society indicated its intention to implement this recommendation.[16]

3.3 Partnerships and business organisations

Solicitors and barristers are both restricted in their choice of business structures for the delivery of legal services, the latter to an extreme degree.

3.3.1 Solicitors

Solicitors in private practice have some degree of discretion over business structures. They can operate as sole traders, in partnership with other solicitors or as associate (non-partner) members of a firm.

It is nevertheless the case that the choice of business structure for the delivery of legal services is significantly constrained. In particular:

- Solicitor firms cannot incorporate;
- Partners have unlimited liability; and

16 As reported in the *Law Society Gazette* March 2007.

- Solicitors can only form partnerships with other solicitors - it is prohibited for solicitor firms to be owned, or part-owned, by non-solicitors (including barristers).

Most legal practices (approximately 70%) are small, i.e. one or two solicitors. In larger commercial centres, there are larger firms, including some with over 50 partners.

3.3.2 Barristers

The restrictions on barristers are more restrictive than those on solicitors and indeed arguably more restrictive than any other regulated profession in Ireland. Practising barristers are required to operate as sole traders.[17] It is prohibited for barristers to operate in partnerships, chambers or any other business model, although a group of barristers can, if they so wish, share administrative costs and premises.

As a consequence of the sole trader rule:

- there are no barrister-only firms;
- there are no barrister/solicitor firms; and
- employed barristers do not have a right of audience in court.[18]

3.3.3 Possible and Pending Reforms

In its Final Report, the Competition Authority recommended that the Code of Conduct of the Bar of Ireland be amended to:

- allow barristers who share administrative costs and premises to present themselves to the public as a group (this could include operating as a chamber);
- allow barristers to form partnerships with other barristers; and
- enable employed barristers to represent their employer in court.

To date the Bar Council has not agreed to any of the above proposals.

4. Institutional framework of self-regulation

4.1 Application of Competition law

The self-regulatory bodies are covered by the prohibition of anti-competitive practices in competition law. Following the enactment of the Competition Act 1991, the Bar Council and the Law Society moved to end certain anti-competitive practices which were common in the past. For example, the Law Society has ended the practice of prescribing solicitors' fees. In 1990, the Bar Council removed the "two-thirds" **rule**,

17 Rule 8.6 of the Code of Conduct of the Bar of Ireland states "*in the interest of maintaining an independent Bar barristers shall not carry on their practices as partners or as a group or as professional associates or in such a way so as to lead solicitors or others to believe that they are partners or members of a group or associated in the conduct of their profession as barristers*."

18 Only independent practising barristers have a right of audience. Ironically no similar distinction applies to solicitors' rights of audience. For example, if a barrister and a solicitor are both employed by the same organisation, the solicitor can advocate in court but the barrister cannot.

under which junior barristers were automatically paid a fee of two-thirds the fee charged by the senior barrister in a case. However, although the rule has been removed, it is still extremely common for "Juniors" to charge two-thirds of the "Senior's" fee. The Law Society and the Bar Council do not issue fee recommendations to their members. In addition, restrictions on advertising have been partially relaxed for solicitors (see 3.2 above).

The Irish Competition Authority has not taken any enforcement action against the legal professions to date although the Chairperson of the Authority, in his remarks at the launch of the Authority's Final Report on competition in the legal profession, warned that the Authority was keeping its enforcement powers in reserve and would use them if necessary.

4.2 Regulatory oversight

The Minister for Justice, Equality and Law Reform has a number of functions in relation to the regulation of solicitors, with the various Solicitors' Acts underpinning the role of the Law Society as the regulator. The Bar Council is a totally self-regulating body and is not subject to any Government oversight in the performance of its functions.

4.2.1 Possible and Pending Reforms

In its Final Report, the Competition Authority recommended the establishment of a Legal Services Commission, an independent statutory body with responsibility for regulation of both branches of the legal profession. The proposed Commission would be given explicit authority to make new regulations and would have the power to veto the rules of self-regulatory bodies.

4.2.2 Complaints

Both the Law Society and the Bar Council, in their capacity as regulators, operate mechanisms by which complaints against practising solicitors and barristers can be dealt with. The Law Society's Complaints Scheme is provided for under the Solicitors (Amendment) Act 1994 and deals with complaints relating to inadequate service, excessive fees and misconduct. The Barristers' Professional Conduct Tribunal deals with complaints from members of the public and from solicitors about barristers.

4.2.3 Possible and Pending Reforms

The Civil Law (Miscellaneous Provisions) Bill 2006 will, when enacted, provide for the establishment of a Legal Services Ombudsman to oversee the handling of complaints by clients of solicitors and barristers by the Law Society and the Bar Council respectively. The Ombudsman will effectively subsume the existing office of Independent Adjudicator in relation to complaints against solicitors and will carry out similar functions in respect of both solicitors and barristers.

ITALY

1. Introduction

In Italy, several aspects of the provision of legal services are subject to some form of regulation. Such regulation, however, does not affect the ability of potential service providers to access the market, since no quantitative restrictions on entry exist for the acquisition of the relevant professional qualifications (with the exception of notaries), nor a *numerus clausus* policy is applied for registration in Law Departments at universities. In fact, Italy is the European country with the highest number of registered lawyers.

The regulatory framework applicable to the legal professions, as well as to other regulated professions, used to present some rigidities, relating to pricing, advertising, reserved activities and business structure. The Italian Competition Authority has consistently advocated a thorough and reasoned review of such restrictions, and the removal of those which caused unnecessary or disproportionate distortions of competition.

Very recent regulatory reforms have eventually taken on board the suggestions and the indications of the Authority, overriding the traditional resistances of professional associations. Although it is still early to assess the impact of these legislative changes the sector is certainly experiencing an evolution towards an even more competitive regulatory environment.

2. The sectoral inquiry on professional services

In 1997 the Italian Competition Authority carried out an extensive sectoral inquiry into liberal professions, aimed at providing a general framework of analysis and at identifying regulatory restrictions of competition calling for possible legislative interventions[1]. The inquiry, covering a large number of professions[2], focused on conditions of entry, as well as on regulation of conduct and of business structure.

As far as the legal professions are concerned, the analysis was hinged upon restrictions on prices and advertising and, especially for notaries, on restrictions on entry. With regard to access to the professions, it was noted that the practical training required for most professions depends essentially on the willingness of other professionals, who frequently delegate only simple routine procedures to their trainees. The Authority therefore suggested that more specialisation schools be established throughout the country as an alternative to practical apprenticeship, or even that university courses be reorganised to provide the practical training needed.

The Authority also emphasised that minimum or fixed tariffs and charges are not necessary to guarantee the quality of the service provided. Moreover, the Authority underlined that advertising on fees and other aspects of professional services would reduce the costs that consumers face when trying to evaluate and compare competing offers on the market. The survey also dealt with the issue of professional

1 See Italian Competition Authority document n. 5400 (IC15) "Settore degli Ordini e Collegi Professionali" of 9 October 1997.

2 Besides legal professions the inquiry concerned accounting professions, health professions (doctors and pharmacists) and technical professions (architects and engineers).

partnerships. The Authority advocated for the Parliament to enact legislation allowing professionals to choose any organizational form for the provision of the services, making it possible to set up partnerships between persons belonging to different categories of regulated professions or between regulated and non-regulated professionals (including foreign professionals). It also suggested that professionals should be able to establish limited liability companies.

Apart from the various, specific suggestions for action contained in the investigation, the Authority stated that regulation of liberal professions should fulfil the criteria of *necessity and proportionality*. In other words, regulation should be enacted or maintained only when significant market failures make it indispensable, that is when: a) consumers are unable to evaluate the quality of professional services; b) the effects of acquiring a service of inadequate quality are particularly severe; c) the provision of professional services relates to crucial societal values. Even in these cases, however, regulation should not exceed what is strictly required to cure the identified market imperfection.

3. The advocacy activity of the Italian Competition Authority

The inquiry identified a series of legislative measures creating distortions of competition not justified by requirements of general interest, and reported the Authority's opinion as to which steps could be taken to remove such distortions. The Parliament and the Prime Minister were notified of the results of the investigation and invited to revise restrictive regulation accordingly. Following the conclusion of the Authority's investigation, a Commission, set up by the Minister of Justice, produced a Bill aimed at re-drafting the regulatory framework of liberal professions.

In February 1999, before the parliamentary discussion on the "reform of liberal professions" had begun, the Authority issued an opinion on the Bill, pointing at its inadequacies in addressing the pitfalls of existing regulation[3].

In particular the Authority, after restating the indications for action contained in the 1997 investigation, highlighted the importance of providing consumers with more information about the characteristics of professionals' services. Statistics on past market prices of services, for example, (rather than minimum fees), could enable consumers to better evaluate the economic terms of professionals' offers and their relative convenience. Correspondingly, regular and updated information about compliance with predetermined quality standards could reduce consumers' searching costs as well as the risk of their being harmed by poor quality services.

The proposed reform of 1999 was discussed in Parliament but never approved. Since then the reform of the professions was subject to an ample debate. The Italian Competition Authority has addressed to the Parliament and the Government several opinions on existing and draft legislation on liberal professions, advocating the elimination of unjustified restraints to competition[4]. The Authority has repeatedly advocated the abolition of minimum tariffs for professional services, since entry qualifications are sufficient to ensure that consumers are offered services of adequate quality. It was also suggested to introduce outcome-based pricing, thus allowing professionals to link their fees to the actual result of their work. The Authority has also consistently advocated a full liberalisation, with regard to both the content and the means of advertising for professional services, including comparative advertising.

3 See the Italian Competition Authority advocacy report n. AS163 of 5 February 1999.

4 See the Italian Competition Authority advocacy reports, n. AS298 of 27 April 2005 and n. AS306 of 14 July 2005.

Such advocacy activity culminated with the adoption of the Report on "Activities Aimed at Liberalizing Professional Services in 2004-2005"[5] whereby the Authority urged the Government and the Parliament to consider a general reform of the regulation of professional services[6].

The advocacy efforts were not directed only at existing or draft legislation. In parallel, the Authority held in 2004 and 2005 a series of bilateral meetings with representatives of professional bodies[7] with a view to analysing their self-regulation under the proportionality test. As a result of this approach, most professional bodies modified their self-regulation in a pro-competitive sense.

4. Recent regulatory reform

Although the debate on the need to reform professional services' regulation has been extremely lively and many projects were discussed in Parliament, such discussion never resulted in a reform because of disagreements among political forces and resistances by the professional associations.

In August 2006, however, important changes regarding liberal professions were introduced by the so-called "liberalisation package", enacted by the law of 4 August 2006, n. 248. This law amended several pre-existing provisions, introducing pro-competitive changes in different sectors[8].

In particular, article 2 eliminated minimum tariff requirements and advertising restrictions for professional services. Professionals are allowed to decide freely the level of their fees, and to link such fees to the outcome of the service. Professionals can advertise their specific qualifications and specializations, and the characteristics and the price of their services. They are also allowed to establish multidisciplinary firms providing an array of professional services. However, a professional cannot be associated with more than one firm; moreover, it is necessary to identify ex ante the professionals who will provide any specific services under their personal responsibility. The firm should also state precisely which professional services it renders.

The new provisions mirror to a large extent the opinions drafted over the past years by the Italian Competition Authority in its advocacy reports and sector inquiries, addressing some of the main competition issues arising from sectoral regulations[9].

Professional associations were required by the law of 4 August 2006 n. 248 to amend their codes of conduct by the end of January 2007, in order to comply with the new provisions.

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5 See the Italian Competition Authority advocacy report n. AS316 "Liberalizzazione dei Servizi Professionali" ("Liberalization of Professional Services"), of 16 November 2005. The report can be consulted at: www.agcm.it.

6 In particular, rules on access to the professions, reserved activities, territorial restrictions, restrictions on the exercise of the professions (tariffs, advertising bans, incompatibilities) and business structure regulations.

7 In particular, lawyers, notaries, engineers, architects, pharmacists and accountants.

8 Law of 4 August 2006, n. 248 "Urgent Provisions regarding economic and social development, the control and razionalization of public expenditure, interventions in the fields of public revenue and repression of tax evasion".

9 On some specific aspects the reform is not entirely in line with the Authority's opinion. For example it only allows professionals to use purely informative advertising. With regard to the possibility of firms providing professional services, the Authority's suggestion to allow financial partners to hold a minority shareholding in such forms has not been followed.

In January 2007 the Authority opened a general inquiry in order to analyse the changes in self regulation and to assess whether all restrictions on competition had been eliminated[10]. The Authority is thoroughly examining the codes of conduct of a number of professions and holding meetings with representatives of the professional bodies. The inquiry is still ongoing.

5. The current regulatory framework

5.1 Lawyers

5.1.1 General regulation and reserved activities

The statute governing the profession of lawyer in Italy dates back to 1933. Subsequent amendments, prior to the abovementioned recent changes, had not significantly modified its provisions. A major distinction was drawn by the 1933 statute between two categories of lawyers (*avvocati* and *procuratori legali).* With the Law n. 27 of February 24 1997 the distinction between the two groups of attorneys has been eliminated and the profession of *procuratore legale* has been abolished[11].

The activity of lawyers pertains to two main areas: judicial activity, involving representation in courts, and extra-judicial activity involving all other forms of legal advice. The activity of representation in ordinary (civil and criminal) and administrative courts is reserved to lawyers, while other professionals (such as accountants) are allowed to represent the clients in front of tax revenue Commissions. It is mandatory for parties to be represented before the court by a lawyer[12].

Representation in superior jurisdictions is reserved to specially qualified lawyers. Only those attorneys who have practised for twelve years, or those who have passed a special examination (that can be taken after at least five years of practice as a lawyer) have rights of audience before the *Corte di Cassazione* and other superior jurisdictions (e.g. Constitutional Court, Council of State). Such lawyers are listed in a special register.

No extra-judicial activities are reserved to lawyers, unless they are directly functional to assistance in court. Many law firms specialise in fields such as contract, corporate or tax law. These firms typically include experts in commercial law, as well as accountants and auditors. There has been some discussion on the need to regulate extra-judicial advice; however, no formal restrictions on non-attorneys operating in this field have been enacted so far.

Italian lawyers are organized in local Bar Associations (Ordini) which are co-ordinated at national level in the Lawyers National Council (Consiglio Nazionale Forense). Membership in the professional association is compulsory. As for other professions the Lawyers' Bar Associations have often interpreted

10 See Italian Competition Authority IC 34 "Enquiry on Professional Orders" decision n. 16369 of 18 January 2007.

11 In the past, noticeable differences existed between the activities of *Avvocati* as compared to those of the *Procuratori Legali.* This distinction had already been mitigated by article 4 of the Law n· 406/85: since then, the only difference was that while a Procuratore Legale was only allowed to practice in the district of the Court of Appeal where he had registered, an *Avvocato* could practise under specific conditions in the whole national territory. Such limitation did not apply to the non judicial activity of the *Procuratore Legale.* According to the former legislation an *Avvocato* was a lawyer who had practised as a *Procuratore Legale* for at least six years and then was admitted to the professional association register. Now Italian lawyers become *avvocati* straight away, if they fulfil the relevant preconditions.

12 The only exception is the Giudice di Pace, a small claims court, in front of which the parties can stand without being assisted by a lawyer.

deontological rules more in view of the protection of their associates than in order to ensure the quality of professional services. Codes of conduct have sometimes been used to introduce competitive restrictions (for instance on advertising).

5.1.2 Entry

Entry in the market is subject to qualitative restrictions. No quantitative restrictions exist. Those who intend to become lawyers need to hold a degree in law, which takes a minimum of five years of study[13]. Then, they must apply as trainees in a law firm, register with the local Bar Association[14] and complete a two-years training[15]. The Authority has suggested that alternative forms of training be introduced. These indications have been followed only in part. Universities have established specialised schools for the legal professions (not only perspective lawyers but also notaries and judges). There is a competitive entry by exam. The course lasts for two years, the first year is common for the three professions, while in the second year separate courses are provided for notaries on the one hand and judges and lawyers on the other. After taking the final exams, the candidates that have attended the school will have only one year of training left, instead of the normal two years requirement.

Upon completion of the training, certified by the law firm, candidates take a written examination, which is held once a year at local level (corresponding to the district of the Court of Appeal)[16]. Only those who pass the written examination are admitted to an oral examination. There are no limits as to the number of candidates admitted to either the written or oral exams. There are, however, systematic territorial differences as to the rate of success (in some districts more than 70% of the candidates are passed, while in others the success rate is below 30%)[17]. Since the introduction of a national exam was hardly feasible, considering the number of candidates, in 2003 it was decided to introduce a system of rotation of the examining commissions. The candidates still take the exam in their district of residence, but the relevant commission is selected randomly from a district of similar dimension.

All the local boards of examiners are appointed by the Ministry of Justice; in each board there are two lawyers (with at least 8 years of practice), two judges and a university law professor.

There is no limit to the number of times the test can be taken.

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13 A recent reform of the university (carried out between 1998 and 2000) had introduced significant changes to the system. Whereas previously most degrees – including law degrees - required four or five years of study, the reform brought about the so called 3+2 curriculum system (a three years degree followed by a two years specialisation degree). Both law departments and the legal professional associations maintained that the three years degree was not sufficient to access the training to become a lawyer and they required completion of the two years specialisation degree. In practice the three years degree in law was useless (some universities did not even offered it). In 2005 the system was once again reformed and now all law degrees require five years of study. Access to law departments is not limited by *numerus clausus* provisions.

14 Relevant applications should be filed with the Bar Association offices of the district of residence and must be supported by evidence of Italian citizenship (this condition cannot apply to EC nationals as a matter of EC law, and has been suppressed for nationals of other countries by the law of 6 March 1998.

15 After completion of the first year of traineeship, candidates fulfilling certain prerequisites may be admitted as *praticante Avvocato*. As such, they may request rights of audience - *patrocinio* - before lower courts in their own district. A candidate may not practise as a *praticante Avvocato* for more than six years.

16 Art. 2 of the Law of 20 April 1989 n·142.

17 This led to a sort of "Examination Commission shopping", with candidates moving to districts that were considered "easier".

Successful candidates can now register directly as lawyers with the Bar Association and start practising.

There is still considerable debate as to the effective ability of the selection method described above to ensure the quality of legal services. However, it is clear that the rules governing access to the profession do not result in quantitative restrictions, since approximately 15.000 new lawyers register every year.

Italy, in fact, is the European country with the highest number of lawyers, with 180.000 registered lawyers (121.380 of whom practising) in 2006[18].

5.1.3 Fees

Until recently, fees for lawyers' services established by the Lawyers National Council every two years, and approved by the Ministry of Justice were binding. The applicable regulation provided for minimum and maximum fees. The official tariffs were detailed and distinguished between in and out of court services, as well as between criminal and civil matters. Legal services were classified for tariff purposes according to the nature of the tasks performed by lawyers rather than with reference to the time required to perform the service. In addition, specific rules addressed the calculation of travel and office expenses, as well as the drafting of legal documents.

Parties were still free to negotiate fees as long as they were in the range of the established minimum and maximum fees for each service[19].

The recent reform has eliminated minimum fees, as well as the ban on contingency fees – *pactum de quota litis*[20]. According to the new rules lawyers are now free to set fees that are related to the outcome of the case.

Self regulation was also changed in order to bring it in line with the new provisions. However, articles 43 and 45 of the code of conduct still provide that the requested fees must not be manifestly disproportioned with reference to the performed activity.

5.1.4 Advertising

Traditionally advertising by lawyers in Italy has been subject to an outright ban. The code of conduct contained a number of provisions aimed at preserving the respectability of the profession and advertising was one of the activities indicated as potentially detrimental of the profession honour. Strict rules contained in the code of conduct applied even to the indication of the name of the lawyers on boards placed outside the law firm premises.

However, already in October 2002, the relevant article of the code of conduct was amended in order to allow some forms of advertising, including signs outside the business premises, brochures, internet sites, juridical publications or 'annuaires', as well as to permit some contacts with the press/media about a case, where the relevant information is non-confidential.

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18 Source: Council of Bars and Law Society of Europe www.ccbe.org/doc/En/table-number-lawyers-2006-en.pdf

19 Minimum fees were binding pursuant to the law of 13 June 1942, n. 794. This legislative provision was mirrored by article 43 of the code of conduct.

20 The law repealed art. 2233 (2), of the Italian Civil Code stating that any agreement on contingency fees was null and void and therefore not binding on the parties.

Even after these changes advertising on press, TV or radio was totally banned. Also advertising through billboards or flyers as well as soliciting by phone call, sponsorships, use of the internet to offer free advice were forbidden. Seminars and conferences organised directly by lawyers' cabinets were only allowed in some cases, after seeking prior authorisation by the professional body. Rules on the advertising content allowed the display of personal information, listing of publications, information on the professional practice, a logo, indication of 'quality certificates' (approved by the professional body), while any information relating to third parties, names of clients (even with their permission), information on the lawyers' specialisation (except those allowed by law), prices (including the indication that the first consultation is free), the percentage of cases won, the turnover of the cabinet were all prohibited.

All bans on informative advertising were eliminated by the Law 4 August 2006 n. 284.

Consequently some amendments were introduced to articles 17 and 17 bis of the code of conduct, in particular in order to allow all forms of informative advertising as to the characteristics of the offered services. The code of conduct requires the information to be transparent and truthful and assigns to the professional association a right of control.

6. Notaries

6.1 General regulation and reserved activities

The main law setting a detailed regulatory framework for the notary profession dates back to 1913[21]. In Italy, as in other civil law countries, notaries belong to the Latin notary system. The main feature of this system is that notaries perform a public function and act as public officers to whom the State delegates a specific public power, i.e. the power to assert the authenticity of a document. This power is functional to giving legal certainty to authentic deeds. As a consequence deeds that are certified by notaries enjoy privileged evidentiary strength, privileged enforceability and almost exclusive entry into public registers. The recognition of this function implies a pervasive regulation of the profession and the concession to notaries of a number of exclusive rights.

Among the reserved tasks one of the most important (also by volume of business) relates to conveyancing services. The purchase and sale of real estate in Italy must necessarily occur with the assistance of an Italian based notary. The notary is legally empowered to witness, validate, and register deeds and contracts for the sale and purchase of Italian immovable property.

Other reserved tasks include business incorporations and some family matters. Until the change introduced with article 7 of Law 4 August 2006 n. 248, transfer of registered movable goods (such as boats, cars and motorcycles) was possible only through public deeds or private deeds with the authentication of a notary. This requirement has been eliminated.

Besides performing the reserved tasks, notaries can also give general legal advice in competition with lawyers.

As for lawyers, self regulatory bodies perform an important role for the profession. Membership in the professional association is compulsory. Both the national (Consiglio Nazionale del Notariato – National Board of Notaries) and local (Consigli Notarili Distrettuali – Notarial District Boards) associations are established by law and their members are selected by the notaries themselves.

[21] Law of 16 February 1913 n. 89.

6.2 Access to the profession

In Italy there are both qualitative and quantitative restrictions to access to the notary profession. Not only is access regulated but the number of notaries is predetermined and each notary has minimum service obligations in the area of assignment.

The steps required to become a notary in Italy are established by the laws 16 February 1913, n. 89 and 6 August 1926, n. 1365. Holders of law degree intending to become notaries need to be accepted by an established notary as trainees, after which they can register in a Notarial District Board (Consiglio Notarile Distrettuale). The period of internship lasts two years from acceptance of the registration by the Notarial District Board[22]. The practice should be effective and continuative and must be demonstrated by means of certificates issued every two months by the notary who has accepted the trainee.

The current legislation does not impose attendance of any of the preparatory schools, run by the Notarial District Boards, recognised and operating in the national territory. Such schools do not issue diplomas or certificates and have only a private nature and function. They prepare candidates for the notarial examination. However, attendance of the post-university specialisation schools for the legal professions can replace one year of practice.

Upon completion of the internship, the aspiring notary must take part in the national competition that consists of three phases: first a general multiple choice test organised electronically. There is a pre-established number of candidates which can be admitted to the following written examination. The written examination is divided into three separate tests of theoretical-practical nature, held on consecutive days, and including: an act among living persons, an act of last will and an appeal of voluntary jurisdiction, randomly selected on the day of each test. Those who obtain at least the minimum mark required by the law on each subject can take the oral examination. The oral examination consists of three separate exams, respectively on civil and commercial law, the system and regulation of notaries and business taxes. Those who obtain for each of the exams the minimum marks are declared suitable, and a graded list of their names is drawn up.

The competition is run directly by the Ministry of Justice and the examining commission is composed of two judges, two notaries (even retired) and one university professor of law. It is an extremely difficult and selective test, passed on an average by only one out of twenty aspiring civil law notaries.

The available seats are attributed to the successful candidates in order of priority on the basis of the results of the exam. According to information by the *Consiglio Nazionale del Notariato* the exams are taken each year by over 3,000 candidates for a number of available posts normally ranging between two and three hundreds. As already mentioned above, the number of seats is fixed. The overall distribution of notary seats may be revised every 10 years by Presidential Decree, after consultation with the Notary professional bodies. In any case, a new seat can only be created if it corresponds to at least 8000 inhabitants.

As a result of the qualitative and quantitative entry restrictions the number of notaries in Italy (approximately 5.400) is smaller than that in countries of comparable population[23].

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22 Internship can be shortened one year for judges, lawyers, Secretary General of municipalities and, pursuant to the Ministerial Decree of 11 December 2001 n. 475, for those who have obtained a diploma in the specialisation schools for the legal professions.

23 In Germany there are 11.000 notaries and in France 7.600 (data from the official website of the National Board of Notaries www.notariato.it)

6.3 Fees

Also for notaries there are scheduled fees, set by the Notarial National Council and approved by the Ministry of Justice[24] within a range (minimum and maximum) on a scale linked to the value of the transaction. The scheduled fees only refer to acts pertaining to the reserved activities. Until the recent reform the fees where binding, but pursuant to the Law of 4 August 2006 n. 248 minimum and fixed fees have been abolished and fees can now be freely established by the parties.

However, in the very same days when the reform was enacted, additional legislative provisions on fees for notarial services have been introduced, which sit uneasily with the new general regulatory framework for the professions. In particular, the Decree of 1 August 2006 n. 349 provides that sanctions 8including suspension or cancellation from the professional register) can be imposed on notaries engaging in *"unfair competition against other notaries, including reduction of fees or advertising contrary to the code of conductor any other means likely to cause detriment to the honour of the notarial profession"*.

6.4 Advertising

Until recently all forms of advertising for notaries were forbidden. In 2005, however, after the meetings with the Italian Competition Authority the Notarial National Council had modified the code of conduct introducing the possibility of advertising through several means, though limited to informative advertising. All bans on informative advertising have subsequently been repealed by the Law 4 August 2006 n. 248.

[24] See Law 5 March 1973 n. 41 "Norms for the determination of notaries' fees and expenses".

KOREA

1. Characteristics of Legal Professions in Korea

The profession providing comprehensive legal services is *Byeon-ho-sa*, or attorney-at-law in Korea. A variety of quasi legal professionals including judicial scrivener and certified labor law attorney also exist. Moreover, many Koreans earn qualifications as a legal expert in foreign countries. Therefore, when the operation of the Foreign Legal Consultancy is permitted by law, the number of Foreign Legal Consultants is expected to increase dramatically.

In Korea, there are various kinds of legal services including but not limited to the following.

- litigation, or representation of clients for various juridical or statutory procedures in courts and other government agencies
- preparation of legal documents on contracts or other legal affairs especially regarding various juridical or statutory procedures in courts, public prosecutors' office and other bodies or agencies of government.
- legal advisory service
- representation of relevant agencies to register the possession, acquisition, loss or change of rights regarding real estate, mining, intellectual property rights, etc.
- notary public service
- arbitration, mediation and other legal services

The profession providing legal services mentioned above in a comprehensive manner is called *Byeon-ho-sa*, or attorney-at-law in Korea. According to the Attorney-at-Law Act of Korea, the mission of an attorney-at-law shall be to defend fundamental human rights and realize social justice. In addition, every attorney-at-law shall perform his duties independently and freely as a legal professional of public nature.

Bub-mu-sa, or judicial scrivener, provides limited scope of legal services including the preparation of legal documents to present to a court or public prosecutors' office and proxy of application for registration, etc.

Attorneys-at-Law vs. Judicial Scriveners

Attorneys-at-Law (*Byeon-ho-sa*)

> Attorneys-at-law participate in judicial proceeding as representatives of parties in civil or administrative cases or as defense counsels in criminal cases. Though the attorneys-at-law represent the parties who hire them, they also bear responsibility to the courts I ensuring fairness in adjudications.

Like judges and public prosecutors, those who have passed the National Judicial Examination and completed a two-year training program at the Judicial Research and Training Institute can become attorneys-at-law. Those who have passed the Military Judiciary Examination and have served 10 years or more in that capacity can also become attorneys-at-law. Once admitted to the bar, attorneys-at-law may plead before any court and be engaged in the general practice of law.

Judicial Scriveners (*Bub-mu-sa*)

> Judicial scriveners perform such duties as preparation of documents to be submitted to a court or public prosecutor's office, preparation of documents necessary for registration and proxy of application for registration or deposit. A judicial scrivener is under the supervision of the Local Judicial Scriveners Association, the Korean Judicial Scriveners Association and the chief judge of the District Court, which exercise jurisdiction over the seat of the office.

(They cannot represent parties in civil or administrative cases. They cannot act as defense counsels in criminal cases. They can only assist their customers in writing documents to be submitted to a court or public prosecutor's office except application for registration.)

The person who has passed the Judicial Scrivener Examination is qualified for the office of judicial scrivener. The person who has served as a public official for a Court, or public prosecutor's offices, and who is deemed by the Chief Justice to have knowledge in law as well as competence required for performance of the duties or judicial scrivener may also be so qualified.

This report primarily focuses on attorneys-at-law.

2. Current Status of Korea's Legal Market

2.1 Share of the legal services industry in the national economy and general situations

The legal services industry took up 0.31% of Korea's GDP in 2004. The legal services market includes businesses of attorneys, patent attorneys and judicial scriveners as well as other legal services.

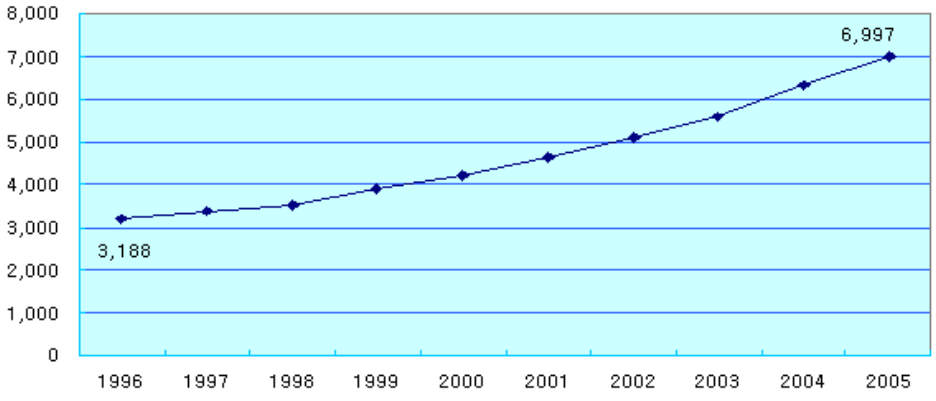
Legal service providers increased by an annual average of 5.5% from 1996 to 2001, and grew further by an annual average of 7.1% from 2001 to 2004. On the other hand, the growth rate of employees decreased from an average of 7.28% to 6.67%, and particularly, the growth rate of sales amount significantly reduced from 19.4% to 5.4%. After the government determined to select more people in the bar exam, the number of practicing lawyers has increased sharply, while office employees have not increased as many as practicing lawyers. Particularly, the sales growth rate dropped significantly.

Table 1: Development of Korea's Legal Services Industry (from 1996 to 2004)

Year	Sales($)	Number of Businesses	Number of Employees
1996	104 billion	6,875	32,177
2001	204 billion	8,765	43,986
Growth rate (from 1996 to 2001)	97% for 5 yrs **(19.4% per year)**	27.5% for 5 yrs **(5.5% per year)**	36.4% for 5 yrs **(7.28% per year)**
2004	2,381 billion	10,634	**52,769**
Growth rate (from 2001 to 2004)	16.2% for 3 yrs **(5.4% per year)**	21.3% for 3 yrs **(7.1% per year)**	20.0% for 3 yrs **(6.67% per year)**

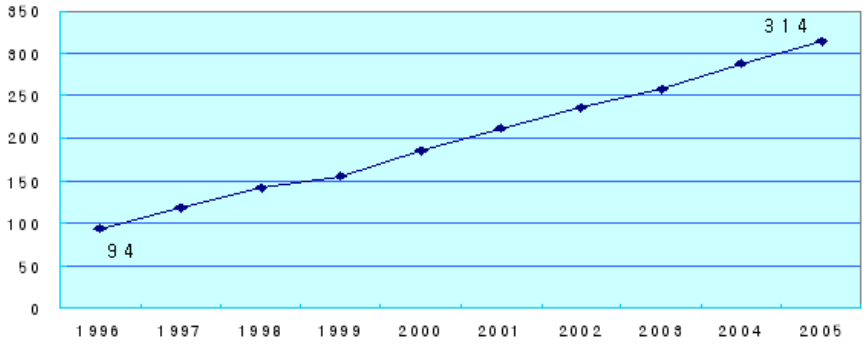
* Source: National Statistical Office, 2004

Figure 1: Number of Practicing Lawyers per year



* Source: The Korean Bar Association, Dec 2005

Figure 2: Number of Law Firms per Year



* Source: Legal Affairs Division, Ministry of Justice, Dec 2005)

2.2 Current Status of Law Practice Business in Korea

The total sales of law practice business in 2006 are estimated at 15 billion to 17 billion dollars.[1] A total of 9,011 lawyers are registered, and 8,168 out of them are now practicing law. Law firms are numbered 364, and 3,585 partners and associates are working for these law firms.

2.3 Current Status of Law Firms in Korea

Law firms are estimated to account for at least 70% of total sales of legal practice business. The sum of sales of six major law firms in Korea – Kim & Chang, Bae, Kim & Lee, Lee & Ko, Yoon Yang Kim Shin & Yu, Shin & Kim and Yulchon – is estimated to take up about 50% of total sales of legal business. Law firms have grown considerably, demonstrated by the number of attorneys-at-law.

[1] The exact statistical data don't exist, and particularly a sizable amount of sales from the patent attorney business is returned to the law firm revenue. Thus, total sales depend on the percentage of the patent attorney business reflected.

Table 4: Ranking of Major Law Firms and Number of Attorneys-at-Law in 2004 and 2007

'04	1	2	3	4	5	6	7	8	9	10
Name	Kim&Chang	Lee&Ko	Bae, Kim &Lee	Shin & Kim	Yoon Yang Kim Shin & Yu	Yulchon	Hwang Mok Park	KCL	Barun	Horizon
No. of Attorneys	198	118	108	101	83	61	45	35	31	28

'07	1	2	3	4	5	6	7	8	9	10
Name	Kim& Chang	Bae, Kim &Lee	Lee&Ko	Yoon Yang Kim Shin & Yu	Shin & Kim	Yulchon	Barun	Hwang Mok Park	Logos	KCL
No. of Attorneys	270	144	140	139	129	103	84	60	57	55
'07	11	12	13	14	15	16	17	18	19	20
Name	Sojong	Deryook	Horizon	Dong In	Jisung	Hankyul	Hanseung	Kim, Lee&Partners	J&P	Hanul
No. of Attorneys	43	42	41	40	38	37	34	27	26	21

* Source: Ministry of Justice

3. Regulation on Entry

3.1 Quality Standard and Entry

A person who has completed the required curriculum of the Judicial Research and Training Institute after passing the Korean Bar Examination shall be qualified for an attorney-at-law of the Republic of Korea (Article 4 of the Attorney-at-Law Act).

3.1.1 The Korean Bar Examination

The Korean Bar Examination is a state-run exam of which the Ministry of Justice is in charge. In the past, the exam did not require applicants to have academic background. However, starting from 2006, it asks applicants to earn at least 35 credits from law-related courses at colleges and other educational programs equivalent to college-level education. This is intended to ask applicants to not only learn knowledge of law but also cultivate their character and acquire basic skills through the courses at the college of law and educational curriculum equivalent to college-level education. However, it only asks applicants to earn a certain number of credits and does not limit the type of the college of law where applicants can earn credits. For example, the Korea National Open University and online universities are all included.

The Minister of Justice determines who would pass the exam based on the consideration of the Korean Bar Exam Management Committee as well as the opinions of the Supreme Court and the Korean Bar Association. As of now, about 1,000 applicants per year are chosen to pass the exam. The exam

consists of the two rounds of tests: the first round is a multiple-choice test encompassing basic legal subjects such as the Constitution, the Civil Code, the Penal Code, etc, and the second round is an essay-type test. If an applicant fails to pass, he is allowed to take the exam as many times as he wants.

Unlike attorney-at-law, the exam for judicial scrivener does not ask for any academic background.

3.1.2 Training and Education

The Judicial Research and Training Institute is a training institute to educate legal experts under the Supreme Court. The president and vice president are served by a high court judge and a chief prosecutor. The training program is a two-year course, and the Supreme Court is in charge of education and operation of the institute. The curriculum comprises of not only theoretical studies but also field training at trial courts, prosecutors' offices, lawyers' offices and other government agencies. The institute secures seasoned judges, prosecutors and attorneys to provide quality education to students. If a student fails to complete the training course at the institute, he is not qualified as an attorney-at-law.

Recently, the Korean Bar Association is offering a variety of education courses in order to help attorneys be specialized in various areas. These courses are not compulsory.

3.1.3 Registration of Attorney-at-Law

Any attorney-at-law who intends to establish a legal practice shall register his name with the Korean Bar Association (Article 7 of the Attorney-at-Law Act).

3.2 Entry barrier in Number

Except for the number of applicants who would pass the Korean Bar Examination, there exists no entry barrier in number.

In order to open the legal services market, the government is now drafting a new legislation. It is intended to allow persons, who are licensed as legal experts equivalent to attorneys in foreign countries, to practice the law of the licensed country with the approval by the Minister of Justice.

3.3 Exclusive Rights

Representation in lawsuit is a legal service which can be provided only by an attorney-at-law. In principle, Korea allows the party to raise a lawsuit by oneself; it does not require the party to appoint an attorney. Therefore, a party litigant is able to proceed the case by himself. In this case, the person can ask a judicial scrivener to prepare legal documents to present to a court or prosecutors' office. However, when a party of a lawsuit decides to appoint a representative, only attorney-at-law is entitled to conduct litigation or represent the lawsuit. In such exceptional case as constitutional petition, however, an attorney-at-law must be appointed as a representative of the case. In patent lawsuits, a patent attorney as well as an attorney-at-law is entitled to represent the lawsuit. Moreover, a certified labor law attorney is allowed to represent a remedy or a trial claimed in accordance with labor-related laws.

In particular, the Presidential Committee on Judicial Reform had verified the exclusive rights of attorneys and other legal professionals in various aspects.

A legal service customer has a limitless access to all kinds of legal services, and if he wants, he can ask for recommendation for an appropriate attorney through the Korean Bar Association and its local branches. Due to the advancement of internet, an increasing number of customers depend on online websites to find attorneys to be appointed.

4. Regulation of Market Conduct

4.1 Fee

An attorney fee is set through free consultation between the client and the attorney. The government places no limitation on the attorney fee itself. In other words, there exists no price control by the government on the minimum or maximum amount of fee.

In case of a lawsuit raised against the government, the government performs the lawsuit by itself in principle. However, in exceptional cases, it appoints an attorney or a law firm as a representative. Since there is no fixed list on attorney fee, the government decides the amount of fee within the budget range in a reasonable manner.

The Korean Bar Association does not impose any limitation on the amount of the attorney fee, either. Therefore, there is no recommended fee.

However, any attorney-at-law shall prepare a register on cases he accepts and keep it (Article 28 of the Attorney-at-Law Act). Starting from the second half of 2007, attorneys who have been practicing law for less than two years after retiring from the government or who are designated as a "special lawyer" for accepting a large number of cases will be required to submit the list of cases they accept to the Legal Ethics Association. The association comprises judges, prosecutors, lawyers and professors with at least ten years' experiences.

Many law firms calculate their fee on a working-hour basis, while only a few practicing lawyers adopt such calculation method.

Unlike attorneys, judicial scriveners, who mainly write legal documents to present to a court or prosecutors' office, are required to conform the rules on payment established by the Korean Judicial Agent Association.

Legal aid for low-income families is under way in various ways. In particular, the Korea Legal Aid Corporation under the Ministry of Justice has been carrying out large-scale legal aid projects for low-income families and the disadvantaged.

4.2 Advertising

Any attorney-at-law, any law firm, any law firm (with limited liability) and any law firm association may advertise his or its members' educations, careers, main services offered, performance records and other matters necessary for publicizing its services through such media as newspapers, magazines, broadcasts and computer communications (Article 23 (1) of the Attorney-at-Law Act). However, in respect of the advertisement referred to in paragraph (1), the Korean Bar Association may place restriction on the kinds of advertisement media, the frequency of advertisement, the total amount of advertisement expenses, and the contents of advertisement, etc. (Article 23 (2)).

According to Regulation on Advertising Attorney-at-Law Business of the Korean Bar Association, there exists no specific limitation on the way of advertising, allowing various ways of advertisement including periodicals, non-periodicals, broadcasts, internet, brochures, explanatory meeting, etc. However, an attorney-at-law shall not visit, make phone calls or send fax, mails and e-mails to unspecified individuals. An attorney-at-law shall not install, attach or display advertisements inside and outside of vehicles and use placards, advertising balloons and loudspeakers (Article 5 of the Regulation on Advertising Attorney-at-Law Business).

An attorney-at-law may display their main services offered. However, such terms as “best”, “only”, “expert” and other words with similar meaning shall not be used in advertisements (Article 7 of the Regulation above)

Advertising the level of attorney fee is not prohibited by the text. However, there has been no such case so far since it is considered to undermine the dignity and reputation of attorneys.

An attorney-at-law shall not run comparative advertisements under the Article 4 Paragraph 4 of the Regulation above, while advertisements stating the partnership with other attorneys are allowed. However, foreign lawyers are not allowed to practice law in Korea as for now, so partnership with foreign lawyers or non-lawyers are not permitted to be mentioned in advertisements.

4.3 Partnership and Business Organization

An attorney-at-law is prohibited from entering into partnership with non-attorney. (Article 34 of the Attorney-at-Law Act). Therefore, LDP and MDP are not allowed.

The Attorney-at-Law Act in place describes three organization types of law office: law firm, law firm with limited liability and law firm association. Law firm with limited liability and law firm association were introduced based on LLC and LLP, respectively. An attorney-at-law is not permitted to establish a law firm other than these three types.

A person who is not an attorney-at-law shall not establish and operate a law office by employing an attorney-at-law (Article 34 of the Attorney-at-Law Act).

In principle, it is not prohibited from outsourcing legal services within the competent jurisdiction to service providers outside such jurisdiction.

5. Self-regulation and Regulatory Oversight

The Korean Bar Association is not entitled to regulate attorney fee and attorneys’ business organization type. However, it has the right to place limitations to some extent on the type and content of advertisements. In the past, there existed strict limitations on advertising. However, from March 2007, lawyers have exercised greater discretion as to the type and content of advertisements due to the improvement in the competition-restricting regulations.

The Korea Bar Association and the Korean Judicial Agent Association are possible to determine the content of self-regulation for attorneys-at-law and judicial scriveners, respectively. The Ministry of Justice oversights such determination process.

If a decision made by an association of experts and other self-regulatory bodies is considered to restrict competition, such bodies will be subject to be monitored by competition authorities, Korea Fair Trade Commission.

A person can claim compensations for damages from malpractice cases and other legal services with flaws or ask for punishment to the Korean Bar Association. However, there existed no separate regulatory body or ombudsman system dealing with such problems. However, the Legal Ethics Association consisting of judges, prosecutors, lawyers, professors and other revered experts with more than ten years’ experiences was newly established in April 2007. The association is entitled to ask for the beginning of punishment or investigation on those who violated laws related to legal ethics. Therefore, the association is expected to serve as a monitoring body or an ombudsman system on malpractice cases and other legal services with flaws.

NETHERLANDS

1. Introduction

This contribution will focus on representation of clients in court (lawyers) and services associated with wills, probate and selling and buying of property (notaries), because in the Netherlands there is no restriction for providing (other) 'legal advice' to clients and outsourcing of legal services.

2. Regulation of entry

2.1 Quality standards and entry

Pursuant to the Act on Advocates (*Advocatenwet*), lawyers are obliged to become a member of the '*Nederlandse Orde van Advocaten (NOvA)*' (the Netherlands Bar Association (the Bar)) (http://www.advocatenorde.nl/). All notaries and junior notaries are members of the '*Koninklijke Notariële Beroepsorganisatie (KNB)*' (Royal Notary Union) (http://www.notaris.nl/). These are the public-law professional and self-regulatory bodies for all lawyers and notaries respectively in the Netherlands. The statutorily regulated core activity of these organizations is to oversee the quality of services by their members. This quality is ensured by, among other things:

- a comprehensive education program for the legal profession;
- drawing up By-laws and other binding rules for lawyers and notaries respectively;
- disciplinary proceedings;
- information and services to the members;

To practice as a lawyer or a (junior) notary a law degree from a University is required. There are no limitations on the number of study places. For both lawyers as notaries additional training is required to practice (independently) as a legal professional. For lawyers there is a compulsory three-year traineeship. This traineeship is an interaction between education and daily practice. In most cases the traineeship, the lawyer is – mostly - employed by a law firm, but always obliged to exercise the practice under the direction of a senior lawyer, the mentor (*patroon*). However, he or she will be conditionally sworn in as lawyer in the court of his or her district: this means that he or she can litigate independently. The first year of the traineeship consists of compulsory basic education. The Bar decides on the content of this education. There are nine fixed components, most of which are concluded with a written test. If all components are passed with a satisfactory result, the trainee will receive a certificate. Pursuant to the Act on Advocates, the trainee has a maximum of three years to obtain this certificate. Trainees who are not in possession of the certificate at the end of their traineeship period will be disbarred.

Graduates are required to serve as junior notary (kandidaat-notaris) in a notary office for six years before they can be appointed as notary by the Crown for life (in other words until the age of retirement at 65). The first three years of this traineeship includes compulsory additional education organized by the KNB.

All lawyers are required to continue paying attention to their education after the period of traineeship. Each lawyer must attain training credits each year for his entire career. Lawyers must attain 16 training credits, of which a minimum of 8 must be in an area related to the content of the profession or, as the case may be, in a legal area. Other relevant areas to which attention will be paid are social skills en ethics. Among others, this is possible by following education at an education institution that is recognized by the Netherlands Bar Association. If the yearly training credits are not obtained, a disciplinary action can be brought against the lawyer. A disciplinary measure can be imposed.

All notaries have to attain a number of 40 training credits every two years. The KNB decides on the number of credits that should be attained, awards credits to training programs and records the credits earned by individual notaries. If the training credits are not obtained a complaint can be lodged against the (junior) notary. A Supervisory Body (*Kamer van Toezicht*) is competent to judge these complaints and could impose a disciplinary measure.

There are no quantitative limits regarding the entry into the legal professions. Since 1999 the countrywide maximum on the number of notaries has been abolished. However, junior notaries wishing to set up a practice have to be authorized by a government commission, based on their business plan. The KNB has a (minority) position in this commission, which influences the decision to accept an entrant (and increased competition). This decision is based on the estimation whether or not the new company will reasonably make a profit in its third year. In addition, the law requires that notaries have the Dutch nationality. However, this condition will soon be abolished.

2.2 Exclusive rights

Dutch law imposes on both lawyers as well as notaries certain monopolies. Lawyers enjoy the exclusive right of representing clients in courts (with the exception of administrative law, labor law and small civil cases). The law requires a notarial instrument for a number of agreements and legal transactions. The most important are:

- Conveying real property in the Netherlands;
- Creating or cancelling mortgages;
- Incorporating public or private limited liability companies (NV's and BV's) or altering their articles of association;
- Establishing foundations or associations (including cooperatives) or altering their constitution;
- Drawing up, altering and executing wills;
- Drawing up or altering marriage contracts (i.e. usually ante-nuptial settlements) and registered domestic partnership agreements;
- Transferring registered shares.

Every notary is bound by the '*ministerieplicht*' this means that every notary has to perform all services for which the notary has a monopoly.

These monopolies have been reviewed in two recent evaluations (*Commissie Evaluatie Wet op het notarisambt* en *Commissie advocatuur: een maatschappelijke orde*) but no changes to the monopoly areas

are being considered. With respect to notaries the evaluation committee stated that the monopolies of notaries are justified since legal certainty is essential in economic and social transactions. With respect to lawyers the government will consider the possibility of enlarging the scope off the small claims. Consumers have direct access to all kinds of legal services.

3. Regulation of market conduct

KNB and The bar are now reconsidering there regulation since the Netherlands Competition Authority (NCa) *(Nederlandse Mededingingsautoriteit)* identified restrictions to competition in dome regulation. The NCa challenged them to justify the restrictions or to remove them.

Notaries as well as lawyers are in general free to set their own fees. Although, maximum rates fixed by the authorities apply to notary family law services in certain circumstances. The KNB or the Bar do not give rules for fees or lays down recommended rates. An exception is the prohibition on 'no cure no pay' by the Netherlands Bar Association. The NCa has objected to this prohibition concerning lawyers because it deems it in conflict with European and Dutch competition regulation. The government is considering a legal prohibition on no cure no pay because of the special role of the lawyer in maintaining the rule of law. Under all circumstances the public interest requires a free and independent execution of one's professional duty. For that reason it is necessary that the cost price of the lawyer will be paid.

In the Netherlands there are no special rules or a fee schedule for legal services purchased by public administration.

Lawyers may resort to the following methods of invoicing:

- Based on an hourly rate: the hourly rate may vary from one firm to the next and from one category of lawyer to the next, depending on the expertise and experience gained by the lawyer in question as well as on the degree of specialization of the firm. The hourly rate varies between €99 per hour for legal-aid cases and €500 per hour for commercial practices. The hourly rate may also be made subject to a client's financial capacity. Alternatively, the hourly rate may be increased/reduced, depending on the positive/negative outcome. The Minister of Justice has suspended NOvA's amended By-law on the professional practice (Verordening Praktijkuitoefening) – which allows charging a percentage of the result achieved in bodily injury cases ('quota pars litis') and the 'no win no fee' variant, while the Netherlands Competition Authority has challenged the ban of 'no win no fee'. The final decision on this form of contingency fee has not been taken yet;

- Based on a fixed fee: a lawyer and client agree in advance on the total sum charged for the legal assistance required. This method of invoicing is common for straightforward products; services for which the lawyer can easily forecast the cost of the services required. Examples include drafting employment contracts or leases;

- Based on a debt collection percentage: the client and the lawyer agree on the collection of debts. The lawyer's dues are a percentage of the amount collected.

- Based on the value of the work determined afterwards: the invoice is made subject to the value the services may reasonably mean to the client. For example: a useful opinion rendered in time and adequate help during negotiations which do not require much time will bring the client an unanticipated advantage worth millions. In liaison with the client, the lawyer determines the fee to be charged once the deal is done.

- Based on a one-year subscription or framework agreement: the lawyer and the lawyer draw up a contract regarding the price of legal advice to be rendered during a specific period or regarding the invoices for set services. The rates may be based on experience gained in previous matters dealt with for the client.

Legal aid is granted in cases where a legal interest in the Netherlands is to be defended by people whose ability to pay does not exceed the fixed maximum disposable income. For 2007 the maximum disposable income is set at €22.400 for single persons and €31.700 a year for married or cohabiting couples. Recipients of legal aid must pay an income-related fee. The lowest fee in 2007 is € 92, and the highest is €690. In criminal cases fees are generally not payable.

Legal aid will not be given in cases worth less than €180.

Subsidised legal aid is also excluded where:

- the application is manifestly unfounded;
- the costs of legal aid are out of proportion to the value of the case;
- the application concerns a criminal case in which only a low penalty is likely to be incurred;
- the application is made by a corporate body which is formed for the purposes of bringing the court action;
- the case concerns the practice of an occupation or business, unless the continued ability to practise depends on the outcome of the case;
- the case is to be brought in an international court that has its own legal aid scheme; or
- the case concerns an interest which the applicant can defend alone without legal representation.

3.1 Advertising and promotion

The KNB state some restrictions on advertising. Notaries are not allowed to advertise through real estate agents or other parties that might refer to their services. However, the KNB is now reconsidering the regulation on advertising.

Till March 30th 2007 the Bar has regulated the advertising for lawyers. This regulation has been reversed since that date.

4. Partnerships and business organization

The Dutch Bar has a wide variety in lawyers. Scaling up has lead to new combinations of firms and new types of lawyers.

Since 1996, for example, we have seen lawyers employed by lawyers, other independent professionals, ideological institutions, legal-aid offices or lawyers in the service of others (including so-called temping lawyers and interim lawyers). The type of firm rendering legal services varies from sole practitioners, cost-pooling firms and partnerships formed by several natural persons or corporate entities (*praktijkvennootschappen*). In the latter variant, however, those private or public companies must issue

registered shares that can only be managed by a board consisting of lawyers or other independent professionals (permitted under the Dutch By-law on Multidisciplinary Partnerships (*Samenwerkingsverordening*) active in the partnership. Lawyers may also practice law in a group practice providing office space, facilities and, if so agreed, guaranteed turnover.

Notaries are only allowed to form partnerships with lawyers and tax consultants. Other partnerships are deemed to inhibit the independence of the lawyer and notary. Law firms can only be managed by lawyers.

5. Institutional framework of professional oversight

5.1 Application of competition law

There are not rules made by the Bar Association which are covered by the prohibitions of anti-competitive practices in competition law. As a public-law professional body, the Bar is responsible for creating rules to encourage Dutch lawyers to practice law in a proper way on the one hand and it promotes the interests of its members on the other.

The following rules have been made:

- Rules concerning the client-professional relationship: Duty of confidentiality, Independence (additional jobs forbidden), Bias, Lawyer's Attitude (no misrepresentations, no gratuitous hurtful statements), Guarantee financial freedom (commission prohibited)

- Rules concerning services: Lawyers have their own responsibility (vouch for any third-party expertise), Dispensation of justice (primarily aiming at amicable settlement, procedural rules) Duty of care (keeping client informed of developments (in writing)), Conflicts of interests (the client's interests take priority over the lawyer's interest, no representation of two parties with conflicting interests).

- Rules concerning financial situation of lawyers: Duty of taking out insurance, Accounts, Receipt of cash payments

- Rules serving cohesion within the professional group: Image of professional group (behaviour should not harm trust in the professional group).

- Rules on business management: Collaboration, Communications towards third parties, Contact with other members of the firm.

In relation to other member states of the EC, the Dutch Bar states that they try to make a minimum of regulation. As said above, the by-law on the publicity has recently be reversed.

5.2 Regulatory oversight

The Bar Association is obliged to make by-laws. Apart from the public-law by-laws, the bar has several other rules in place, including the highly important code of conduct and professional rules on practising law. The By-laws are approved by the government. The government can reverse a by-law which is contrary to the public interest.

Lawyers shall face disciplinary sanctions with regard to any act or omission which is in breach of their duty of care to those whose interests they look after or have a duty to look after as an lawyer, with

respect to violations of the By-laws of the Netherlands Bar Association or with respect to any act or omission that does not befit a good lawyer. These disciplinary proceedings shall be conducted before the Disciplinary Courts in first instance. Appeal, being the final recourse, may be lodged to the Disciplinary Appeals Tribunal.

There are more possibilities to lodge complaints about lawyers. Think about the civil court, specific complaints and dispute committees for legal services and the Ombudsman. (This is the general Dutch Ombudsman, there is no specific Ombudsman for legal services although the Evaluation Commission on Lawyers suggested to install one. That suggestion is not taken over by the government.) They all have their own rules on the admissibility of complaints.

The Dutch Bar Association is working on setting up an advisory body which will give a weighty advise on the proposed regulations of the Bar. Members of this body will be the representatives of several social organizations. The advise of the advisory body will contribute the social acceptance of the regulation from the Bar.

With regard to notaries, disciplinary rules are enforced by a Supervisory Body (*Kamer van Toezicht*) consisting of judges and notaries.

Decisions of the self-regulatory bodies being regulation are subject to approval by the Minister of Justice. For regulation from the KNB approval is required in advance. Regulation from the Dutch Bar Association can be annulled by the Minister of Justice afterwards. The Minister of Justice takes issues of competition law into account by his judgement.

Dutch law consists of a legal procedure to lodge complaints because of malpractice by lawyers or notaries. Anyone is competent to lodge such a complaint at the independent disciplinary tribunal (*de tuchtrechter*). Possible sanctions of the disciplinary tribunal are a reprimand (*berisping*), warning (*waarschuwing*), suspension (*schorsing*) and expulsion for notaries or to be dropped from the bar (*schrappen van het tableau*) for lawyers.

NEW ZEALAND

This paper sets out the features of the regulatory regime related to the provision of legal services in New Zealand.

1. Regulation of entry

1.1 Quality standards and entry

With regard to regulation of entry into the legal profession, the Law Practitioners Act 1982 ("the Act") is the operative law in New Zealand. Amongst other matters, the Act establishes the New Zealand Law Society and District Law Societies (Part 1 of the Act), and the New Zealand Council of Legal Education ("the Council") (Part 2 of the Act). Further, the Act provides the mechanism for admission and enrolment as a barrister and/or solicitor (Part 3), and prescribes for practice in the legal profession (Part 4).

1.1.1 LLB Degree

In New Zealand if an individual wishes to practise as a barrister and/or solicitor, it is a mandatory requirement to hold a Bachelor of Laws (LLB) degree. There are presently five universities around the country with law school facilities offering the LLB degree. The entry to the first year of the LLB degree is generally open to all students who have gained University Entrance. However, entry to second year courses is limited. For example, in the year 2007, the University of Auckland had 300 places available in each of the LLB Part II courses, and in the University of Otago in Dunedin places were limited to 200 candidates. The LLB degree is a four year course, although frequently students also undertake a conjoint degree contemporaneously with the LLB, for example, a Bachelor of Arts.

One of the functions of the Council is to define, prescribe and arrange for the provision of courses of study, including practical training, for those individuals wishing to be admitted as barristers and solicitors in New Zealand. The Council comprises, amongst others, two judges of the High Court of New Zealand, a District Court Judge (nominated by the Chief District Court Judge), the Dean of the Faculty or school of law from each of the five universities, and five members nominated by the New Zealand Law Society.

The Council therefore prescribes the core curriculum for the LLB degree and monitors the subjects at each university through a moderation system. There are five compulsory subjects which are moderated, namely the law of contracts, law of torts, criminal law, public law and property law (or land law and equity in succession, where property law is not offered). The Council reports annually to the Minister of Justice. The annual report is tabled to the House of Representatives.

1.1.2 Professional Legal Studies Programme

In addition to holding an LLB degree, in order to be eligible for admission as a barrister and solicitor of the High Court of New Zealand, a candidate must complete an undergraduate university course in legal ethics, and pass the Professional Legal Studies Programme ("the Programme").

The Institute of Professional Legal Studies and the College of Law are the Council's two provider arms for the delivery of the Programme. The College of Law is a New Zealand institution established by the College of Law in Sydney, Australia. The Institute of Professional Legal Studies is a 'committee' of the Council. The Programme is a competency-based skills training programme, which prepares trainees for legal practice. It has components of drafting legal documents, negotiation/mediation, and trial preparation and advocacy in respect of criminal and civil proceedings. There is the ability to complete the Programme either on site or "on line" and it is available in the major cities of New Zealand. In terms of the advocacy and negotiation components, they are assessed by way of live performances, such as, a mock trial and the skills in relation to drafting legal documents, such as wills, is assessed by way of written examinations. There is the ability to repeat the Programme if an individual is unsuccessful in passing it.

After the student has successfully completed the Programme, he or she may make an application to the High Court of New Zealand to be admitted as a barrister and solicitor. However, once admitted, and in order to practise law as a barrister and/or a solicitor, an individual must hold a current practising certificate issued (annually) by one of the 14 District Law Societies in New Zealand.

1.1.3 The Law Society

As noted above, the New Zealand Law Society is prescribed under the Act. The functions of the Society are, amongst others, to promote and encourage proper conduct amongst the members of the legal profession and to promote the interests of the public. In this respect the New Zealand Law Society is responsible for promulgating the rules of professional responsibility, known as the Rules of Professional Conduct for Barristers and Solicitors (aspects of which are covered below). Further, it sets up a complaints process for dealing with complaints about lawyers' conduct. The New Zealand Law Society also has specialist sections to which its members may subscribe. For example, family law practitioners in New Zealand can join the Family Law section of the New Zealand Law Society.

The practising certificates are issued by the District Law Society of the district in which the applicant intends to have (or has) his or her principal place of business. It is an offence under the Act to act as a barrister and/or as a solicitor without a current practising certificate. The issuing of a practising certificate by a particular district law society carries membership of both that district society, for example, the Auckland District Law Society, and of the New Zealand Law Society. Notably, unlike some overseas jurisdictions, it is not possible in New Zealand to be admitted only as a barrister, or only as a solicitor. Nor is it possible to be admitted on a limited basis, for example, on a condition that the applicant will only practise in one area of law such as criminal law.

Once a New Zealand lawyer is admitted as a barrister and solicitor, he or she has the flexibility to choose his or her mode of practice. Most New Zealand practitioners, including those who only practise as solicitors, hold practising certificates as "barristers and solicitors", which entitle them to act both as solicitors and to appear as counsel in the New Zealand courts. It is however possible under the Act to obtain a practising certificate from the law society either as a barrister and solicitor, or solely as a barrister. The independent bar of "barristers sole" operates in New Zealand as a separate group within the legal profession. Barristers sole are not permitted to practise in partnerships, but may employ other barristers sole. Interestingly, in New Zealand a lawyer may set up as a barrister sole without any need for post-admission training or experience such as that described below in respect of sole practitioners or partners in a law firm. Barristers sole may, with a few exceptions, accept instructions only from a solicitor.

The Queen's Counsel (or *QC*) designation is a well established and continuing institution in New Zealand. Every appointment of Queen's Counsel is made by the Governor-General on the recommendation of the Attorney-General and with the concurrence of the Chief Justice of New Zealand. Counsel seeking appointment as *QC*s must apply in writing to the Solicitor-General. In New Zealand, the

rank of Queen's Counsel may only be conferred on barristers sole; however, this limitation will be removed from July 2008 as a consequence of reforms contained in the Lawyers and Conveyancers Act 2006. In considering applications for Queen's Counsel, the Attorney-General and Chief Justice will have regard to the personal qualities of applicants and the number of Queen's Counsel in active practice and the strength of the independent bar in each applicant's district. The number of Queen's Counsel appointed will depend in part on the number of practitioners in each district concerned who are generally regarded by the profession as being in active practice as independent barristers.

In terms of the ability of a solicitor to practice on his or her own account, namely as a sole practitioner or as a partner in a law firm, there are extra requirements which must be met. These requirements include at least three years' legal experience in New Zealand during the preceding eight years, which can be waived by the High Court in certain circumstances. In addition, amongst other requirements, there is a need to undergo a short course and a test in trust accounting. Further, a lawyer in practice on his or her own account who is operating the firm's trust account must also undertake training and qualify as a trust account partner.

There are a significant number of individuals in New Zealand who are enrolled as a barrister and solicitor of the High Court but who do not hold a current practising certificate. An enrolled individual may take an affidavit (provided it complies with the High Court Rules), but cannot properly give any certification that legal advice as to the contents has been given. In addition, they can take statutory declarations in accordance with the Oaths and Declarations Act 1957 and may, on a casual or infrequent basis and without payment of a fee, certify true copies, and witness other documents. The Law Society suggests however that when describing their status those enrolled but without practising certificates use the wording "Enrolled barrister and solicitor of the High Court of New Zealand".

1.1.4 Continuing legal education

Under the Act, the Law Society has the power to arrange for the provision of services and facilities for practitioners including seminars and educational training services. There is an expectation therefore that continuing legal education is a vital part of practise for the profession. Further, there are a number of rules under the Rules of Professional Conduct for Barristers and Solicitors ("the Rules") which certainly imply the need for continuing education. For example, the commentary to Rule 8.01 (which provides that the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned), makes it clear a practitioner has an obligation when conducting a case to put all relevant authorities known to the practitioner, whether decided cases or statutory provisions, before the court - whether they support the practitioner's case or not. Further, under Rule 1.12 a practitioner must accept legal responsibility for his or her actions, and (subject to further provisions, provided for in the Rule itself) must be prepared to meet any liability arising out of any act, error or omission in the course of the practitioner's professional duties or business.

1.1.5 Foreign legal professionals

The process and cost for overseas lawyers (except for Australian-admitted lawyers) to become admitted in New Zealand starts with a threshold application in writing by the lawyer to the Law Society for a formal assessment of his or her qualifications and experience abroad (an "Assessment Application"). The purpose of an Assessment Application is to allow the Law Society to determine (i) whether the foreign lawyer's qualifications equate with the admission requirements for New Zealand candidates and (ii) what further qualifications (e.g., exams and/or university courses) and/or experience will be required of the foreign lawyer prior to gaining admission in New Zealand. An Assessment Application requires, among other things, submission of original or certified copies of all academic records and course descriptions from original law school handbooks (and translations thereof if in a foreign language). The processing fee

associated with an Assessment Application is NZ$1,147.00 for candidates applying from abroad, or NZ$1,177.87 for candidates applying from within New Zealand.

Assessment Applications are forwarded to the Council's Credits Committee, which undertakes a substantive review of the foreign lawyer's qualifications. A recommendation is subsequently made to the Admissions and Credentials Committee of the Law Society, which then makes a final determination and notifies the applicant. The letter of notification sets out the Committee's determination, including any further qualifications and/or experience required of the foreign lawyer prior to eligibility for admission in New Zealand.

The Committee does not provide reasons for its determination. The Committee's decision is not subject to appeal, but the Committee may decide to reconsider its decision upon request by the foreign applicant. The processing time for an Assessment Application (excluding the time required to compile the application) is two to three months at a minimum.

Admission to the NZ legal profession is subject to the completion of one or more of the following:

- One or more parts of a New Zealand LLB degree;
- A course in Legal Ethics and Professional Responsibility;
- The Professional Legal Studies Course;
- The New Zealand Law and Practice (NZLP) Examination;
- An English language proficiency test or test.

Although the Law Society is empowered to grant foreign qualified candidates such credits or exemptions it deems appropriate, for the purposes of any course of study, its own publications state that every foreign applicant must sit at least six NZ Law and Practice exams covering: NZ Legal System; Contracts; Tort; Criminal Law; Property; and Equity and Trust Law. These exams are the equivalent of the first two years of a New Zealand LLB degree, although (as discussed above) passing a course in Equity and Trust Law is not a mandatory prerequisite to admission for domestic candidates. These exams may be sat by foreign candidates on only two occasions each year, in July and February, when the six exams are scheduled over two consecutive days. Each exam costs NZ$360 to sit, and candidates must apply to sit an exam at least one month prior to the date of the exam, or three months prior to the exam if the candidate is sitting the exam overseas.

The Law Society recommends four to six months study. The relevant study materials need to be collected by candidates from a range of copyright protected sources and predominantly consist of a large list of authorities and text books without guidance regarding the focus and depth of the knowledge required to be demonstrated.

The total monetary cost for foreign qualified lawyers to obtain a Certificate of Completion typically runs into the several thousands of dollars and, particularly in circumstances involving foreign language jurisdictions, may exceed NZ$10,000, consisting largely of fees, study materials and translations (where relevant).

The admission process for foreign trained lawyers in New Zealand may be contrasted, for example, with the rules of the Law Society of England and Wales, which require New Zealand-admitted barristers and solicitors wishing to practice in the UK to sit only the Professional Conduct and Accounts exam, once

the candidate's qualifications are verified and an administration fee is paid. In addition, Australian-admitted lawyers qualify automatically in New Zealand under the Trans Tasman Mutual Recognition regime.

1.1.6 Changes in New Zealand

Changes are in train in New Zealand with the passing of the Lawyers and Conveyancers Act 2006 ("the LCA"). The LCA is yet to come into force, but has been signalled to come into effect some time in 2008. It will repeal the Law Practitioners Act ("the LPA") and will affect lawyers and consumers of legal services. Section 3(1) of the LCA provides, in part, that the purposes of the LCA are to protect the consumers of legal services and conveyancing services, and to recognise the status of the legal profession and establish the new profession of conveyancing practitioner. Section 3(2) of the LCA provides that to achieve those purposes, the LCA reforms the law relating to lawyers; provides for a more responsive regulatory regime in relation to lawyers and conveyancers; and enables conveyancing to be carried out by both lawyers and conveyancing practitioners.

Of note is that once the LCA is in force, there will no longer be the need for compulsory membership of district law societies, and there will be the transition to voluntary membership. Further, one of the slightly more contentious provisions is the introduction of senior counsel to replace Queen's Counsel. The appointment of senior counsel will be open to lawyers in all forms of practice not just barristers sole.

In terms of continuing legal education, section 97(1)(b) provides that practice rules made by the New Zealand Law Society may require lawyers to undertake ongoing legal education relating to the law or the practice of law.

In terms of foreign legal professionals, under section 25 of the LCA a person who is a member of the legal profession of a country outside of New Zealand, but is not admitted or who does not hold a practising certificate, may also provide legal services outside of "the reserved areas of work" as referred to in 1.2 below. However, certain important protections provided by the regulation of lawyers under the Act do not apply.

1.2 Exclusive rights

At present, New Zealand lawyers largely enjoy exclusive rights. For example, at present it is an offence under section 65 of the Act for a person, other than the holder of a current practising certificate as a barrister and/or solicitor to draw or prepare for any other person any conveyance, any deed relating to personal property, and any tenancy agreement (if amongst other matters the tenancy is for a term of more than 12 months).

Consumers of legal services in New Zealand do generally have direct access to all legal services. Under Rule 1.02 of the Rules a practitioner must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.

As noted above, once the LCA comes into force, there will be a new profession of conveyancing practitioners who will be able to carry out work in competition with lawyers. A conveyancing practitioner will mean a person who holds a current practising certificate issued by the New Zealand Society of Conveyancers.

The LCA will provide for certain "reserved areas of work" and make it an offence for a person who is not a lawyer to carry out work in these areas. The "reserved areas of work" include providing legal advice in relation to the direction or management of any proceedings before a New Zealand court or tribunal;

appearing as an advocate before a New Zealand court or tribunal; and giving legal advice, or carrying out any other action which is required by any enactment to be carried out by a lawyer. The result of this is that any person may provide legal services which do not fall into these reserved areas, provided they do not hold themselves out as being a lawyer, or as having any qualifications or expertise in the law which they do not have. There are some limited exceptions such as employees of Crown organisations. This means that organisations such as accounting firms, banks and the like could offer their clients a range of legal services outside the "reserved areas", for example, advice on contracts, tax, and wills. However, legal professional privilege does not attach to the advice nor does the client have other important protections provided by the regulation of lawyers under the Act.

2. Regulation of market conduct

2.1 Fees

In terms of fees for private practitioners, Rule 3.01 of the Rules provides that a practitioner shall charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner. The Law Society does not set fees for practitioners. It has however published guidelines regarding fees, including that charges shall take account of all relevant factors, such as, the skill, specialised knowledge, and responsibility required, the importance of the matter to the client and the results achieved, the urgency and circumstances in which the business is transacted, the complexity of the matter and the difficulty or novelty of the questions involved, and the time and labour expended.

If a consumer is concerned about his or her bill of costs being unreasonably high, they can ask their lawyer for an itemised account. If they are still concerned they can ask the relevant district law society (in writing) to review the bill. Further, if they are not happy with the decision of the district law society on a costs revision, they can appeal to a Registrar of the High Court.

One of the requirements that the LCA will impose on the New Zealand Law Society when it is enacted, will be to introduce practice rules. Section 94(j) of the LCA provides that the New Zealand Law Society must have rules that include a requirement for practitioners and incorporated firms to provide clients in advance with information on the principal aspects of client service, including the basis on which fees will be charged.

The Government is responsible for setting some of the fees for legal services in New Zealand. The Crown Solicitor's Regulations 1994 establish a charging regime for the number of hours that may be claimed in preparation time, and for appearances in Court. The regulations apply to legal business of the Crown conducted by Crown solicitors. The Solicitor-General is responsible for determining whether the particular counsel, on instructions from the Crown Solicitor, is to be regarded as a senior, an intermediate, or a junior counsel. That classification of counsel sets the scale of fees that may be charged by a Crown Solicitor from the Crown.

With regard to legal aid services in New Zealand, the Legal Services Agency is a Crown entity set up by the Legal Services Act 2000. The agency is responsible to the Minister of Justice and advises the minister about the provision of legal service. The purpose of the Act is to promote access to justice by providing a legal aid scheme for people who cannot afford legal services, and support community legal services through funding for community law centres and education.

There are 27 community law centres across New Zealand, which provide free legal advice and representation. In addition, Youthlaw was established to provide free legal services for all children and

young persons under 25, living anywhere in New Zealand. The service gives legal advice and information including criminal matters, employment problems, and school problems.

Legal aid may be granted in respect of criminal and civil proceedings. Eligibility for criminal legal aid is based on whether the applicant has sufficient means to obtain legal assistance, taking into account their gross income and disposable capital. Assuming the applicant has insufficient means to pay for legal assistance, aid may be granted whenever the offence is punishable by a term of imprisonment of six months or more, or whenever the interests of justice require that aid be granted.

2.2 Advertising

Advertising of legal services is allowed in New Zealand. The Rules regulate the same, as follows.

Rule 2.02 of the Rules provides that in an advertisement of a firm's services, a firm must see that neither the public, nor other practitioners are misled about the structure of the firm or the status of any person named.

Under Rule 4.10, advertisements to or any other communications with any person relating to the services of a practitioner or of a firm of practitioners, must be consistent with the maintenance of proper professional standards. The commentary for the rule provides that the advertisement or communication must not be false, misleading or deceptive, or likely to be so. Any advertisement by a barrister sole must make it clear that members of the public may instruct a barrister sole only through a solicitor.

Under Rule 4.02, a practitioner must not, in any advertisement to, or any communication with any person, claim to be a specialist or have specialist expertise in any field or fields of practice unless such a claim is capable of verification on inquiry. The Council may at any time after such a claim has been made, call on the practitioner to verify the claim.

When offering services direct to members of the public, other than by normal advertising channels, a practitioner must ensure that approaches to persons who are not existing clients are made in a manner which does not bring the profession into disrepute. Approaches must be made in accordance with proper professional standards and not in a way that is intrusive, offensive, or inappropriate (Rule 4.03).

The New Zealand Law Society Ethics Committee has ruled on the issue of whether it was misleading, and a breach of Rule 2.02, for a law firm in its advertising to describe a staff solicitor as "legal director" and, further, to publish an advertisement in conjunction with an accounting firm which showed photographs and identified staff members, but did not state with which firm each of those persons was associated or gave legal advice. The advertisement had appeared in a newspaper and referred to senior appointments in the accounting firm "AA", and in the associated legal firm "A legal".

After submissions from the Auckland District Law Society and "A legal", the Ethics Committee made a ruling that it was misleading and a breach of the rules for the law firm to describe a staff solicitor as a "legal director". It said that the use of the word "director" implied that the person so described was one of the controllers of the firm and had the status and authority of a partner, rather than a staff solicitor. Further, that it was misleading for the law firm to publish an advertisement in conjunction with an accounting firm. It appeared to be calculated to convey the implication that "A legal" and "AA" were the same entity. The Ethics Committee said that the advertisement should have made it clear that they were a law firm and an accounting firm independent of each other and specified to which firm each person belonged.

2.3 Partnerships and business organisation

The formation of legal disciplinary partnerships is allowed in New Zealand. However, multi-disciplinary partnerships are not allowed in New Zealand. That position will not change once the LCA is enacted. Pursuant to section 7(3) of the LCA, a lawyer or incorporated law firm will be guilty of misconduct if he, she or it shares, with any person other than another lawyer or incorporated firm, the income from any business involving the provisions of regulated services to the public.

Under the present Law Practitioners Act, New Zealand lawyers are not permitted to practice with the benefit of limited liability through a corporate entity. However, that position will change with the enactment of the LCA: there will be the ability for law firms to form limited liability companies, subject to certain restrictions including who may be directors and shareholders and personal liability of directors.

3. Institutional framework of self-regulation

3.1 Application of competition law

The New Zealand Law Society approves and adopts rules under the rule-making powers[1] in the Act. There is a professional obligation on every practitioner to observe and comply with the rules that follow in the course of practice in New Zealand. There is a corresponding duty on the council of each District Law Society to enforce those rules. Those rules are subject to the Commerce Act 1986, the primary statutory instrument governing anti-competitive practices. However, practices specifically authorised by other statutes are exempt from the anti-competitive practice provisions of the Commerce Act. Any practice that is otherwise anti-competitive, but is specifically provided for in another statute, will not come under the Commerce Act. Any specific provisions in the LCA, once enacted, will therefore be free of the Commission's scrutiny.

3.2 Prior enforcement activities

3.2.1 Mixed Practices (e.g. of lawyers and accountants)

The Rules prevent a barrister and solicitor from entering into a partnership with a member of another profession, such as an accountant, whilst holding him or herself out as a lawyer. The Law Society contended that the various Law Society requirements relating to the handling of client funds and other professional obligations associated with being a lawyer were incompatible with a partnership with members from another profession. The argument ran that several of these professional obligations were effectively statutory, or in statutory regulations, so were exempt from the anti-competitive practices provisions of the Commerce Act. While the Commission received advice that these obligations were not clearly statutory, its investigation was ultimately concluded on the basis that proposed statutory reforms, contained at that stage in the Lawyers and Conveyancers Bill, would clarify the situation by specifically prohibiting multi-disciplinary practices.

3.2.2 Barristers sole must obtain clients via a barrister and solicitor

This limitation is contained in the Rules, rather than a statute or regulation. However, given that barristers sole compete with experienced barristers and solicitors in the provision of court-related services, the Commission concluded that the relevant market, however defined, probably was sufficiently broad that it would not be possible to show a substantial lessening of competition in terms of the Commerce Act.

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1 *Section 17 Law Practitioners Act 1982*

3.2.3 Conveyancing Fees

Prior to the Commerce Act coming into effect, the Law Society suggested a scale of fees for conveyancing services. The Law Society also had a booklet to guide practitioners in the calculation of such fees. Still prior to the Commerce Act coming into effect, the Law Society abolished its scale of fees for conveyancing services but initially retained the guidance booklet. Upon Commission investigation of the booklet, the Law Society discontinued its usage, and the Commission issued a formal warning to the Law Society cautioning it against giving such pricing advice to its members.

3.2.4 Restrictions on marketing

When the Commerce Act came into force, the Rules contained a number of restrictions, particularly on members' ability to promote their practices. These restrictions included a prohibition against a lawyer "touting" for work or in any way accepting instruction from a client of another practitioner, limitations on advertising, and a ban on results–based fee setting. A significant number of such restrictions were removed as a consequence of the Commission's investigation (see under 2.2 above).

3.3 Regulatory oversight

Part 7 of the Act, prescribes for discipline within the profession. As noted above, a member of the public may make a complaint about the conduct of a practitioner to the District Law Society of which the practitioner was a member at the material time. Further, under the Act the Law Society may of its own motion cause an investigation to be made into the conduct of a practitioner, for example, if it is of the opinion that the practitioner has been guilty of conduct unbecoming a barrister or a solicitor. The law society may appoint a complaints committee to inquire into the matter, and if, in the opinion of the committee or law society the case is of sufficient gravity to warrant the making of a charge, a charge can be laid before the relevant District Disciplinary Tribunal ("the District Tribunal"). The District Tribunal consists of between five and eight practitioners recommended by the District Council, and two lay members who are not practitioners, but whose appointments are made by the Governor-General on the recommendation of the Minister of Justice. Amongst other powers, the District Tribunal has the ability to order the practitioner to cease to accept work for a specified period in the order, and to censure the practitioner. An appeal against any order may be made to the New Zealand Disciplinary Tribunal.

If that District Tribunal is of the opinion that the case warrants the referral to the New Zealand Law Practitioners Disciplinary Tribunal ("the New Zealand Tribunal"), it must refer it accordingly. It consists of between five and twelve members of the New Zealand Law Society and three lay members (appointed in the same way as the District Tribunal). The New Zealand Tribunal's function is, in part, to hear and determine any charge referred to it by, or appealed against, the District Tribunal. Amongst other powers, the New Zealand Tribunal may order a practitioner's name be struck off the roll, order that the practitioner be suspended from practice for such period, not exceeding 3 years as it thinks fit, and order the practitioner not to practise as a solicitor on his or her own account until authorised to do so.

Notably, under section 115 of the Act, at any time a charge against a practitioner has been made or referred to the New Zealand Tribunal, the Tribunal upon application from the District Law Society or on its own motion make an order suspending the practitioner from practice pending disposal of the charge. Appeals from the New Zealand Tribunal may be made to the High Court of New Zealand.

There is no independent ombudsman in New Zealand for legal services, or independent regulatory authority consisting of a majority of non-lawyers to handle complaints. Further, there are no independent complaints offices which handle malpractice cases.

INFORMATION SOURCES

New Zealand Law Society	www.lawyers.org.nz
New Zealand Council of Legal Education	www.nzcle.org.nz/
The College of Law	www.collaw-ac.nz/
Institute of Professional Legal Studies	www.ipls.org.nz/
Faculty of Law – University of Auckland	www.law.auckland.ac.nz
Faculty of Law – University of Otago	www.otago.ac.nz/law/
The Family Law section	www.familylaw.org.nz

POLAND

1. Introductory information

There are three regulated legal professions in Poland: advocates, legal advisors and notaries. Advocates and legal advisors provide legal advice and represent clients in courts, whereas notaries provide conveyancing and other services associated with confirming authenticity of documents. The principle of self-regulation, as enshrined in the Polish Constitution, is the primary form of regulation in legal professions - all of them are governed by professional associations and supervised by the minister of justice, who can appeal their decisions to the Supreme Court and exercises power over the rates for *ex officio* legal help and notaries' maximum rates. Membership to the association is necessary for being able to practice as a legal professional. Outside the professional framework, legal advice can also be provided on the basis of general provisions on economic activity.

Last years have seen lots of initiatives aiming at increasing competition among legal professionals. There is a clear trend towards facilitating access to professions and allowing wider use of competitive tools, like advertising. There is still wide scope for reform, nevertheless.

2. Entry and quality standards

Admission to the legal professions in Poland entails the following stages:

1. Degree in law.
2. Traineeship entry examination.
3. Training under the supervision of professionals (3.5 years for advocates and legal advisors, 2.5 years for notaries).
4. Professional examination.
5. Status of a junior professional (notaries only, for 3 years).

To become a legal professional, a person must also have "impeccable reputation". Professional examination is not required from persons who hold a title of professor or doctor habilitatus in law, have passed professional examination in a similar profession (judge, prosecutor)[1] or worked for 3 years as legal counsels in a state agency representing the Treasury[2]. The training requirement is waived for persons holding a Ph. D. in law and those who worked for at least 5 years as court clerks or judge assistants.

Requirements for notaries are similar. Professors and doctors habilitatis in law do not have to pass professional exam, as well as persons who worked as judges or prosecutors or for 3 years as legal counsels in a state agency representing the Treasury. Advocates and legal advisors need 3-years professional experience to be exempted from the exam requirement. Training is not required from persons who hold a Ph. D. in law and those who worked for at least 5 years as court clerks or judge assistants, as well as

[1] In addition, such persons must have sufficient professional experience, which is yet to be precised in the law.

[2] "Prokuratoria Generalna Skarbu Państwa".

persons, who passed judge, prosecutor, advocate or legal advisor exam. Law graduates who worked for 5 years in legal firms, state institutions or as self-employed persons, whose work entailed applying law also do not need to go through training[3].

Advocate and legal advisor entry examinations are organized each year by professional associations in cooperation with the ministry of justice. Test questions are prepared by a team appointed by the minister (including representatives of professional associations) and the examinations are administered on a local basis by commissions, where the ministry, professional associations, prosecutor's office, and law schools have their representatives. Commissions appointed to administer a yearly notaries' entry exam are made up of representatives of the ministry, professional association, as well as notaries and judges.

Persons who pass the entry examination go on to practice under the supervision of professionals. Content and form of the training is decided by professional associations. After 3,5 years (advocates and legal advisors) or 2,5 years (notaries), the trainees take professional exams, administered by commissions similar to those before which entry exam is taken. If successful, legal advisor and advocate trainees obtain full professional rights, whereas notary trainees are appointed junior notaries (which allows them to practice under the supervision of a notary) and after at least another 3 years become full notaries.

Foreign lawyers, who wish to practice law in Poland, must be registered with appropriate professional association. Scope of their activities is limited to issuing opinions and providing legal advice concerning the law of their home country or international law. The registration is subject to reciprocity principle. Notaries must have Polish citizenship.

Providing limited, paid legal advice is also possible within the framework of the general provisions on economic activity, on the basis of which people with a degree in law set up offices, where they provide basic legal advice, usually concerning everyday legal problems of individuals and small businesses.

The professions of an advocate and a legal advisor are similar in nature. They both entail providing legal advice and representing clients before courts. Main difference lies in advocates retaining exclusivity for representing clients before courts in criminal cases, as well as being a strictly liberal profession (legal advisors can work as employees in firms). With very few exceptions, court representation is an exclusive right of advocates and legal advisors. Notaries have a legal monopoly on registration and confirmation of certain transactions, when notarial form is mandated by law or wished by the parties. It is especially important in the field of property transfer, where the Polish law imposes compulsory notarial form on transfer of real estate.

Continuous education is not a requirement imposed directly by the law, nevertheless professional associations' codes of conduct provide that legal professionals are obliged to continuously improve their qualifications in order to perform their duties properly. To that end seminars and other courses are organized by the associations, which professionals are encouraged or obligated to attend. Failure to participate in continuous education is considered to be a breach of professional ethics.

In 2004 the competition authority issued a report on barriers to competition in the liberal professions sector. It found the following main barriers with regard to legal professions:

- exclusive (advocates and legal advisors) or almost exclusive (notaries) control of associations over the entry process;

[3] Similar provisions have been found unconstitutional by the Constitutional Tribunal in case of advocates and legal advisors. Notaries' case has not been heard yet.

- ban or heavy restrictions on advertising;

- restrictions on business structure and cooperation with other professions.

Notaries turned out to be by far the most heavily regulated profession, with advocates and legal advisors less strictly, but still relatively heavily regulated.

In 2005 there were 6 179 advocates practicing law in Poland, 17 501 legal advisers and around 1 700 notaries. The number of legal professionals has been increasing since the beginning of the 90., yet it has been markedly slower then the increase in the caseload at the courts. The number of trainees has been rising faster, which may eventually lead to a faster growth in the number of professionals. Another factor which may contribute to increased pressure on the supply side is the large number of law graduates, which, at 8662 in 2005, was markedly above the number of all practicing advocates.

The development in the number of practicing advocates and legal advisors in the years 1998-2005, as well as the number of law graduates is shown in the table below:

Table 1. Developments in the number of practicing legal professionals, trainees, law graduates and new court cases in Poland.

Year	1998	1999	2000	2001	2002	2003	2004	2005
Advocates	4713	4849	4990	5193	5415	5623	5733	6179
Trainees	742	825	970	923	1132	1203	1245	881
Legal Advisors	15689	16426	16645	16733	16762	16954	16905	17501
Trainees	1728	1857	2472	2537	2692	2750	3086	2280
Professional lawyers in total	20402	21275	21635	21926	22177	22577	22638	23680
Law graduates	6439	7830	7222	7300	7527	8903	8310	8662
New cases (thous.)	6 446	6 614	7 415	8 369	8 697	9 521	9 729	9 582

Source: Ministry of Justice, Central Statistical Office

As can be seen, the number of practicing advocates has increased by 30% in the years 1998-2005, whereas the number of practicing legal advisors grew by over 11%. In total, the number of professional lawyers increased in that period by 16%, lagging behind the inflow of new cases, whose number increased by almost 50%.

2.1 Changes to the regime

The restrictiveness of regulations in legal professions sector has been decreasing in recent years, either due to more pro-competitive regulation or as a result of court rulings. The restrictions on the number of trainees admitted each year, decided by the professional association (and more generally the power of the associations to decide on the form and content of entry examinations), have been ruled unconstitutional in 2004 and a large reform package was passed by the parliament in 2005. The reform:

- facilitated access to professions, allowing entry by persons who passed judge or prosecutor professional exam, as well as enabling persons with sufficient experience acquired in law

firms, public offices or in the course of providing legal advice services, to take professional exam without having to go through training,

- removed exclusive control of the entry process from the associations and revoked the right of the advocates' local associations to determine the seat of a new advocate,

- expressly provided for the possibility of legal advice being provided by persons not belonging to professional associations.

Some of the above-mentioned solutions have been successfully challenged by professional associations before the Constitutional Tribunal. The Tribunal questioned provisions allowing people without professional experience (i.e. those, who passed an exam, but have not worked in any legal profession) access to professions, decided that provisions exempting certain groups from training were imprecise and questioned the third group of provisions mentioned above. Works are under way to introduce amendments which will take into account the Tribunal's ruling.

The government also plans a new law, introducing a new legal profession in parallel with and with rights similar to those of legal advisors and advocate. The new profession would entail a three-tier licence system. First grade licence would be given to persons with a degree in law and will allow to provide basic legal services, without the right to represent clients in courts. After gaining appropriate experience, a person would be given second grade licence, allowing to appear before all courts in cases which do not concern criminal and family law. Finally, a third grade licence would be awarded to holders of second grade licence who pass an exam checking their theoretical and practical knowledge of law. Third grade licence would allow to appear before all courts and in all kinds of cases. No restrictions would be placed on advertising or business structure of the new profession's economic activity.

3. Conduct regulation

3.1 Fees

Fees for the work of legal advisors and advocates are freely negotiated with their clients. The exception to this rule concerns *ex officio* legal help, which is remunerated according to the fee scale laid down in an ordinance of the minister of justice, where rates vary according to the type and difficulty of the case. The decision on the actual amount of remuneration is taken, on the basis of the ordinance, by the court handling the case.

Professional associations do not issue any price recommendations, as it would be incompatible with Polish competition law. Codes of conduct of advocates and legal advisors, however, provide for the ban on *pactum de quota litis* type of agreements, where the lawyer's remuneration is dependent only on the result achieved, although they allow additional bonuses for a successful outcome of the case.

Notaries' fees, although freely negotiated, are subject to regulation (by the minister of justice) imposing maximum rates. The rates are proportional to the value of the subject of the transaction.

3.2 Advertising

Advertising rules are laid down by professional associations in their codes of conduct. The most restrictive regulations concern notaries. Their code of ethics considers any "personal advertising" to be an act of unfair competition. Less stringent but still restrictive rules are to be found in advocates' code of ethics. It rules out comparative advertising, unsolicited offers or using third parties to spread information

about a particular advocate. The rules specifically determine what type of information an advocate can provide. He/she is allowed, however, to provide information on remuneration and the way it is calculated.

Rules concerning advertising among legal advisors' are more relaxed. Their latest draft code of conduct states that advertising is allowed as long as it is not forbidden by law or customs. Additional restrictions concern informing about legal advisors' clients without their consent, as well as aggressive advertising which infringes on the right to privacy.

There is a distinct trend towards liberalization of advertising in legal professions – both advocates and legal advisors are much more advertising-friendly now than 4 years ago.

3.3 Business structure and cooperation with other professionals

Rules on business structure referring to legal professionals are rather stringent, as there is a general ban on multi-disciplinary partnerships. The strictest regulations concern notaries. They can only operate as sole traders and in partnership (civil partnership and partners' partnership). In addition, a notary can operate only one office.

Advocates and legal advisors are allowed to cooperate with each other and foreign lawyers. They can operate as sole traders, in civil partnership, professional partnership and in a specific type of limited private partnership, where lawyers hold unlimited liability and which is run by them. Incorporation is not possible. Legal advisors, unlike advocates, can also be employed in undertakings. .

3.4 Loyalty clauses

Codes of conduct of legal professions also contain provisions imposing a duty of "loyalty to colleagues". Even though this provision has not proved problematic in practice, it may be used to suppress competition, if competitive behaviour is qualified by the association as "disloyalty".

3.5 Help for the poor and disadvantaged

Legal help for the poor and disadvantaged is provided by the state and non-government organizations. People who cannot afford legal representation in court proceedings can apply for a lawyer to be appointed as their *ex officio* representative. Criminal procedure, for some categories of cases and defendants, requires obligatory representation by a professional lawyer. Lawyers taking *ex officio* cases are either chosen by the local professional association or appointed by the court on the basis of the list of active lawyers provided by the local association. Their remuneration is decided by the court, based on the ordinance of the minister of justice laying down minimum and maximum rates for various types of cases.

Non-government organizations play a very important role in providing out-of-court or pre-court legal advice to disadvantaged and poor citizens. There are legal clinics organized at the universities, where free legal advice is provided by law students under the supervision of university teachers, as well as other organizations where such advice can be obtained. Some qualified lawyers are also involved in *pro bono* services for the poor and disadvantaged. The government currently works on a law, which sets up a system of state funded free legal advice, where providers would be selected on the basis of an open bid.

4. Competition law and regulatory oversight

4.1 Competition law

Competition law has full application in the legal services sector. Any activities by professionals, which infringe it, are prohibited. Polish competition authority has decided on two important cases in this area.

The first one concerned local advocates' association refusal to allow a new advocate to set up an office in Wroclaw. Under provisions in force at that time, local association decided on the seat of the office of an advocate. The competition authority considered the actions of the local advocates association to be a decision of an association of undertakings aiming to restrict access to market and issued a decision finding an infringement. It was finally overturned by the Supreme Court on the lack of public interest grounds, as it concerned the protection of interests of an individual, while the behaviour of the professional association did not amount to a general refusal to allow new advocates into Wroclaw (other advocates were permitted to set up offices there). The ruling was important for competition enforcement in the legal services sector, as the Supreme Court ultimately confirmed that providers of such services had to comply with competition rules.

Second important case concerned notaries, whose code of conduct listed "attracting clients with lower [than maximum] rates" as an instance of "glaringly unfair competition", subject to disciplinary sanctions. Compliance with the provisions was enforced by local associations, whose representatives inspected notarial offices around Poland, checking whether the rates offered do not amount to "unfair competition" as defined in the code of conduct. In effect it turned a system of maximum rates (set by the ministry of justice) into a system of prices fixed at the maximum level. Competition authority issued a decision declaring the contested provision to be a price fixing agreement. After conflicting court rulings, the provision was declared unfair and unlawful by the Supreme Court and removed by notaries from the code of conduct.

4.2 Oversight by the ministry of justice and lawyers' liability

Oversight of associations is carried out by the minister of justice. His main tool is the power to appeal all the decisions by associations he finds unlawful to the Supreme Court. The greatest supervisory powers exist with respect to notaries, where presidents of local courts, as well as persons appointed by them or the minister of justice may carry out inspections of notarial offices to check, whether they are run in compliance with the law. The minister may depose a notary if the outcome of two consecutive inspections is negative.

Disciplinary sanctions are decided by disciplinary courts organized within each profession. The courts have two-tier structure – lower ones function at local level of association, whereas higher court, which handles appeals, is organized at the national level. The government plans to take disciplinary courts away from the associations and put them within a unitary framework of disciplinary judiciary for lawyers (i.e. advocates, legal advisors, notaries, judges and prosecutors). In addition, a lawyer can be sued for damages, if due to his unlawful actions his clients suffered a loss. All legal professionals are required by law to have civil liability insurance.

PORTUGAL

1. Regulation of entry

1.1 Quality Standards and entry

A MA in law (typically a five-year university degree) is required as basic qualification for both lawyers and notaries. For the so called "solicitadores" (herewith called *solicitors*), only a BA in law (typically a three-year university degree) is required. There are limitations to the number of admissions in law schools, but they are not a serious barrier to entry as the number of law graduates is reported to be above market needs.

Nevertheless, additional training is required for law graduates to qualify as legal professionals. For lawyers, a further 24 month training program is a prerequisite, whereas an 18 month program is required for notaries and *solicitors*.

The law provides for the general requirements of the additional training, although the specific content and form of the program is decided by each professional body (*Ordem dos Advogados, Ordem dos Notários* and *Câmara dos Solicitadores*). A final exam is required for all categories of legal professionals, upon completion of the training program. Specifically, in the case of lawyers should a candidate fail twice in the concluding exam then it has to go through the training program again.

There are no legal specific requirements for on-going education for any of the legal professions. Nevertheless, Portuguese law entrusts the professional bodies – *Ordem dos Advogados e Câmara dos Solicitadores* – with the provision of on-going training programs for their members.

Although quality standards are not specifically set-up, a certain element of quality guarantee is implicit in the so-called professional duties set-up by law and enforced primarily by the professional bodies. The violation of deontology rules may lead to the license to practice as a lawyer, solicitor or notary being revoked.

Membership of a professional association is a prerequisite to practice as a legal professional. The self-regulatory bodies are the Professional bodies, e.g., *Ordem dos Advogados*, *Ordem dos Notários* and *Câmara dos Solicitadores*. In addition, for notaries a territorial based license is required. This license is competitively awarded by the Ministry of Justice.

There are no quantitative limits regarding entry as far as lawyers and solicitors are concerned. For notaries, *numerus clausus* is set by law according to territorial criteria (judicial district), the number of notaries licensed to practice in each district being established following demographic and economic characteristics.

The Portuguese Competition Authority is in the process of preparing a Recommendation to Government on the reform of notary services covering, *inter-alia*, the suppression of *numerus clausus* and the removal of other restrictions to competition, as indicated below

1.2 Exclusive Rights

Under Portuguese law both lawyers and notaries enjoy exclusive rights. Lawyers are exclusively entitled to represent litigants in court, but for tax actions and for civil actions for which there is no appeal. Indeed, for these actions *solicitors* are also entitled to represent litigants in court. As to notaries, they are the sole legal professionals entitled to elaborate public deeds and certain forms of wills.

It is worth noticing that the Government is legislating towards making public deeds optional for an increasing number of acts. Indeed, under a "cutting the red tape" program being implemented, the need for public deeds in the area of commercial law has already been phased out. It is expected that this trend will be extended in the near future to buying and selling property, as well as to pre-nuptial agreements and inheritances. As a result, notaries will retain exclusive rights for public deeds, but these will be made optional at the choice of the parties.

2. Regulation of market conduct

2.1 Fees

In general, fees are freely agreed between the parties, except for notary services in which they remain largely regulated following a fixed schedule. However, the Government has recently liberalized fees for some notary services, following its decision to allow other legal professionals, as well as other private and public entities, to provide such services.

There is also no fee schedule for legal services purchased either by the Government or the public administration. The purchase of legal services by public entities is subjected to the rules of public procurement, the final fees depending on the bid offers.

Self-regulatory bodies for the legal professions are not legally entrusted to set fees for services provided by their members. However, the articles of association of professional bodies, which are approved by law, specify the criteria upon which the fee structure should be based.

For instance, in the case of lawyers these criteria include number of hours worked; value of the litigation; qualifications of the lawyer; complexity of the case; and outcome of the case. However *quota litis* is not permitted, e.g. fees depending entirely on the outcome of the case are forbidden.

Access to justice is provided by the Ministry of Justice in cooperation with *Ordem dos Advogados* and *Câmara dos Solicitadores*. Legal aid includes legal advice, representation before the courts, and financial support to other expenses related to the litigation. This support is granted to those providing evidence that they can not afford the reasonable costs of litigation, as per information provided by the social security.

As to legal advice, it is provided by legal offices, established by *Ordem dos Advogados* in cooperation with Municipalities and operating under the overview of the Ministry of Justice. Legal representation before the courts is provided either by lawyers or solicitors, depending on the specific proceeding. The corresponding fee amount is set by a regulation jointly approved by the Minister of Justice and the Minister of Social Security.

Ii is worth noticing that regulated notary fees are expected to be phased out, should the Government adopt into policy the Recommendation being finalized by the Portuguese Competition Authority. Accordingly, notaries would be able to competitively set out their fees as soon as the current *numerus clausus* rule is eliminated.

2.2 Advertising

Advertising of legal services is subject to the same constraints as any other business, e.g. prohibition of misleading advertising. But further legal restrictions are imposed on legal professionals.

Lawyers are not allowed to advertise their fees. However, special expertise can be advertised, as well as cooperative arrangements with other lawyers, including with foreign lawyers. In any case, comparative advertisement is not permitted.

As to *solicitors*, the law entrusts *Câmara dos Solicitadores* to impose limitations on advertising to their members, but it does not specify the restrictions. To this extent, the *Câmara dos Solicitadores* has issued internal regulations broadly in line with the ones legislated for lawyers.

With respect to notaries, advertising is forbidden. Notaries are only allowed to publicize information on the location of their premises and working hours, as well as on their curricula and academic background.

In all cases, the self-regulatory professional bodies are legally entrusted to initiate disciplinary proceedings and to apply sanctions whenever advertising rules are violated.

Changes in the advertising legal framework are likely to occur in notary services. Indeed, the Recommendation of the Portuguese Competition Authority advocates that notary advertising restrictions should be relaxed towards bringing them more in line with the ones applicable to lawyers.

2.3 Partnerships and business organization

Legal disciplinary partnerships are allowed for lawyers and solicitors but not for notaries. Multidisciplinary partnerships are not permitted.

Legal professions can incorporate, except for notaries. But there are restrictions with respect to the legal form of incorporation. Lawyer firms have to take the form of civil corporations with limited or unlimited liability. Furthermore, law firms cannot be either owned or managed by non-lawyers. The same rules are applicable to *solicitors*.

The Recommendation of the Portuguese Competition Authority on notary services includes a proposal for the elimination of the legal rules that prevent notaries either to integrate a disciplinary partnership or to incorporate, thus bringing the regime applicable to notaries in line with the one for the remaining legal professions.

3. Institutional framework for self-regulation

3.1 Application of competition law

The rules enacted by self-regulatory bodies are covered by the prohibitions of the competition legislation as far as the adoption of these rules is not imposed by law. The exemption for some self-regulatory rules may always be granted under the Portuguese competition law, if these rules would ever be deemed necessary for the proper practice of the legal professions.

To date, the only specific experience of the Portuguese Competition Authority has been related to price fixing by professional bodies. For instance, the medical and veterinary professional bodies (*Ordem dos Médicos*, *Ordem dos Médicos Dentistas* e *Ordem dos Veterinários*) as well as the accountants' association - *Câmara dos Técnicos Oficiais de Contas* - have already been sanctioned by the Competition

Authority for price fixing practices. With respect to legal professionals, the Competition Authority is currently handling a case on potential price fixing, but a final decision has not yet been reached.

3.2 Regulatory oversight

The decisions of self-regulatory bodies are not subject to approval by the State but they are subjected to antitrust scrutiny.

There is no independent Complaints Office for handling malpractices cases. As a matter of fact, tort or criminal liability for malpractice falls under the jurisdiction of ordinary courts for all legal professions.

Disciplinary sanctions for lawyers and solicitors are under the exclusive jurisdiction of their professional bodies, which apply the sanctions provided by law, including expulsion. As to notaries, disciplinary powers are discharged by *Ordem dos Notários* and by the Ministry of Justice. This is the result of notaries´ double status, both as liberal professionals and as public officials. Notary expulsion remains the prerogative of the Minister of Justice. All disciplinary decisions applied to legal professionals are subject to judicial appeal.

There is no independent Ombudsman for legal services that handles complaints not relating to malpractices cases. Likewise, there is no independent Regulatory Authority for the legal professions.

In the near future, no major intuitional and legal change is anticipated in the above arrangements.

SPAIN

1. Introduction

This contribution will focus on these legal professions that, according to the current domestic regulation, provides specific legal services concerning representation (including defence) of clients in courts, wills and probate, and selling and buying property (*conveyancing* services). Therefore we address the following regulated professionals: advocates, solicitors, notaries and "registradores".

2. Regulation of entry

2.1 Quality standards and entry

2.1.1 Advocates and Solicitors (Abogados y Procuradores)

The entry into the legal professions of advocate and solicitor is regulated in the Act 34/2006, of 30 October, of entry into the professions of advocate and solicitor.

The tasks that the Spanish advocate performs are essentially the legal defence of clients before courts. The solicitor' tasks are merely the representation of clients in courts (without legal defence).

The Act 34/2006, distinguish between the University Law Degree and the Professional License of Advocate and Solicitor. The qualifications necessary for obtaining the Professional License include having the University Law Degree and passing the specialised training and the evaluation (these last two requisites are different whether they are for advocates or solicitors).

The specialised training includes two training courses and a work experience placement or internship. That educational programme is giving by universities or legal practice schools, and it is required the official supporting/accreditation of the Ministry of Justice and the Ministry of Science and Education. The evaluation is a State exam announced by both ministries, following consultation with the undertakings involved[1]. This is an annual periodical state exam, with no limited number of places.

For practising these professions it is necessary to belong to the corresponding Professional Association (advocates or solicitors). There are professional associations at provincial level (occasionally at local level). In the case of advocates, it is enough to join one Professional Association to be allowed to practice in the whole national territory. Nevertheless, there are territorial restrictions for the solicitor which is only allowed to practice in the territorial division of its association.

Foreigners that want to practice in the Spanish territory are also required to join the corresponding professional association.

[1] Consejo General de la Abogacía Española, Consejo General de Procuradores de España and Universities.

2.1.2 Notaries and "Registradores"

The entry into both legal professions is made through a *numerus clausus* State exam. It is not required to join the professional association to practice the profession; neither the professional association has regulatory powers. The regulatory body of those legal professions is the "Directorate General of *Registros y Notariado"* of the Ministry of Justice.

2.2 Exclusive rights/reserved activities

2.2.1 Advocates and Solicitors (Abogados y Procuradores)

The practice of advocate and solicitor professions is incompatible. Additionally, in the case of advocates it is also incompatible to perform at the same time for the same client or for those who were clients in the last three years, auditing activities or others activities which are incompatibles with the good practice of the profession.

Consumers have a direct access to any of the services provided.

2.2.2 Notaries and "Registradores"

The task that only a Notary can legally perform, the public certify and attest *(fe pública notarial*), it is considered as a public service, which is reserved to the notary as a public civil servant. This task specially affects to the services related to wills and probate and conveyancing (selling and buying property). Additionally, the register of those legal transactions, in particular real state transactions, should be made on the *Registry of the Property* (*Registro de la Propiedad*) which is linked with the territory where the property is located.

In the case of legal transactions in which Public Administration takes part, consumers are subject to notaries turn. There are others additional restrictions concerning the election of a notary in the case of buying/selling property: the transaction should be made with a notary that perform its activity in the territory near to the place where the property is located.

3. Regulation of market conduct

3.1 Fees

3.1.1 Advocates

The fees paid to advocates for the services provided are freely negotiated by clients, without any intervention of the Public Administration. The Professional Association may set an indicative list of recommended fees, with very detailed criteria, usually according to the service provided. It is relevant to highlight that in Spain it is not allowed the *cuota litis* agreement.

The legal defence of the State in courts is performed by the State Advocates *(Abogados del Estado)*, which are a specialised group of civil servant and the entry into the profession is made through a *numerus clausus* State exam.

When the State hires the professional services of private law firms, these services are paid with charge to the State Budget.

The Spanish Constitution provides a system of free justice for the disadvantaged and the poor. The *Act 1/1996, of 10 January, of Free Justice Assistance (Asistencia Jurídica Gratuita)*, regulates the access

to the free justice (free advocate) for those citizens which annual incomes are below of twice the statutory minimum wage *("Salario minimo Interprofesional"*), the Public Interest Associations and Foundations. The applications filed by the potential beneficiaries are settled by the *"Comisiones de Asistencia Jurídica Gratuita"*, of territorial scope and attached to the State or Autonomous Communities' Administration.

In the current moment the Competition Service is carry out a review of the compatibility with competition law of the indicative list of recommended fees, in consultation with the professional associations.

3.1.2 Solicitors

The solicitors' fees (*aranceles)* are fixed based on the service provide. They are settled by the State, following consultation with their Professional associations, and they may be negotiated with clients up to 12% of their amount.

Currently there is a request from the Competition Court to the Competition Service to review these fees, in particular, whether they are protected by a law.

3.1.3 Notaries

Theirs fees (*aranceles)* are fixed based on the type of transaction. They are settled by the State, following consultation with their Professional associations; they may be negotiated with clients up to 10% of their amount and free settled in case of high amount.

3.2 Advertising

3.2.1 Advocates and Solicitors

Notwithstanding the Professional associations of advocates and solicitors are currently making efforts to adapt their advertising regulations to both the General Advertising Act and the Unfair Competition Act, there still remain some relevant aspects which hamper a total equivalence. Particularly, it is not allowed for advocates to make comparative advertising with others advocates, or to allude to cases or clients independently of having their authorisation. Additionally, in the case of solicitors, it is not allowed to advertise the information concerning their fees or the information about former professional posts served by them.

3.2.2 Notaries and "Registradores"

The new Notaries Regulation *(Reglamento Notarial)* provides the possibility to advertise in the web page of their Professional Associations the list and identity of notaries along with the location of their offices; nevertheless some basic aspects about the provision of the services that may not be advertised still remain. In particular, it is not authorised the advertising about eventual discounts that notaries may applied on their fees.

Advertising is not allowed for *Registradores.*

3.3 Partnership and business organisation

3.3.1 Advocates

It is authorised the multi-professional collaboration with other professionals when the professions were not incompatibles (it is forbidden the association between advocates and solicitors). In any event, the

general limitation is that collaboration would not affect the "the good practice of the profession" and avoid conflict of interest. It is permitted any type of association, including commercial association.

In Spain, a recent regulation, *Act 2/2007, of 15 March, on Professional Societies,* has introducing the regulation of those societies. In those cases, 75% of the share capital or the partners and political rights and the representative boards should at least belong to the professional partners. According to this Act, the societies may perform several activities provide that their fulfilment were not declared incompatible by a law or regulation.

3.3.2 Solicitors

It is authorised the association whenever the solicitors belong to the same territorial demarcation and there were not a conflict of interest. This association is subject to several mandatory prerequisites concerning the creation of the society, communication to the professional association, register and advertising (regulated in the General By-Law of the Spanish Solicitors).

3.3.3 Notaries

Notaries may become partners in order to manage a Notarial office, but not with other type of professionals.

4. Institutional framework of self-regulation

4.1 Application of competition law

Self-regulation does not exist in the case of Notaries. The Notarial Act *(Ley Notarial)* and the Notaries Regulation *(Reglamento Notarial)* are approved by the State, upon request from the Ministry of Justice and following consultation with the national level representation of the professional associations.

Concerning advocates and solicitors, their professional associations may regulate the activity of their profession by means of its by-laws, according to the Act of Professional Associations *(Ley de Colegios Profesionales)*. The Competition Act is applied to this self-regulation.

According to the Competition Act, restrictions of competition resulting from the application of a law are exempt. This means that restrictions of competition regulated by the professional associations in their By-laws could be exempt when they were protected by the Act of Professional Associations (one understand that they are necessary restrictions for a good exercise of the advocate and solicitor professions).

The enforcement of the Competition Act gave rise to the opening of sanctioning proceedings[2] and, eventually, the imposition of fines, when professionals have acted without the legal protection of the Professional Association Act.

It has also been carry out some competition advocacy activities, in particular, a report by the Competition Court[3] in 1992 that had effects in the reform of the Professional Association Act, in such a way that associated professions were, since then, submitted to the Competition Act. It has also been recently carry out some meetings (April 2005 and July 2006) between the European Commission, the

2 *Exp. 603/05, Procuradores Ponteareas.*

3 *Report on the free exercise of the Professions. June 1992.*

Spanish Competition Service and the Competition Court, the National Consumers Institute and others Ministries involved, discussing and reviewing the legality of the recommended fees.

As for possible future changes, the Competition Court foresees to issue a new report on professional services this year.

4.2 Regulatory oversight

Self-regulation of Professional Associations is approved by the Government when it has a national scope (General By-laws), upon request from the Ministry of Justice. In the case of regional scope, they are approved by Autonomous Communities' Government. The Draft of General By-laws is review by the Ministry of Economy, so that, by the Spanish Competition Service, which reports on potential restrictions on competition.

There is not an independent Complaints Office. Compensation of damages for malpractices is decided by ordinary courts and decision on the existence of a disciplinary infringement and the imposition of sanctions is left to the Professional Association.

Neither exists in Spain an independent Ombudsman nor a specific self-regulatory body for legal professional sector.

Concerning possible changes in current regulation, it is not envisaged in the near future to pass a new Act on Professional Associations which replaces the current in force since 1974, although with important modifications along these years (1997, 1999 and 2000).

SWITZERLAND

1. Introduction

In Switzerland, the regulation of most professions is up to the cantons. This is in principle also true for the legal professions. Every canton has its own cantonal Attorneys-at-Law act, its own supervision commission and its own bar as well as its own system of regulating notaries.

However, the introduction of the Federal Attorneys-at-Law Act in 2002 brought some major steps towards harmonization and liberalization of the attorney's profession. The act introduced the free movement of attorneys between the cantons, i.e. inter alia, lawyers who are registered in a cantonal register can represent parties in whole Switzerland without a further authorisation (art. 4 Federal Attorneys-at-Law Act). The Attorneys-at-Law Act also lays down the conditions on which lawyers from Member States of the EU and EFTA may be licensed to practise law in Switzerland (art. 21 ff. Federal Attorneys-at-Law Act). The practicing of EU/EFTA lawyers in Switzerland has been significantly simplified over the past years with the EU/EFTA Bilateral Agreement on Reciprocal Recognition of Diplomas and the Swiss-EU Bilateral Agreement on the Free Movement of Persons.

Furthermore, the Federal Attorneys-at-Law Act sets minimum standards for entry and conduct. The cantons have the competence of regulating the more detailed requirements for practicing as a lawyer and the admission to the bar (art. 3 Federal Attorneys-at-Law Act). They can require tougher standards in their own cantonal acts as long as they do not restrict the free movement of attorneys between cantons as required by law or interfere with the competence of the state in an other way. Insofar the cantons renounce to regulate a specific aspect of the legal profession, the cantonal bar associations can establish their own rules.

Notarisation of documents is a monopoly of the notary profession, which is regulated at the level of the Canton. There is no federal law on notaries and large regulatory differences exist between the cantons. The notaries' associations also issue provisions, i.e. fee scales.

While reading the following pages, it should be kept in mind that several regulatory differences between cantons persist. Moreover, the bar associations' provisions are very varying in every canton: There is a broad spectrum from rather restrictive to the very liberal solutions[1].

[1] This paper focuses on regulation in the Cantons of Zurich, Geneva and the Grisons, which are quite representative for the range of cantonal regulations. Results are taken from a comparative study on the liberalization of legal services by Prof. Frank H. Stephen, University of Manchester. The study was commissioned by SECO, an interim version is available at http://www.seco.admin.ch/themen/00374/00459/02061/index.html?lang=de&download=NHzLpZig7t,lnp6I0NTU042l2Z6ln1acy4Zn4Z2qZpnO2Yuq2Z6gpJCEdHt8gGym162dpYbUzd,Gpd6emK2Oz9aGodetmqaN19XI2IdvoaCVZ,s-

2. Regulation of Entry and Exclusive Rights

2.1 Attorneys

Attorneys-at-Law have a monopoly of professional representation before civil and criminal courts. However, in general parties can also represent themselves in court. In order to practise professionally, Attorneys-at-Law must be listed in a cantonal registry. There are no quantitative limits for the number of registered attorneys. As stated before, an attorney that is listed in one canton's registry can practise in all the other cantons as well. Nevertheless, some differences exist in the conditions between the cantons for being registered.

According to the Federal Attorneys-at-Law Act, the following education requirements exist for Attorneys to be listed in Cantonal registries (art. 7 of the Attorneys-at-Law Act):

- They must hold a licentiate (a Master's degree) in law of a Swiss University or of any University of a country, with which Switzerland has agreed mutual recognition of diplomas;
- they must have completed an internship of one year in Switzerland;
- they must have passed a theoretical and a practical exam.

Additional internship requirements exist with respect to individual cantonal registries (e.g. some cantons require that the internship was completed in their canton).

Registration in cantonal registries requires also a liability insurance of CHF 1 million and usually a business address in the respective canton.

In Switzerland, only professional representation in court is an exclusive right to attorneys. On other legal services except for notary services, there are no regulatory restrictions. Namely legal advice is unregulated.

2.2 Notaries

Basically, there are three forms of notaries:

- In some cantons notaries are members of the public administration and their fees are fixed by the public authority. E.g. in Zurich, notarisation is undertaken by officers. Officers are employed by the Canton of Zurich and they are paid independently from revenue.
- In other cantons notaries are not part of the public administration, they practise in a liberal profession, the so-called latin notaries. Whilst their fees are usually set by cantonal ordinances or by professional associations, competition exists between notaries in service quality e.g. speed of service.
- In yet other cantons there is a mixture of systems with certain types of documents (such as those relating to the transfer of real property) being notarised by public notaries and others by latin notaries.

3. Regulation of market conduct

3.1 Attorneys

As mentioned before, the minimum standards for conduct are set within the Federal Attorneys-at-Law Act. These standards are relatively liberal compared to other countries. In addition to this, all the cantons and the respective bar associations have established further provisions and own rules.

3.1.1 Advertising

According to the Attorneys-at-Law Act, advertising by attorneys has to comply with society's needs, be truthful, preserve the attorneys' obligation of confidentiality and make only factual claims concerning the attorney's work (art. 12 lit. d Attorneys-at-Law Act). The provisions with respect to advertising are relatively recent and the differing interpretations of Cantonal Supervisory Commissions (see further below) have been only subject to limited testing in the courts thus far.

The level of self-regulation varies between cantons. E.g. advertising by attorneys in Zurich is not subject to any regulation other than that contained in the Federal Act. On the other hand, very specific rules exist for example by the Geneva Bar, whose rules go as far as defining what information may be contained on an attorney's letter head. The cantonal supervision commissions evaluate advertising on a case-by-case basis.

Thus far it was ruled by cantonal supervision commissions that advertising of fee rates and specialisation is permissible. Entries in Yellow page directories, newspaper advertisements announcing relocation or opening of a new office are permitted, as are unsolicited mailings so long as they do not include names of current or former clients and are not comparative in nature.

Though regulation has been liberalized in most cantons over the past years, advertising for legal services is still not very common in Switzerland. Exceptions, such as websites comparing attorney tariffs, do exist.

3.1.2 Fee setting

The practise of Cantonal Bar Associations publishing mandatory scales of fees has ceased following the amendments of cartel law in 1995 and 2003. The practise with respect to recommended fee scales varies from canton to canton. In some cantons (e.g. Zurich, Geneva), recommended fees have been abandoned completely. In other cantons (e.g. the Grisons, Basel), recommended fee scales persist.

Furthermore, most cantonal bar associations maintain fee commissions, which arbitrate on disputes between clients and attorneys concerning fees.

Restrictions on the nature of fee contracts arise from rules of conduct of the Swiss and the Cantonal Bar Associations rather than from the Federal Attorneys-at-Law Act. Fixed fee contracts are generally permitted, as are fixed success premiums (*pactum de palmario*) but contracts based on a contingency fee (*pactum de quota litis*) are not permitted. In some cases provisions of Cantonal Bar Associations in this respect have been incorporated into Cantonal Attorney-at-Law Acts (see further below). 'No win, no fee' contracts are prohibited.

3.1.3 Partnerships and business organization

The Attorneys-at-Law Act does not generally limit attorneys in their choice of organisational form. According to Art. 8 of the Federal Attorneys-at-Law Act, attorneys must be able to exercise their

profession independently. Until recently, this provision was interpreted as such that it required them to be self-employed or employed by another registered attorney.

Some scholars have pronounced a different interpretation. They believe that the current law allows incorporation (also limited liability corporations) and that the condition of independence is fulfilled if all owners are registered lawyers. This interpretation has recently been tested before the Attorneys' supervisory commission of the canton of Zurich which has endorsed this view.

So, incorporation is now formally possible subject to the incorporated body being permanently dominated by registered attorneys and that the rules of conduct and confidentiality governing attorneys apply to all members of the incorporated body. There are now examples of limited liability law firms (GmbH) and stock corporations (Aktiengesellschaft) that were successfully registered. However, there are still some cantons that still prohibit incorporation (e.g. Geneva).

3.2 Notaries

In the cantons with public service notaries, no competition exists. However, it has to be mentioned that usually the fees charged by the public service notaries are inferior to those charged by the latin notaries.

In the cantons with latin notaries, conduct regulation is usually strict. For example, in Geneva, the preconditions for nomination are to be at least 25 years old, to possess Swiss citizenship, be domiciled in the canton of Geneva, to have passed an internship of 4 years and 3 months at a notary's office (out of which at least 3 years must have been in Geneva) and to have passed an oral and written examination. According to the Cantonal Act on Notaries practise as a notary is incompatible with any other profession and notaries are not permitted to associate or share offices with another notary. They are not permitted to advertise. The fees are fixed by Cantonal regulation.

3.3 Enforcement

The cantonal regulations are enforced by cantonal supervision commissions. The supervisions commissions' composition varies between the cantons. In most cantons, they are composed by judges, law professors and representatives of the bar.

4. Application of competition law

The Swiss Cartel Act applies to lawyers and notaries. In principle, there is no exemption concerning the lawyers and thus, any kind of self-regulation must comply with the Federal Cartel Act. There is an exception with fee scales allowed for by the law and approved by the cantons. As far as notaries are concerned, there is an exemption insofar they perform a public task which is assigned to them by the cantonal law. However, this exemption only refers to the main activity of notaries, i.e. public notarisation.

With regard to federal and cantonal acts, the Comco can express recommendations to promote effective competition and give opinions. The cantonal acts are not submitted systematically to the Comco. With regard to the fee scales of the cantonal bar and notaries' associations the Comco can conduct the procedures stated by the law.

Several times, the Comco has expressed recommendations concerning cantonal fee scales for lawyers. Repeatedly, it has recommended the modification of singular provisions concerning price fixing. In general, it has recommended not to draw up a fee scale in the sense of recommendations as these generally have the consequence of the fee scale being observed. The description of the services without

recommendation of fees and/or the publication of historical, aggregate informations which are based on an enquiry through an independent third person seem to be the less harmful solutions.

Last year, the Comco opened four preliminary investigations concerning several cantonal bar associations' recommendations with regard to the fees for lawyers.

The Act about the interior markets was revised lately (coming into force on 1 July 2006). According to the revised act, the Comco is responsible for the observation of it. However, the Comco does not have the competence of releasing decisions, it only can express recommendations (art. 8 Code about the interior market). Moreover, the act states that the Comco gives opinions concerning the application of it (art. 10 al. 1 Code about the interior market). The Comco can be heard in procedures of the federal court. There is no obligation to hear the Comco though (art. 10 al. 2 Code about the interior market). Further, the Comco can appeal against decisions in cantonal procedures in order to provoke a declaratory judgment with regard to the question whether a certain decision restricts the access to the market in an unlawful way (art. 9 al. 2^{bis} Code about the interior market). The Comco is about to implement the revised act.

5. Conclusions

Over the past years, the regulation of attorneys in Switzerland has continuously been liberalized. Important liberalization steps were the Federal Attorneys-at-Law Act and the bilateral agreements with the European Union. Most notably, barriers on the movement between cantons were abandoned, and restrictions on advertising, on organizational form and on cross-border services were relaxed. Nevertheless, differences between cantonal regulations are still existent. The role of bar associations is particularly important for conduct regulation. However, self-regulation must comply with the Federal Cartel Act and a trend towards liberalization can be observed.

On the contrary, competition between notaries is limited in Switzerland. In the cantons with public service notaries, there is no potential for competition whatsoever; in the cantons with latin notaries, fees and advertising are usually strictly regulated by cantonal provisions. There, competition is limited to speed and quality of service.

TURKEY

1. Regulation of entry[1]

1.2 Quality standards and entry

Relevant legislation concerning attorneys is the Attorneyship Law No 1136. One of the conditions for admission into the profession of attorney is being a graduate of faculty of law (Article 3 of Attorneyship Law).

Certain business conduct such as providing opinion in legal matters; litigating and defending the rights of real persons and legal entities before courts, arbitrators, and other bodies invested with jurisdictional powers; and managing all documentation associated therewith are the sole prerogative of attorneys enrolled with bar associations (Article 35 of Attorneyship Law). Moreover, attorneys enrolled with bar associations may conduct all types of action with public offices other than those mentioned in the previous sentence.

There is a limited number of study places in faculties of law like any other faculties and in Turkey every year students are selected and placed to these places by a centrally administered examination system.[2]

In order to become an attorney, graduates of law schools must serve apprenticeship lasting one year, first half of which should be in courts and the second half with an attorney with a minimum 5 years in the profession (Article 3 and 15 of Attorneyship Law). The rules concerning apprenticeship is regulated in an implementing regulation adopted by the Union of Bar Associations of Turkey which is an organization formed with the participation of all of the bar associations in Turkey. For instance, the implementing regulation requires the bars to prepare a training programme during apprenticeship and determines the basic principles and methods of this programme. There is no concluding examination following apprenticeship in order to become an attorney. Graduates of the law faculties submit a petition to the relevant bar in order to be eligible for apprenticeship. The board of directors of the relevant bar decides whether to accept the petition. The public prosecutor or the petitioner may contest the decision before the Union of Bar Associations of Turkey. Decisions by the Union of Bar Associations of Turkey are finalized in case Ministry of Justice either gives its approval or does not reach a decision within two months. Decisions by the Ministry of Justice approving the decision of the Union of Bar Associations of Turkey may be challenged before administrative courts. Ministry of Justice may also send the decision of the Union of Bar Associations of Turkey back for reconsideration. If Union of Bar Associations of Turkey adopts the same decision by qualified majority, it is deemed that the decision has been approved. This decision may be challenged before administrative courts.

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1 This submission includes information regarding attorneys only.

2 The organization responsible for administration of this examination system is The Student Selection and Placement Center which is affiliated to The Higher Education Council.

The government does not play a role in overseeing the establishment of entry standards or the number of training places available.

There are no requirements relating to on-going education for any of the legal professions in Turkey.

Individuals who are not registered with a bar association may not use the title "attorney" or work in the profession. As stated in Attorneyship Law, certain conduct is the sole prerogative of attorneys enrolled with bar associations (Article 35 of Attorneyship Law). In Turkey, there are bar associations,[3] and Union of Bar Associations of Turkey composed of all bar associations[4]. Taking all kinds of measures to encourage and ensure the professional development of attorneys, defining and recommending the mandatory rules of the profession can be cited among the duties of the Union of Bar Associations of Turkey (Article 110 of the Attorneyship Law).

There are no quantitative limits (for example, relating to demographic or territorial criteria) regarding the entry into the legal profession(s) in Turkey.

In Turkey, the profession of attorneyship is reserved to Turkish nationals (Article 3 of Attorneyship Law). The only exception to this rule are those foreign lawyers involved in partnerships that fall within the scope of the legislation governing the encouragement of foreign investment. Such partnerships must be established according to the Attorneyship Law and may only offer services of consultancy in foreign laws and international law.

1.3 Exclusive rights

Attorneys have exclusive rights regarding providing opinion in legal matters; litigating and defending the rights of real persons and legal entities before courts, arbitrators, and other bodies invested with jurisdictional powers; and managing all documentation associated therewith (Article 35 of Attorneyship Law). In Turkey, attorneys are not required to specialize and are free to address "*...the resolution of every sort of legal relationship, every legal matter and dispute according to principles of justice and equity*" and to use their knowledge and expertise in the service of justice and persons "*... before all courts, judges, private and public persons, boards and organizations.*"

Real estate agencies provide services associated with selling and buying property. However, individuals can also sell their own houses.

Consumers have direct access to all kinds of legal services. Every person with the capacity to sue may prepare the documents for his/her own lawsuit, file suit in person, and conduct his/her own business in courts. However, certain joint stock companies and building cooperatives are required to retain a lawyer under contract.

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[3] Article 76 of the Attorneyship Law provides that "Bar associations are professional organizations in the nature of public agencies with legal personality operating on the basis of democratic principles by conducting the whole range of activities for the purpose of promoting the profession of attorneyship; ensuring honesty and confidence in the mutual relations between the members of the profession and their relations with clients; defending and safeguarding the order, ethics, and respectability of the profession, the supremacy of the law, and human rights; and to satisfy the common needs of attorneys."

[4] Article 109 of the Attorneyship Law provides that "The Union of Bar Associations of Turkey is an organization formed with the participation of all of the bar associations in Turkey. The Union is a professional organization in the nature of a public agency with legal personality. …"

2. Regulation of market conduct

2.1 Fees

Rules regarding fees are specified in the Attorneyship Law. The attorneyship contract is drawn up at liberty (Article 163 of Attorneyship Law). The attorneyship contract must cover a specific legal service and an amount or a value (Article 163 of Attorneyship Law). Contracts in excess of the attorneyship fee ceiling are valid at the ceiling value specified in Attorneyship Law (Article 163 of Attorneyship Law). The attorneyship fee may be agreed as a certain percentage of the entity or money to be litigated or adjudicated, not to exceed twenty-five percent (Article 164 of Attorneyship Law). No agency fee may be agreed below the minimum attorneyship fee tariff (Article 164 of Attorneyship Law). Cases of accepting a commission free of charge will be reported to the board of directors of the bar association. If an attorneyship fee has not been agreed or there is no written fee contract among the parties or fee contract is either not clear or is controversial, an amount from ten to twenty percent of the value of the suit is adjudged as the attorneyship fee by an authority having the power to review objections to fees in cases and lawsuits the value of which can be measured in terms of money, the fee thus determined not being less that the minimum attorneyship fee tariff. If the value can not be measured in terms of money, minimum attorneyship fee tariff is applicable (Article 164 of Attorneyship Law).

Every year board of directors of each bar association prepares a tariff indicating the minimum limits of attorneyship fees to be charged for actions in the juridical authority and other actions, and forward it to the Union of Bar Associations of Turkey (Article 168 of Attorneyship Law). The tariff to be prepared by the Board of Directors of the Union of Bar Associations of Turkey by taking into consideration the recommendations of the bar associations will be completed the same year and submitted to the Ministry of Justice. The tariff will become final if no decision is made by the Ministry of Justice within one month as of the date of its receipt by the Ministry of Justice or if the tariff is approved by the Ministry. However, the Ministry of Justice will return a tariff if it does not deem appropriate to the Union of Bar Associations of Turkey for reconsideration together with the reasons for return. A tariff thus returned will be considered as approved if passed unchanged by a qualified majority vote of the Board of Directors of the Union of Bar Associations of Turkey; otherwise it will be considered as not approved. The result will be communicated to the Ministry of Justice by the Union of Bar Associations of Turkey. Suits may be filed with administrative tribunals by the Union of Bar Associations of Turkey, the candidate, and the bar association concerned against the decisions made by the Ministry of Justice; and by the Ministry of Justice, the candidate, and the bar association concerned against the decisions made by the Union of Bar Associations of Turkey after reconsideration of the decisions found inappropriate and returned by the Ministry of Justice.

The Attorneyship law does not specify any criteria upon which the amount of fees is based.

Attorneyship Law includes provisions regarding legal aid for the benefit of those who do not have the wherewithal to pay attorneyship fees and other adjudicatory expenses (Article 176-181 of Attorneyship Law). Legal aid service is rendered by a legal aid office established at the headquarters of bar associations by the board of directors of the bar association with manning drawn from among its attorneys (Article 177 of Attorneyship Law). A request for legal aid shall be made to the legal aid office or its representatives and the requestor must prove the rightfulness of the request by presenting evidence (Article 178 of Attorneyship Law). If the request for legal aid is accepted, the legal aid office will assign one or more attorneys to carry out the actions required (Article 179 of Attorneyship Law). The Attorneyship Law also includes a provision on revenues and expenses of the legal aid office (Article 180 of Attorneyship Law). An implementing regulation regarding legal aid has been adopted by Union of Bar Associations of Turkey.

2.2. Advertising

Attorneys are prohibited from engaging in any kind of activity or enterprise which may be regarded as being in the nature of publicity in order to offer their services and particularly from displaying any other title than that of attorney and their academic titles in their signs and letterheads (Article 55 of Attorneyship Law). This prohibition also applies to the attorneys sharing an office and to attorney partnerships (Article 55 of Attorneyship Law). The provisions governing the above prohibitions will be determined by means of regulations to be prepared by the Union of Bar Associations of Turkey (Article 55 of Attorneyship Law).

In line with Article 55 of the Attorneyship Law, Union of Bar Associations of Turkey has adopted an implementing regulation on advertising bans. For instance, according to implementing regulation, signs can include only the following: title of attorney, name and surname, academic title, address, phone number, internet address and email. In case attorneys work together in the same office, the term "attorney office" can be accompanied by names and surnames of one or more of the attorneys or only surnames. In case of partnership, the term "attorney partnership" must accompany the name and title of partnership written in the partnership contract. In printed materials such as business cards, letterheads, only the following information may be found: title of attorney, academic title, name and surname, address, phone-facsimile numbers, internet address and email, registration number for the relevant bar association, and Union of Bar Associations of Turkey, relevant tax administration and tax ID. Regarding phone directories, name, surname, address, phone-facsimile number, internet address and emails can be published on the condition that the information is put under the section for professions, the section is organised in alphabetical order and no term, sign, symbol, etc distinguishing attorneys, attorney offices or partnerships from other attorneys, attorney offices or partnerships is used. The implementing regulation also includes provisions regarding relations with the newspapers and other media, and use of internet. Attorneys, attorneys working in the same offices and attorney partnerships can not make public or announce attorneys, attorney partnerships whom they cooperate inside or outside Turkey by using liaison office and like phrases in a way that generalises the cooperation and makes it continuous. Therefore, it can be said that there is total advertising ban excluding signs, phone directories etc.

2.3. Partnerships and business organisation

Attorneyship Law provides provisions regarding attorney's working together or as an attorney partnership (Article 44 of Attorneyship Law).

Accordingly, attorneys may practice their profession together in the same office or as an attorney partnership.

2.3.1 Working Together in the Same Office

Working together is when more than one attorney enrolled with the same bar association practices their profession using the same office. Such togetherness does not form a legal entity; nor is the work done considered commercial.

It is mandatory to juxtapose the expression "Attorneyship Office" with the name(s) and/or last name(s) of one or several of the attorneys working together. The mutual rights and obligations, the sharing of revenues and expenditures, office management, and the termination of togetherness are defined by those working together and submitted in writing to the bar association they are enrolled with.

2.3.2 Attorney Partnership

An attorney partnership is a legal entity formed by more than one attorney enrolled with the same bar association to practice their profession in accordance with the Attorneyship Law. The work done by an

attorney partnership is professional and not considered commercial. It is subject to the same provisions as applied to privately owned companies as far as taxation is concerned. The name of the attorney partnership is made up by the addition of the expression "Attorney Partnership" to the name(s) and/or last name(s) of one or several partners.

Foreign attorney partnerships wishing to operate in Turkey within the framework of the current laws on incentives for foreign capital may only offer services of consultancy in foreign laws and international law provided that they have been formed in compliance with the Attorneyship Law and the arrangements stipulated for attorney partnerships. This restriction also applies to attorneys who are citizens of the Republic of Turkey or of foreign countries working for the foreign attorney partnership. The condition that the partners be enrolled with a bar association is not required for this type of attorney partnerships. The implementation of this rule is contingent upon reciprocity.

An attorney partnership with a basic contract modelled after the standard basic contract[5] assumes legal personality upon being recorded in the Attorney Partnership Register of the Bar Association by the board of directors of the bar association with which its partners are enrolled. A request for registration may only be refused on the grounds of discordance with the Attorneyship Law and the standard basic contract. A copy of the basic contract will be forwarded to the Union of Bar Associations of Turkey.

Law firms can not be owned or managed by non-lawyers.

3. Institutional framework of self-regulation

3.1. Application of competition law

Attorneyship Law grants Union of Bar Associations of Turkey the right to determine the minimum level of fees. Although Competition Board mentioned that this has the effect of restricting competition and the provisions of Attorneyship Law conflicts with those of the Act No 4054 on the Protection of Competition, the Competition Board decided to use its advocacy powers before the National Assembly, Prime Ministry and the relevant ministry to demand amendment in the Attorneyship Law upon a complaint regarding fixing of minimum level of fees by the Union of Bar Associations of Turkey.[6]

In this decision, the Competition Board also mentioned that although the Union of Bar Associations of Turkey exceeded its powers granted by Attorneyship Law to fix minimum level of fees by fixing monthly fees to be paid to attorneys working on a contractual basis, actually the powers granted to the Union of Bar Associations of Turkey to fix the minimum level of fees were contrary to the Act No 4054 on the Protection of Competition and advocacy powers should be used before the National Assembly, Prime Ministry and the relevant ministry for the amendment in the Attorneyship Law. According to the Competition Board, following amendments in the relevant laws, demands by the professional associations to fix minimum level of fees may be assessed under the exemption provisions of the Act No 4054 on the Protection of Competition.

In sum, the Competition Board can not use its enforcement powers against conduct by professional associations like that of the Union of Bar Associations of Turkey that is authorized by another law such as Attorneyship Law and it employs its advocacy powers to amend the relevant provisions of such laws.

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5 Drawing up the standard basic contract of attorney partnerships is mong the duties of the board of directors of the Union of Bar Associations of Turkey.

6 *TBB*, 13.11.2003; 03-73/876 (a)-374.

3.2. Regulatory oversight

Regarding regulatory oversight, for instance decisions by the board of directors of bars regarding apprenticeship can be contested before the Union of Bar Associations of Turkey. Decisions by the Union of Bar Associations of Turkey in these cases are subject to approval of the Ministry of Justice (see explanations in "1.1. Quality Standards and Entry" for details). The tariff including minimum level of fees set by the Union of Bar Associations of Turkey is subject to approval by the Ministry of Justice (see explanations in "2.1. Fees" for details).

There is no independent complaints office. Negligence of duty and abuse of power are punished according to Turkish criminal code (Article 62 of Attorneyship Law). Moreover, regarding disciplinary penalties foreseen in Attorneyship Law, the authority to decide the initiation of and conduct a disciplinary prosecution rests with the bar association in whose directory the attorney was enrolled.

There is not an independent Regulatory Authority (consisting of a majority of non-lawyers) for the legal professions. As mentioned in "1.1. Quality Standards and Entry", there are bar associations and Union of Bar Associations of Turkey. Taking all kinds of measures to encourage and ensure the professional development of attorneys, defining and recommending the mandatory rules of the profession can be cited among the duties of the Union of Bar Associations of Turkey.

UNITED KINGDOM

1. Introduction

The Office of Fair Trading (OFT) has operated a UK-wide competition programme[7] dedicated to the professions, including the legal professions, since 2000. The aim of the programme is to ensure that competition is not unnecessarily restricted as a result of:

- the conduct of professional service providers or the rules of their regulatory bodies;
- restrictions for which government is responsible (that might arise from laws, regulations or administrative practices); or
- market structures.

This benefits efficient and innovative service providers, who compete on both a domestic and international level, and ultimately consumers.

This paper:

- Examines the progress that has been made in removing unnecessary restrictions of competition in the legal professions (see section IV).
- Discusses the recently proposed legislation which, if adopted in its current form will extensively change the regulatory framework of the legal professions of England and Wales and the way in which legal services are delivered (see section V).
- Discusses the progress that is being made in Scotland and Northern Ireland on the competition programme (see section VI)
- Discusses regulation of entry and market conduct of the legal professions (see section VII).

By way of background, the next two sections briefly outlines how the legal professions in the UK are organised (see section II) and highlights the range of tools available to OFT to intervene to address unnecessary restrictions on competition (see section III).

2. Organisation of the legal professions in the UK

Two main legal professions exist in the UK: solicitors (generally the first point of contact for individuals/organisations seeking legal advice) and barristers (lawyers offering specialised services, usually as an advocate and an adviser in all matters involving the practice of the courts, but also in specific

[7] The OFT's Annual Reports for 2000, 2001, 2003-2005 contain brief summaries of some of the work undertaken on the professions in those years. The reports are available on the OFT web-site: http://www.oft.gov.uk/advice_and_resources/publications/corporate/annual-report/

areas of the law)[8]. Alternative legal services providers (such as licensed conveyancers, patent attorneys, trade mark attorneys and legal executives) also provide certain legal services in direct competition to solicitors and barristers.

Solicitors and barristers are regulated separately in the three jurisdictions of England and Wales; Scotland and Northern Ireland. At present, both professions are largely self-regulated. Solicitors are regulated by the Law Society[9] of the relevant jurisdiction and barristers (in Scotland, advocate) are regulated by the Bar Council[10] (in Scotland Faculty of Advocates) of the relevant jurisdiction. The rules are broadly similar for solicitors and barristers (advocates) respectively in each jurisdiction.

The risk that self-regulation, in particular, *ex ante* self-regulation, may excessively restrict competition and promote the interests of the professions, without yielding corresponding benefits to consumers has been widely discussed[11]. It has therefore been necessary to ensure that the competition regime applies fully to the legal professions and that the OFT has effective tools to ensure that self-regulation does not allow the legal professions to create monopoly rents by setting disproportionately stringent *ex ante* rules or excessively *ex post* regulation whilst claiming that such regulations are in the public interest in terms of protecting consumers.

In addition, OFT has strongly advocated for the regulatory structure of the legal professions to change. Partly as a result of OFT's efforts, the government of England and Wales has recently introduced to Parliament a Bill which, if adopted in its current form, will have the effect of substantially removing responsibility for regulation of the legal professions from self-regulatory organisations, and transferring it to a government oversight regulator. This is discussed further below (see section IV).

In the UK the legal professions are also regulated by government. Some restrictions on competition therefore have their origin in governmental measures. In order to be able to intervene in an appropriate way in relation to restrictions that have their origin in governmental measures the OFT has a range of advisory and advocacy powers.

The next section briefly discusses these tools; setting out how the OFT was able to remove a number of restrictions of competition in the legal professions and how we expect to achieve further progress in creating a more competitive environment in the legal professions in the UK.

3. The UK competition regime and the role of advocacy

The UK has a comprehensive and modern competition regime within which the OFT is an independent consumer and competition agency with powers of investigation and enforcement. The competition regime, which applies fully to the legal professions, provides a broad range of tools for both enforcement and advocacy. These include:

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8 For further details see *Economic Impact of regulation in the field of liberal professions in different Member States – Regulation of professional services* Institute for Advanced Studies, Vienna 2003. Report for DG Comp.

9 In England and Wales the Law Society has separated its professional and regulatory functions. Regulatory functions are undertaken by the Solicitors' Regulation Authority.

10 In England and Wales the Bar Council has separated its professional and regulatory functions. Regulatory functions are undertaken by the Bar Standards Board.

11 For a fuller account of the issues expressed in the remainder of this section see: Fletcher, A. 2006. 'The liberal professions: getting the regulatory balance right' in: Ehlermann, C. & Atanasiu, I. (eds). *European Competition Law Annual 2004: the relationship between competition law and the (Liberal) professions*, pp51-72, Oxford: Hart.

- enforcement powers under the Competition Act 1998 and Articles 81 and 82 of the EC Treaty[12];
- general competition advisory functions in relation to regulations[13];
- specific advisory functions in relation to certain professional services[14];
- powers to conduct market studies[15]
- to consider super-complaints[16];
- and a range of powers under consumer protection legislation[17].

The regime also enables the OFT to refer merger and market investigations[18] to a separate body, the Competition Commission, for further investigation, reporting and, where appropriate, remedial action.

In addition to these formal powers, the OFT also uses competition advocacy to address restrictions for which government is responsible (for example through representation on steering groups; by reporting on the effects of existing restrictions and the benefits of increased competition; and informing and educating the public).

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12 Under the Competition Act 1998, the OFT has the power to investigate where it has reasonable grounds to suspect the existence of:

- an agreement between undertakings, decision by an association of undertakings or concerted practice which has the object or effect of preventing, restricting or distorting competition within the UK and which may affect trade within the UK; conduct by one or more undertakings which amounts to the abuse of a dominant position in a market which may affect trade within the UK.

13 The OFT has general capacity to advise on the impact of competition of any form of proposed regulation (formal legislation, codes of practice, information campaigns etc). In 2002, the UK introduced a competition assessment element to the mandatory Regulation Impact Assessment of proposed UK-wide regulation.

14 For the legal professions, rules relating to rights of audience in the courts and rights to conduct litigation under The Courts and Legal Services Act 1990, in relation to England and Wales, and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, in relation to Scotland.

15 The OFT can undertake studies to determine whether a market is working well for consumers and, if not, what measures need to be taken to ensure that competition is not unnecessarily restricted.

16 Designated consumer organisations, such as Which? can require the OFT to take a wider look at markets under "super-complaints". A fast-track complaints procedure requires the OFT to respond to such complaints which suggest that there are market structures or practices that are working against the interests of consumers. After a 90 day period OFT must make known its findings and state what action, if any, it proposes to take.

17 In certain cases, it may be more appropriate for the OFT to use consumer protection legislation, rather than competition legislation, to address information-related market failures that are typical in the professions, such as through the adoption of consumer codes of practices approved under the OFT's Consumer Codes Approval Scheme. However, such legislation has not yet been used in relation to the legal professions.

18 Under the Enterprise Act 2002, the OFT has the power to refer markets to the Competition Commission for further investigation where we have reasonable grounds for suspecting that any feature, or combination of features, of a market is preventing, restricting, or distorting competition. Following a reference it will be for the Competition Commission to decide whether competition is indeed prevented, restricted or distorted, and (if so) what, if any, action should be taken to remedy the adverse effect on competition or any detrimental effect on consumers arising from the adverse effect.

Nevertheless, it is important for OFT's advocacy role, whether through use of its formal powers or otherwise, to be backed by the actual or threatened use of enforcement powers.

The OFT's programme dedicated to reviewing competition in the legal professions in the UK described below reflects the OFT's ability and capacity to apply all the tools available to it flexibly, using a mixture of advocacy and enforcement.

4. Liberalisation of the legal professions

4.1 Liberalisation of the legal professions in the UK pre-2000

One of the first significant projects to liberalise professional services was a government-initiated study on the effects of certain restrictions in the professions on consumers, markets and the competitive process conducted by the Monopolies and Mergers Commission[19] in 1970[20].

The Commission's initial conclusion was that in many cases there were methods less restrictive of competition that could address underlying market failures in professional services and the report resulted in the removal of blanket prohibitions on advertising, as well as the abolition of mandatory fee scales.

In the 1980s and 1990s, legislative changes brought an end to solicitors' monopoly on the provision of conveyancing services in England and Wales (i.e. the right to transfer title to land)[21] and permitted authorised practitioners to undertake certain such functions[22].

Further legislative changes brought an end to barristers' monopoly on advocacy in higher courts and solicitors' monopoly on litigation in England and Wales, by allowing both existing and new professional bodies (such as the Institute of Legal Executives and the Chartered Institute of Patent Attorneys) to apply for such rights[23]. As a result of further extended rights of audience [24] all barristers and solicitors in England and Wales currently have full rights of audience subject to the qualification requirements of their respective professional bodies- solicitors who have extended rights of audience are called "solicitor advocates".

4.2 Liberalisation of the legal professions in the UK post-2000

A further phase of reform was triggered by an OFT report entitled *Competition in professions*[25], published in March 2001 which identified restrictions on competition in three professions: law, accountancy and architecture in England and Wales. Following the publication of the report, a broader review commenced. The review's strategy and its impact on legal professional services is explained more fully below.

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19 This became the Competition Commission in 2003 which significantly changes powers.

20 *A report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to the supply of professional services,* Monopolies and Mergers Commission, 1970.

21 The Administration of Justice Act 1985

22 The Courts and Legal Services Act 1990

23 The Courts and Legal Services Act 1990

24 The Access to Justice Act 1999

25 *Competition in professions,* A report by the Director General of Fair Trading, March 2001, available on the OFT web-site: http://www.oft.gov.uk/advice_and_resources/publications/reports/professional_bodies/oft328

4.3 Competition in professions report

The basis of the *Competition in professions* report was a consultation exercise which allowed 93 professional bodies across a whole sector to identify possible restrictions on competition.[26]

The scope of the report was not limited to the identification of restrictions that had their origin in professional rules but also identified restrictions that arose from law or other sources. The report challenged those responsible for the restrictions identified and raised the presumption that restrictions should be promptly removed unless they could be justified as benefiting consumers.

The majority of restrictions on competition were found to originate in professional rules and were thus for the self-regulatory organisations to either remove or justify. Professional bodies were given 12 months to do this. The OFT emphasised that if appropriate action was not taken by the professions to remove rules which appeared to infringe UK competition law, it would use its competition enforcement powers.

Some restrictions, for example, those that had their origin in statute, were for government to address. For example, the report called on government to remove the exclusion of professional rules, which existed at the time, from the prohibition against restrictive agreements in the then recently enacted Competition Act 1998.

4.4 Competition in professions - Progress statement[27]

In April 2002 the OFT published a progress statement reviewing progress made by the professions and by government in addressing restrictions identified in the 2001 report.

Many of the conduct restrictions (restrictions on comparative advertising; restrictions on cold-calling (subject to safeguards); restrictions on the payment of referral fees; restrictions on direct access to the professional) were addressed by the relevant self-regulatory organisations. In other cases, the OFT found the professions' arguments to justify restrictions on competition sufficiently persuasive.

The lessons of the 2001 report were also used to inform work across the whole range of professions and throughout the UK. This was particularly effective where lessons learned by self-regulatory organisations based in England and Wales were taken on board by their sister organisations in Scotland and Northern Ireland.

The report therefore allowed the OFT to achieve considerable liberalisation in the professions without incurring the costs involved in running a significant number of competition enforcement cases.

However, some of the more significant restrictions, in particular those on business structure within the legal professions, remained. These restrictions were the result of both statutory restrictions and restrictions contained in professional rules. For example, barristers were not permitted to enter partnership with solicitors and solicitors could not share fees with non-solicitor professionals, nor participate fully in multi-disciplinary practices regulated by other professional bodies. While the report did not immediately result in the lifting of these restrictions, it was a key driver in the decision by government in 2004 to launch an independent review towards reform of the regulation of legal services.

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26 Professions where the provisions were predominantly in the public sector, for example in the medical and teaching professions, were excluded.

27 *Competition in professions*- Progress statement, April 2002, available on the OFT web-site: http://www.oft.gov.uk/advice_and_resources/publications/reports/professional_bodies/oft385

5. Changing the regulatory structure of the legal professions and the way legal services are delivered

5.1 Review of the Regulatory Framework for Legal Services in England and Wales[28]

The review, led by Sir David Clementi, considered what regulatory framework would best promote competition, innovation and the public and consumer interest in legal services. In addition, the review explored which type of regulatory framework would be independent in representing the public and consumer interest and would be no more restrictive or burdensome than is clearly justified.

The main findings and recommendations[29] of the review, which are set out below, were broadly accepted by government and are contained in the government's legislative proposal, the Legal Services Bill, to reform the way legal services are regulated and delivered. The Legal Services Bill was introduced to Parliament on the 23 November 2006 and is currently being debated in the House of Lords.

5.1.1 The Legal Services Bill

The Legal Services Bill provides for a Legal Services Board to act as the single external oversight regulator in legal services to provide consistent oversight regulation of professional bodies, which would retain day-to-day regulatory functions. One of the Legal Services Board's regulatory objectives is to promote competition. The Bill also provides for effective competition scrutiny by the OFT of key regulatory decisions.

The Legal Services Board model allows for proportionate, yet effective, oversight and intervention while retaining the expertise and the goodwill of the professional bodies who maintain significant regulatory roles. In order to retain this role, professional bodies are required to separate their representative functions for their professional members from their continuing function as regulators of their profession. This separation of functions has already been undertaken (see footnotes 3 and 4). The establishment of an independent body with oversight powers in relation to regulatory decisions by professional bodies is also a fundamental step towards ensuring that regulation is necessary, proportionate and meets the consumer interest.

Further, the Bill includes proposals to improve consumer complaints handling, by setting up a single independent body (Office for Legal Complaints) to handle complaints in respect of all members of professional bodies, subject to oversight by the Legal Services Board.

Finally, the Bill proposes to lift restrictions on alternative business structures that could enable different types of lawyers and non-lawyers to manage and own legal practices so as to allow them to adapt business structures to meet client needs.

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28 The published *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, December 2004, can be found on: http://www.legal-services-review.org.uk/

29 The Review concluded that the current regulatory system is flawed in part as a result of:
- the governance structures of the main front-line bodies being inappropriate for the regulatory task they faced;
- the over-complex and inconsistent system of oversight regulatory arrangements for existing front-line regulatory bodies;
- there being no clear objectives and principles which underlie this regulatory system;
- the system not having sufficient regard to consumers.

Facilitating these new ways of providing services can bring benefits to both consumers and suppliers and at both ends of the market. In relation to vulnerable consumers the changes facilitate the provision of combinations of services that are currently impossible. Both the convenience of a one-stop shop and the capacity of the supplier to see and address needs more comprehensively are potential advantages here. In relation to rural and isolated consumers, new structures, as well as potentially improving quality of service, can bring innovative ways of giving consumers access to services. This is essentially because such new structures allow for fixed and operating costs to be spread over a broader range of services.

At the commercial end of the market, potential benefits include cheaper and more efficient services, for example where the new structures unlock efficiencies of scope and scale or where external expertise and investment brings improvement to management and service delivery. Firms that are more efficient and better adapted to client needs will be better able to contest what are, increasingly, international markets.

Legal Disciplinary Practices (LDPs) could bring together lawyers from different professional bodies such as barristers, solicitors and licensed conveyancers to provide legal services. This would allow barristers and solicitors to enter partnership with lawyers who are members of professional bodies other than their own; solicitors employed by non-solicitors to provide services to the public; and clients to obtain litigation and advocacy services from the same firm.

Further, Multi-Disciplinary Practices (MDPs) would allow legal services to be supplied alongside other services such as accountancy and surveying, which could have further benefits for clients needing combinations of professional services.

Alternative business structures would thus allow firms, in due course, to evolve and develop new working practices and partnerships - very much a step by step approach.

6. Taking forward the competition programme in Scotland and Northern Ireland

The OFT has also been increasingly involved in advocacy to government in Scotland and Northern Ireland to ensure that progress similar to that made in England and Wales on reforming the regulatory framework in the legal profession is also made in those jurisdictions. Scotland and Northern Ireland have their own legal systems which are different to that of England and Wales. The use by the OFT of its advisory and advocacy functions therefore needs to take account of the reality of the arrangements for devolved government in Scotland and Northern Ireland. The OFT has therefore been involved in assessing which regulatory structures in the professions best serve consumers in those jurisdictions.

In addition, OFT has used its advisory and advocacy functions in order to highlight why existing restrictions on competition, in the context in which they apply in Scotland and Northern Ireland, need to be lifted in the interest of consumers. Where this has not had the desired results, OFT has been active in applying its enforcement powers.

6.1 Scotland

The OFT was represented on the Working Group on the Legal Services Market in Scotland established in March 2004 to research and report on competition and regulation in the legal services market in Scotland. The OFT worked to ensure that the group's report,[30] published on 2 May 2006, highlighted to Scottish Ministers a range of restrictions on competition in professional rules and in regulation.

[30] Available on the Scottish Executive's web-site http://www.scotland.gov.uk/Publications/2006/04/12093822/0

In the course of this work the Law Society of Scotland agreed to the removal of fee recommendations previously issued by the Law Society and to the lifting of restrictions on advertising, including comparative advertising. The OFT is now working to ensure that other necessary reforms identified in the report are taken forward. Such necessary reforms include implementing a regulatory oversight system that can benefit competition in the provision of legal services; removing restrictions on business structures; and the removal of the Law Society of Scotland's restriction on receiving a payment for referring a client.

Other recommendations for reform, as set out in report, have already been achieved through a combination of advocacy and the threat of enforcement action- the Faculty of Advocates has recently amended its rules on advertising and direct access. This is discussed further in paragraph 56 below.

However, the group's report did not contain recommendations that restrictions on alternative business structures should be lifted. This has, in part, led to a super-complaint[31] by a consumer organisation being submitted to the OFT on 11 May 2007, regarding the legal professions in Scotland. The consumer organisation is concerned that the regulatory restrictions on lawyers and non-lawyers working together, the prohibition on lawyers adopting appropriate business models for the provision of legal services and the prohibition on consumers having direct access to advocates is a combination of features in the Scottish legal services market which appears to be significantly harming the interests of consumers. The OFT is currently considering the issues raised by the consumer organisation and will respond within the statutory 90 day time limit.

6.2 Northern Ireland

In December 2005, OFT sent a submission on reform of legal services in Northern Ireland to the Legal Services Review Group chaired by Sir George Bain. The Review Group was established by the Government to report to the Minister of Finance and Personnel with recommendations relating to the current regulation of the legal professions in Northern Ireland. The submission highlighted the case for structural reform as well as a range of restrictions on competition in both statute and professional rules such as rules that prohibit partnerships between barristers and between barristers and other professionals (both lawyers and non lawyers); rules that prohibit solicitors from entering partnerships with members of other professions (both lawyers and non-lawyers); and rules that prevent solicitors in employment to non-solicitors from providing services to third parties.

In February 2007, the OFT submitted a response[32] to the Legal Services Review Group's report[33], emphasising OFT's disappointment in the recommended "wait and see" approach to the adoption of alternative business structures similar to those being considered for England and Wales. The OFT intends to remain engaged with the relevant government departments in order to ensure that consumers in Northern Ireland can benefit from increased competition.

7. Regulation of entry and conduct

Whilst a range of restrictions on competition in the legal professions have been lifted, the OFT intends to remain active in order to ensure that further liberalisation is achieved. The remainder of this paper looks

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31 See footnote 7 *supra*.

32 Available on the website for the Department of Finance and Personnel: http://www.dfpni.gov.uk/consultation-response-office-of-fair-trading.pdf#search=%22OFT%20Northern%20IReland%20legal%22

33 http://www.dfpni.gov.uk/report_-_final_tso_version.pdf

at the current rules on entry and conduct in the legal professions and highlights areas which require further attention.

7.1 Quality standards and entry

There are two main routes for admission to the solicitors' profession in England and Wales: one via a university degree and another via obtaining employment in a legal office and joining the Institute of Legal Executives[34]. After successful completion of the law degree, or for those with degrees in other subjects the Common Professional Examination or the post-graduate Diploma in Law, prospective solicitors have to undertake the Legal Practice Course, which is the professional training for solicitors, followed by a two year training contract with a firm of solicitors or other approved organisation.

The route to admission into the solicitors' profession in Scotland is broadly similar to that of England and Wales. The standard route to entry is via a law degree, followed by a post graduate Diploma in Legal Practice, followed by a two year period of professional training. During this training, a Professional Competence Course and Test of Professional Competence is undertaken. A small proportion of entrants take a three year 'in-office' traineeship and professional examinations set by the Law Society as an alternative to the law degree, prior to taking the Diploma in Legal Practice and the two year post-Diploma traineeship.

The Law Society of Scotland has recently consulted on the future of the education and training of solicitors in Scotland. OFT has advised that a balance needs to be struck between requiring levels of training which are sufficient to ensure competence and imposing unnecessarily stringent requirements which have the effect of restricting entry to the profession. In order to ensure that an appropriate balance is struck between what would sometimes be competing objectives, the OFT has emphasised to the Law Society of Scotland the need for ensuring that decisions on education, training and development are subject to an approval process and that there should be a system of independent regulatory oversight which is external to the Society.

To qualify as a barrister in England and Wales, there are three main stages to be completed:

i) Academic stage: undergraduate degree in law, or undergraduate degree in any other subject plus a Common Professional Examination conversion course

ii) Vocational stage: the Bar Vocational Course

iii) Pupillage: a year's supervised practical experience, which is generally taken with a barrister in practice, although part of it can be completed in another approved legal environment[35].

At present, the title “barrister” is awarded on satisfactory completion of the vocational course.[36]

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34 For those that do not wish to take a degree, it is possible to qualify as a solicitor by obtaining employment in a legal office, joining the Institute of Legal Executives and taking the examinations to qualify as a member, and subsequently a Fellow, of the Institute. Prospective solicitors require a minimum of five years of relevant practice and complete two courses and sets of examinations. After this, the Legal Practice Course has to be completed, but the need for a further period of training and the Professional Skills Course is waived.

35 For further details see *Economic Impact of regulation in the field of liberal professions in different Member States – Regulation of professional services* Institute for Advanced Studies, Vienna 2003. Report for DG Comp

The process of becoming an advocate in Scotland is currently under review. At present, admission requires either an honours degree or an ordinary degree with distinction. Candidates normally also have to complete the Diploma in Legal Practice and undergo a period of training in a solicitor's office. In addition, they are required to undertake a period of pupillage.

7.1 Advertising and direct access

Broadly speaking, solicitors in England and Wales are allowed to advertise their services to potential clients subject to certain limited controls. The Solicitors' Publicity Code states that publicity must not be misleading or inaccurate. Any publicity as to charges or a basis of charging must be clearly expressed and it must be clear whether disbursements (expenses) and VAT are included. Practitioners must not publicise their practices by making unsolicited visits or telephone calls to a member of the public.

The Code of Conduct for barristers in England and Wales states that a barrister may engage in any advertising or promotion in connection with his practice which conforms to the British Codes of Advertising and Sales Promotion. Barristers may not, however, make direct comparisons with individuals, state success rates or advertise in such a way that it is so frequent or obtrusive as to cause offence.

As mentioned above, a mixture of advocacy and the threat of enforcement has persuaded the Faculty of Advocates in Scotland to amend its rules on advertising. The OFT had concerns about the prohibition on advocates from using advertising or promotion which makes comparisons with other advocates or members of any other profession and the prohibition on advocates from using advertising or promotion which includes statements about the quality of an advocate's work and the size or success of the advocate's practice or "success rate". In November 2006, the Faculty of Advocates resolved that advertising as provided for in the Code of Conduct for barristers of England and Wales, as described above, is to be allowed.

Furthermore, the prohibition on advocates appearing in Scottish legal proceedings only on the instructions of a Scottish solicitor has also been partially suspended for professional or commercial clients who may instruct an advocate directly under the 2006 Direct Access Rules[37].

7.3 Fees

As a basic principle, the fees of solicitors are not regulated and are freely negotiable. Usually solicitors' fees will be calculated on the basis of an hourly rate agreed between the client and solicitor and will not correlate directly with the value of the matter.

Barristers' fees are not regulated and are generally negotiated between the solicitor and the barrister's clerk. In relation to drafting and advising barristers generally charge an hourly rate. For appearances in

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36 The Bar Standards Board is currently examining the question of deferral of "call" to the Bar. Under this proposal, individuals would not gain the title "barrister" until they had completed a period of training (pupillage) after their vocational course. It issued a consultation document in July 2006 and its decision is awaited. In its response on the consultation, the OFT stated that it was necessary for the Bar Standards Board to consider both the issue of safeguarding consumers and the impact on diversity and competition in order to determine whether to defer call to the Bar until after completion of pupillage would be in the public interest.

37 The new rules, which came into effect in October 2006, allow advocates to accept instructions from any persons or bodies detailed in the appendix to the direct access rules (which include a list of legal professionals; other professionals; public authorities; and various other persons and bodies).

court, a lump sum fee will be charged for the preparation of the case and first day in court together with a daily sum for each day in court thereafter.

7.4 Exclusive rights

Rights of audience and rights to conduct litigation are regulated in that they are reserved to those who are considered appropriately qualified. Under the Courts and Legal Services Act 1990, the Secretary of State for Constitutional Affairs (the Secretary of State)[38] has powers to designate professional bodies who wish to grant to their members rights of audience and rights to conduct litigation in England and Wales, or to revoke such designation. Rule changes by professional bodies are also subject to the approval of the Secretary of State where proposed changes relate to either of these two areas. The Secretary of State also has a power to "call in"[39] any such rule where he believes it to be unduly restrictive.

The OFT has an advisory role with respect to the potential competition effects of the proposed designation, revocation or rule change by a professional body or by the Secretary of State. The OFT's advice is provided to the Secretary of State and published. Although the OFT's advisory role in this connection relates only to rule changes, and not to existing rules, these advisory powers have proved a useful way for ensuring that where changes are made to this very significant area of legal service provision the potential competition implications of such changes are fully considered prior to the introduction of the change.

It should be noted that the Solicitors' Regulation Authority, which has taken over the regulatory responsibility for solicitors from the Law Society, recently sought the views of stakeholders on the necessity for solicitors to achieve a separate qualification before being permitted to exercise rights of audience in the higher courts or whether standards could be secured through some other quality assurance measure. The consultation closed on 12 April 2007 and the Solicitors' Regulation Authority is currently analysing and considering stakeholders' responses[40]. Once the Solicitors' Regulation Authority and Law Society have made the necessary rule changes, they will be presented to the Ministry of Justice for approval. As part of the approval process, the OFT is consulted.

As in England and Wales, the OFT has an advisory role, under the recently commenced Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, in considering whether the regulations and rules in Scotland would have, or would be likely to have, the effect of restricting, distorting or preventing competition to any significant extent.

7.5 Issues relating specifically to barristers

There are a number of issues that relate specifically to barristers/advocates in the UK. This section highlights two: the ban on "mixed doubles" in Scotland and the QC system.

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38 Rights of audience are currently overseen by the Secretary of State for Constitutional Affairs. Following the recent creation of the Ministry of Justice, this function will shortly be transferred to the Secretary of State for Justice.

39 "Calling in" the rules is a power that the Secretary of State may exercise under Part 3 of Schedule 5 of the Access to Justice Act 1999. This gives the power to make alterations to an authorised bodies' qualification regulations or rules of conduct. It is a power that has never been exercised. This power will be repealed under the Legal Services Bill, and instead the Legal Services Board will have the power to approve alterations to the regulatory arrangements of approved regulators, or direct an approved regulator to alter its arrangements if they damage the fundamental regulatory objectives set out in the Bill.

40 http://www.sra.org.uk/consultations/102.article

7.5.1 "Mixed doubles"

The OFT has launched a full investigation under the CA98 into a ruling by the former Dean of the Faculty of Advocates which prohibits advocates from appearing in court with a solicitor who is qualified as a solicitor advocate[41] instructed for the same client. The OFT considers that this ruling restricts competition for the provision of advocacy work[42]. It is worth noting that such a restriction does not exist in England and Wales.

This case will test the way in which the *Wouters*[43] decision can be applied within the legal professions. In *Wouters*, the European Court of Justice considered the application of Article 81 EC to a regulation of the Dutch Bar association that prohibited partnerships between members of the Dutch Bar and accountants. The judgment underlines that, in principle, rules of professional bodies fall within the scope of Article 81 EC as decisions by an association of undertakings. The court held that in the circumstances in which that professional rule operated it could reasonably be considered necessary for the proper practice of the profession. On this basis it therefore fell outside the scope of Article 81 EC.

7.5.2 The QC system

In July 2003, the Department for Constitutional Affairs (now Ministry of Justice) consulted on the possibility of constitutional reform regarding the appointment of barristers to Queen's Counsel, or "QC"[44].

In its response to the consultation, the OFT expressed concerns that governmental involvement in distinguishing between junior barristers and QCs has no parallel in other markets. In addition, the OFT questioned the operation of the system as a quality mark. A mark will generally only be of value to consumers where certain conditions are met. One of these is that it be awarded according to clear criteria and in a transparent way that has particular regard to the experience of consumers of the services. Whether the QC system meets this condition remains open to debate. Another condition is that the mark can be lost as well as won; and that continued holding of the mark is contingent upon continued high quality performance. This condition is not met by the QC system. Moreover, the OFT is concerned that the QC title may operate to distort competition. One sign of this is the step-change in fees that QCs are said to command; another is that custom and practice has given rise to some *de facto* demarcations as to what work is and is not suitable for QCs. It has also been suggested frequently that the operation of the QC title displays elements of a quota system and that some quantitative as distinct from purely qualitative criteria may apply.

The consultation on the reform of the system has so far led to two outcomes:

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41 See paragraph 17 above.

42 See section V of the Working Group report

43 Case C-309/99 *Wouters* v *Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap intervening)* [2002] ECR I-1577

44 http://www.dca.gov.uk/consult/qcfuture/index.htm. The Queen's Counsel have traditionally been appointed annually by The Queen on the advice of the Lord Chancellor. Lawyers who wish to be considered are invited to apply to the Lord Chancellor. Appointment as a Queen's Counsel brings a number of formal privileges. First, Silks wear a distinctive uniform. Secondly, the judiciary have traditionally given QCs a formal right to address the court before any other advocates (although it is doubtful whether this right has any longer any practical significance). Thirdly, Silks sit in a particular part of the court. They are entitled to sit in the front row (also known as sitting "within the Bar in the Supreme Court"). This tradition is a matter of professional etiquette, rather than part of the practical process of discharging business.

i) The method of selecting QCs has been reformed such that the government is no longer involved in the process. Instead, a process was agreed between the solicitors' and barristers' professions and approved by the government which is overseen and directed by an independent selection panel. The panel now assesses applications and makes recommendations for appointment. This change, however, does not allay the OFT's other competition concerns that the quality mark of QC could be lost as well as won or that quality of performance is appraised on a continuing basis. Furthermore, the new process focuses on advocacy, therefore tending to undervalue other skills that may be relevant;

ii) A study of the need for, and provision of, information to consumers about the quality of legal services is being carried out by the government. This study is being undertaken because, while the QC rank conveys information about quality in higher-court advocacy, responses to the 2003 consultation (see above) indicated that there might be demand for similar information in respect of other legal services. We are awaiting the conclusions of the study and hope that it will address OFT's competition concerns described above.

8. Conclusion

Significant progress has been made in the removal of competitive restrictions in the legal professions in the UK. This has been possible with the range of tools available at OFT's disposal. Further significant changes are in contemplation in England and Wales under the Legal Services Bill currently before Parliament. If passed in its current form, the Bill will extensively change the regulatory structure of the legal professions in England and Wales by substantially removing responsibility for regulation of the legal professions from self-regulatory organisations, and transferring it to a government oversight regulator. The Bill would also lead to improvements in the management and delivery of legal services.

Similar changes can be expected in Scotland and Northern Ireland as a result of the combined use of the OFT's advocacy and its enforcement powers and against the background of significant political and consumer interest in promoting reform of the legal professions.

UNITED STATES

1. Introduction

In the United States, there is no national license to practice law. Rather, each state and the District of Columbia has adopted different standards for licensing attorneys to practice law.[1] Some states and the District of Columbia have entered into reciprocity agreements that allow individuals who have been admitted into one state's bar to qualify to become members of another state's bar.[2] Attorneys are required to pay annual dues and, in some states, to attend continuing legal education seminars to maintain their licenses.

In addition to setting licensing standards, state bar associations have developed and implemented ethics rules to govern the practice of law. Among other things, these rules restrict the performance of certain tasks to licensed attorneys and govern attorney advertising. Although some regulation of the legal profession is undoubtedly necessary to protect consumers, on occasion state bar associations, legislatures, and courts have adopted rules that unduly restrict competition among attorneys and competition between attorneys and non-attorneys.

The U.S. Supreme Court has made it clear that, notwithstanding state regulation, U.S. federal antitrust law applies to the legal profession.[3] Further, state restrictions on attorney advertising are subject to First Amendment (freedom of speech) scrutiny.[4] However, certain actions by state bar associations, legislatures, and courts may be beyond the reach of the antitrust laws.[5] Accordingly, the antitrust agencies have engaged in competition advocacy to prevent anticompetitive advertising and practice of law restrictions from going into effect.

To avoid duplicating the Agencies' 2005 Global Forum submission[6] on unauthorized practice of law (UPL) restrictions, this comment will repeat in Section 2 only the brief UPL discussion from the U.S. submission to the February 2007 roundtable on improving competition in real estate transactions, and then focus on recent agency experience in the form of advocacy relating to restrictions on attorney advertising. Section 3 explains the FTC's framework for evaluating such restrictions, and Section 4 discusses recent

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1 Every state determines the qualifications necessary to take the state bar exam, which typically include completing law school and meeting the state's requirements for character and fitness. Law school accreditation is done by the American Bar Association, which has established criteria to determine if a law school should be accredited. To be admitted to the bar, a person must pass the requisite state exam and swear an oath before the highest court of that state.

2 This type of qualification may involve several years of practice by the attorney, a letter of good standing from the state in which the attorney is already licensed, satisfying character and fitness requirements, and payment of an admission fee.

3 *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975)

4 *Bates v. Arizona State Bar*, 433 U.S. 350, 364 (1977)

5 *Id., see also Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

6 DAF/COMP/GF/WD(2005)35.

FTC advocacy concerning attorney advertising. Section 5 describes a recent DOJ enforcement action relating to the American Bar Association.

2. Restrictions on Use of Non-Attorneys to Close Real Estate Transactions

Pursuant to unauthorized practice of law (UPL) statutes, states determine the tasks that only an attorney legally can perform. In the majority of states, non-lawyers compete with lawyers to provide real estate closing services, such as performing title searches and completing mortgages and deeds. Some states, however, have restricted anyone other than licensed attorneys from performing many of the tasks associated with closing a residential real estate transaction.

Through competition advocacy, DOJ and FTC (the Agencies) have encouraged state legislatures, bar associations, and courts to eliminate or narrow restrictions on competition between attorneys and non-attorneys in performing tasks related to a real estate closing.[7] Separately, the Justice Department has obtained injunctions prohibiting bar associations from unreasonably restraining competition from non-attorneys in violation of the antitrust laws.[8] The Agencies have argued that these UPL restrictions are likely to reduce consumer welfare. First, they reduce consumer choice and increase the price of closing services for consumers who otherwise would hire a non-attorney. Second, to the extent that non-attorneys

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7 *See* letter from the Justice Department and the FTC to New York Assemblywoman Helen Weinstein (Jun. 21, 2006); letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass.n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al*. (Jun. 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Ass'n (Jun. 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htmhttp://www.ftc.gov/be/V040017.pdf; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), *available at* http://www.ftc.gov/os/2003/07/georgiabrief.pdf and http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm. Advocacy letters are available at http://www.usdoj.gov/atr/public/comments/comments.htm and http://www.ftc.gov/be/advofileother.htm.

8 In *United States v. Allen County Bar Ass'n,* the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyer examinations of title abstracts and had induced banks and others to require lawyer examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). In *United States v. N.Y. County Lawyers Ass'n*, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with lawyers. No. 80 Civ. 6129 (S.D.N.Y. 1981). *See also United States v. Coffee County Bar Ass'n*, No. 80-112-S (M.D. Ala. 1980).

provide a competitive constraint on attorney pricing, these restrictions also are likely to raise the price that consumers who prefer to hire an attorney pay for closing services. At the same time, the Agencies are not aware of any evidence of widespread consumer harm due to non-attorneys performing tasks related to real estate closings. Thus, the harm from restricting competition in the provision of closing services is not offset with any benefits that consumers value.

3. Analysis of Attorney Advertising Restrictions

Advertising is an indispensable component of any free enterprise system because it helps consumers compare prices and quality offered by competing suppliers.[9] When it is difficult for consumers to find such information, firms have less incentive to compete. Theory and empirical evidence have shown that when consumers face large costs to discover market prices, firms charge higher prices and enjoy larger margins.[10] Likewise, empirical research has found that restrictions on attorney advertising and on other professional advertising lead to higher prices and have either a negative or no effect on quality.[11]

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9 *Bates*, 433 U.S. at 364; *See also In the Matter of Felmeister & Isaacs*, 104 N.J. 515, 523-24 (1986) *citing* Report of the Staff of the Federal Trade Commission, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984) (FTC Report).

10 *See, e.g.*, G. Stigler, *The Economics of Information*, 64 J. Pol. Econ. 213, 220 (1961). In addition, several economists have developed models that predict firms will be able to charge higher prices when consumers face high costs of obtaining marketplace information. *See, e.g.*, Dale O. Stahl, *Oligopolistic Pricing with Sequential Consumer Search*, 79 AM. ECON. REV. 700 (1989); Kenneth Burdett & Kenneth L. Judd, *Equilibrium Price Dispersion*, 51 ECONOMETRICA 955 (1983); John Carlson & R. Preston McAfee, *Discrete Equilibrium Price Dispersion*, 91 J. POL. ECON. 480 (1983); Steven C. Salop & Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUDIES 293 (1977). Using these models as a theoretical framework, several authors have found evidence that the Internet has led to lower prices by reducing consumers' costs of comparing prices. *See, e.g.*, Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGM'T SCIENCE 563 (2000); James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), *available at* http://www.ftc.gov/be/workpapers/ wp283.pdf. This comports will theories that restrictions limiting truthful attorney advertising reduce the incentive for attorneys to compete. H. Beales, *et al., The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 492 (1981); *see also* R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 670 (1977).

11 *See* Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 Sup. Ct. Econ. Rev. 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions and citing, among others: James H Love and Jack H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, 3 Intl. J. Econ. Bus. 227 (1996); J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National* Advertising 8-9 (1993); R.S. Bond, J.J. Kwoka, J.J. Phelan, and I.T. Witten, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980); J.F. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (Washington, D.C.: American Enterprise Institute, 1976); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 Econ Inq 490, 504 (1976); James H. Love, et al, *Spatial Aspects of Competition in the Market for Legal Services*, 26 Reg Stud 137 (1992); Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market*, 26 Applied Econ 1177 (1994)); In *the Matter of Polygram Holdings, Inc., et al*.; FTC Docket No. 9298, at 38 n.52 (F.T.C. 2003), *aff'd* 416 F.3d. 29 (D.C. Cir 2005)(same). *See also* Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 American Bar Found. Res. J. 179, 184 (1979) (discussing that attorney advertising results in the phenomena of increased consumer requests for legal services coupled with lower prices and higher quality of services, particularly in specialized areas of the law); *see* Frank H. Stephen & James H. Love,

Recognizing the value of advertising in promoting competition and consumer choice, the FTC has a long history of advising regulators not to adopt overly broad attorney advertising restrictions. The FTC staff believes that although deceptive advertising by lawyers should be prohibited, restrictions on advertising and solicitation should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information.[12]

The FTC's analysis is consistent with the U.S. Supreme Court's treatment of advertising restrictions under the First Amendment, which encourages the free flow of truthful and non-misleading information to consumers.[13] The U.S. Constitution does not protect deceptive and misleading advertising, but truthful advertising is protected and any restrictions limiting such advertising must advance a significant state interest and be carefully tailored to advance the state interest.[14] Following this principle, the Supreme Court has struck down prohibitions on attorney advertising that did not have sufficient evidence to support the state interest or that were not narrowly tailored to prevent the specific consumer harm.[15]

Regulation of the Legal Professions, 5860 Encyclopedia of L. & Econ. 987, 997 (1999), *available at* http://encyclo.findlaw.com/5860book.pdf (empirical studies demonstrate that restrictions on attorney advertising have the effect of raising fees).

12 *See, e.g.*, Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), *available at http://www.ftc.gov/be/V070002.pdf;* Letter from FTC Staff to Louisiana State Bar Association (Mar. 16, 2007), *available at http://www.ftc.gov/be/V070001.pdf;* Letter from FTC Staff to Office of Court Administration of the New York Unified Court System (Sept. 14, 2006), *available at http://www.ftc.gov/os/2006/09/V060020-image.pdf;* Letter from FTC Staff to Committee on Attorney Advertising, the Supreme Court of New Jersey (Mar. 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf; *see also, e.g.*, Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), *available at* http://www.ftc.gov/be/v020023.pdf. In addition, the staff has provided its comments on such proposals to, among other entities, the Supreme Court of Mississippi (Jan. 14, 1994); the State Bar of Arizona (Apr. 17, 1990); the Ohio State Bar Association (Nov. 3, 1989); the Florida Bar Board of Governors (July 17, 1989);New Jersey Supreme Court's Committee on Attorney Advertising (November 9, 1987), and the State Bar of Georgia (Mar. 31, 1987). *See also* Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

13 *See, e.g.*, Virginia *Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (holding that the free flow of commercial information is indispensable to preserve a predominantly free enterprise economy); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561-62 (1980) (advertising not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information).

14 *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (1980)*; see also Florida Bar v. Went for It*, 515 U.S. 618, 632 (1995) (restrictions on commercial speech must be reasonable and narrowly tailored to achieve the state's desired objective).

15 *See, e.g., Zauderer v. Office of Disciplinary Counsel Of the Supreme Court of Ohio*, 471 U.S. 628, 638 (1985) (restrictions rooted on bald assertions without evidence of deception were struck down), *see also Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 106 (1990) (rejecting for lack of evidence of deception an argument that a form of advertising was misleading) s*ee also Bates*, 433 U.S. at 372-74 (same); *Mason v. Florida Bar*, 208 F.3d 952, 956 (11th Cir. 2000) (explaining that the state must demonstrate that the harms it recites are real and that its restrictions will alleviate the identified harm).

4. Recent Federal Trade Commission Staff Guidance on Attorney Advertising

In 2006 and 2007, the FTC staff offered several state attorney regulators guidance on proposed attorney advertising policies that risk harming consumers. Below is an analysis of specific restrictions found in these proposals.

a. Comments and Amicus Curiae submitted to New York, Louisiana, New Jersey, and Florida Regarding Proposed Rules Governing Attorney Advertising

In June 2006, the New York Unified Court System promulgated draft rules to impose significant restrictions to attorney advertising, and, in October, 2006, the Louisiana State Bar, following the model of the rules proposed in New York, circulated similar proposed restrictions. The New Jersey Supreme Court's Committee on Attorney Advertising proposed a rule that would restrict the use of testimonials, and the Florida Bar proposed a rule that would require, among other things, regulatory screening of certain forms of advertising. Subsequently, the New Jersey Supreme Court's Committee adopted an attorney advertising ethics opinion enforcing a prohibition against comparative advertising. In these cases, the FTC and the FTC staff were concerned that several provisions in the proposals were overly broad, would restrict truthful advertising, and may adversely affect prices paid and services received by consumers. The FTC staff submitted comments to the policymaking body in each jurisdiction, and the FTC filed a Brief Amicus Curiae in New Jersey, recommending significant changes to the proposed rules.[16]

The FTC filings identified four main areas of concern in the proposed rules. First, in New York and Louisiana, many of the proposed rules related to the style and content of media advertising but did not necessarily target deception. Specifically, the rules sought to prohibit voice-overs or images of non-attorney spokespersons recognizable to the public, depictions of courtrooms or courthouses, portrayals of judges and lawyers by non-lawyers, portrayals of clients by non-clients, re-enactments of events or scenes or persons that are not actual, and Internet pop-up advertisements. Such techniques can be useful to consumers in identifying suitable providers of legal services, however, and are effective ways to reach consumers. The FTC staff comments advised that the proposed constraints would prevent the use of common advertising methods that were unlikely to hoodwink unsuspecting consumers, who are usually familiar with them. Concerns that, for example, actors may be more poised or otherwise more appealing than actual clients could be addressed by requiring clear and prominent disclosures that the advertising used actors in lieu of a prophylactic ban on such techniques.

Second, the FTC filings expressed concern about limitations on comparative advertisements. In 2006, the New Jersey Supreme Court Committee on Attorney Advertising, applying a rule that bans all comparative advertisements, issued an ethics opinion banning attorneys from disclosing their ranking by certain attorney rating programs. Comparative advertising, including certain attorney ranking programs,[17]

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16 *See* Letter from FTC Staff to Office of Court Administration of the New York Unified Court System (Sept. 14, 2006), *available at http://www.ftc.gov/os/2006/09/V060020-image.pdf;* Letter from FTC Staff to Louisiana State Bar Association (Mar. 16, 2007), *available at http://www.ftc.gov/be/V070001.pdf;* Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), *available at http://www.ftc.gov/be/ V070002.pdf;* and Letter from FTC Staff to Committee on Attorney Advertising, the Supreme Court of New Jersey (Mar. 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf; *See also* Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, *available at http://www.ftc.gov/opa/2007/05/fyi07244.shtm.*

17 *See* Brief *of* the Federal Trade Commission as *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, *supra* note 13, at 3-4, 12-14 (ratings programs serve a demand of consumers seeking to compare lawyers on price and quality).

can be a source of useful information to consumers and thus assist them in making rational purchase decisions, encourage competition, spur innovation, and lead to lower prices in the marketplace. Similarly, the proposed rules in New York, Louisiana and Florida sought to prohibit comparative advertising unless such claims can be objectively verified. The FTC filings advocate that although requiring that material claims be substantiated can serve consumers by helping to ensure that claims are not misleading, if substantiation is demanded for representations that, though not misleading, concern subjective qualities that are not easy to measure (i.e. the "friendly law firm") and for which substantiation may not normally be expected, then messages that consumers find useful may be unnecessarily barred.

Third, the proposed rules in New York and New Jersey would prohibit paid endorsements and testimonials and would place significant restrictions on testimonials and endorsements from existing clients. Testimonials and endorsements can convey valuable information to consumers and spur competition and thus should not be prohibited outright unless they are deceptive. There can be risk of deception when, as explained in the FTC's Endorsement Guides, there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.[18] In such cases, however, the Commission suggests that requiring disclosure rather than prohibiting such endorsements protects consumers while encouraging the truthful flow of information to consumers.

Lastly, the proposed rules in New York, Louisiana, and Florida required that copies of all or some advertisements and solicitations be placed on file with the bar or court, and in Louisiana and Florida, the proposals sought to require that attorneys receive prior or concurrent approval before promulgating the advertisements. The FTC staff expressed concern that, as with other regulations on attorney advertising, these types of requirements likely raise the cost of doing business for attorneys and thus likely raise prices for consumers without providing countervailing benefits to consumers.

Also, as expressed in the Louisiana and Florida comments, competitive concerns arise when state bars, composed of competing attorneys, regulate and screen attorney advertising. Legitimate and fair industry self-regulation, when implemented properly, can provide efficiencies and other benefits to consumers.[19] However, there are risks to competition when one group of competitors is charged with regulating another. Attorneys on the advertising committee may have the incentive, and would have the ability, to limit advertising by competitors to soften competition rather than to protect consumers. The FTC staff comments recommended that state bar associations forego the filing and screening rules in favor of enforcing the general prohibition against deceptive and misleading claims through sanctions for violations.

Following the FTC advocacy, the New York Unified Court system promulgated revised rules incorporating nearly all of the FTC staff's recommendations.[20] The rules proposed in New Jersey, Louisiana and Florida are still pending before the respective policymaking bodies in those jurisdictions.

b. Advocacy to the Texas Bar Regarding Restrictions on On-Line Attorney Referrals

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18 *See* Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.5.

19 See Deborah Platt Majoras, "Self Regulatory Organizations and the FTC," Address to the Council of Better Business Bureaus (April 11, 2005), available at http://www.ftc.gov/speeches/majoras/050411selfregorgs. pdf.

20 The revised Rules of the Unified Court System of New York (with red-lined changes comparing the initial draft) are available at http://www.nycourts.gov/rules/attorney_ads_amendments.shtml.

In May 2006, the FTC staff filed comments with the Professional Ethics Committee of the State Bar of Texas as it considered whether rules prohibiting attorneys from paying for referrals precluded participation in on-line legal matching services.[21] Presently, many states require attorneys who wish to obtain legal referrals to do so only through certain approved programs, typically those operated by the local or regional bar associations, thus giving the bar association a near monopoly in providing referrals. Several businesses have begun to provide Internet-based attorney/client matching platforms as a competitive alternative to such approved referral services.[22]

Typically, these services recruit licensed attorneys who pay a fee to participate. In their applications, member attorneys may disclose their areas of practice, years of experience at the bar, affiliations, and any other pertinent information. The client can examine the service's Web site to learn how attorneys become members of the service and how the service can help the client identify an attorney to satisfy his or her legal needs. If the client would like to seek legal assistance from a member attorney, he or she usually completes a short on-line questionnaire describing the legal issues, the practice area of the attorney being sought, the amount of experience desired for the retained attorney, the geographic region or jurisdiction of the representation, and the requested fee range. The service sends the questionnaire to attorneys in the designated practice area, and interested attorneys may send a response, which typically contains information such as fees, experience, and other qualifications. With this information, the client determines which attorneys – if any – to contact, and initiates the contact. In some instances, the client's application may invite an attorney to contact a client directly.

Compared to many bar-operated referral programs, the on-line legal matching format allows consumers to compare more easily the price and quality among several competing attorneys. By lowering consumers' costs of obtaining information about price and quality of legal services, online legal matching services are likely to allow consumers to pay lower prices and/or obtain higher quality legal services than they would have had they used their next best alternative means for identifying a legal service provider.[23]

Following the FTC staff advocacy, the Texas State Bar adopted an opinion that allows attorneys to participate in on-line legal matching services.[24]

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21 *See* Letter from the Federal Trade Commission to the Professional Ethics Committee of the Texas State Bar, May 2006; http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf

22 Although not all services are identical, many share the same general business model. *See, e.g*, LexisNexis/Martindale Hubbel's Attorney Match (http://www.lawyers.com/find_a_lawyer/am/am_aop_list.php); Casepost (http://www.casepost.com); LegalConnection (FindLaw) (http://www.legalconnection.com); LegalMatch (www.legalmatch.com); and Legal Fish (www.legalfish.com).

23 A pair of studies find that consumers who use an on-line service that sends consumer requests to an affiliate car dealer that sells cars matching the consumer's inquiry pay approximately 2 percent less for the same car compared to those who did not. Also, the authors found that those who were likely to be poor negotiators were more likely to use these services to increase their bargaining power. *See* Fiona Scott Morton *et al.*, *Internet Car Retailing*, 49 J. INDUS. ECON. 501 (2001); Florian Zettelmeyer *et al.*, *Cowboys or Cowards: Why are Internet Car Prices Lower?* (2005), *at* http://flomac.haas.berkeley.edu/~florian/Papers/selection.pdf.

24 *See* Tex. St. Bar Eth. Op., No. 573, *available at* http://www.texasbar.com/Template.cfm?Section=texas_bar_journal1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15929

5. DOJ Lawsuit Against Anticompetitive American Bar Association Law School Accreditation System

In June 1995, the DOJ sued the American Bar Association ("ABA"), alleging that the ABA, in its accreditation of law schools, restrained competition among professional personnel at ABA-approved law schools, by fixing their compensation levels and working conditions. The complaint also alleged that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather than setting minimum standards for law school quality and thus providing valuable information to consumers, which are legitimate purposes of accreditation, the ABA at times acted as a guild that protected the interests of professional law school personnel. ABA approval was a valuable asset to law schools, as over 40 states required graduation from an ABA-approved school to qualify to take the state bar exam, and the ABA is the only agency the US Department of Education recognizes as a law school-accrediting agency. In 1996, the US District Court entered a modified consent decree, which prohibits the ABA from misusing its powers as the law school-accrediting agency to restrain competition among professional personnel at ABA-approved law schools. The decree bars the ABA from fixing faculty salaries, refusing to accredit schools simply because they are for-profit, and refusing to allow ABA-approved law schools to accept credits from schools that are state-accredited but not ABA-approved.

In June 2006 the court found that the ABA had violated multiple provisions of the 1996 consent decree, following a petition filed with the court by DOJ requesting that the ABA be held in civil contempt. The ABA acknowledged the violation of provisions that required it to:

- annually certify that it had complied with the terms of the final judgment;
- provide proposed changes to accreditation standards to the DOJ for review;
- provide briefings to certain ABA staff concerning the decree's requirements;
- obtain annual certifications from certain ABA staff that they agree to abide by the decree and are not aware of any violations;
- ensure that no more than half of the membership of the ABA's Standards Review Committee be comprised of law school faculty; and
- include on the on-site law school evaluation teams, to the extent reasonably feasible, a university administrator who is not a law school dean or faculty member.

The district court ordered the ABA to comply with the 1996 judgment until its expiration and ordered the ABA to compensate the DOJ for attorneys' fees and costs related to the investigation of the violations. *U.S. v. American Bar Ass'n*, 2006-1 Trade Cases ¶ 75,295, D.D.C., June 26, 2006.

EUROPEAN COMMISSION

1. Background

The Commission's work to reform anti-competitive self- and State-regulation in the legal services area is well known[1]. The regulation of lawyers/advocates and notaries has been examined in detail by the Commission as part of its work to reform anti-competitive regulation in the professions, including through an independent study carried out by the Institute for Advanced Studies in Vienna (IHS). The results of this analysis are set out in the two Commission reports on the subject of competition in professional services. As reported at the Working Party 2 roundtable on real estate transactions in February 2007, the Commission has decided to do a further in-depth study into the EU conveyancing services market (services associated with buying and selling property), a market which is largely reserved in the EU27 countries to notaries and/or lawyers. This will look in detail at the effect of regulation of the legal professions on the functioning of this market. The study has yet to be finalised and so is not reported on further in this paper. This paper rather reports on the results of the Commission's work to date to reform the legal professions in the EU27.

2. Regulation of legal services

The legal professions in the EU are subject to national State-regulation in one form or another as well as self-regulation, national codes of conduct and rules of professional bodies. In the absence of harmonisation at EU level of the regulation of legal services, Member States are free to decide how much to leave to self-regulation by professional bodies or how much to regulate directly through State regulation. However, under the loyalty obligation arising from the EC Treaty they must ensure that both types of regulation are compatible with the EC Treaty rules on competition and the internal market.

It is normally claimed that regulation has been introduced to safeguard public interests. The regulatory environment is linked to the fact that quality standards are important because of the potential serious consequences for the user when legal services are not of the necessary quality and that the necessary standards can not be applied *ex post* because of the quasi simultaneity of production and consumption of the service. It would be wrong therefore to imply that regulation is unnecessary and the Commission's agenda is not one of deregulation. But what is apparent is that in spite of a rapidly changing world, the regulatory structure for the legal professions has nevertheless evolved relatively little over time. In the Commission's view it is certainly not clear that existing regulations in this sector (as with other liberal professions) are always the most efficient in meeting the public interest requirement or that they take account of developments in the level of education of the population or better access to information through for instance the Internet. Against this background the Commission has called on public authorities in the Member States to look again at the current regulatory set up in the legal professions and to re-examine regulations using a proportionality test to see whether they are still required at all or whether the same objectives could not be met with less burdensome requirements and which inhibit competition to a lesser extent. This means that the underlying motivation for the regulation - a clearly defined public interest

[1] All relevant documents can be found on the Commission's Liberal Professions website: http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html

objective - be made explicit, its ability to meet that objective at all be examined and alternative forms of regulation which would be less restrictive of competition and the internal market freedoms (freedoms of establishment and to provide services) be assessed and implemented. The European Parliament in its Resolution of 12 October 2006, recognising the economic importance of this sector to the EU and its potential for new jobs and growth, wholly endorses Commission efforts to remove unjustified restrictions on competition thus paving the way for greater competition.

3. Market entry regulation

The most common form of entry regulation is that of a qualification requirement. At a minimum, this bars those without the qualification from claiming a certain status (e.g. lawyer) or setting up as if they had obtained it. In most cases, certain forms of activities are reserved to those that have acquired the necessary qualifications. For instance, the ability to plead in court is by and large a reserved area for lawyers across the EU27, while conveyancing services, wills and probate and company formation are areas commonly reserved to Latin notaries.

It is the norm in the EU27 that those wishing to enter the legal professions and gain the title of lawyer and notary must have a recognised law degree, have undertaken relevant professional qualifications and have fulfilled the prerequisite period of practical training. A particular problem in some EU Member States (e.g. Poland) seems to be access to the practical training element which by its very nature has to be provided by incumbent firms. There seems to be capacity problems with too few training places available to properly service the market and this is preventing young lawyers from entering.

Economic needs tests that limit the number of outlets or practitioners in the absolute are the most restrictive of competition. This practice is widespread in those EU Member States with the Latin notary profession (with the exception of the Netherlands where this requirement has been abolished). The number and location of notaries is tightly controlled according to certain objective criteria. This is based on the premise that notaries are holders of public office and exercise public authority. So it follows their numbers too should be controlled as the State would control the number of judges, registrars or other civil servants. The Commission does however not accept the contention that notaries activities are the exercise of public authority and the question is currently at stake in a number of EC Treaty infringement procedures the Commission has brought under the EC internal market rules (freedoms of establishment and to provide services) against nationality clauses to be found in several Latin notary countries, under which only nationals of the respective country are eligible to become notaries. Rather, the Commission deems that notary activities are essentially economic in nature and so fall within the economic articles of the EC Treaty, including the EC competition and internal market rules. As a consequence the notary profession should be treated no differently than any other profession and absolute limits on numbers subjected to the utmost scrutiny.

Other reasons proffered for controlling the number of notaries include ensuring that all appointed notaries have sufficient business to keep their practices going, which is highly questionable in a market economy. The other key reason is to ensure an adequate supply of services countrywide (i.e. "universal services") even in areas which might not be economically viable. This may however be reached by far less restrictive and anti-competitive means – for example, if certain services continued to be reserved to notaries only then the State could intervene directly (e.g. by paying income supplements) to notaries wishing or being obliged (e.g. to ensure universal services) to establish themselves in less economically viable areas. Of course there is also the option of opening up the reserved rights (e.g. conveyancing) to other suitably qualified and licensed professionals which would then see other providers entering the market. This is discussed further below under reserved rights.

4. Reserved rights

The key areas reserved to the legal professions in the EU are in-court services and the giving of legal advice. A range of services probably of most interest to consumers and small business are also currently reserved to Latin notaries in many EU Member States. These include conveyancing, wills and probate and company formation. These rights are longstanding and in the case of notaries have to our knowledge never really been put into question.

Some Member States have seen the clear benefits from reducing the range of reserved tasks and in so doing have created new professions (e.g. UK licensed conveyancers) and innovative ways of providing services thus providing a wider choice and variety of services for consumers. The Commission has therefore been calling on Member States to critically review such rights and the Commission's new study into the EU conveyancing services market looks in detail at this hitherto neglected question in this important market.

5. Market conduct regulation

In addition to this basic form of regulation, many others may also affect the exercise of a profession. A commonly expressed motivation for regulation of the legal profession is that of asymmetric information between the supplier of the service and the client. According to this line of reasoning, the particular training required means that those practicing as a legal profession have much greater knowledge than the customer of the service, which could lead to abuse. At the minimum, it is claimed that the customer will not be able to judge quality ex ante since production and consumption of the service take place simultaneously. Asymmetric information is however endemic in economic life and this does not necessarily preclude the customer from making an informed judgement. The most direct method to overcome such problems is by providing the consumer with the necessary information to make a judgement, and advertising and information giving have a key role to play in this. Currently however a number of Member States have a total ban on any advertising contained in State law and in many others proactive advertising (i.e. cold calling or canvassing), the publishing of price lists and comparative advertising is banned.

Territorial restrictions exist in some Member States (e.g. Greece) whereby lawyers can only generally practice in the district covered by the regional bar association in which they are registered. The ability to set up under any legal form, including a public company, or for a law firm to be owned and managed by persons or legal persons outside the legal profession, is also restricted in many. The restriction on legal forms is in some cases is linked to the liability incurred and to the financial ability to compensate for damages, as well as the need to ensure the independence of the legal profession. These types of rules however act to restrict the possibility of providing a complete service to consumers of a specific product (e.g. conveyancing services by real estate agents, in-court legal representation by insurance companies). Such ownership restrictions also inhibit the introduction of more professional management and economies of scale in the provision of services.

Practising in conjunction with other professions (i.e. forming multi-disciplinary practices) is barred in nearly all the EU27 often due to concerns about compromising the independence of lawyers and notaries.

In many Member States fee regulation still exists for legal services, which often takes the form of State-set fixed prices. In Latin notary countries fee regulation goes hand in hand with limits on the number of notaries and State-set fixed prices exist for notary services in all countries with the Latin notary system except the Netherlands and more recently Italy too who has also wiped away pricing regulation. Even for lawyers some Member States still maintain State-set minimum fee scales especially for in-court services (e.g. Germany, Greece) arguing that these are needed to maintain quality standards and provide a guide to

judges when awarding costs. Even where fixed prices have been wiped away some Member States maintain recommended fee scales for lawyers services which are in some cases set by the professional body rather then the State (e.g. Spain). These are justified on the basis of being a guide for consumers and judges, as well as a fall back in cases of where no agreement on fees is reached between lawyer and client. The Commission has and continues to argue that both fixed and recommended fee scales should be abolished at the earliest opportunity as these are the most restrictive and anti-competitive form of regulation and that, for example, relevant information on the costs of legal services for consumers could be provided through alternative means far less restrictive of competition (e.g. publication of historical and survey-based price information by independent parties (such as consumer organisations)).

6. Application of competition law

The application of the EC competition rules to the legal services profession is explained in detail in the Commission's 2004 and 2005 reports on competition in professional services and so is not repeated here. This covers application of the EC competition rules to self-regulation by professional associations and bodies (e.g. rules contained in professional bodies' codes of conduct) and against State-set restrictions (i.e. those restrictive rules contained in State law).

With the modernisation of EC competition, law enforcement action against restrictive self-regulation by professional bodies is now generally undertaken at national level by national competition authorities. Action has been taken by several national competition authorities under the EC competition rules against advertising restrictions contained in self-regulatory codes of conduct, including bans on comparative advertising and advertising on the internet with regard to lawyers. The Commission itself took enforcement action against the Belgian Architects' Association using the EC competition rules against the use of recommended prices in 2004. It has not taken any direct enforcement action since.

The European Court of Justice (ECJ) recently had cause to consider the question of the compatibility of State-set minimum fixed prices with the EC competition rules for lawyers services (both in and out-of-court services) in Italy in the *Cipolla* (C-94/04) and *Macrino* (C-202/04) cases. Both joined cases are preliminary rulings in reply to questions from Italian courts. The first three questions in *Cipolla*, and the sole question put in *Macrino*, ask essentially whether EC competition law (Articles 10, 81/82 EC) precludes a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body such as the Italian Lawyers' Association, a scale fixing a minimum fee for members of the legal profession and from which there can generally be no derogation in respect of either services reserved to those members, or those such as out-of-court services, which may also be provided by any other economic operator not subject to that scale. In this regard, the ECJ concludes that there is no State liability under EC competition law (Articles 10, 81/82 EC), thus re-affirming its earlier judgment in *Arduino* of 2002 (C-35/99). In line with the *Arduino* judgment, the ECJ argues (in paras 48-52) that the State is not liable under these provisions for having delegated its regulatory powers to the Italian Lawyers' Association because the State retains the power to make decisions of last resort (i.e. to amend and enact the draft submitted by the Association) and to review the implementation of the fee scale. Moreover, for the same reasons, including the fact that the Italian Lawyers' Association produces a non-binding draft only, the ECJ concludes (in para 53) that the State is likewise not liable under Articles 10, 81/82 for requiring, encouraging or reinforcing practices by that Association which would be contrary to Articles 81 or 82 EC.

However, the ECJ does find (in paras 58-59) that State-set minimum fixed prices for Italian lawyers services do amount to a restriction within the meaning of Article 49 EC on the freedom to provide services since that legislation makes access to the Italian legal services market more difficult for lawyers established in other Member States, in particular because these lawyers cannot engage in competitive pricing below the fixed minimum level. The ECJ also points out (in para 60) that the users of legal services in Italy are deprived of the benefits of unrestricted price competition. The ECJ leaves it (in paras

61 ff) to the national court to determine whether, and to what extent, this restriction can be justified on the basis of overriding requirements relating to the public interest, such as the protection of consumers and the proper administration of justice. In any event, the ECJ makes clear (in para 64) that any national measures (e.g. State fixed prices) designed to secure these public interest objectives must be subjected to a strict two step proportionality test, firstly, to ensure such measures are suitable at all for securing the attainment of the objectives pursued and, secondly, that they do not go beyond what is necessary in order to attain these objectives.

7. Reforms made

There have been some very exciting developments in EU Member States during 2006 where Governments themselves have taken action to reform anti-competitive legal services regulation and it shows the increasing impact of the European Commission's and national competition authorities' work to reform this sector. These include:

- The package of deregulation measures adopted in summer 2006 by the Italian Parliament in professional services is a land mark development (based on the so-called "Bersani" decree). The changes made eliminate certain serious restrictions to competition in a range of professions in Italy, including the legal professions. The restrictions to be eliminated include State imposed minimum tariffs (maximum tariffs are however maintained), advertising and business structure restrictions. Consumer groups have applauded the measures. Further reforms are under discussion in the Italian Parliament, which will see the re-organisation of professional associations, including conditions for access to the professions and reform of their ethical/deontological rules.

- In Spain, discussions have started between the Government, the national competition authority and certain professional associations about the possible review of the existing system of recommended tariffs whereby the bar associations set recommended fee tariffs in their codes of conduct. One of the regional bar associations has recently, upon its own initiative, abolished the practice of providing recommended fee tariffs. These are significant developments. It is hoped that the Government will propose amending the State legislation which enables all professional bodies to recommend fees to their members.

- Then there is the recent biennial report of 5 July 2006 by the German “Monopolkommission” (Monopoly Commission), an independent advisory body established by German competition law, which recommends wide scale reform of professional services in Germany. It calls for the abolition of State fixed minimum fees for in-court work by lawyers. It also recommends the removal of profession specific advertising restrictions and the relaxation of business structure restrictions for lawyers. The German Government will respond formally to these recommendations later this year.

- And in the UK, the Government has presented its Legal Services Bill to Parliament. This is the biggest ever shake-up of legal services regulation. It introduces a new regulatory structure which will see: the creation of a new regulatory set up for legal services with a new Legal Services Board (LSB) at its head with significant powers; the separation of the representative and regulatory functions of the front line professional bodies; and the creation of a single new statutory complaints body (The Office for Legal Complaints) with powers to handle complaints that are not satisfactorily resolved “in-house” by the legal service provider and to award redress. It will remove existing restrictions on the business structures in which legal services can be provided thus allowing outside management or ownership of law firms and

enabling lawyers and non-lawyers to work together. The changes have been welcomed by the Legal Ombudsman and consumer organisations.

Professional services reform is also now firmly embedded in the wider Lisbon and better regulation agendas of the EU and the Commission is urging Member States to tackle this as part of their action plans to meet the Lisbon objectives of greater economic growth and competitiveness. For its part the Commission will continue to work towards the goal of ridding the EU legal professions of disproportionate anti-competitive regulation.

8. Conclusion

The Commission would be happy to answer any questions on this paper.

BRAZIL

1. Introduction

The Brazilian experience in improving competition in liberal professions is quite recent and becomes even more incipient when it comes to legal professions. The relatively low revenue owned by Brazilian legal firms, the common sense shared on the availability of options amongst these service providers, the traditional association of market with trade businesses only and the historic motivation for antitrust legislation (which have initially targeted huge conglomerates) – have contributed to leave aside such services from competition analyses for years. Such understanding that law firms belong to a world apart and are subject to peculiar provisions has led to the explicit prohibition to bear mercantile characteristics or to adopt a trade name. However, besides old-fashioned, the so-called dissociation from the aim to profit must not mislead the application of the antitrust principles to such ordinary economic activities.

Aware of that, the Brazilian antitrust authority – the Administrative Council for Economic Defense ("CADE") – is keen on the debate about competition restrictions in the legal professions promoted by the OECD so as to improve its pro-competitive mechanisms.

2. Overview

The Brazilian Constitution regards lawyers as essential to the administration of justice and their work is deemed a public service with a social role or a *munus publicum*. As case laws are built, their task creates positive externalities, since third parties will not be charged for the benefits they will harvest from a solid precedent. In this sense, there is an overall interest in that lawyers deliver good work in court.

There are 547.037 lawyers in Brazil. Like other liberal professions, the legal one is regulated so as to guarantee the quality of the service. Such regulation can take different aspects, but price fixing, educational requirements and compliance with a code of conduct are certainly the most relevant for our analysis. The need for regulation in legal practice and other services alike is usually attributed to a market failure known as asymmetric information. Asymmetric information is characterized by the existence of privileged information, which is essential to the dealing but accessible to one party only. Such failure can inhibit transactions if consumers believe that lawyers behave in an opportunistic fashion.

In this sense, in order to avoid misleading advertisements, the bar gives little room for self-promotion, prohibiting (i) collective mailing, (ii) announcements on TV, radio and outdoors, (iii) mentioning firms that the lawyer has held or favor rulings accomplished. Moreover, it is expressly forbidden to make explicit or implicit reference to the fees. The rules are so restrictive that however expensive the announcement, it might become innocuous.

A certain degree of knowledge in this scenario is attained by area-specific publications and individual assessment, which are only feasible to individuals and corporations that regularly make use of these services. Such corporations usually have access to preferred provider lists, which, narrowing their lists of outside providers, lead them to a much shorter learning curve, lower negotiated fees and shorten negotiation costs. But even regular clients do not possess the thorough insight into how attorney fees are stipulated. Regulation aims at avoiding that such asymmetry may lead to an abuse from the professional.

Although regulation is needed, independence is the quintessence of the practice. Hence why regulation is carried out by a private association with public ends.

Legal practice in Brazil is generally disciplined by a federal law – Law 8906/94 – and regulated by rules that the national bar association – the OAB – issues with legally ensured exclusivity rights. According to the law, it is a precondition for the validity of bylaws and social contracts that they be executed by a regular lawyer. Even some public firms can only be performed by acting lawyers who, nonetheless, must have also been approved in a particular entrance exam for that specific public career. Moreover, legal advisory as well as the right to plea in court – except for the *habeas corpus* – are legal monopoly of attorneys regularly enrolled in the bar. Therefore, there should be no competition between Brazilian and foreign lawyers.

Yet this is not entirely true. International firms compete in some degree with Brazilian lawyers in legal advisory and are not subject to the enforcement of the Brazilian bar disciplinary sanctions. The truth is that especially in financial matters, advisory does not respect the boundaries established by each country's bar associations[1].

Legal exclusive rights are justifiable when, due to the asymmetry of information, it is mandatory to guarantee a minimum level of quality in legal services. In some circumstances professionals from other areas can be even more skilled than attorneys-at-law to provide the defense of a party in the lawsuit. Actually, in such cases, acting simply as experts may be more costly than allowing them litigate *in lieu* of lawyers.

It is highly recommended that other professionals could advise in areas whose knowledge would demand from the lawyer another graduation, specialization or constant appeal to outside experts. In such cases, entry barriers are even deeper and the market, more concentrated. Not less important, more than a quantitative restriction, entry barriers might create qualitative deficit, since other professionals are able to provide more effective defense in their areas of expertise. In countries where such competition already exists, like Denmark[2]: *"(...) lawyers compete against other advisers. Lawyers meet competition from other advisers in the 85 percent of their turnover that is not subject to the monopoly of representation. Accountants advise on tax legislation, business establishment etc., estate agents advise on legal matters regarding property, and a number of organisations such as e.g. the Danish Federation of Motorists offer standard contracts. In particular, lawyers meet competition from other advisers when the clients have low willingness to pay and when the task is not too complex. In the area of tax legislation, it is possible to calculate market shares for various advisers in complaints cases where the state offers full or partial cost redemption14. Lawyers have a market share of 20 percent while accountants have a market share of 65 percent in the administrative part of the complaints system, i.e. before the cases reach High Court or Supreme Court. There is clearly competition between lawyers and accountants in tax complaints cases."*

Figures brought by the report prepared by Copenhagen Economics also show preference for non-legal experts when the service demanded is limited to advisory and does not include court proceedings:

1 http://conjur.estadao.com.br/static/text/49231,1

2 http://www.copenhageneconomics.com/publications/The_legal_profession.pdf.

Table 1. Market Shares For Different Advisers On The Tax Area

TYPE OF ADVICE	LAWYER	*ACCOUNTANT*	*OTHERS*
General tax advice	Almost 0%	Almost 100%	
Complaints (administrative part, not representation monopoly)	20%	65%	15%
Disputes (High Court and Supreme Court, representation monopoly)	100%	0%	0%

Source: http://www.copenhageneconomics.com/publications/The_legal_profession.pdf.

Surmounting existing restrictions should follow very strict rules, though. The unreasoned absence of a law graduate lawyer may lead to wrong rulings and thus jeopardize the positive externalities caused by the good work delivered by lawyers today.

Legal firms in Brazil can have no other object than the legal practice and cannot allow a non-lawyer partner. As already mentioned, such firms are expressly forbidden to bear mercantile characteristics or adopt trade name. Since legal practice does not demand prohibitive costs, the presence of an expert in administration is not relevant for a firm to be functional.

Copenhagen Economics enlists lawyer's independence and confidentiality as two reasons of utmost importance for keeping lawyers as the sole owners of legal firms. Under oath privileges and professional morals could be jeopardized by the access of other professional to classified information they had no obligation to safeguard. Confidentiality obligations are set forth in the conduct code lawyers should stand by.

In Brazil, the practice is subject to quasi-regulation. Quasi-regulation means that the regulating authority is a class disciplinary body where lawyers elected by their peers are in charge of it. Quasi-regulation is also a prerequisite for independence, since it prevents conflicts of interest in cases where the Administration is a party to the lawsuit.

In relation to the "lack of enforcement" that is usually associated with quasi-regulation, such disadvantage is not applied to the legal professions, where enforcement is achieved by means of the compliance with the code of conduct. Non compliance would affect directly the lawyer's main asset, his reputation. In this sense, coercion plays a very important preemptive function.

Liberalization of legal practice to other professionals should include the regulation of their conduct by the same principles and organization that discipline current lawyers, thus creating two different qualifications for the same genre of professional. Ownership exclusivity should be extended to those who would be allowed to advise in legal concerns and be subject to the lawyers' code of conduct.

The aforementioned notwithstanding, there are problems that could easily arise from such multi-professional partnerships, even if non-legal graduates could only work with legal area-specific advisory. Bad reputation from one specific career could contaminate the other. KPMG and Ernst & Young have lived such experience in 2000 and 2001, when both tried to integrate with law firms. In 2000 and 2001,

KPMG Legal and Ernst & Young Law were set up with 15 and 60-70 lawyers respectively. These investments were however not successful and had to close again after a couple of years.[3]

In the aforementioned case, conflicts of interest could be prevented because lawyers are bound by a moral code and so would be non-law graduate lawyers. But even then, non-law graduate lawyers would never be for the public in general as close to law-graduate lawyers as they would be to their natural careers. In this sense, contamination would be unavoidable. Due to that, the ownership of a law firm is better suited for lawyers who do not hold firms in different activities, so that clients would not feel that confidentiality could be hazarded by the goals pursued in the parallel activity.

Regulatory measures, on the other hand, might create entry barriers by means of educational requirements and, since liberal professionals tend to compete more on quality than on price, the lack of competitors may lead to a price boost.

Enrollment in the Brazilian bar association demands both the graduation from a Ministry of Education approved law school (or a validated foreign legal education) and the approval in the bar examination. The registry allows the lawyer to the practice within the jurisdiction of a certain state, but the performance of regular practice within another jurisdiction is still allowed under the payment of an additional fee.

Law schools in Brazil are very common – there are 1,004 conceding the law degree to nearly 120 thousand new graduates each year, 212 only in São Paulo[4]. Nonetheless, only 16,6% of those who took the bar examination last year were approved and many of them have chosen not to become acting lawyers, staying only as potential competitors. Therefore, a great deal of the above mentioned 547.037 lawyers enrolled in bar are not acting lawyers. Even then, there is still a great deal of acting lawyers in Brazil.

The Brazilian priority lies at improving the quality of education, eventually decreasing the number of institutions legitimated to teach Law. It is important to mention that most courses recently approved by the Ministry of Education are not recommended by the bar association, which means that the method used by many countries of assigning the task of approval of new law schools to the bar could be of good use in Brazil. Therefore, in Brazil entry barriers create above all qualitative deficit.

It is also Law 8906/94 that ensures the right of the bar to fix the attorneys' fees and establish them on a regional basis, by means of each OAB regional office. Due to Law 8906/94 the OAB is the only Brazilian professional association to be legally entitled to issue a charter defining minimum prices. Actually, the OAB charter is not as effective as wished by the entity. Attorney's fees are often deemed too expensive for the simplest legal acts. Nevertheless, non compliance with the law is still punishable by the bar.

Price fixing tends to be defined as illegal in current most advanced antitrust legislations. Suggested price practices, on the other hand, could partially counterbalance the lack of information caused by

3 *The previous head of KPMG, Lars Isacsson, explains that the clients, especially after the Enron scandal, were very sceptical of the accounting firm offering legal services. The interest in multi-disciplinary advice was also less than expected. At the same time, there were large company cultural differences that made it difficult to run legal business and accounting in the same company*. (The Law Society of Sweden (Sveriges Advokatsamfund) (2003), printed in the magazine: "Advokaten 2003 nr. 3., Reasons why the targetting of the accounting firms in the legal profession did not work (Därför fungerade interevisionsbolagens juristsatsningar)" (in Swedish), apud Copenhagen Economics, op. cit..)

4 Valor Econômico, *apud:* http://www.senado.gov.br/sf/noticia/senamidia/principaisJornais/verNoticia1.asp?ud=20061124&datNoticia=20061124&codNoticia=209367&nomeOrgao=&nomeJornal=Valor+Econ%F4mico&codOrgao=47

asymmetric information and would also leave enough room for professionals to provide their services at more accessible fees. In this sense, charters would be deemed pro-competitive when they standardize reasonable values to be paid for the legal procedures, enabling the negotiation of fees from objective criteria.

In this very sense, advertising on price can be pro-competitive, but could also increase the judicial costs burdened by the Administration. Lower prices for the individuals may be costly for society as a whole. It happens because the collected court fees cover less than the total costs incurred in a lawsuit: the exceeding and most significant part is afforded by the state. In other words, the society pays for almost all the proceeding. In this sense, lower fees may lead to a lawsuit boom and lay a heavier burden on the state. This issue clearly involves the dilemma of the commons, where individual choices are not optimal for society as a whole.

Nevertheless, it is not a public function of the bar to define the judicial policy towards the access to justice. The fee should not be seen as a means to reduce the access to the court, which is guaranteed by the Brazilian Federal Constitution and cannot be restrained by ordinary law. Such observation is also valid in relation to attorney's fees, since raising prices, in as much as such practice curbs universal access to justice, must not be deemed as a means to achieve financial balance in the process.

3. Considerations on the Brazilian relevant market for legal professions

The first step in order to verify the existence of potential competition problems is to determine the relevant market – comprising, naturally, the geographic and the product perspectives.

Lawyers are not usually generalists. They litigate or advise in a specific area. Nevertheless, it is a fact that the most important entry barrier is establishing a client basis and that building the reputation of a lawyer takes time. It is not for other reason that it is often more attractive to become an associate in an existing law firm and only eventually, after building his reputation, open a new one. For instance, the largest Brazilian law firm in number of lawyers has approximately 380 attorneys-at-law and 1,800 clients[5]. Another expressive firm has 230 legal lawyers.

Reputation leads to fidelity, which means that most clients do not change their regular lawyers. Such loyalty is also a result of the personal relationship which naturally arises between a good attorney and his habitual client.

Such reputation, nevertheless, is not automatically extended to every field of work. The reputation is specific for each area and the decision of changing from one to another must take into consideration opportunity costs. In the incoming market he will be a new player regardless his expertise in the outgoing. In this terms, since the maturity date for reputation is long, each segment cannot be contested by another in the long run and therefore constitute a different market.

In fact, legal practice involves not only one activity, but a myriad of specialized fields with different demands and degrees of complexity. But the legal education on most of the universities is concentrated on some traditional topics. Civil and penal law are the quintessence of the above mentioned. In such areas, the number of acting lawyers is greater, as well as the amplitude of the ratings involving professionals working in the area.

Other subjects are not even contemplated in the schedule of most law schools or are not given much room to evolve. In these areas, the need for specialization leads to the lack of professionals available to

[5] http://conjur.estadao.com.br/static/text/49231,1

teach and narrows the number of attorneys capable of rendering services with the required efficiency. Therefore, since those who venture in such areas must at least major in the correspondent discipline, acting professional in such fields are in general more prepared than other lawyers.

If it is true for individual lawyers that specialization prevents the prompt change from one area to another, it is also true that legal firms can change their focus and count on new and qualified personnel in the short run. Nevertheless, there is no sense in believing that there is one sole market for legal firms and as many as the legal areas for individual lawyers. The broader or different expertise of a firm cannot be assessed as a mathematical operation. Lawyers have a period of adaptation inside a firm and their clients are aware of that. No other reason would make so many clients stay in the original firm instead of following their original consultants.

On the other hand, the delimitation of the relevant market depends on the client's economic status. In this sense, adopting this approach – and once excluded those who cannot afford private lawyers and make use of public *pro bono* services -, there are essentially four different markets: (1) premium corporate, (2) premium individual, (3) regular and (4) occasional.

Premium corporate lawyers (1) are usually more expensive, since their activity usually demands further education in economics, accountancy or statistics and is rather specific for huge corporations. Wealthier individuals demand a second group of professionals (2) who excel at their areas and can add comfort to the client. Their clients have specific demands, including highly complicated divorces, financial advisory and usually hire on a regular basis. Demanding regular lawyers with specific corporate knowledge but unable to afford expensive professionals, smaller companies and businessmen are supplied by a third group (3), while attorneys occasionally hired for punctual cases by those who cannot afford to pay for the premium market are a fourth group (4).

Despite the fact that groups (3) and (4) are commonly supplied by the same lawyers, the significant gap between the needs of their clients has refrained us from identifying one with the other. However, competition is clearly more vigorous in the third and forth groups, where individual lawyers are even more common than large legal firms – which prevail on the former two markets.

According to the newspaper Valor Econômico[6], in São Paulo's regular and occasional markets, competition seems to be so ferocious that 20% of the total number of lawyers are out of the private market and must live on what they can earn from *pro bono* services subsidized by the state. Further, in the end of 2006 there were already 7.324 firms registered only in São Paulo[7]. In this sense, allowing new professionals would be an unnecessary in quantitative terms. Nevertheless, in a qualitative outlook, more professionals with specific qualifications would imply efficiency gains, which is certainly pro-competitive.

Competition could be sharply enhanced in the premium markets by the entrance of new professionals. Figures show that the largest law firms in Brazil have grown by 35% per year since privatizations and that, even now, when growth is expected to be modest, analyses estimate that those firms will grow 2% above the GDP variation[8]. A partner from the big Brazilian firm, stresses that: "*[I]n the past, law firms have grown*

6 *Apud*: http://www.senado.gov.br/sf/noticia/senamidia/principaisJornais/verNoticia1.asp?ud=20061124&datNoticia=20061124&codNoticia=209367&nomeOrgao=&nomeJornal=Valor+Econ%F4mico&codOrgao=47

7 *Idem. Ibidem.*

8 http://www.cesa.org.br/eventos_clip020320.asp and http://conjur.estadao.com.br/static/text/49231,1

in line with the economy, but in recent years that growth has become exponential, with new areas such as mining, oil, gas and other forms of energy being opened up to the private sector.[9]"

Growth, nonetheless, is intimately associated with privatizations and the subsequent creation of brand new areas targeting specific regulatory and investment issues arising thereof.

But even in this particular area competition is increasingly fierce. International firms – times larger than Brazilian ones – clearly compete with local firms in consultancy matters. And it should be said that advisory is usually the key area of most Brazilian premium corporate firms. In the larger firms, 65% of the service supplied lies on this field[10].

International competition has been one of Brazilian firms main concerns. Many firms, especially in the United Kingdom, have come to Brazil because their clients want their legal advisors to follow them abroad. Associations with large international firms have become a natural phenomenon as well.

It is also in groups (1) and (2) that information asymmetry is not an absolute barrier to assess the counselor's work. In this sense, regular use of lawyers (experience) and access to preferred lists and area-specific publications can make competition on quality more effective in the premium market than in sectors (3) and (4) – which increases bargaining power and lowers the fees. Sectors (3) and (4) cannot benefit from experience or from such specific publications. First, because even using legal services on a regular basis, sector (3) hires locally; on the other hand, experience is an unheard-of element for the occasional market. Second, due to the fact that such reviews do not assess smaller firms, the only source of supply both can afford.

Geographic boundaries are not important for the first two segments, mainly when the service to be rendered consists of a consultation. But even when it comes to litigation, the most relevant firms of the country usually assign their representation to a local firm, whose lawyers are enrolled in the local section of the bar. For the third and forth groups, services are hired locally, due to transportation and representation costs.

Asymmetry of information can be bad even for good lawyers. Working for large firms with steady reputations, Brazilian best lawyers usually fill their time-sheet programs with parsimony, since they do not have how to charge for every time spent on a case. Besides negotiating the whole hours spent by lawyers, clients usually negotiate a ceiling for the service. I this sense, the lawyer should not work on that case more than the necessary hours to reach the budget. But since the reputation of the firm depends on providing in full every single service they accept to undertake, very often lawyers do not charge what they have effectively worked. This is especially true in less complex cases, when less renowned lawyers could have accomplished a satisfactory result charging cheaper instead.

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9 The Internacional Law Office 2007 Client Choice Guide, *apud* *http://www.demarest.com.br /anexos/Size_matters.pdf*

10 http://conjur.estadao.com.br/static/text/49231,1. The same can be identified in other legal systems, such as the Danish one:

Turnover and competitors in the three steps of a case history

	CONTENT	SHARE OF TURNOVER	COMPETITORS
Step 1	General information	5	Information services, interest groups, public authorities
Step 2	Specific advise	80	Accountants, estate agents
Step 3	Disputes	15	None

Source: http://www.copenhageneconomics.com/publications/The_legal_profession.pdf.

Actually, asymmetry affects mostly good lawyers by means of two distinct situations called by economists 'adverse selection' and 'moral hazard'.

When clients are not able to assess in advance the excellence of an attorney, which happens with particular frequency in markets (3) and (4), the bad service performed by an agent affects the trust in legal service as a whole, preventing good lawyers from entering into a market notoriously known for its service providers' bad reputation.

Actually, knowledge is so shallow that consumers usually do not know whether another lawyer could have done better, even after the service has been provided. Said situation prevents such consumers from trying to hire other lawyers. In this sense, good professionals avoid entering such a market where their reputation would be contaminated in advance by a general feeling that clients would cultivate for the class as a whole. That is adverse selection. Adverse selection is impaired by means of educational requirements and could decrease with the acceptance of non law graduate advisory in their specific fields of knowledge, sometimes inaccessible to law graduate lawyers.

Similarly, clients must believe that their counselors are advising on their behalf only and that their interests will be accomplished by the least costly means. The dependence on the counselor's moral standards lead to the classic economic dilemma named moral hazard. As confidence decreases, the search for legal services falls as well, which means that bad lawyers can cause negative externalities upon good lawyers. Moral issues can be tackled by means of a rigid application of the code of ethics.

4. Learned professions and CADE's decisions

Since the first half of the 1990's the Brazilian antitrust system has been handling price fixing cases involving learned professions. Most cases analyzed so far pertain to the health sector, more specifically to the issuance of fee tables by medical associations (especially the Brazilian Medical Association – AMB) divulging minimum prices. Even if legal professions have not been directly involved, the rulings of CADE have been setting a path towards general considerations which will be of great help when dealing with attorney's fees.

The understanding of the Council is not already consolidated. In fact, it is constantly evolving. Nevertheless, it is a fact that the administrative court understands that under the rule of reason price fixing would only be regarded as anti-competitive if there were means to compel the professionals to abide by the fees.

Sharing the same view that the Portuguese antitrust authority expressed in the condemnation of the national dentist's association for price fixing, the Brazilian council acknowledged that price fixing in general (i) lays limits to the associates to determine price according to the laws of the market; (ii) helps price uniformity and then cartelization; (iii) creates a barrier to the entry of new professionals, who cannot compete with the reputation of established professionals unless they offer lower fees; (iv) prevents bargains and price negotiations; (v) as a result, impairs general welfare.

There already are leading cases[11] issued by the Brazilian antitrust body regarding the condemnation of the use of price tables. Such jurisprudence was almost entirely built on cases involving the medical sector and currently faces three major issues:

[11] Administrative Process 08000.011520/94-40: in 1998 the Alagoas regional medicine association and other regional health institutes were condemned for price fixing and cartelization. This was one of the many cases brought to the administrative court due to the boom of charges which took place in the health sector between 1992/1994. Relying on leading cases (PA 53/92, PA 61/92, PA 62/92), the Council believed that

- whether physicians could gather in associations and discuss prices to be negotiated with healthcare institutions or corporations. Such assumption arises from the power asymmetry between individual doctors and corporations;

- whether prices issued by the association could bind doctors in their relations with individual clients, where there is no power asymmetry; and

- whether price fixing was legal where there was a labor relationship between the doctor and the association.

The Administrative Process 08000.020294/1996-03 deals precisely with the first two matters. Taken place in 2006, in this particular case the council discussed power asymmetry. Firstly, the Council found that physicians had no power to bargain individually with health plans. The deterioration of labor relations could lead to an eventual lack of interest in the profession, which would be bad for the society as a whole. Due to power asymmetry, collective bargaining would be pro-competitive in this particular case. This position expressed in the winning-vote represented a turnover in the understanding of the Council. On the other hand, the Council stated that since there was no asymmetry in the relationship with clients, associations to fix price should be deemed anti-competitive when dealing with final consumers.

The last issue is tackled by the administrative Processes 08000.005351/97-42, judged on 2005 and 08012.003664/2001-92, judged on 2004. In both, the Council understood that there was no actual illicit practice when the association does not fix the prices of services rendered by third parties, but only the prices of those services that the association itself provides by means of hired physicians. In this situation, two conditions must concur:

- the association must not prevent physicians from performing their activity outside the association; and

- the association must not intervene in the price established by the doctors in their activities outside the association.

It is of utmost importance to stress that such understanding is very recent and has not been ratified by enough subsequent rulings. It is perceivable that the understanding of CADE is under a process of solidification and that resorting to the rule of reason implies constant revaluation of precedent decisions.

Such revaluation notwithstanding, the transposition of antitrust principles to the legal professions faces a very peculiar obstacle: when it comes to legal professions, it is a fact that the OAB is entitled by law to issue a charter defining minimum prices. In this sense, any decision of the bar towards liberalization is, firstly, an illegal conduct. Further, the law is so clear that there is no room for CADE to rule against price fixing in the legal profession, since *contra legem* ruling from an administrative tribunal is not an option in Brazil. On the other hand, CADE is entitled to promote competition advocacy and by its means arouse the political interest necessary to curb pernicious price fixing.

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price fixing curbed the freedom of choice, the chance to bargain and impaired the willingness to seize technical and economic efficiency. Therefore, following precedents, the Council fined the associations the minimum value with an educative purpose.

6. Conclusion

In view of the above, we have seen that the Brazilian legal market can be divided in accordance with the demand needs into four different relevant markets, the premium corporate (1), the premium individual (2), the regular (3) and the occasional (4) ones.

We have also seen that all the segments might have efficiency gains if other professionals were allowed to compete with law graduates in their areas of expertise and be subject to OAB's regulation.

Allowing non-legal graduates to become legal advisers on some issues and, therefore, be subject to the rulings of the bar – including obedience to the code of ethics – might not only increase the number of agents, but also boost the quality of the service. Legal services would be provided in a more efficient way, diminishing transaction costs incurred when economics or other professionals are hired exclusively to deliver punctual expert services.

Allowing other professionals enrolled in the bar become legal advisers would also increase the economic potential of the firms, as they would be providing a service they used to hire from professionals who could not be partners in as much as they could not be lawyers. New services would imply extra revenue and help make competition with foreign firms more viable. This alternative which spares time and negotiation costs is what economists use to call "one-stop-shopping".

On the other hand, such professionals could act only in advisory services and specifically in their areas of expertise in order not to lower the quality of services rendered where law graduate lawyers are experts.

It seems that the bar examinations could be exceptionally suppressed in cases where a person has renown in a specific area, too. The bar registration would allow practice in that specific area of knowledge only. This is the case of public attorneys, commissioners and administrative authorities as well as other experts whose expertise could have been proved by relevant work in that specific field.

People tend to associate good service with higher prices and it would be no surprise if price liberalization offered more transparency and therefore more protection to consumers than price fixing – which is, nonetheless, economically inefficient. Moreover, lower prices would allow more people negotiate with private counselors, which could reduce dramatically the use of public *pro bono* services and help the Administration spare public resources. It is a fact that people are more confident on the work of a private lawyer – not only for their independence, but also because their earnings depend above all on their reputation.

In this very sense, advertising on price is pro-competitive. Increase in judicial costs to be burdened by the Administration that could arise from further advertising and lower costs must not be counterbalanced by depriving the individual from his constitutional right to plea in court.

As already said, since attorney's fees fixing is provided by law, competition education could be provoked by the Brazilian competition authority, which is entitled to promote competition advocacy and by its means arouse the political interest necessary to curb pernicious price fixing. Price fixing policies could be easily replaced by suggested price practices. Allowing price negotiations by means of objective standards published by the bar, they would diminish asymmetry of information and simultaneously make it legal to charge fair prices, making an essential service – as regarded by the Brazilian Federal Constitution – more accessible to the citizenry.

Legal practice is one of those rare situations where monopoly must be discarded by principle. Obviously, one lawyer cannot represent opposite sides and due to such elementary point there will always

be some level of competition. A possible increase in competition and a subsequent upgrade in efficiency levels must continue to be pursued by antitrust authorities, though.

CHINESE TAIPEI

This submission briefly explains the background along with the entry qualifications, practices and recent concerns in Chinese Taipei's legal professions. It also discusses some possible ways forward based on a few noteworthy cases involving both the legal professions and competition law.

1. Legal System of Chinese Taipei

The body of codified law that Chinese Taipei has established is based on civil law, and it was, for the most part, originally modeled after the German civil code during the Ching Dynasty in China. Not only did it form the basis of the law of China at that time, but it has also remained in force in Chinese Taipei since the days of Japanese colonial rule. In that legislation is seen as the primary source of the law, courts base their judgments on the provisions of the codes and statutes therein and determine their rulings in particular cases on the basis of those provisions. Courts and central competent authorities practicing and overseeing the laws have to reason extensively using the general rules and principles of the code, often drawing analogies from statutory provisions to fill lacunae and to achieve coherence. Aside from this, legal culture and law schools have mostly adopted the style and approach of the German system and tend to put a greater emphasis on social stability than on the rights of the individual.

But by any measure, it is no easy feat to develop an entire legal system strictly based on that of another country. Differences in language are one of the major problems. Those who draft a new law, for instance, have to be mindful and particularly wary of possible misunderstandings that may arise because of the translations of subtle words with slight nuances in meaning. There is no question that words often come to have very special meanings, connotations and usage patterns that differ from, or are not explicit in, their dictionary definitions. Apart from this, words, paragraphs and sometimes even entire sections of a law have been incorporated into law only because of political reasons or compromises, and these may or may not be applicable in the country that adopts that law.

2. Legal Professions in Chinese Taipei

The legal profession in Chinese Taipei comprises a large number of law-trained individuals, but only *bona fide* lawyers are allowed to serve as defense attorneys in a criminal lawsuit. According to Article 29 of the Code of Criminal Procedure, however, non-lawyers may be allowed to serve in the capacity as defense attorneys but only on the condition that this has won the approval of the presiding judge in the trial. In Chinese Taipei, clerks may fill out court forms and draft simple papers for individuals who cannot afford or do not need an attorney, and those same clerks may advise them as to how to manage and argue their own cases. As regards the delegation *(or,* the distribution) of legal responsibilities, like researching cases, drafting court papers, counseling clients, giving legal advice, protecting intellectual property rights, negotiating and drafting contracts and engaging in real estate transactions, qualified individuals from all other legal professions, such as legal agents or consultants on real-estate, marriage relationship, succession, are permitted to handle these. Furthermore, in Chinese Taipei, free legal consultation services are provided by local governments' contracted legal consultants who are able to answer questions mostly related to civil cases.

In Chinese, the word "lawyer" is a noun made up of two independent Chinese words. The first word refers to 'laws and statutes', while the second means 'master'. In Chinese Taipei, lawyers, medical doctors, architects and accountants are the sole professionals who are entitled to use the term 'master' in Chinese, and they have fittingly become known as the so-called "four masters." Justifiably, along with this distinguished title come relatively high incomes and a highly respected social rank in society.

Before receiving a license to practice, citizens of Chinese Taipei as well as overseas Taiwanese have to have succeeded in the Attorney Qualification Examination held annually by the Ministry of Examination, and in addition to that, they have to have successfully completed all of the requisite training programs. (Article 3 of the Attorney Regulation Act).

It should be noted that the examination requirement does not apply in all cases. The Attorney Qualification Examination shall be waived for certain individuals provided that they meet one of the following conditions:

- the person has previously been a judge or prosecutor within the territory of Chinese Taipei;
- the person has previously been a government-appointed public defender for more than 6 years;
- the person has graduated with at least a Master degree from the law department of a university in Taiwan, and in the capacity as full-time professor in the law department of a university, has previously taught core subjects pertaining to law for more than 2 years, or in the capacity as full-time associate or assistant professor, has been teaching law courses for more than 3 years; or
- the person has been qualified to serve as a military judge for more than 6 years.

As could be expected, the Ministry of Justice (hereinafter the MOJ) plays a pivotal role in the legal professions in Chinese Taipei. In addition to being the sole competent authority for the issuance of attorney licenses, it is directly charged with the admission of lawyers to the authorization of charters in bar associations and the rules and regulations governing attorneys. It is also responsible for lawyers at the national level so that a lawyer, once licensed, can argue cases in any court in the land. And, in this capacity, the MOJ periodically makes its own independent re-evaluations of a lawyer's fitness or ability to practice.

As stipulated in Articles 2 and 30 of the Attorney Regulation Act, attorneys are required to demonstrate their commitment to the legal professions by constantly striving to meet the highest standards of ethical conduct, making every effort to preserve the integrity of the legal profession, meticulously abiding by the codes of professional ethics and by continuously improving their knowledge of the law. Furthermore, an attorney shall not post or publish notices amounting to deception or threats in his or her name or in the name of another. And, a lawyer or law firm shall not create or partake in advertising related to legal services.

3. Legal Education in Chinese Taipei

Law departments in the general undergraduate programs of many universities do not just teach Law; on the contrary, they instruct their students in a myriad of other subjects. Law students pursue a Bachelor, Master or Ph.D. degree in Law, and with a multiplicity of lectures on highly abstract legal doctrines, young would-be lawyers are compelled to figure out how to actually think and write like lawyers. Another one of

their requirements is to successfully complete a variety of extensive clinical, hands-on training programs in the form of apprenticeships.

According to the Rules Governing the Attorney Qualification Examination (hereinafter the "Exam Rules"), the ratio of the number of qualified individuals to the total number of test participants (an average of 5,000 per year), i.e., the success rate, shall not exceed 8%. Comparing this considerably low success rate with that in other professions, such as the more reasonable rates for medical doctors (about 90%) and accountants (32%) there can be no question that, as many say, the success rate for lawyers is, in a word, quite pitiful. In fact, the success rate is so low that the service market of lawyers is far from competitive. The reason for such a low success rate is largely rooted in the fact that decision-makers have always worried that the quality of legal services would be compromised if the legal profession market were to become highly competitive.

The examination subjects comprise the following: 1) the Chinese language; 2) the Constitution; 3) the Civil Code; 4) the Code of Civil Procedure; 5) the Criminal Code; 6) the Code of Criminal Procedure; 7) Administrative Law; and 8) Business-related Law. Examinees are required to analyze` and answer questions in written form within a 2-hour session for each subject; the full battery of examinations lasts 2 and a half days. Scholars have often criticized the restricted choice of subjects included in the examination as well as the traditional format of the examinations which, they claim, confuse and mislead law students about the core values of legal education and which do not take into account the interests of the public at large; just as bad, they contend, it also forces those students to spend a great deal of time memorizing the codes of various laws. However, to revamp the current legal profession examination system and its contents would be to take on a very difficult, most challenging task. This would be even more difficult given the importance of the factors, such as preventing the examiners from intervention of interpersonal relationship, associated with fair competition among examinees.

4. Case Related to Attorney Fee

Although there are several pro bono cases, lawyers in Chinese Taipei are paid for their work in a variety of ways. In private practice, they may work at an hourly rate based on a billable hourly structure, a contingency fee, or a lump sum payment if the legal matter is fairly straightforward. There are also fee-shifting arrangements, according to which the loser of a case is required to pay the winner's fees and costs.

Article 16 of the Attorney Regulation Act, which regulates the responsibilities of bar associations, requires that the charter of each association include the following information:

- name and location of the association;
- number of executive board member seats and the rules for the election of board members;
- rules for meetings;
- rules for reviewing membership;
- membership fees;
- standards for attorney fees;
- ethical rules and disciplinary regulations;
- prescribed notices regarding meetings and agendas;

- pro bono work; and
- other clauses necessary for the functioning of the association.

The Fair Trade Commission of Chinese Taipei (hereinafter the "Commission") is very well aware that the charters of bar associations set service remuneration standards for attorney fees. The Commission has also known for a very long time that some laws regulating other professionals in different fields require that the charters of individual trade associations, for example, set fee standards for certain practices--like, fees professionals may charge and fee schedules applicable to different types of service. In some cases, in fact, trade associations even have to submit their fee standard proposals for the regulators' approval. The truth is that professionals in Chinese Taipei cannot practice without membership in their respective association -- or, in the case here, lawyers in a bar association. Although the fee standards stipulated in the relevant associations' charters have been set as the reference for the minimum of service charged, still they have unfortunately eliminated any possibility of price competition in different practicing markets.

Since charters are authorized by the Attorney Regulation Act and have existed for quite a long time in legal professions, to avoid any potential conflicts, or even heated debates among different jurisdictions and uncertainty of laws, the Commission decided to consult with the MOJ in 1999 to investigate whether the price standards in the different bar associations' charters for lawyers were in violation of the Fair Trade Act (hereinafter the "Law").

The representatives of the bar associations claimed that the fee standards stipulated by their associations were only for reference purpose and that they served to protect legal services from cut-throat competition and guaranteed the quality of legal services. But it must be pointed out that fee standards, which are stipulated by bar associations, have nothing to do with the quality of services and could be adjusted upwards relative easily when competition is orchestrated. On these grounds, the Commission concluded that the bar associations had undoubtedly been engaging in concerted actions, and as a consequence, it forwarded its formal opinions to the MOJ as well as to the bar associations to explain its position vis-à-vis the implementation of the Law. The Commission advised the government agency to amend the relevant laws and required that the relevant associations delete all provisions concerning setting fee standards within a year.

Some two years later, in 2001, the Commission found that the MOJ had failed to propose a draft to revise the relevant laws. However, of the bar associations that the MOJ was overseeing, some had urged their members not to continue to follow the fee standards in their charters. The MOJ preferred to amend Article 16(6) of the Attorney Regulation Act by adding the clause "reference for standard attorney fees" to avoid the concern that the provision in dispute was inconsistent with Article 14 of the Law prohibiting concerted action. In 2003, the MOJ held its "Conference on the Reform of the Lawyers' System," and the recommendations of the Commission formed part of the conference topics and were discussed there.

5. Case Related to the Qualification Examination of Attorneys

In order to disseminate information with regard to the issues that were discussed and the communications that the Commission had with other jurisdictions subsequent to the peer review activity of the OECD Competition Committee in February 2006, the Commission held the "Symposium on the OECD Peer Review of Chinese Taipei's Competition Law and Policy" in Taipei, May 2006. Experts from the OECD Competition Committee along with local scholars and lawyers were invited to serve as panelists in the seminar and to offer their thoughts and views on both the issues related to the valuable policy suggestions from the OECD Competition Committee and on their achievability.

In the report of the "Competition Law and Policy in Chinese Taipei, 2006", the OECD strongly suggested that the Commission increase the number of lawyers that are available to both represent smaller parties and process class-actions or collective-actions; this would mean revising the quota on the number of new lawyers, in turn enabling the Commission to concentrate these resources more efficiently. In the findings reported in the OECD's report, it was also noted that, despite the implementation of the Consumer Protection Law in 1994 in Chinese Taipei, the Consumer Protection Commission is only responsible for policy co-ordination, not enforcement. Moreover, under the regulations of the Consumer Protection Law, the principal remedy for individual complaints is through civil lawsuits, but the Consumer Protection Commission can intervene and make collective or class litigation processes available when the parties are on an unequal footing.

Handling unfair trading cases related to Article 21 of the Law about misleading advertising and to Article 24 about general catchall provisions are, to some extent, similar to dealing with consumer complaints. However, enforcing the Law in cases involving unfair trading consumes a great deal of the Commission's resources. There have been more than 900 cases related to misleading advertising and nearly another 800 related to other unfair competitive practices since the establishment of the Commission in 1992. This is attributed to the fact that filing a complaint with the Commission rather than engaging in private litigation is generally more appealing partly because the legal services provided by the Commission are free of charge. For this reason, the OECD Competition Committee also suggested that the rights to private action in areas related to competition should be strengthened.

If the Commission does not feel obligated to respond to every complaint, it should concentrate its legal resources more efficiently. Chinese Taipei has already put in place some procedural innovations to aggregate consumer-level claims and to extend them to actions involving similar kinds of claims under the Law. Another measure that would tend to facilitate private litigation would be to increase the number of lawyers available to represent smaller parties, and this could be achieved by revising the quota on new lawyers.

After the "Symposium on the OECD Peer Review of Chinese Taipei's Competition Law and Policy" in May 2006, the Commission formally asked the competent authorities of the Exam Rules, the Ministry of Examination, to eliminate the restrictions with regard to the quota on the number of new lawyers so as to decrease the costs of legal consultation for consumers and increase the incentives for them to opt for class-action. The Ministry of Examination informed the Commission that it had already been considering how the examination affected legal education and the legal profession, as a whole, and to this effect, it had taken steps to set up the "Task Force for Reforming the Examinations of Judges and Attorneys". The purpose of the Task Force is to reform the current requirements of the examinations for judges and attorneys; moreover, and this is particularly important, in their topics of discussion, the Task Force has decided to include the OECD Competition Committee's suggestions about the qualification quota, i.e., the success rate on the Law examinations. Also pertinent here, the Task Force will consider other issues related to the required qualifications for examinees to take the examination, the examination subjects and all other relevant factors that might affect entry barriers in the legal professions.

6. References:

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INDONESIA

1. Background

The Role of competition as one of instruments to enhance better economic development of a country nowadays becomes a preference. Currently, Competition Law has been a part of country's economic system that considers the market mechanism. In 1999, the Government of Indonesia enacted the law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition that effective within 1 (one) year as from its enactment.

The Law No. 5/1999 is based on economic democracy, which observing the balance between interest of the business actors and the public. The Law No. 5/1999 has intention to: (1) protect the public interest and consumers, (2) create conducive business competition by creating a healthy business competition, and (3) create effectiveness and efficiency in business activities in order to promote national economic efficiency as one of the means to improve the public welfare.

The Law No. 5/1999 created to reach all business activities of goods and services in Indonesia, including services in legal profession. Although Law No. 5/1999 is not excluded legal profession from business competition, yet the competition in legal profession has not becomes main concerned of the Indonesian competition authority (KPPU).

Business competition in legal profession has not become main concerned of KPPU based on it evaluation that competition in legal profession is still in fair competition. Beside the large number of business actors, there is no significant barrier to entry and to exit, the variation amount of fee and there is no difficulty for consumers to have services from legal professions.

The Indonesian Constitution ruled that Indonesia is a state law. One of the demands of State law principles is equity before the law. Therefore, our constitution also ruled that everyone have rights of recognition, guarantee, protection, and assurance of law also due process of law.

Its been 10 years since Indonesia have entered the reformation era, included law reform. One of the efforts of law reform is to created the principles of state law in state and society with the increasingly society awareness of their rights. Beside police, attorney, and judge, advocate also plays significant part to implement law for society who seeks of justice, included have society realized their fundamental rights of law.

The needs of Advocates services outside the court process for now is increasingly, as the widening needs from society to entered the open relationship among countries. Through the consultation services, negotiation, and business contract, Advocates gives an essential role to society and reformation of national law especially in economic and trade, included settlement outside the court.

2. Quality standards and entry

Indonesia ruled Advocates as a legal profession in The Law No. 18/2003 concerning advocate. Before we have The Law No. 18/2003, all regulations regarding Advocate based on the regulations from colonial

age, such as found in Reglement op de Rechterlijke Organisatie en het Beleid der Justitie in Indonesie (Stb. 1847 : 23 jo. Stb. 1848 : 57), article 185 to article 192 with the amendment, Bepalingen betreffende het kostuum der Rechterlijke Ambtenaren dat der Advokaten, procureurs en Deuwaarders (Stb. 1848 : 8), Bevoegdheid departement hoofd in burgelijke zaken van land (Stb. 1910 : 446 jo. Stb. 1922 : 523), and Vertegenwoordiging van de land in rechten (K.B.S 1922 : 522).

Membership requirements of the Advocates in Indonesia are:

1. a citizen of the Republic of Indonesia
2. domiciled in the territory of the Republic of Indonesia
3. not a government employee;
4. at least 25 (twenty five) years old;
5. have a bachelor degree from law university
6. passed the exam held by Advocates Organization;
7. at least 2 (two) years as internship at Advocates Office;
8. Have never been convicted of criminal conduct which sentenced of 5 (five) years in prison;
9. Good moral behaviour, honest, responsible, just, and high integrity;
10. after fulfill those requirements, they can sign as an Advocate by The Indonesian Bar Association and reported to Supreme Court and Minister of Justice and Human Right.

To be able practicing law in Indonesia, one should have a law university degree. This requirement applies for all legal profession. Furthermore, to be a Notary, one should have a master degree in Notary. Law University degree means the alumnus of Law Faculty, Syariah (Moslem Law) Faculty, Military Law University, and Police University. Based on the requirements, obvious that to be sign as an Advocate must be one that has degree in Law University.

Even though already have a law degree, one cannot be automatically become an Advocate. Regulations said that to be an Advocate, one should also pass the examination held by the Advocate Organization. Before attend the exam, one should take an Advocate course for 3-4 months with the lesson that set by the Advocate Organization. One that not passed the exam, can repeat the exam if: (a) still a citizen of the Republic of Indonesia; (b) still domiciled in the territory of the Republic of Indonesia; (c) not become a government employee; or (d) have never been convicted of criminal conduct which sentenced of 5 (five) years in prison or more.

Differ from the Notary which examination held by state, in this means the Minister of Justice and Human Right, and supervise by the government, based on the law concerning advocate, government is no longer involved to set the standard for an Advocate. The standard for an Advocate and places to hold the courses, handles by the Advocate Organization. The obligation of Advocate Organization is to report every appointment of Advocate(s) to Supreme Court and Minister of Justice and Human Right.

The constitution also ruled that an Advocate can be charge of a verbal warning, written warning, temporally dismissal from the profession for 3-12 months, or dismissal from the profession, if:

11. disregard the clients interests;

12. inappropriate conduct to the opposite or the colleagues;

13. act, conduct, speak, or give statement that dishonour the law, constitution, or contempt of court;

14. conduct things that contradictory the obligation, honour, or the value of profession;

15. against constitution and or have a dishonour deed;

16. fail the Summons of Advocate and or Ethics Code of Advocates;

To evaluated an Advocate activities, Advocate Organization compose a Supervisory Commission whose members are Senior Advocates, Expertise/Academies and society, and the enforcement held by The Honorable Council of The Indonesian Bar Association based on Code of Conduct of Advocate.

An Advocate must be a member of one of the 8 (eight) Advocate Organization to be able of get a practice license that renew every year. Before the enactment the law concerning advocate, Indonesia already have 8 Advocate Organization, but the law concerning advocate only recognition 1 Advocate Organization. At the first time, it occurred problem among the Association, whether the organization which already exist should diminished or merged, or Association only be a main organization from all Advocate Organization. The result was the Advocate Association found The Indonesian Bar Association as the parent organization from all.

Different from the Notary that limited it neither territory nor the number of Notary in the territory, the Advocate limited territory is Indonesia territory with no limited number of Advocate may practices at certain territory.

The law concerning advocate admit the existence of foreign Advocate, but foreign advocate forbid to act inside the court, practice, or open Law Service Office nor the representatives in Indonesia. Foreign advocate only allowed to work as an employee or expertise in foreigner law with government license based on advocate organization's recommendation.

3. Fees

The law concerning advocate not give the authority to The Indonesian Bar Association to regulated the amount of fees that charged by Advocate to their client, in fact the constitution protect the freedom to advocate and the client to negotiated the fees that will be given to Advocate as the service given. Government also not in a possition that able to set the amount of fee at any form, even only maximum or minimum fee. Through constitution only ruled that advocate entitled to have fee for the services given.

The law gives protection to the disadvantaged and the poor, if they faced legal problems. Although advocate entitled to have fee for the service given, still they obligated to aid law services for free (pro bono). The disadvantaged and the poor may submit their financial incapability, then court will ask the Advocate organization to point out one of it member to given those certain aid.

The law ruled that one should pass the examination to be able to follow the internship for at least 2 years. Although it not mentioned in the law to entered Advocate course, but in the implementation, such requirements necessary imperative by the advocate organization and the amount of money takes has been setting by the advocate organization.

No limitation of fee that given is similar as the principle of competition that globally applied. Such as the competition law among countries, Indonesia competition law also forbids the limitation of price and it applied as per se illegal. Therefore, it can be contempt of competition law if The Indonesian Bar Association makes an adjustment about the fee that charged.

4. Advertising

The advocate law not giving any forbids to the Advocate to advertise them. Nevertheless, it forbid in the Code of Conduct of Advocate creates by The Indonesian Bar Association. One of the sections of Code of Conduct banned Advocate to advertise himself. The code of conduct tolerate Advocate to put their name board in the front of their building and or office, but not at a exaggerate size.

Advocate also prohibited to publish himself in the media for publicity and or to drive society attention about his acts in his clients case, unless the information or statement given is to enforced law principle that his obligated to.

5. Application of competition law

The advocate law requires that one should pass the examination to be able to follow the internship for at least 2 years. Although it not ruled in the constitution to entered Advocate course, but in the implementation, such requirements necessary imperative by the advocate organization and the amount of money takes has been setting by the advocate organization.

As mention above, the amount of price for the course have been set up by the advocate organization, the amount is quite expensive for a fresh graduate degree generally in Indonesia, but like it or not, one should pay because the course is the major requirement to be able to follow the exam that held by advocate organization.

After passed the examination, one cannot automatically be an advocate; he should fulfill the obligation to take the internship at least 2 years in any pointed advocate office. This requirement of 2 years can be an obstacle to someone that already have a law firm yet not fulfill the requirement.

The Indonesian Bar Association, although non-profit self-regulatory bodies, the members are advocates that give legal services, therefore it still included in business actors definition. The Indonesia competition law said that Business actor is an individual person or a business entity, incorporated or not incorporated as legal entity, established and domiciled or engaged in activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various kinds of business activities in economic sector.

The Indonesian competition law not giving any exception for the self-regulatory bodies and any regulations creates by them even though with a reason of “necessary for the proper practice of the legal profession(s)”. Things that exception from the competition law are:

1. actions and/or contracts with the intention to implement the existing law;

2. contracts related to intellectual property rights such as license, patent, trade brand, copy right, industrial product design, integrated electronic series, and trade secrets, and contracts related to franchise; or

3. contracts on technical standardization of products of goods and/or services which do not restrict and/or hamper competition; or

4. contracts for a distribution purposes which do not stipulate to re-supply of goods and/or services with the price lower than the price agreed upon in the contract; or

5. contracts of research cooperation for the purposes of promoting or improving the living standards of the people in general; or

6. international contracts which have been ratified by the Government of the Republic of Indonesia; or

7. contracts and/or actions intended for export which do not distract domestic needs and/or market supply; or

8. business actors categorized as engaging in small scale business; or

9. cooperative business activities serving specifically only its members.

and under article 51 is Monopoly and/or centralization of activities related to the production and/or marketing of goods and/or services which control the needs of people in general and production branches vital to the state shall be regulated under the law and shall be performed by the State Owned Companies and/or entities or institutions established or appointed by the Government.

Therefore, every regulation in legal profession creates by The Indonesian Bar Association that related to competition also covered by the law competition.

As mention above, KPPU still pay an attention to the competition in legal profession especially advocate, but its not a most important concentration because the large number of advocate and their high independency. In the other hand, there are no meaningful obstacles for the consumers to choose any of advocates. On the other words, since the market of advocate is still growing, until now the competition among advocates in Indonesia quite fair.

6. Regulatory oversight

Every appointed of advocate by the advocate organization, should reported to the Supreme Court and minister of justice and human rights. The dismissal advocate also reported by the advocate organization to Supreme Court, Court High, and other enforcement offices.

Indonesia has not known an independent ombudsman for legal services that handles other complaints that not relating to malpractice cases. Indonesia has an ombudsman commission that evaluates the law process that includes advocate, police, attorney, and court, but the main duty of this commission has not shown any concrete implementation in Indonesia.

Beside that, Indonesia also has Judicial Commission. This commission has main duty to evaluate the conduct of judges in Indonesia, but not evaluate any behaviour of advocate.

Based on the advocate law, evaluation of advocate run by The Indonesian Bar Association, but for daily The Indonesian Bar Association create a supervisory commission which members are senior advocate, expertise/academician, and society. Although it has non- lawyer members, but the founder is The Indonesian Bar Association, so it can not be said as an independent regulatory authority.

On the other hand, The Indonesian Bar Association make a Code of Conduct for advocate to honorable it profession. Even though the evaluation of the Code of Conduct by The Indonesian Bar

Association, but for examined and judging the act against code of conduct done by Honorable Council of The Indonesian Bar Association.

Honourable Council of The Indonesian Bar Association found in central and district. Honourable Council of The Indonesian Bar Association in district sentenced in first stage and Honourable Council of The Indonesian Bar Association in central sentenced in appeal and last stage.

To judge an accusation an offense of code of conduct, Honourable Council of The Indonesian Bar Association build a council which members are Honourable Council of The Indonesian Bar Association, expertise or academician in law, and society.

7. Conclusion

Competition in legal profession in Indonesia not yet a concentration from the competition authority in Indonesia because the large number of advocate and each or them have their own independency to negotiated about fees with the client. The clients also have freedom to decide which advocate services use.

Price fixing of fee by the advocate or the organization have not found yet and until now KPPU has not receive any complain about it. Discrimination by the well-known advocate to new advocate not yet happened. Although advocates have it own specific expertise on certain law field, there is no domination from one of the business actor in legal profession, as we can say that we have fair competition on legal profession in Indonesia.

One disturbance for the new entrance to legal profession is the advocate courses still monopolized by the advocate organization with price fixing the courses payment that quite expensive. The obligation to internship for 2 years also becomes an obstacle because there are no certain guarantees whether the 2 years experience has describe the capability of an advocate. Yet, overall, the whole regulation in the constitution quite good enough with all the requirements takes to be an advocate.

LITHUANIA

Introduction

Over the past three or four years a number of amendments to legal acts regulating the provision of legal services were made: in April 2004, a new Law on the Bar came into effect[1] (nevertheless, quite a few provisions of this law can be criticised in terms of competition); in 2003, private bailiffs started their activities replacing public bailiffs (preliminary results of the bailiff reform show a considerable increase in collection efficiency); and a review of notary fee rates was made. The Competition Council of the Republic of Lithuania (hereinafter referred to as the "Competition Council") has been pro-actively voicing its opinion on many regulatory issues related to the increasing of competition efficiency, however, not all the proposals have been accepted by the legislator. Below an overview of the main factors influencing competition in the area of legal services is provided, with a focus on the regulation of advocates' and notaries' activities in Lithuania.

1. Regulation on entry

1.1 Quality standards and entry

The laws establish strict requirements for persons wishing to engage in advocate's practice or to apply for notary's position. Legal services not exclusively "reserved" for advocates or notaries (as described in p. 1.2 below) may also be provided by other persons having selected one of the set forms of business organisation (e.g. by forming a limited liability company). In such a case no additional requirements are applied.

The Republic of Lithuania Law on the Bar and the Republic of Lithuania Law on Notaries[2] establish similar basic requirements for persons wishing to work as an advocate or applying for notary's position[3]:

1) Citizenship. A person wishing to engage in advocate's practice must have citizenship of the Republic of Lithuania or another Member State of the European Union. Citizens of other states may not become members of the Lithuanian Bar, however, they are not prohibited from providing legal consulting or other services not "reserved" for advocates. In such a case general rules of the person's establishment apply, without providing for any special requirements for lawyers of foreign states. Only persons having Lithuanian citizenship can become notaries.

2) Educational attainment. A degree in law earned at a higher university educational establishment is required. Studies may last from 2.5 to 5 years depending on the degree received on completion of studies (bachelor's degree, master's degree, professional qualification degree of a lawyer).

1 Republic of Lithuania Law on the Bar of 18 March 2004, No. IX-2006, Official Gazette, 2004, No. 50-1632.

2 Republic of Lithuania Law on Notaries of 15 September 1992, No. I-2882, Official Gazette, 1992, No. 28-810.

3 Requirements applied to bailiffs are substantially the same as those applied to notaries.

3) Legal practice. Several alternatives are available. A person wishing to become an advocate may either complete a two-year assistant advocate's practice (in such a case one has to find an advocate who will agree to guide such practice period) or do other legal work during five years (e.g. at public institutions or companies). Each advocate with at least five-year advocate's practice can have up to three assistants. At present there are around 1,500 advocates in Lithuania, therefore, persons wishing to complete an assistant advocate's practice have wide opportunities. Analogous alternatives are available for those who apply for a notary's position; the difference is that the length of the practice period for a candidate to notary's position is one year. The number of candidates is limited and a person wishing to complete such practice must win a public competition. In recent years the number of candidates to notaries has been gradually increased (8 candidates in 2003, 21 candidates in 2006).

4) Qualifications examination. As a general rule, qualifications examination is mandatory for both those wishing to become advocate and a notary, although several exceptions have been provided for in the laws (e. g. for doctors of law). The qualifications examination requirement has not been very consistently applied in Lithuania: during more than one year (from April 2004 till July 2005) all persons having a five-year record of work in the legal field were recognised as advocates without examinations. Those advocates who had passed the examination expressed a rather strong discontent with such changes in regulation. In their opinion, the examination is necessary in order to ensure appropriate quality of legal services. The procedure for the organisation of examinations involves both self-regulatory bodies of notaries and advocates and the Ministry of Justice, therefore, opportunities for a person to enter the legal services market is not dependent exclusively on other advocates or notaries, i. e. potential competitors. The Ministry of Justice draws up a programme for the qualification examination and establishes the procedure for the conduct of the examination. A self-regulatory body (which appoints three of seven members) and the Minister of Justice (who appoints the other four members) take part in the formation of the commission on qualification examinations. The number of re-takings of the examination is not limited.

Entry to the market of notary services is more limited than entry to the market of legal services provided by advocates. In Lithuania, the number of notaries is limited following the *numerus clausus* principle of the Latin notary, therefore, a person wishing to occupy a notary's position and complying with all the set requirements must, in addition, win a public competition. Winner of the competition is appointed to perform duties of a notary in a specific administration unit (municipal office) by an order of the Minister of Justice. The number of notaries and the areas covered by their activities are established by the Ministry of Justice taking account of population of administration units, the number of notary actions performed by a notary, and income earned by a notary. The number of notaries in Lithuania is being gradually increased (from 199 notaries in 2003 to 248 notaries in 2006); the notary quota is to be increased up to 300 in the nearest future. The Competition Council recognises that regulation may be useful in order to secure access to services throughout Lithuania, nevertheless, it has presented its opinion to the Ministry of Justice stating that liberalisation in the areas of increasing the number of notaries, setting up of notary offices, and territorial distribution should be continued.

1.2 Exclusive rights

The new Code of Civil Procedure came into effect in Lithuanian in 2003[4]; it establishes the advocates' monopolistic right to represent clients before courts. The Code provides for several possible exceptions, e. g. a company can be represented before court by its employee with higher university educational attainment, however, such exceptions do not change the situation in substance. Such legal regulation has resulted in significant confrontation among advocates and lawyers engaged in private

[4] Republic of Lithuania Law on the Approval, Coming into Effect and Implementation of the Code of Civil Procedure of the Republic of Lithuania, 28 February 2002, No. IX-743, Official Gazette, 06-04-2002 04 No. 36-1340.

practice. Lawyers have united into the Association of Firms Providing Legal Services and have been lobbying pro-actively in order to change the regulation unfavourable to them. The problem has been solved, at least temporarily, by amendments to the Law on the Bar. As it has already been mentioned, for more than one year (from April 2004 till July 2005) all persons having a five-year record of work in the legal field were recognised as advocates without examinations. As a result of this many lawyers engaged in private legal practice have shifted to advocacy, the opportunity to enter the Bar without qualification examinations was abolished again, and pro-active fighting of lawyers for the possibility to represent clients before courts has stopped. The Competition Council has expressed an opinion against the granting of the monopolistic right of representation before courts to advocates, stating that prohibiting lawyers working with legal service firms from representing clients before courts would mean restriction of competition in the market. Irrespective of this position, situation so far remains the same. The laws do not grant any other exclusive rights to advocates. Other persons having relevant knowledge may also engage both in different consulting activities in the legal area and in representation before different administrative bodies. It should be noted that the draft new Law on the Bar contained a provision granting advocates monopolistic rights both in representation before courts and in provision of other legal services. The Competition Council has expressed strong negative opinion on such intentions. Such draft provisions were not included in the final version of the law.

The number of reserved functions performed by notaries in Lithuania is much larger than those performed by advocates: they certify different transactions (a mandatory notary form has been established for all transactions related to the transfer of title to immovable objects as well as to the encumbrance of immovable objects, e. g. sale – purchase, donation and mortgage) and powers of attorney for which a notary form has been established; certify marriage contracts; certify that transcripts of documents and signatures in documents are true; note bills and cheques; certify documents of formation of legal persons; certify wills. It should be noted that specific service territories have been defined for notaries for cases of bequest and bequest files are kept by the notary based on the last place of residence of testator. A person wishing to have his/her bequest matters to be handled by another notary must obtain a separate permission from the Notary Chamber.

2. Regulation of market conduct

2.1 Fees

The levels of regulation of fees for the legal services provided vary considerably between notary and advocate services. In case of legal services provided by advocates, free agreement of the parties is the basic principle underlying the setting of a fee. Whereas prices for notary services are regulated by the Ministry of Justice upon agreement with the Ministry of Finance. Therefore, an examination of the fee regulation issue should be split into two parts – advocates fees and notary fees.

Neither the Government (or a body authorised by the Government) nor advocates' self-regulatory bodies have established minimum, maximum or fixed fees for legal services provided by advocates. The Law on the Bar establishes just the main criteria for the determination of the amount of fee such as complexity of the case, qualifications and experience of the advocate, and financial position of the client. The law also permits agreement on the fee whereby the amount of the fee depends on the outcome of the case. The Ministry of Justice has established recommended upper ceilings of fees for representation before courts in civil cases. The recommendations are applied for the award of payment for legal services to the party that has lost its case. In substance, they are just a guideline for the advocate's client in order to know what share of the fee paid to the advocate could be recovered in case of winning of the case and what share he/she will have to pay. Recommendatory fee ceilings are set for individual actions (for example, drawing up of a claim or appeal) and per hour of representation before court. Minimal monthly pay established by the Government is taken as a basis for the setting of such fees. It should be noted that in practice

(particularly in case of business clients) the recommended fees rarely influence the service price agreed by the client and the advocate.

In Lithuania there also exists regulation of the amount of fees paid to advocates for legal aid[5] provided in the course of representation before courts. Legal aid is provided on two levels: primary legal aid (legal consulting, drawing up of documents except procedural documents) is rendered free of charge to all citizens of Lithuania and other EU Member States; secondary legal aid (representation before courts) is only provided to low-income persons and may be paid for by the State either fully or partially depending on the person‘s assets and income. Advocates are selected for the provision of secondary legal aid on competition basis. Rates of fees for advocates providing legal aid are fixed based on coefficients calculated on the basis of the minimum monthly pay established by the Government.

New notary fee rates came into effect in Lithuania in April 2007. Just as before, the Ministry of Justice has established minimum and maximum rates, although the original purpose of the changes (actively promoted also by the Competition Council) was the setting of just the ceilings for the rates. Evaluation of the new fee rates cannot be unequivocal. In some cases, the fee rates were liberalised leaving more room for the client and the notary to agree on the fee for certain notarial actions. For example, before the introduction of new fees, the fees for many transactions related to immovable and movable objects, money, shares and bonds were fixed at set percentage rates not subject to change by agreement of the client and the notary. Now, brackets of percentage rates have been set, within which agreement on specific rate will be possible. However, one must note that in some cases the brackets have been narrowed as the lower limit was raised upon lowering of the upper ceiling. Furthermore, another change – differentiation of fees for notary actions between natural and legal persons – is subject to discussion. In most cases, notary services will become more expensive for legal persons as the lower limit has been raised. Although the Ministry of Justice asserts that the new fee rates will provide more room from competing in prices, however, certain doubts arise concerning more active competition in terms of price. The official position of the Notary Chamber is that notaries should compete by quality of their services and not by prices. Such position is based on the Notaries' Code of Conduct, which establishes that luring of clients by rates that are lower, on either one-off or constant basis, than those offered by other notaries is unfair competition. Disciplinary penalties may be imposed on notaries for violations of the Notaries' Code of Conduct. Thus, even though efforts are put forth in Lithuania to gradually liberalise the regulation of notary fees in Lithuania, a number of obstacles to competition by prices still remain.

It should also be noted that a review of fees to bailiffs for legal acts performed in the execution process is underway in Lithuania[6]. The aim is to provide a most exact economic justification and detailing of the bailiff fee rates, which are established by the Ministry of Justice. It should be mentioned that although private bailiffs have been operating in Lithuania for over four years only, this has produced obvious positive effects upon collection efficiency (now up to 30% of debts are recovered compared with below 10% in previous years). Bailiff activities are restricted by many requirements (such as limited number of bailiffs, established territories of operation, fixed service prices), which are perhaps most strict compared with representatives of other legal professions. However, one must recognise that this service is specific both by its nature (the aim is to ensure proper execution of effective court decisions) and by peculiarities of payment for the services. The Code of Civil Procedure establishes that all execution costs ate paid by the executor, however, upon execution of the decision these costs are recovered from the debtor. Advance payments are quite rare in practice, furthermore, in all cases when a decision is executed the bailiff's services must be paid by the debtor, i. e. not the person who has selected a service provider.

5 Legal aid guaranteed by the State is provided only to natural persons.

6 In addition to performing execution functions, bailiffs may provide legal consulting, state factual circumstances, mediate in discharging property liabilities, and provide certain other legal services. The fee charged for the service is established by agreement between the bailiff and the client.

Therefore, in this case large variations in prices for the same services may evoke undesired effects, e. g. it will be in the interests of the person recovering the debt to select, in order to punish the debtor, a bailiff offering more expensive services. So positive effects usually produced by competition by prices would not be achieved in this case. A working group formed by the Ministry of Justice aims to establish the principles for recalculation of present fee rates and also considers the extent to which the rates could be liberalised (e. g. is it possible to separate out certain execution actions to be paid exclusively by the person recovering the debt, at a price agreed with the bailiff). Up until now the group has produced no specific projects.

2.2 Advertising

Advertising of services provided by advocates and notaries is completely prohibited in Lithuania. The prohibition does not apply when details of a notary or an advocate are specified in information publications, official letterheads or business cards. The advocates self-regulatory bodies have established in detail which information is not considered to be advertising and placing of which is permitted for advocates. It should be noted that advocates tend to provide more and more information about themselves and their services and a certain new form of information is being gradually accepted, e. g., law firms do not hesitate to inform about their cooperation or merging with foreign law firms, moving into new premises etc. When a major law firm takes such a step for the first time (sometimes agreeing on their intentions with the advocates self-regulatory body), this becomes an acceptable and permissible standard of advocates‘ activities. Thus, the Lithuanian Bar has established that the following is permitted for advocates and not considered to be advertising: presentation of details of an advocate/law firm in different publications of legal nature, information statements, on objects intended for representation, in books and monographs written or compiled by advocates, various publications sponsored by the advocate/law firm; provision of details of an advocate/law firm while expressing opinions in the press and other mass media and at seminars/ conferences; in additions, details on a law firm may be presented, in different forms, at the events sponsored by the law firm. The Lithuanian Bar has explicitly established that the following is considered to be advertising and therefore prohibited: any direct or indirect comparisons with another advocate/law firm specifying one‘s advantages and shortcoming of another advocate/law firm; publication of information which is untrue is also prohibited.

The Competition Council has expressed an unequivocal opinion on prohibition on advertising. Both during consideration of the new version of the Law on the Bar and while changing the regulation of notaries activities, it has stated that advertising is one of the means of competition enabling consumers to collect more detailed information on the goods/services available in the market and meeting a specific demand and on the price and quality differences as well as to adopt decisions on acquisition of the goods/services. Considering that prohibition on advertising of services could produce a considerable impact upon competition in legal services markets, the Competition Council has come out in favour of provision of opportunities for notaries and advocates to inform consumers about service prices and other related aspects. Up until now the legislator has not implemented these proposals in the legal acts in force.

2.3 Partnership and business organization

Only three forms of advocates‘ activities are permitted in Lithuania: individual practice; partnership without establishing a legal person; and establishing of a legal person – a professional association of advocates. All other forms of activities are strictly prohibited. An advocate may engage in individual practice upon establishing an advocate‘s place of business. In such case the advocate himself/herself is a subject of legal relations. Cooperation of advocates is permitted by concluding an agreement on joint activities (partnership) without establishing a legal person; each participating advocate is a subject of legal relations. Since 2004 advocates may establish a private legal person, with its legal form being a professional association of advocates. Only advocates can be members of such an association, furthermore, activities of the association are limited to the provision of legal services. A professional association of

advocates is not a limited liability legal person as the advocate that has provided legal services is liable for the responsibilities arising under agreements on provision of legal services (where assets of the association are not sufficient). Law firms often hire specialists in different fields (e. g. accountancy and audit) to assist them in providing consulting on legal matters (e. g. in the area of tax law), however, the association may not engage in activities other than the provision of legal services. Major law firms set up their divisions in the largest cities of Lithuania. Cooperation with foreign law firms is also permitted. Civil liability insurance is mandatory for advocates.

There are strictly established forms of notaries' activities. Notaries may not establish private legal persons or limited liability partnerships. The law provides an opportunity for two or more notaries performing their duties within the same administrative unit to run a common notary office. However, in such a case each of the notaries working in such common office must take notarial actions in his/her own name and is personally liable for the performance of his/her duties. As the number of notaries is limited in Lithuania, notary offices are not allowed to set up divisions. Civil liability insurance is mandatory for notaries.

3. Institutional framework of self-regulation

3.1 Application of competition law

The Law on the Bar and the Law on Notaries explicitly state that activities of an advocate are not economic/commercial activities and a notary office is not a subject of civil legal relations including economic/commercial activities. Due to such regulation, application of the competition law to representatives of these legal professions is questionable. As the new version of the Law on Bar was considered at the Lithuanian Parliament quite recently (2004), the Competition Council had presented relevant comments providing for the deletion of such provision. It has stated that, in accordance with the European Union law, activities of persons providing legal services are treated as economic activities, while persons providing such services are considered to be undertakings. The legislator did not take this comment into account. The Notary Chamber has expressed an official opinion to the effect that notaries are officials authorised by the State providing services of preventive justice, which are intended for securing public interests. Therefore, standards of the competition law cannot be applied to notaries' activities. It should be noted that the Law on Competition establishes that professional activities (and not only commercial activities) are one of the types of economic activities, therefore, persons engaged in professional activities of an advocate or a notary should be treated as undertakings. The Competition Council is of the opinion that current regulation does not prevent the application of the competition law to notaries and advocates or associations thereof (e. g., in case of agreement on fixed prices). No judicial practice has formed in this area up until now. The Competition Council is putting forth efforts to influence the legal acts' adoption process to the largest extent possible by pro-actively voicing its opinion on the necessity to gradually liberalise the market of legal services as far as possible.

3.2 Regulatory oversight

Activities of the Lithuanian Bar and the Notary Chamber (self-regulatory bodies) are influenced, in some respects, by the Ministry of Justice, however, the law does not directly provide for the approval of self-regulatory bodies' decisions by government authorities. As it has already been mentioned, the application of the competition law to decisions adopted by self-regulatory bodies is questionable.

There are no specific independent bodies responsible for the examination of cases of malpractice by advocates or notaries in Lithuania. Disputes over the provision of legal services arising between an advocate and his/her client may be considered both by the Lithuanian Bar and Lithuanian courts, however, decisions adopted by the Lithuanian Bar in such disputes are of a recommendatory nature. Disciplinary

proceedings may be instituted against an advocate for violations in advocate‘s practice. The Court of Honour of Advocates may also impose disciplinary penalties such as expelling from the Bar. Disciplinary cases is not a very rare phenomenon, however, there are practically no judicial disputes concerning inappropriate provision of legal services by an advocate. Substantially the same principles of liability apply to notaries. In addition, it should be mentioned that a notary is a person performing functions entrusted by the State, therefore, notary‘s actions can be appealed against to the Ombudsmen (an appeal concerning bureaucratic treatment or abuse).

To sum up the regulation of legal services in Lithuania one may state that the level of regulation is different for advocates and for notaries. Although quite stringent qualifications requirements and prohibition on advertising apply to advocates, the operation of competition by prices is sufficiently effective in practice. The price setting is not completely transparent as no law firm publishes its service fee rates, however, advocates recognise that clients (business clients in particular) increasingly tend to negotiate over prices upon comparison of rates offered by different law firms. Prices for legal services provided by advocates vary extensively depending on the quality of legal services and the name and qualifications of an advocate, therefore, no regulation can result in fixed market prices. There are much more restrictions on activities of notaries. Prices are being regulated quite stringently, the number of notaries is limited, while prices for analogous notarial actions are very similar at different notary offices. So far it is still difficult to predict how market prices will be affected by newly approved rates, which have recently come into effect and which provide for wider competition opportunities in some cases. Nevertheless one may assume that there may be no significant changes in the market as the prohibition on competition by prices established in the Code of Conduct of Notaries remains in force. Furthermore, the new fee rates show that there can be an increase in prices for companies. Thus there is still much room for liberalisation in the market for notary services.

ROMANIA

1. Introduction

In Romania, the term "legal profession" is generic and includes lawyers, notaries and bailiffs/court officers involved in the administration of justice and or legal process[1]. Occupational or professional regulation occurs in all legal professions, in particular the notary and bailiff professions are characterized by a high level of regulation, with the Government (Ministry of Justice) playing an important role (access, fees etc). According to the regulations in place, both professions provide services of public interest and issue official acts.

There are other legal activities that may be exercised by specialists with legal background as well as other background (economics or engineering) such as the profession of insolvency practitioner. In 2006, the Government introduced legislation that confirmed mediators/arbitrators as a separately regulated profession. Prior to this such activities were conducted solely by lawyers. According to the provisions of the new regulation, any person with a university degree may be a mediator/arbitrator, provided he/she has a 3 years work record, graduated the mediator formation courses and has an authorization from the Mediation Council[2]. Lawyers, public notaries and legal executives that acquire mediator status under these circumstances may act as mediators within their profession. C:\Documents and Settings\ncrisan\Sintact\cache\Legislatie\temp\00093014.HTM - #

2. Regulation of entry

2.1 Quality standards and entry

In Romania the lawyer profession is regulated by a special law, adopted by the Parliament, and by a statute, adopted by the board of the professional association. The lawyers' professional association is the National Bar Association, which comprises all local Romanian bar associations – 42 in total. This reflects the county/municipal structure of Romania[3].

The notary profession is regulated by a law of organization and exercise, a regulation enforcing this law, adopted by the Ministry of Justice, and a statute of the professional association, the National Public Notaries Association. The association is comprised of 15 notary chambers (one for every appeal court). Notaries affiliated to a chamber are the notaries functioning in the territorial area of the respective appeal court.

The same type of regulation and organizational structure applies to bailiffs.

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1 Bailiff/court officer are responsible for the service of legal process. Duties of the bailiff include the service of legal documents, repossession and evictions in accordance with court judgments, execution of writs etc.

2 The Romanian Mediation Council is an autonomous body; its members are validated by the Minister of Justice.

3 There is a bar association for each of the 41 counties for Romania and a separate one for the capital, Bucharest

In order to conduct a legal profession, there are certain educational requirements. The first necessary step is a law degree from one of the authorized faculties of law. The number of students for each of these universities is set by the senate of the university within the limits approved by the National Council for Academic Evaluation and Accreditation. Another mandatory requirement is to adhere to a professional association. The admission is contest-based. The next step in order to become a lawyer/notary/bailiff is to undertake a 2 year training course and graduate or, in case of lawyers, to graduate from the National Institute for Lawyers.[4.]

During training, the lawyers' professional association organizes monthly training conferences that include topics such as legal doctrine, jurisprudence and debates on cases. At the end of the apprenticeship, each trainee needs to pass a final exam. Individuals may become lawyers without passing an exam if they have a PhD in law or if they were previously employed as judges, prosecutors, public notaries or legal counsellors for at least 10 years. For those cases the license exam is not a requirement if individuals in question had already passed the exam for their previous position.

The number of apprentice notaries is set according to requests made by established notaries for trainee positions in their practices. At the end of their two years apprenticeship, trainee notaries have to pass a final exam. In case of individuals with a minimum of 5 years legal experience, the apprenticeship is no longer necessary; however a contest is still required.

Continuous professional training is another mandatory requirement of all the branches of the Romanian legal profession. Lawyers have to permanently improve their professional expertise and the relevant institutions have to ensure and verify this process of training. The notaries' professional association recently decided to establish a Notary Institute specialized in the training of established and future notaries, given the forecasted amendments to the deontological code of the profession that will make the permanent professional training mandatory. Also, bailiffs have to participate at least once every three years in training courses organized by the professional fora or by education institutions from Romania or from abroad.

There are no restrictions regarding the number of lawyers on the market. However, in the case of notaries and bailiffs, the number of professionals and respectively the number of established practices is set and revised annually by the Minister of Justice, at the proposal of the relevant professional body. This proposal takes into account the area in question, the population, the size and type of legal procedures in demand. Last year, at the Competition Council's proposal, the professional fora decided to eliminate from the Deontological Code of the Notaries the territorial criterion related to the distance between a practice and another, but the regulation in force regarding the notary profession was not amended accordingly.

Currently the demographic criterion is still present, as the professional associations believe that 1 notary/8000 inhabitants is sufficient and recommend at least 1 bailiff/15.000 inhabitants.

The limits imposed on the number of established practices for notaries and bailiffs were the focus of numerous interventions of the national competition authority. The notaries continue to be in favour of such limitations, stating that even under these circumstances in the last years the number of notaries and notary offices has increased constantly. However, increases in trainee notaries were insignificant.

The Ministry of Justice considers that such limitation is justified and proportionate, being in the general interest of access to justice. According to the ministry, since the activities of notaries and bailiffs

[4] The institute (INPPA) is not part of the national education system, being under the patronage of the National Bar Association.`

need careful scrutiny, both the public institution and the professional body should be enabled to ensure access to the profession, professional training and activity control.

2.2 Exclusive rights

Lawyers provide legal counselling, issue legal opinions upon request, elaborate draft legal acts (contracts, covenants, statutes etc) and assist their client in negotiations regarding these acts, take part as consultants in legal deliberations of legal entities.

Unlike a licensed lawyer, a trainee lawyer may submit written pleadings only in certain types of first instance courts.

In Romania, legal assistance and representation in courts or in relation with other relevant bodies is only done by lawyers or legal counsellors. Legal counsellors may only function under the employment of a public authority or legal entity, and therefore may only assist and represent their employer. They also advise and countersign their employer's legal acts.

The legal counsellor profession is still under debate and there are several legislative initiatives towards the unification of lawyers and legal counsellors, since at present time counsellors can only function as civil servants or employees of legal entities.

In Romania, the task of a public notary is to draft documents with legal content, to certify the authenticity of such documents, which can be drafted by a lawyer and even by members of support staff, to certify certain deeds, to legalize signatures/specimen signatures/seals on written documents as well as copies of documents, to execute and authenticate translations, to receive in the archive documents and deeds presented by the parties. For all these activities the notary public has general competence.

However, there are activities for which they have territorial competencies. Mainly this refers to the procedure of succession, an exclusive competency of public notaries in the territorial circumscription of the court where the deceased had his last residence. Everything related to the succession procedure is exclusively the public notary's competency.

As regards the transfer of property rights through a trading contract, as it is a written document for which the legislation requires an authentic form, the document is drafted, in principle, by the notary public and lawyer, by the legal counsellor/attorney or legal representative of the legal entity or by the party itself when they have legal background. But, further on, the notary public is the one who certifies the documents transferring property rights over buildings.

The procedure implies a previous ascertainment of all substance/essence and format conditions which, under the penalty of the nullity of the document, must be complied with: the property title of the transmitter, tabulation of the property right on his name, cadastre sketches etc. Simultaneously with the document authentication, the public notary will establish, calculate and receive the tax obligations owed by the seller. The advertising procedures fall under the public notary's responsibility as well on the new owner's name.

Moreover, a legal document signed in front of a lawyer, bearing a closure, a resolution, a stamp or any other identification for parties, consent and date of document can be presented to the notary public for authentication.

3. Regulation of market conduct

3.1 Fees

Until 2004, the professional body was empowered to set minimum fees for lawyers. The competition authority considered these limits anticompetitive and repeatedly requested the annulment of such provisions. Initially, it was unclear whether lawyers should be considered as undertakings, and therefore under the incidence of the Competition Law. Later, this approach changed.

Thus, in 2004, when the regulatory framework for lawyers was amended, the incriminated provisions were removed. Currently, the lawyers' statute explicitly states that lawyer fees are established freely between client and lawyer and that fixing minimum, recommended or maximum thresholds by any relevant body is strictly forbidden.

Lawyers set their fees according to the complexity and duration of the case. Usually the following criteria are used: volume of work, the nature, novelty and difficulty of the case, the interests involved, experience and specialization of the lawyer in question, need for extra staff, potential gains and the financial status of the client.

The fees may be hourly fees, fixed fees or success fees. The first two categories are due to the lawyer irrespective of the outcome of the case, unlike the third type of fee. In penal cases, the success fee can only be applied in relation with the civil side of the case.

Minimum fees for notaries are set by the professional association upon approval from the Minister of Justice. The criteria taken into account for legal acts in the exclusive competence of the notary are the complexity and value of the legal act. Fixed minimal tariffs are set for other legal acts and consultations.

Minimum and maximum fees to bailiffs for services rendered are established by the Minister of Justice, upon consultation with the relevant professional association. The tariffs must reflect the expenses incurred by the bailiff, the intellectual effort, the complexity and value of the legal act as well as the bailiff's legal responsibility for the legal act.

Even from its establishment, the competition authority had numerous interventions regarding the existence of a minimum and a maximum for notary/bailiff fees. In the case of lawyers, as shown above, such interventions were successful. However, as regards notaries and bailiffs the Ministry of Justice still argues that these professions, issuing public authority acts, should be exempted from the application of competition rules as, in their view, such professions do not fall within the definition of an undertaking. To support its position regarding the enforcement of minimum level for fees, the Ministry cites the CEJ decision in the Cipolla case (C94/04 and C202/04)[5], and demands the exclusion of the legal professions from the scope of the Services Directive.

Legal aid is provided by all bar associations in cases where defense is mandatory or upon request from courts and penal prosecution bodies. Public administration bodies may also request that legal aid is provided if they determine that the individuals in question have no means of paying the fees. Such cases are usually allocated to junior or trainee lawyers.

5 ECJ ruled that the provisions of art.10, 81 and 82 EC do not preclude a Member State from adopting a legislative measure which approves, on the basis of a draft produced by a professional body of lawyers, a scale fixing a minimum fee for members of the legal profession from which there can generally be no derogation in respect of either services reserved to those members or those, such as out-of-court services, which may also be provided by any other economic operator not subject to that scale.

In exceptional cases, if the rights of an individual with no material means would be severely prejudiced by a delay, the Dean of the bar association may approve legal aid being granted. #The defense attorney has an independent stance, since even if he/she represents the interests of the party in question, the extent of his assignment is limited to the legitimate interests allowed by law. Legal aid can be denied or withdrawn if it was obtained on false pretenses or if the financial status of the party has since improved. #

3.2 Advertising

Lawyers may not use advertising to attract customers. The lawyers' guild considers that notoriety must prevail over advertising. The competition authority considers that honest and objective advertising enables clients to make an "informed decision" regarding their choice of legal representation. Also, the provisions as indicated above set anticompetitive barriers for any young aspiring lawyer that would want to exercise the lawyer profession, since notoriety is gained only after long years of practice.

The forms of permitted advertising are: placing the name of the firm in directories, sending invitations and leaflets for specialized conferences and roundtables, posting the firm's details in the business correspondence, on business cards and web sites. Irrespective of the advertising vehicle used, all comparative or commending comments and all information regarding customers' identity are strictly forbidden.

Notaries and bailiffs are forbidden to advertise, unless ads refer to the existence and location of the practice, office hours and object of activity. The notaries' professional organization may advertise in the mass-media the entire notarial activity, showing the advantages of using the services of public notaries for the conclusion of legal acts. Also, at the end of every year, the association publishes the list of public notaries and practices.

3.3 Partnerships and business organization

#Lawyers may function within individual law firms, associate law firms, professional corporations or PLLCs (professional limited liability corporations). Individual law firms may form partnerships either with other individual law firms, associate law firms or PCs, individual lawyers within the respective firms retaining their rights and obligations.

Individual firms may also use in common the professional patrimony and/or employees. In this case, legal assistance can not be granted to clients with conflicting interests.

Professional corporations may be established with at least 2 partner lawyers. Collaborating lawyers may also be employed. Any lawyer may conclude a collaboration contract with experts and specialists. PCs and PLLCs may only conclude such contracts with the approval of all partners.

One or more partner notaries may function within a notary office, with the help of relevant ancillary staff. The public notary or associate notaries may employ trainee notaries, translators, various experts, as well as other support staff. #

4. Institutional framework of professional oversight

4.1 Regulatory oversight

Lawyers' professional body is entitled to discipline members where that person is, for example, professionally negligent, or in breach of the professional rules, focusing on action against that individual. In addition, #lawyers have also the obligation to have professional liability insurance and disciplinary

actions taken by the professional body in cases of malpractice do not exclude damages being claimed by prejudiced parties.#

For notaries and bailiffs, professional control lies within the power of the professional organization and the Minister of Justice. The professional liability insurance is mandatory also for notaries and bailiffs.

4.2 Application of competition law

The Romanian Competition Law applies to all undertakings and has no exemptions for professional services. Antitrust rules forbid agreements to fix prices, limit access on the market or divide the market. Also, collective dominance may emerge within a professional association, since the respective bodies impose rules such as the ones presented in the previous chapters that obviously are/may be damaging to the consumers' interest.

Within the scope of the specific rules, members of a legal profession meet in the framework of a professional association and debate, exchange information and agree upon certain issues, including issues such as tariffs that should be set on an individual basis.

Although, as shown above, controversies existed whether professionals in this field should be considered undertakings and therefore treated as such, under the scope of antitrust rules, currently in most cases the situation is clearer. Yet, notaries and the Ministry of Justice still support the idea that notaries and bailiffs issues acts of public authority and therefore should be exempted from the application of competition provisions.

In its advocacy efforts, the Competition Council focused on eliminating serious restrictions of competition such as fixing maximum/recommended/minimum tariffs, numerus clausus, advertising restrictions, and not on provisions that may affect the essence of the profession such as, for example, affiliation to professional organization.

Since the main anticompetitive issues in the legal profession emerge from normative acts (laws, regulations etc), the Competition Council approached the sector even since it was established and led an intense advocacy campaign. The main tool of our advocacy was establishing a strong dialogue with relevant line ministries, including debates within the Inter-ministerial Working Group on Competition, established in 2004, and a dialogue with the relevant professional associations. Antitrust experts participated also in working groups on drafts of normative acts as part of the RIA mechanism, together with all parties concerned.

In this respect, based on its powers, the competition authority transmitted its point of view to the Government, the two Chambers of the Parliament, including the Legal Commission of both chambers, and to the Presidency of Romania.

At present, the public authorities show an obvious preoccupation in this field; a number of parliamentary initiatives were recorded regarding either a deregulation of the liberal professions sector or unifications of certain legal professions. Also, recently the Romanian Government established a new Ministry for liberal professions with which the competition authority plans to develop a cooperation relation.

Since legal professions are to some extent self-regulating certain issues of their activities that may restrict competition, the competition authority tried and even succeeded in several cases to impose a modification of the incriminated provisions as shown in the examples already presented. Such successful interventions were made also in other areas of the liberal professions: minimum and/or maximum fee limits were eliminated for accountants, architects, geodesists; geographical and demographic barriers to entry

were removed in the case of dentists; territorial criteria for the establishment of pharmacies and notary offices were removed as well.

There were no cases of enforcement of competition rules in the legal professions sector. Enforcement measures were taken however in other areas of the liberal professions, such as healthcare. Yet, certain practices considered anticompetitive and forbidden by the competition rules were sanctioned by the lawyers professional body and were forbidden by statute under sanction of exclusion: concluding agreements regarding market allocation, bid rigging, restricting access to customers and restricting freedom of exercising professional competition .

SOUTH AFRICA

1. Introduction

The purpose of this paper is to provide an overview of the legal profession in South Africa, as well as a summary of the cases relating to the legal profession that the Competition Commission has considered/is considering and the competition concerns that have been raised.

A. Overview of the Legal Profession

2. Persons Providing Legal Services

In South Africa, the following persons provide legal services:

- Attorneys
- Advocates
- Legal advisors
- Paralegals or legal assistants

Attorneys and advocates are part of the "practising legal profession". Attorneys may provide services in "private practice" where they earn fees for their own account or practice for the state (the South African government). State advocates deal with criminal matters on behalf of the state in the High Court of South Africa.

An attorney provides legal services and advice dealing with a broad spectrum of legal problems. Although, attorneys with the appropriate legal qualification and advocates may both present cases in court, advocates are recognized as specialists in the presentation of cases in court. Advocates also give legal opinions and draft legal documents.

Attorneys are approached directly by members of the public. Only an attorney may brief an advocate and members of the public may not approach the advocate directly for advice ("the referral rule"). The Competition Commission in its capacity as a user of legal services (a client) has itself approached the General Council of the Bar ("GCB") for the relaxation of its referral rule. The Competition Commission has in-house admitted attorneys in its employ but is compelled to use the services of private practice attorneys in order to instruct advocates even where the attorneys have no value to add. These attorneys are often only needed for the purpose of briefing counsel and nothing more. The GCB refused the Competition Commission's application.

Attorneys are also employed in the Legal Aid Board, a South African government-funded independent statutory body which derives its mandate from South Africa's constitutional bill of rights. The Legal Aid Board has provincial as well as regional offices and various justice centres. The Legal Aid Board is specifically aimed at helping people who seek legal representation who cannot afford their own

counsel. In criminal matters, all persons are entitled to request legal aid. In civil matters, a means test is used to determine whether a person qualifies for legal aid. People who are unmarried and whose financial position or income exceeds R1750.00 (approximately €184) do not qualify. People who are married do not qualify if their financial position or income exceeds R2500.00 (approximately €263).

Legal advisors are "in-house" lawyers and are often employed by the South African government departments, parastatals, regulatory bodies, companies and other organizations to provide legal advice and services to their employers. Most legal advisors are non-practising attorneys and advocates.

Persons who are not qualified as attorney or advocates, but may still work in a legal environment as support staff, researchers, assistants or advisors, are known as "paralegals or legal assistants". A paralegal is trained in the basic knowledge of the law and its procedures. A paralegal therefore does not assist people in court and other tribunals, but has sufficient knowledge of the law to investigate matters brought by members of the public. A paralegal will thereafter refer matters to lawyers or the relevant bodies which can deal with them. Paralegals are often employed in community advice offices where they offer a fee basic advice-giving, community education and referral service. Paralegals are also employed by trade unions, law firms and legal resource centres as support staff.

3. The Regulatory Authorities

The attorneys' profession in South Africa is governed by the Attorneys Act 53 of 1979, as amended ("the Attorneys Act"). Attorneys in South Africa are regulated by four statutory provincial Law Societies established in terms of the Attorneys Act. All practising attorneys are required to be members of the statutory provincial law societies of the province in which they practice. The provincial law societies essentially regulate the exercise of the profession, maintain ethical standards, and are responsible for examinations and entrance into the profession. The provincial law societies also issue rules regulating the conduct of its members and dealing with administrative issues. These rules are referred to again and in more detail under discussion of the cases below.

In addition to the provincial law societies, there is the Law Society of South Africa, which is an association to which attorneys belong. The Law Society of South Africa is the umbrella body of the attorneys' profession in South Africa. The Law Society of South Africa was established by the statutory provincial law societies, the Black Lawyers Association ("BLA") and the National Association of Democratic Lawyers ("NADEL").[1] The Law Society of South Africa is the "mouthpiece" of the profession and is responsible for publications, continuing legal education, practical legal training, and professional affairs. Its has *inter alia* as its objective to promote on a national basis the common interests of members of the attorneys' profession and the welfare of the profession, and to maintain the independence, professional standards and integrity of the profession.

In respect of advocates there are ten voluntary societies of advocates or "bars" in the major regions in South Africa. These societies of advocates are constituent members of the GCB. The bars and GCB are not statutory councils and are voluntary. Advocates who are admitted to practice as such pursuant to the Admission of Advocates Act 74 of 1964 and who have served pupilage and passed the advocates examinations may become members of the GCB. The GCB represents the organized advocates' profession

[1] During the Apartheid era, there were a number of attorneys who felt that their interests where not being served by the statutory provincial law societies or the then Association of Law Societies of South Africa. These attorneys then formed two different voluntary associations, namely the BLA (in 1976) whose members were black attorneys and NADEL (in 1987), a national lawyer organization incorporating all lawyer groups in South Africa. In March 1998, the four provincial law societies, BLA and NADEL formed the Law Society of South Africa.

and has *inter alia* as its objects to consider, promote and deal with all matters concerning the teaching and practice of the law and the administration of justice, to deal with all matters affecting the profession and to take action thereon, and to uphold the interests of advocates in South Africa.

4. Academic Studies

Currently, in South Africa a four-year LLB degree ("law degree") must be obtained from a recognized university in order to practice as a legal professional. The requirement of a law degree is not dependant on the type of services provided (for example, representation of clients in court). The South African government does not play a role in overseeing the establishment of entry standards or the number of training places available. There are limitations on the number of study places in law schools with the selection criteria being academic qualification and availability of places.

Diplomas or short certificate courses (duration of 6 months) are offered to persons who wish to work as paralegals. Paralegal studies are offered by several training colleges.

The Council on Higher Education[2] monitors quality standards of tertiary education in South Africa which includes the standards of South Africa's university law degrees.

5. Entry into the Legal Profession

In order to be admitted as an attorney in South Africa, a person must be regarded as a fit and proper person by the Law Society and the High Court, be older than 21 years and a South African Citizen; or be legally entitled to permanent residence in the South Africa and be ordinarily resident in the South Africa; or be a citizen of a state which was formerly part of the South Africa. Foreign legal professionals are not automatically allowed to provide legal services in South Africa. They must apply to the High Court for admission. In respect of certain designated countries, the requalification criteria are relaxed.

It is compulsory for the prospective attorney to attend the Law Society of South Africa's Legal Education and Development training course or practical law school (a five week course). There is also an additional period of practical training (articles of clerkship) required, ranging from one to five years. The number of years required for the articles of clerkship depends on a variety of factors, for example, a person who has completed six months of full-time practical legal training at a School for Legal Practice need only serve one year of articles at a private law firm or with the state attorney.

The South African Safety and Security Sector Training Authority (SASSETA) is a body responsible for promoting and facilitating skills development of the safety and security sector in South Africa. The SASSETA is registered by the South African Qualifications Authority (SAQA) as an ETQA (education and training quality assurance body). In this capacity, it is *inter alia* able to accredit education and training providers such as the Law Society's practical law school to ensure high-quality learning and assessment. It also enables learners to achieve standards and qualifications registered on South Africa's national qualifications framework (NQF). A National Certificate in Attorneys Practice has been registered on the NQF. This qualification is unit-standard based in terms of which a learner accumulates credits by institutionalized and workplace learning. The unit standards for this qualification, such as the necessary communication, advocacy and litigations skills a learner must have in order to qualify for the certificate was drafted by the legal profession.

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[2] The South African Council on Higher Education (CHE) was established as an independent statutory body in May 1998 in terms of the Higher Education Act, No 101 of 1997. Its responsibilities include advising the Minister of Education on all matters related to higher education policy issues and assuming executive responsibility for quality assurance within higher education and training.

In addition to the articles of clerkship, attorneys must write and pass the Attorneys' Admission Examination. The Law Society of South Africa has an Examinations Committee that is responsible for the drafting of the examination papers for admittance to the profession as well as the marking of the papers. Committee members are full-time practising attorneys and experts in the field of law.

Attorneys may also study further to be notaries or conveyancers. To be admitted in the High Court as a notary, one must be an admitted attorney and pass the notary examination regulated by the Law Society of South Africa. To be admitted in the High Court as a Conveyancer one must be an admitted attorney and pass the conveyancing examination.

There are currently no requirements relating to on-going education for any of the legal professions in South Africa. However, a mandatory course in Practice Management for new entrants into the attorneys' profession has been approved by parliament. There is no implementation date set as yet.

In order to be admitted as an advocate, a person does not have to belong to a bar association or complete pupilage. However, to be a member of a (voluntary) bar association, practical training (pupilage) of up to one year as well as practical training courses set by that association is required. In order to be admitted to the voluntary bar association, the Bar Examination must be written and passed successfully.

Membership of the constituent Bars is open to advocates who are admitted to practice as such pursuant to the Admission of Advocates Act 74 of 1964 and who fulfill the requirements of a constituent Bar. In general terms, an advocate will be admitted to membership of a constituent Bar upon serving pupilage and passing examinations that test an advocate's competence to practice in the courts. Advocates admitted as members of a constituent Bar must be fit and proper persons and must bind themselves to observe and be bound by the rules of the constituent Bar and those of the GCB.

B. Summary of Cases

6. The General Council of the Bar's Exemption Application

During December 1999, the GCB applied to the Competition Commission for an exemption against some of its rules in terms of Schedule 1 of the Competition Act, which relates to the exemption of rules of professional associations.

The Competition Commission refused to grant an exemption against some of the GCB's rules, *inter alia* that members keep chambers, shall not be free to form partnerships with each other, may not advertise their services freely, and the referral rule requiring members of Bars to take instructions from practising attorneys, not from the general public.

The GCB decided to take the ruling of the Commission on review to the High Court.

6.1 The High Court case

The thrust of the application in this court was that the Commission had not properly applied the '*audi alterem partem*' rule and in particular had not afforded the applicants ("the GCB and the constituent bars") and the opportunity to respond to the comments of the Minister of Justice and Constitutional Development which impacted, mostly negatively, on the application.

In his judgment, Mr Justice FCL Roos ruled as follows:

> "…the following rules of the applicants are exempted in terms of schedule 1 of the act:

(a) the prohibition on a member accepting a brief from any person other than an attorney;

(b) the prohibition of accepting a brief to work together with an admitted advocate who is not a member of the constituent association;

(c) the rule regarding contingency fees."

6.2 The Supreme Court of Appeal case

The judgment of Mr Justice Roos was taken on appeal by the Competition Commission and cross-appealed by the GCB.

In his decision AJA JJF Hefer, made the following order:

(a) The Competition Commission's decision in the GCB's' application for exemption was set aside.

(b) The rules of the applicants prohibiting the members, subject to certain exceptions, from accepting briefs from persons other than an attorney were exempted from the application of the Competition Act 89 of 1998.

(c) Subject to paragraph (b) hereof the applicants' application for exemption was remitted to the Competition Commission for reconsideration.

6.3 Current position

The effect of the court's decision was that certain of the GCB rules were dealt with in the court applications, not exempted and referred back for reconsideration to the Competition Commission, namely:

6.3.1 The Two Counsel Rule

This rule recommends that senior counsel be briefed with another senior or a junior in any matter in which, in the opinion of the senior counsel the circumstances warrant and make it desirable that another senior or junior be employed;

6.3.2 The prohibition on partnerships with other members of the Bar:

In terms of this rule no relation in the least degree resembling partnership in practice is permissible;

6.3.3 The prohibition of accepting a brief to work together with an admitted advocate who is not a member of the constituent association (and this also applicable to attorneys);

6.3.4 The blacklisting of attorneys (overdue fees);

6.3.5 Advertising:

Since the previous application, this rule was amended by the GCB. Advertising is now allowed, but with the limitations that it must be truthful, legal and in good taste. Council must first give consent for a member to advertise himself as an expert. Advertising in any commercial directory in any media is still not allowed;

6.3.6 The Fee Parameters rule:

In terms of this rule fees must be reasonable. Counsel is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and services, as well as those which undervalue them. Where a Bar Council lays down, from time to time, a scale of minimum fees for particular services, such scale:

(a) Shall be the fees recommended by the Bar Council as the minimum fees normally charged for such services;
(b) Shall be as a guide for the convenience of members and it shall not be unprofessional conduct for member to charge less than the recommended minimum fees.

According to the information presented to the Competition Commission the guideline tariffs are prescribed by the individual constituent associations. They differ from association to association with some being described as "recommended" while others are described as "minimum recommended".

6.3.7 Contingency Fees:

In determining the additional fee to be paid by the client (the success fee), over and above Counsel's normal fee, such fee must be reasonable and just. Counsel in determining the amount of the success fee to be charged, should specify his normal fee, plus a percentage, being the success fee. The Bar Council may review any such agreement and set aside any provision thereof, or any fees claimable in terms thereof, if in the opinion of the Bar Council the provision, or fees, are unreasonable or unjust.

6.3.8 Location of Chambers:

There is no general GCB rule on the location of premises; however, certain local Bar rules prescribe that advocates must operate from specific chambers that have been designated as such by the relevant Bar Council.

The Competition Commission is currently liaising with the Department of Justice of South Africa to obtain input into the Competition Commission's proposed recommendations on the exemption application.

7. The Law Society of South Africa's Exemption Application

In 2004, the Competition Commission received an application for exemption from the Law Society of South Africa. The Law Society of South Africa filed the application on behalf of the four statutory provincial law societies in South Africa and sought to exempt, from the application of the Act, the provincial law societies' rules on the basis that the rules:

- have the effect of substantially preventing or lessening competition in the market; and
- are reasonably required to maintain professional standards or the ordinary function of the legal profession.

7.1 The rules for which exemption is sought can be categorized as follows:

7.1.1 Professional fees, which includes tariffs, allowances and guidelines:

These rules encompass the prohibition on attorneys to accept remuneration for professional services other than at the tariff prescribed by law, by a ruling of the council, the customary rate charged or, subject to the rule which authorises the relevant council of a law society to determine the reasonableness of

attorneys' fees, agreed in regard to a specific mandate. Included in these rules are the various provincial societies' fee guidelines.

7.1.2 Reserved work:

The rules relating to reserved work prohibit practitioners from assisting or allowing any unqualified person to charge, recover or receive any fee in connection with the preparation or execution of any document or the performance of any professional work which only a practitioner is qualified by law to prepare, sign, execute, attest to or perform. These rules also prohibit attorney's, notary's or conveyancer's from referring work reserved for them by law, to a person prohibited from performing such work, or assisting such person in performing the work.

7.1.3 Organisational forms and multi-disciplinary practices:

The rules relating to organisational forms and multi-disciplinary practices prohibit practitioners from giving, sharing or dividing with any person other than a practising practitioner, either by way of partnership, commission or allowance or in any other manner, any portion of their professional fees.

7.1.4 Advertising, marketing and touting.

The Law Society of South Africa has sought to exempt a wide range of rules prohibiting and/or restricting the use of advertising, marketing and touting in the promotion of legal services offered by a legal practitioner.

The Competition Commission is currently liaising with the Department of Justice of South Africa to obtain input into the Competition Commission's proposed recommendations on the exemption application.

8. Complaint by an Attorney against the Law Society and Provincial Law Societies

In 2005, the Competition Commission received a complaint from an attorney against the Law Society of South Africa and the four provincial law societies. The allegations made against the law societies include that:

- Entry requirements and the admission's examination are too restrictive and do not make provision for the practical realities of the current business environment. It is argued that the examinations may set some higher standards of proficiency which screens out aspirant legal practitioners who do not meet the minimum standards of proficiency.

- Prescribed tariffs amount to price-fixing.

- The prohibition on multi-disciplinary practices and restrictions on ownership of a law firm are anti-competitive.

- The prohibitions on comparative advertising and touting are anti-competitive.

As the complaint deals with the issues that were raised in the exemption application of the Law Society of South Africa, the Commission resolved to consider them under the exemption application case.

9. Complaint against the Pretoria Attorneys'Association

In December 2002, the Competition Commission initiated a complaint against Pretoria Association of Attorneys on the basis that their recommended tariff of fees contravened section 4(1)(b)(i) and amounted to

price fixing. The complaint was initiated on the basis of a "Guideline for Attorneys and Own Client Fees" issued by the Association and circulated to members under cover of an undated letter under signature of Mr. C R Botha. A consent order was concluded between the Competition Commission and the Association wherein the Association conceded that it was in contravention of the Act even though it had never intended the recommended fees to be binding on its members. The Association agreed to withdraw the offending guidelines and undertook not to re-issue them or any like guidelines. An administrative penalty of R223 000 (€23 473) was imposed on the Association.

10. Legal Services Charter and legal Practice Bill

The legal profession is currently undergoing transformation. The legal profession is currently discussing a Legal Services Charter for black economic empowerment which would inter alia determine the opportunities given to persons entering the legal profession and receiving skills transfers based on race and gender factors.

There is also a Legal Practice Bill which is pending before the parliament. The Legal Practice Bill may affect the way in which regulatory oversight over the legal profession is carried out. The bill provides for the establishment of a South African Legal Practice Council to regulate all legal professions including paralegals. It also provides for the appointment of a Legal Ombudsman to protect the public interest. It also aims to allow South African government to address monitor and play a greater role in overseeing the establishment of entry standards or the number of training places available.

BIAC

BIAC understands and appreciates the potential benefits of promoting competition within self-regulated industries, including lower prices, greater choice, innovation and efficiency.

Specifically, with respect to the legal profession and with reference to the OECD Secretarial Note on Competition in Professional Services, BIAC agrees with the following general principles:

a. Entrance requirements into the legal profession should not be disproportionate to what is required to perform the service competently.

b. Regulatory objectives should take into account the specific needs of small consumers. BIAC notes that sophisticated commercial purchasers of legal services are in a position to better obtain services on a basis suited to their specific needs.

c. Restrictions on competition between members of a profession should be eliminated subject to necessary public interest safeguards. These include agreements to restrict price, to divide markets, to raise entrance requirements or to limit advertising. For example, it would be reasonable and in the public interest to prohibit unfair or misleading advertising practices, or advertising which would bring the administration of justice into disrepute.

BIAC believes that statutes prohibiting the unauthorized practice of law are necessary and appropriate to ensure that consumers are provided with legal services from qualified providers meeting minimum standards of practice. However, prohibitions on the unauthorized practice of law should not be used as a cloak to shield lawyers from competition by non-lawyers having appropriate qualifications to undertake specific legal functions.

BIAC also agrees that recognition of qualifications of professionals from other countries should be promoted, but having regard to the specific professional qualifications necessary to practice law in a given jurisdiction and the need to ensure that there are available remedies to consumers of their services. BIAC notes that some reduction in these barriers to legal practice within the EU would be consistent with the freedom of establishment principles underlying the EU Treaty and would also help to facilitate the single market objective of the European Union.

BIAC agrees that regulations relating to the legal profession should be reviewed against principles of good regulation, including that the regulation be targeted and not restrict competition more than is necessary.

However, as with any market in which the minimum performance standards are an essential requirement, BIAC is against basing reform of the regulation of the legal professions solely on competition principles. A proper balance must be struck between the objectives of free competition and the objectives underlying the regulation of the legal profession. These latter objectives may vary from country to country.

In all cases, BIAC recommends that competition regulators proceed with an appreciation of the other public interest implications of any intervention in the regulatory framework of the legal professions.

The considerations informing the regulation of the legal profession, it should be noted, can be different from those relevant to the regulation of other professions. For example, in Canada, the courts have recognized the fundamental importance of having an independently governed legal profession to its constitutional framework. This independence is fundamental to Canada's rule of law, which is the underpinning of its constitution. Such principles are of general application in all OECD Member States.

BIAC notes the division in certain jurisdictions between the governance and the professional or trade association-like functions of the legal profession. This is the case, for example, in the United States and Canada, where the bodies that regulate standards of conduct and other matters relating to the practice of law, are separate from the bodies that provide continuing education and other services to the members of the profession. In these countries, the regulators of the legal profession have a statutory obligation to regulate in accordance with specific objectives determined by the legislature, which puts them on a similar platform as the competition authority. Where the regulators do not have the power to regulate certain types of conduct or have chosen to forbear, market forces prevail and the competition law would apply to prevent any anti-competitive conduct in that regard by the regulatees. Accordingly, it follows that in such jurisdictions general regulators applying an umbrella or framework law (such as competition law) must defer to the sector specific regulators in determining the appropriate balance of potentially competing public interest objectives. Such a division of responsibilities and functions is one model for consideration in seeking better regulation of the legal profession.

In this context, BIAC suggests that competition regulators proceed with appropriate restraint in judging the regulation of the legal profession. We submit that the promotion of competition ought not to be the sole goal in the governance of the legal profession, and must be carefully balanced against the primary public interest objectives that regulators of the legal professions are charged with protecting.

The right balance between economic and non-economic factors must be found in order to properly regulate the legal profession. For example, ensuring the competency of lawyers necessitates a certain level of restriction on entry and mobility. Similarly, the requirements to ensure the avoidance of conflicts of interest or the maintenance of solicitor/client privilege, for instance, may require regulations that limit the forms of association between lawyers or between lawyers and other professionals.

In certain jurisdictions there is a perceived need to improve access to justice for consumers with the aim of enhancing the ability of consumers to utilise the laws introduced for their benefit including competition law. Whether such ideas as creating legal advice centres in supermarkets are viable and realistic or not may be open to question but in any event such considerations should not override and are not a substitute for the need to maintain the essential skills, integrity and competence of the legal profession which is a fundamental safeguard for all consumers, business and anyone else that may require the advice and assistance of the legal profession from time to time.

CCBE

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The comments in this paper are a submission to the OECD Report on "Competitive Restrictions in Legal Professions" (the Report).[1] The comments are not exhaustive and are not intended to discuss in detail the analysis carried out in the Report, but rather to clarify the CCBE position as regards the approach, the method and the language used in the Background Paper and the Executive Summary and to express the position of the legal profession on the policy proposals put forward by the OECD. Observations from CCBE National Delegations on certain National Contributions forming part of the Report are available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comments_ national_de1_1232620813.pdf.

1. Introductory remarks

The CCBE would like to clarify at the outset that the legal profession has been, and will continue to be open to reforms. In the past few years, European and national regulatory bodies have undertaken several initiatives aimed at reviewing and reforming regulations applicable to the profession of lawyer. The CCBE and its member bars favour those initiatives, insofar as they can effectively improve access to justice and ensure the full exercise of the right of defence, respecting the fundamental principles of the profession. It is recognised that they are of importance and take place in a constantly evolving society. Further, the legal profession throughout Europe is a dynamic sector of the economy, open to intense and ever-increasing competition.

However, through its European and national organisations, the legal profession has constantly expressed the concern that, whilst intending to achieve increased competitiveness of legal services markets, attempts to overhaul the regulatory framework applicable to lawyers do not take the peculiar role of the legal profession, its principles, its functioning and the repercussion of "*liberalising*" measures on the markets for legal services access to justice and the public interest, sufficiently into account.

The CCBE, and its Member Bars and Law Societies, firmly believe that regulatory reviews should be based on the following principles:

- **The legal profession mainly serves non-economic values.** The legal profession serves the administration of justice and the rule of law. Its role and function has constitutional relevance in all EU Member States.[2] In the same vein, the EU legal order, through the case-law of the ECJ,

1 The Report is available at http://www.oecd.org/dataoecd/12/38/40080343.pdf .

2 The Belgian Constitutional Court (Cour d'Arbitrage) and the French Conseil d'Etat, in their rulings of 23 January and of 10 April 2008 have reaffirmed the role of lawyers in ensuring right of defence and access to the law, clarifying that national legislators must respect the fundamental principles of the profession when enacting provisions aiming at protecting other public interests.

provides for express recognition of the importance of lawyers in European society.[3] The regulatory framework applicable to lawyers is conceived with a view to promoting and protecting fundamental values, rather than being merely aimed at ensuring economic efficiency and competitiveness. In this respect, professional regulations differ from frameworks applicable to other activities (such as postal, transport, electronic communications and financial services) whose nature is primarily an economic one. National and supra-national legislators and regulators (chiefly anti-trust agencies) should always take this aspect in due consideration;

- **Lawyers' regulations are aimed at preventing market failures.** Besides guaranteeing constitutional values, professional regulations aim at ensuring the smooth functioning of the sector and at avoiding market failures and negative externalities. These may occur primarily as a consequence of information asymmetries. The consequences of removing *ex ante* regulation (and self-regulation) should be carefully assessed by national and supra-national authorities: fostering competition through de-regulation is not necessarily the best option if the quality and reliability of legal services has to be ensured uniformly for all users. Economic analysis (which presupposes the gathering of sound empirical evidence and the use of generally accepted scientific methods) should be constantly applied in order to assess the consequences of policy and regulatory choices for the welfare of citizens.[4] Regulators should be warned against the use of arbitrary indexes such as those created by the IHS and whose validity is questioned also by the OECD Report.

- **The market for legal services is a competitive one and its regulations do not prevent competition**. Only after having assessed the importance of professional regulations for the protection of constitutional values and the general interest, may regulators consider the impact of those regulations on the competitive conditions in the market. This assessment should be carried out through impartial and extensive empirical studies, taking into account well established principles of economic analysis. The CCBE points out that the lawyers' profession is a highly competitive and dynamic one. The markets for legal services in the EU and beyond are fully exposed to competition; quantitative restrictions to entry do not exist and the number of operators is extremely high and growing. Regulations often have a pro-competitive effect, fostering competition on the quality of services. Hard-core restrictions of competition, such as cartels and abuses of dominant positions, have never been detected in the market for legal services[5]. The restrictive nature of regulations cannot simply be assumed; it must be checked against the concrete functioning of the markets. In this respect, it is paramount to recognise that the various legal professions do not constitute a single service market (lawyers should not be confused with notaries, which enjoy a number of public privileges) and that, having regard to the geographic dimension, each national market is distinct and should be subject to a separate analysis.

In light of the foregoing, the CCBE believes that any reform of the lawyers' regulations should be undertaken only once it has been established: 1) that it would not affect the constitutional values, which the

3 See, for instance, Judgment of the Court of 5 December 2006, joined cases C-94/04 and C-202/04, *Federico Cipolla v Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v Roberto Meloni* in ECR [2006] Page I-11421. See also, Judgment of the Court of 26 June 2007, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, ECR [2007] Page I-5305.

4 In this respect, the CCBE appreciates that the OECD took into account the findings of the study prepared by Copenhagen Economics in 2006. See Report, pages 53 and 55.

5 On the contrary, the Court of Justice has found that regulations applying to the legal profession either do not restrict competition or are justified in the public interest. See, Order of the Court of 17 February 2005, Case C-250/03, *Mauri*, ECR [2005], Page I-1267 and Judgment of the Court of 19 February 2002, Case C-309/99, *Wouters*, ECR [2002] Page I-1577.

profession is required to promote, 2) that the general interest and the welfare of consumers are adequately protected and 3) that reforms are likely to provide, on the basis of a sound economic analysis, for a tangible and significant improvement of the competitive conditions in the relevant market(s).

2. CCBE's Comments on the Report

In light of the principles set out in the previous paragraph, the CCBE would like to submit certain general comments on the Report.

The CCBE acknowledges the effort that the OECD has made to deal with the issue of regulation of legal services using a generally balanced and objective approach, notwithstanding the starting point and the objectives of the Report, which are clearly focused on challenging those regulations.

The CCBE deems it very important that, in its second section, the Report carried out an extensive analysis of the issue of information asymmetries and negative externalities which make regulation necessary and justified for legal services. The CCBE appreciates that the Report also takes into account a third form of market failure, namely the "*under-provision of public goods*".[6] Indeed, regulation may be considered to be necessary if certain public goods are to be made widely available to society.

In this respect, the CCBE notes that the Report states clearly that:

> *"Legal professionals generate important positive externalities that are of great value for society in general. Lawyers play a crucial role in the proper administration of justice and notaries contribute to legal certainty by allowing a transfer of real estate property to have full effect vis-à-vis third parties.*
>
> *An important positive external effect of exclusive rights is a lowering of the cost of judicial administration. Pleading of cases in court by non-lawyers may place a high burden on judges (particularly in complex cases), whereas qualified professionals may produce better argued cases and more valuable precedent (Bishop 1989)."*[7]

The CCBE also notes that account is given to the fact that governments may pursue non-economic goals (e.g. the protection of constitutionally safeguarded rights or legal certainty) when they enact regulation for legal services.[8] It is undoubtedly important for the legal profession that all the relevant factors are taken into account when regulatory frameworks are discussed.

Regarding the analysis of the "*private interest theories of regulation, in particular self-regulation*", the CCBE is satisfied that the Report acknowledges that, despite the work undertaken by economists, there is no sufficient evidence to support the idea that regulation may be enacted for private rather than public interest.[9]

Concerning the analysis of the specific professional regulations (exclusive rights and other entry restrictions, restrictions on fees and advertising and restrictions on business organization and multi-disciplinary practices) the CCBE observes that – unlike the European Commission's report on competition in the liberal professions - the Report strives to carry out a balanced review of the economic theories in

6 Report, Page 24.

7 Report, Page 24.

8 *Ibidem*.

9 Report, Page 26.

support of or against the regulation itself and it makes the necessary effort of ascertaining whether any empirical evidence exists in order to support either theory.

It should be pointed out that, as a result of the adoption of a more balanced approach, the Report reaches important conclusions in favour of regulation of legal services, which offset or strike a balance with conclusions tending to the opposite direction:

- On exclusive rights and other entry restrictions, for instance, the Report states that "there is little empirical evidence to support the view that qualitative entry restrictions will lead to a lower number of active professionals" and that little support has been found for the view that entry restrictions affect the price of legal services in the U.S.;[10]

- On the restrictions on fees, the Report states that there is no sufficient evidence to link recommended fees with the actual fees charged by lawyers and that "*competition authorities may assimilate recommended fees with price cartel too easily*";[11]

- On advertising, the Report takes into account the results of two studies, leading to opposite conclusions on the impact of advertising on quality and the price of services. Correctly, the Report does not reach any strong policy conclusion on this subject;[12]

- In the same fashion, the Report points out that there is very little empirical evidence confirming arguments in favour or against restrictions on partnerships and business organization.[13]

With regard to the policy recommendations, the CCBE can certainly agree with the view that policy makers should always consider whether, through a revision of professional regulations, they are opening the doors to undesirable negative externalities. Lawyers fully support the view that "*in some cases there may be too little regulation rather than too much regulation*".[14]

As stated at the beginning of this commentary, the CCBE supports the idea expressed by the fourth policy recommendation, that a public interest assessment of regulatory and self-regulatory rules should include non-economic objectives reflecting different policy choices used across jurisdictions.[15] Non-economic objectives are at the basis of lawyers' regulation. They should be taken into account not only as an additional factor in the evaluation of the regulatory framework, but as one of its main parameters.

Finally, the CCBE deems it obviously necessary that policy makers conduct a cost-benefit analysis in order to establish whether restrictions of competition are disproportionate; too often professional regulations have been considered to be unduly restrictive without adequate consideration of the negative externalities that those regulations are aimed at preventing.

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10 *Ibidem*, Page 37.

11 Page 44.

12 Page 48.

13 The main sources of empirical evidence refer to architects and dentists. Only one study dealt with law firms in the U.S. The increased average size of law firms in countries where LLPs were allowed was considered only as "*a possible indication of efficiency gains*".

14 Page 52.

15 *Ibidem*.

3. Critical remarks

Against this background, the CCBE considers that it is necessary to address certain critical remarks to the authors of the Report.

First and foremost, in relation to the overall approach adopted by the authors, the CCBE regrets that the Report does not satisfy the same standards of impartiality and accuracy throughout the whole document. Further explanation can be found at http://www.ccbe.eu/fileadmin/user_upload/ NTCdocument/EN_CCBE_comments_on_1_1232621722.pdf.

The CCBE also regrets that the OECD did not check the quality and accuracy of national contributions. Several CCBE delegations have pointed out the existence of serious flaws, factual mistakes and biased views in the contributions referring to their national regulatory framework.

Detailed examples are attached to these comments http://www.ccbe.eu/fileadmin/user_upload/ NTCdocument/comments_national_de1_1232620813.pdf. Given the relevance of the issues at stake, the CCBE would have expected national contributions to satisfy the same standards as the background paper. The lack of uniformity affects the validity of the whole exercise.

In relation to more specific aspects, the CCBE believes that it would have been preferable, from an analytical point of view, if the Report dealt with each legal profession separately. If the purpose of the Report was to assess competitive restrictions in the markets for legal services, the definition of those markets should have been an unavoidable first step. The application of the elementary "supply-side substitutability" criterion should have led to the conclusion that, for instance, lawyers and notaries operate in markets which are only partially overlapping. Therefore, the analysis of the impact of regulations in those markets should have been separated. However, the CCBE acknowledges that the Report marks a significant progress in comparison with the European Commission's reports, which had the unrealistic ambition to deal simultaneously with the whole range of professional services, putting lawyers and pharmacists in the same 'basket'.

The observations above lead to another important issue: the Report suggests, in its second policy guideline, that regulation should be addressed to markets rather than to professions (which may explain why all legal services are dealt with simultaneously). This idea was already put forward by the Commission in its progress report on competition in professional services, which proposed a distinction between categories of users in order to justify different levels of regulation. The CCBE already rejected this idea, which seems to take into account only the problem of information asymmetry. The European Bars and Law Societies have pointed out that regulation exists not only because of the supposed sophistication of the people using the services, but to protect the general public and to guarantee the right of defence and access to justice (to which also "sophisticated" users are entitled). In other words, according to the CCBE, lawyers (and not just legal services) are regulated in the public interest.[16]

A final issue of particular concern to the CCBE is the proposal of an independent Regulatory Authority for the Legal Service Markets. This proposal appears to be based on the assumption, which finds no demonstration throughout the paper, that "*self-regulation lacks legitimacy due to the absence of representation of consumers and stakeholders in the self-regulatory bodies of the legal profession*" and that "*self-regulation enables the legal profession to restrict competition and harm the consumer interest*". The Report points out to the recent reforms adopted in England and to the recommendations in the report

[16] CCBE Comments on Commission progress report on Competition in professional services, page 5.

of the Irish Competition Authority of 2006 as possible solutions to overcome the problems relating to legitimacy and supra-competitive prices, preserving most of the benefits of self-regulation.[17]

In the CCBE's view, the proposal should have been supported by a more structured and in-depth analysis of the concept of "self-regulation" in the various jurisdictions and – at the very least – by a credible economic exercise aimed at establishing a certain link between "self-regulation" and harm to consumers and supra-competitive prices. The CCBE does not oppose any regulatory model, provided that the necessary independence of the legal profession is guaranteed. However, it firmly believes that regulatory structures should be chosen by national legislators taking into account a plurality of factors, as it happens with professional regulations. Furthermore, the proposal is difficult, when not impossible, to discuss, insofar as it does not define the concept of self-regulation and does not provide any indication as to the impact that it should have on the market. The CCBE notes that pure self-regulation of lawyers does not exist anywhere in Europe, since rules enacted by the bars (such as ethical codes) are always combined with statutory provisions and are in any event subject to the rule of law and judicial review.

4. Conclusions

The CCBE finds the OECD background papers for the roundtable to be interesting and informative documents, insofar as they propose an acceptable framework for analysis of regulation of legal services. The CCBE appreciates that the authors of the report made a visible effort to assess impartially legal professional regulations, taking into account not only the interest of increasing competition but also non-economic values linked to the provision of legal services.

The CCBE deems that the method which the OECD has endeavoured to follow is substantially acceptable. The CCBE therefore believes that the Report may be, to this extent, considered as a reasonable base for discussion. However, as regards the concrete assessment of the impact of professional regulations on the functioning of the market, the CCBE considers it necessary to carry out a proper factual analysis. In this respect, no conclusion can be drawn from the Report as such, which is by necessity a theoretical work, containing a review of empirical studies carried out in various jurisdictions for different purposes and without following a uniform approach.

Further, the CCBE and its Member Bars and Law Societies regret that national contributions are, in certain cases, biased and flawed and that not all sections of the Report meet the same standards of accuracy and impartiality. Further comments are provided at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comments_national_de1_1232620813.pdf.

Finally the CCBE questions the appropriateness of certain policy conclusions reached by the Report, particularly those related to the regulation of services (rather than professions) and to the establishment of a Regulatory Authority for the Legal Service markets. The CCBE believes that those conclusions would require a further in-depth analysis of economic and institutional implications which go well beyond the scope of the Report. The CCBE and its Member Bars and Law Societies are willing to contribute to a more in-depth analysis of these issues with the OECD, with a view to serving the public interest and the rule of law in the best way possible.

[17] Report, Page 55.

CCBE

Le Conseil des barreaux européens (CCBE) représente plus de 700 000 avocats européens à travers ses barreaux membres de l'Union européenne et de l'Espace économique européen. Il répond régulièrement au nom de ses membres à des questions politiques qui concernent les citoyens et les avocats européens.

Les commentaires repris dans le présent document constituent les conclusions sur le rapport de l'OCDE sur les « restrictions concurrentielles dans les professions juridiques » (ci-après le rapport)[1]. Les commentaires ne sont pas exhaustifs et ne visent à pas à discuter en détail de l'analyse effectuée dans le rapport, mais plutôt à clarifier la position du CCBE s'agissant de l'approche, de la méthode et du langage utilisé dans la note de référence et la synthèse, et à exprimer la position de la profession d'avocat à l'égard des propositions politiques avancées par l'OCDE. Les observations des délégations nationales du CCBE sur certaines contributions nationales incluses dans le rapport sont disponibles à l'adresse http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comments_national_de1_1232620813.pdf.

1. Remarques introductives

Le CCBE souhaite rappeler tout d'abord que la profession d'avocat a toujours été ouverte aux réformes et le restera. Au cours des dernières années, les organes de régulation européens et nationaux ont entrepris plusieurs initiatives afin de revoir et de reformuler les règlements applicables à la profession d'avocat. Le CCBE et ses barreaux membres sont favorables à ces initiatives dans la mesure où elles peuvent améliorer concrètement l'accès à la justice et assurer le plein exercice du droit de la défense, en respectant les principes fondamentaux de la profession. Il est admis qu'elles sont importantes et qu'elles se déroulent dans une société en constante évolution. Par ailleurs, la profession d'avocat dans toute l'Europe représente un secteur dynamique de l'économie, ouvert à une concurrence intense et sans cesse croissante.

Toutefois, à travers ses organisations européennes et nationales, la profession d'avocat a toujours exprimé sa crainte que, bien que visant à atteindre une compétitivité accrue des marchés des services juridiques, les tentatives de révision du cadre réglementaire applicable aux avocats ne tiennent pas suffisamment compte du rôle particulier de la profession d'avocat, de ses principes, de son fonctionnement et de l'incidence des mesures « de libéralisation » au sein des marchés pour les services juridiques, l'accès à la justice et l'intérêt public.

Le CCBE et ses barreaux membres croient fermement que les révisions d'ordre réglementaire devraient se basent sur les principes suivants :

- **La profession d'avocat sert principalement des valeurs non économiques**. La profession d'avocat sert l'administration de la justice et l'Etat de droit. Ses rôle et fonction ont une pertinence constitutionnelle dans tous les Etats membres de l'UE[2]. De même, l'ordre juridique

[1] Le rapport est disponible à http://www.oecd.org/dataoecd/12/38/40080343.pdf

[2] Dans leurs arrêts des 23 janvier 2008 et du 10 avril 2008, la Cour d'arbitrage belge et le Conseil d'Etat français ont réaffirmé le rôle des avocats en vue de garantir le droit à la défense et l'accès au droit, en clarifiant le fait que les législateurs nationaux doivent respecter les principes fondamentaux de la profession lorsqu'ils adoptent des dispositions visant à protéger les autres intérêts publics.

européen, à travers la jurisprudence de la CJCE, reconnaît expressément l'importance des avocats dans la société européenne[3]. Le cadre réglementaire s'appliquant aux avocats est conçu de manière à promouvoir et protéger les valeurs fondamentales, plutôt qu'à assurer simplement l'efficience économique et la compétitivité. A cet égard, les réglementations professionnelles diffèrent des cadres s'appliquant aux autres activités (comme les services de la poste, de transport, de communication électronique et les services financiers) qui ont une nature essentiellement économique. Les législateurs et les régulateurs nationaux et supranationaux (principalement les agences antitrust) doivent toujours tenir compte de cet aspect.

- **La réglementation des avocats vise à prévenir les défaillances du marché**. En plus de garantir les valeurs constitutionnelles, les réglementations professionnelles ont pour objectif d'assurer le bon fonctionnement du secteur et d'éviter des défaillances du marché et des externalités négatives. Elle peut essentiellement se produire suite à des asymétries au niveau de l'information. Les conséquences de la suppression de la réglementation ex ante (et de l'autoréglementation) doivent être analysées en détail par les autorités nationales et supranationales : renforcer la concurrence par la dérégulation ne constitue pas nécessairement la meilleure option s'il faut assurer une qualité et une fiabilité uniformes des services juridiques pour tous les utilisateurs. L'analyse économique (qui présuppose la collecte de preuves empiriques solides et l'utilisation de méthodes scientifiques communément acceptées) doit s'appliquer en permanence pour évaluer les conséquences des choix politiques et réglementaires pour le bien-être des citoyens.[4] Les régulateurs doivent être prévenus de l'utilisation d'indicateurs arbitraires comme ceux créés par IHS et dont la validité est aussi remise en question par le rapport de l'OCDE.

- **Le marché des services juridiques est concurrentiel et ses règlements n'empêchent pas la concurrence**. Ce n'est qu'après une évaluation de l'importance des réglementations professionnelles pour la protection des valeurs constitutionnelles et de l'intérêt général que les régulateurs peuvent examiner l'impact de ces réglementations sur les conditions concurrentielles du marché. Cette évaluation doit être réalisée par le biais d'études empiriques impartiales et extensives en tenant bien compte des principes établis de l'analyse économique. Le CCBE souligne que la profession d'avocat est extrêmement concurrentielle et dynamique. Les marchés des services juridiques dans l'UE et en dehors de l'UE sont pleinement exposés à la concurrence ; il n'existe pas de restrictions quantitatives de l'entrée et le nombre d'acteurs est très élevé et croît sans cesse. Les règlements ont souvent un effet favorisant la concurrence, renforçant la concurrence en matière de qualité des services. Des restrictions très strictes de la concurrence, comme les ententes et les abus de position dominante, n'ont jamais été constatées sur le marché des services juridiques[5]. La nature restrictive des règlements ne peut pas être simplement supposée, mais elle doit être vérifiée sur la base du fonctionnement des marchés dans les faits. A cet égard, il est fondamental de reconnaître que les différentes professions juridiques ne représentent pas un marché unique des services (il ne faut pas confondre les avocats et les

3 Voir par exemple, le jugement de la Cour du 5 décembre 2006 dans les affaires jointes C-94/04 et C-202/04, Federico Cipolla c. Rosaria Fazari, née Portolese et Stefano Macrino et Cladia Capoparte c. Roberto Meloni, Rec.2006,p.I-11421. Voir aussi le jugement de la Cour du 26 juin 2007, Affaire C-305-05, Ordre des barreaux francophones et germanophones et autres c. Conseil des ministres, Rec.2007,p.I-5305.

4 A cet égard, le CCBE apprécie que l'OCDE tienne compte des conclusions de l'étude préparée par Copenhagen Economics en 2006. Voir rapport pp. 115 et 116.

5 En revanche, la Cour de justice a estimé que les règlements s'appliquant à la profession d'avocat soit ne restreignent pas la concurrence, soit sont justifiés par l'intérêt public. Voir, l'ordonnance de la Cour du 17 février 2008, affaire C-250/03, Mauri, Recueil [2005] p. I-1267 et le jugement de la Cour du 19 février 2002 dans l'affaire C-309/99, Wouters, Recueil [2002] p. I-1577.

notaires, ces derniers disposant de plusieurs privilèges publics) et que, s'agissant de l'aspect géographique, chaque marché national est distinct et doit faire l'objet d'une analyse séparée.

A la lumière de ce qui précède, le CCBE estime que toute réforme des réglementations des avocats ne doit être entreprise que lorsqu'il aura été établi que : 1) elle n'a pas d'incidence sur les valeurs constitutionnelles pour lesquelles la profession est responsable de la promotion, 2) l'intérêt général et le bien être du consommateur sont protégés de manière adéquate et 3) les réformes peuvent, sur la base d'un analyse économique poussée, fournir une amélioration tangible et significative des conditions concurrentielles sur le(s) marché(s) concerné(s).

2. Commentaires du CCBE

A la lumière des principes présentés ci-dessus, le CCBE souhaiterait faire quelques commentaires d'ordre général sur le rapport.

Le CCBE reconnaît les efforts consentis par l'OCDE pour traiter la question de la réglementation des services juridiques en utilisant une approche généralement équilibrée et objective, nonobstant le point de départ et les objectifs du rapport, qui se concentrent clairement sur la remise en question des règlements.

Le CCBE juge très important le fait que, dans sa deuxième partie, le rapport effectue une analyse extensive de la question de l'asymétrie de l'information et des externalités négatives qui rendent nécessaire et justifiée la réglementation des services juridiques. Le CCBE apprécie le fait que le rapport tient également compte d'une troisième forme de défaillance du marché, à savoir « *l'insuffisance de biens publics* » [6]. En effet, la réglementation peut être jugée nécessaire si certains biens sont disponibles en grande quantité pour la société.

A cet égard, le CCBE note que le rapport indique clairement que :

> *« Les prestataires de services juridiques sont à l'origine d'importantes externalités positives, qui ont beaucoup de valeur pour la société en général. Les juristes jouent un rôle crucial dans la bonne administration de la justice et les notaires contribuent à la sécurité juridique en permettant que le transfert de propriété d'un bien immobilier prenne pleinement effet vis-à-vis de tiers.*
>
> *A noter, parmi les externalités positives importantes des droits exclusifs, le fait qu'ils abaissent le coût de l'administration de la justice. Le fait que des affaires puissent être plaidées par des non-juristes peut faire porter une lourde responsabilité au juge (en particulier dans les affaires complexes); en revanche, des professionnels qualifiés peuvent présenter une meilleure argumentation et être à l'origine de précédents valables (Bishop 1989) »*[7].

Le CCBE note également que l'on indique également que les gouvernements peuvent poursuivre des objectifs non économiques (comme la protection des droits consacrés par la constitution ou la sécurité juridique) lorsqu'ils adoptent des règlements pour les services juridiques[8]. Il est sans doute important, pour la profession d'avocat, que tous les facteurs pertinents soient pris en compte lors de la discussion des cadres réglementaires.

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6 Rapport, Page 81.

7 Rapport, Page 81.

8 Ibidem.

S'agissant de l'analyse des « *théories de la réglementation, en particulier de l'autoréglementation* », le CCBE se réjouit que le rapport reconnaisse que, malgré les travaux effectués par les économistes, il n'existe pas assez de preuves pour confirmer l'idée que la réglementation peut être adoptée pour des intérêts particuliers plutôt que publics[9].

Quant à l'analyse des règlements professionnels spécifiques (droits exclusifs et autre restriction à l'entrée, restrictions en matière d'honoraires et de publicité, et restrictions pour les organisations commerciales et les pratiques multidisciplinaires), le CCBE note que, contrairement au rapport de la Commission européenne sur la concurrence dans le secteur des professions libérales, le rapport essaie de réaliser une révision équilibrée des théories économiques en faveur de la régulation elle-même ou contre celle-ci, et il réalise les efforts nécessaires pour s'assurer de l'existence de preuves empiriques pour soutenir une des deux théories.

Il convient de souligner que, suite à l'adoption d'une approche plus équilibrée et précise, le rapport dégage des conclusions en faveur de la régulation des services juridiques, ce qui compense ou établit un équilibre avec les conclusions allant dans le sens inverse :

- S'agissant des droits exclusifs et autres restrictions à l'entrée par exemple, le rapport établit qu' « on dispose de peu de données empiriques démontrant que les restrictions qualitatives à l'entrée vont également de pair avec un nombre de praticiens plus limité » et que peu corroborent l'avis que les restrictions à l'entrée ont une incidence sur le prix des services juridiques aux Etats-Unis ;[10]

- Au sujet de la restriction des honoraires, le rapport indique qu'il n'existe pas assez de preuves permettant de lier des honoraires recommandés aux honoraires réellement demandés par les avocats et que « *les autorités de la concurrence assimilent peut-être trop rapidement honoraires recommandés et ententes sur les prix* » [11].

- En matière de publicité, le rapport tient compte des résultats de deux études, ce qui conduit à des conclusions opposées s'agissant de l'impact de la publicité sur la qualité et le prix des services. Le rapport ne dégage pas à juste titre de conclusions politiques fortes à ce sujet ; [12]

- Dans le même ordre d'idée, le rapport souligne qu'il existe peu de preuves empiriques confirmant les arguments en faveur de ou contre les restrictions de partenariats et d'organisation commerciale. [13]

En ce qui concerne les recommandations politiques, le CCBE peut évidemment convenir du fait que les législateurs doivent toujours considérer, lors de la révision de réglementations professionnelles, si elles donnent lieu à des externalités négatives non souhaitées. Les avocats soutiennent pleinement l'avis selon lequel, « dans certains cas, [la réglementation] *est peut-être insuffisante plutôt qu'excessive* »[14].

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9 Rapport, Page 83.

10 Ibidem, Page 96.

11 Page 105.

12 Page 48.

13 Les sources principales des preuves concernent les architectes et les dentistes. Seule une étude a traité des cabinets d'avocats aux Etats-Unis. La taille moyenne des cabinets dans les pays où les LLP sont autorisés a été considérée uniquement comme « une indication possible de gains en efficacité ».

14 Page 113.

Comme indiqué au début du présent commentaire, le CCBE soutient l'idée, exprimée dans la quatrième recommandation politique, selon laquelle une évaluation de l'intérêt public des règles de régulation et d'autorégulation doit comprendre des objectifs non économiques reflétant les différentes orientations politiques suivies dans les pays.[15] Les objectifs non économiques sont à la base de la réglementation des avocats. Ils doivent être pris en compte non seulement en tant que facteur supplémentaire lors de l'évaluation du cadre réglementaire, mais aussi comme un de ses principaux paramètres.

Enfin, le CCBE estime qu'il est évidemment nécessaire que les législateurs doivent réaliser une analyse des coûts-avantages afin de voir si les restrictions de la concurrence sont disproportionnées ; trop souvent, les réglementations professionnelles ont été considérée comme indûment restrictives sans considérer de manière adéquate les externalités négatives que ces réglementations visent à éviter.

3. Remarques critiques

Compte tenu de ce qui précède, le CCBE estime nécessaire de répondre à certaines remarques critiques des auteurs du rapport.

Tout d'abord, s'agissant de l'approche générale des auteurs, le CCBE regrette que le rapport ne respecte pas les mêmes critères d'impartialité et de précision dans tout le document. Des explications complémentaires sont disponibles à l'adresse at http://www.ccbe.eu/fileadmin/user_upload/ NTCdocument/FR_CCBE_comments_on_2_1232621722.pdf.

Le CCBE regrette également que l'OCDE n'ait pas vérifié la qualité et l'exactitude des contributions nationales. Plusieurs délégations du CCBE ont souligné la présence de défauts majeurs, d'erreurs factuelles et d'avis biaisés dans les contributions sur leur cadre réglementaire national.

Des exemples détaillés sont joints aux présents commentaires http://www.ccbe.eu/fileadmin/ user_upload/NTCdocument/comments_national_de1_1232620813.pdf. Compte tenu de la pertinence des questions examinées, le CCBE s'attendait à ce que les contributions nationales respectent les mêmes normes que la note de synthèse. L'absence d'uniformité affecte la validité de tout l'exercice.

En ce qui concerne des points plus spécifiques, le CCBE pense qu'il aurait été préférable, d'un point de vue analytique, que le rapport traite de chaque profession séparément. Si l'objectif du rapport était d'évaluer les restrictions concurrentielles sur les marchés des services juridiques, la définition de ces marchés aurait dû constituer une première étape inévitable. L'application d'un critère de « viabilité de l'offre » aurait dû conduire à la conclusion que, par exemple, les avocats et les notaires sont actifs sur des marchés qui se recoupent uniquement de manière partielle. Par conséquent, l'analyse de l'impact des règlements de ces marchés aurait du être séparée. Toutefois, le CCBE reconnaît que le rapport constitue un progrès important par rapport aux rapports de la Commission, qui avaient comme ambition irréaliste de traiter un ensemble de services professionnels en même temps, en mettant les avocats et les pharmaciens dans le même « panier ».

Les observations susmentionnées conduisent à un autre sujet important : dans sa deuxième ligne directrice politique, le rapport suggère que la réglementation concerne les marchés plutôt que les professions (ce qui peut expliquer le traitement simultané de tous les services juridiques). Cette idée était déjà avancée par la Commission dans son rapport d'avancement sur la concurrence dans le secteur des professions libérales qui proposait une distinction entre les catégories d'utilisateurs pour justifier différents niveaux de réglementation. Le CCBE a déjà rejeté cette idée qui semble tenir compte uniquement du

15 Ibidem.

problème d'asymétrie de l'information. Les barreaux européens ont souligné qu'une réglementation existe non seulement pour la sophistication supposée des personnes recourant à ces services, mais également pour protéger le public et garantir le droit à la défense et l'accès à la justice (auquel les utilisateurs « sophistiqués » ont aussi droit). En d'autres termes, les avocats (et non uniquement les services juridiques) sont réglementés dans l'intérêt du public, selon le CCBE[16].

Un dernier point qui préoccupe particulièrement le CCBE est la proposition d'une autorité de régulation indépendante pour les marchés des services juridiques. Cette proposition semble se baser sur la supposition suivante, qui n'est pas démontrée dans le rapport : « [le] *manque de légitimité* [de l'autorégulation]*, lié à l'absence de représentation des consommateurs et parties prenantes dans les instances d'autoréglementation* » et « *l'autoréglementation permet à la profession juridique de restreindre la concurrence et porte préjudice aux consommateurs* ». Le rapport met en avant les réformes récentes adoptées en Angleterre et les recommandations dans le rapport de 2006 de l'autorité de la concurrence irlandaise pour surmonter les problèmes en matière de légitimité et de prix supérieurs au prix concurrentiel, préservant ainsi la plupart des avantages de l'autorégulation[17].

Le CCBE estime que la proposition aurait dû être corroborée par une analyse plus structurée et plus approfondie du concept d'autorégulation dans les différents pays – et à tout le moins - par une étude économique crédible visant à mettre en place un certain lien entre l'« autorégulation » et le préjudice causé aux consommateurs et aux prix supérieurs au prix concurrentiel. Le CCBE ne s'oppose pas à un quelconque modèle réglementaire, pour autant que l'indépendance nécessaire de la profession d'avocat soit garantie. Toutefois, il croit fermement que les structures réglementaires devraient être choisies par les législateurs nationaux en tenant compte d'une multitude de facteurs comme c'est le cas des réglementations professionnelles. Par ailleurs, la proposition est difficile, voire impossible, à discuter dans la mesure où elle ne définit pas le concept d'autorégulation et ne fournit pas d'indication quant à l'impact éventuel sur le marché. Le CCBE constate que l'autorégulation pure des avocats n'existe nulle part en Europe car les règles adoptées par les barreaux (comme les codes de déontologie) s'accompagnent toujours de dispositions statutaires et sont en tout cas soumises à l'Etat de droit et à la révision judiciaire.

4. Conclusions

Le CCBE estime que les notes de référence de l'OCDE constituent des documents intéressants et informatifs dans la mesure où ils établissent un cadre crédible et acceptable pour l'analyse de la régulation des services juridiques. Le CCBE apprécie le fait que les auteurs du rapport ont consenti un effort réel en vue d'évaluer les réglementations de la profession juridique de manière impartiale, en tenant compte non seulement de l'intérêt d'une concurrence accrue, mais aussi des valeurs non économiques liées à la fourniture de services juridiques.

Le CCBE estime que la méthode choisie par l'OCDE est acceptable sur le fond. Le CCBE juge donc que le rapport peut dans cette mesure être considéré comme représentant une base de discussion raisonnable. Toutefois, s'agissant de l'évaluation concrète de l'incidence des réglementations professionnelles sur le fonctionnement du marché, le CCBE estime nécessaire de réaliser une analyse factuelle adéquate. A cet égard, il n'est pas possible de tirer des conclusions à partir du rapport en soi, rapport qui est nécessairement un travail théorique, contenant une révision des études empiriques réalisées dans différents pays à des fins différentes et sans approche uniforme.

16 Commentaires du CCBE sur le rapport d'avancement de la Commission sur la concurrence dans le secteur des professions libérales, Page 5.

17 Rapport, Page 117.

De même, le CCBE et ses barreaux membres déplorent le fait que les contributions nationales sont biaisées, imprécises et erronées dans certains cas et que toutes les sections du rapport ne répondent pas toutes aux mêmes normes d'exactitude et d'impartialité. Des commentaires complémentaires sont disponibles à l'adresse http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/comments_national_de1_1232620813.pdf.

Enfin, le CCBE se pose la question de l'adéquation de certaines conclusions politiques dégagées par le rapport, en particulier celles qui concernent la régulation des services (plutôt que des professions) et l'établissement d'une autorité de régulation pour les marchés des services juridiques. LE CCBE estime que ces conclusions nécessiteraient une analyse approfondie des implications économiques et institutionnelles qui aille au-delà du champ du rapport. Le CCBE et ses barreaux membres souhaitent contribuer avec l'OCDE à la réalisation d'une analyse plus approfondie de ces questions en vue de servir l'intérêt public et l'Etat de droit de la meilleure manière qu'il soit.

SUMMARY OF DISCUSSION

The Chair, Alberto Heimler, noted that the Working Party had discussed legal professions in the broader context of professional services a number of years ago. Why are lawyers so important? The major reason is that citizens and firms in every jurisdiction in the world use legal services, some of them quite often, sometimes judicially and sometimes extra judicially, that is in a trial or outside a trial. Competition authorities are sometimes concerned that customers pay too much for legal services either because prices are excessive or because they are badly informed about relative qualities of services that are provided to them. There are many reasons for allegedly excessive prices: lawyers may be scarce (because universities supply too few lawyers or because the Bar exam is too rigorous), they may cooperatively set excessively high prices, clients may not be well informed of market prices or quality and not shop around. So even though there might be a number of lawyers around and there might even be competition, if customers do not shop around and prices are not transparent, the result may be high prices. Legal services in economic terms are credence goods and many consumers might get swindled, either because they are offered inadequate services or because the price they pay is not disciplined by experience.

The Chair addressed, as a preliminary, the role of credence goods and how consumers can be protected. There are no windows in lawyers' offices, like shop windows showing clothing and price tags. What can be done to help consumers make more reasoned choices? The problem does not exist for big corporations that know exactly what they want and have different law firms compete to supply them, which is often the case even for competition cases.

The way lawyers have approached the problem is to say that the lawyer-client relationship is based on trust. What this implies is that officially for lawyers, money – and this is the experience in Italy - does not matter and that lawyers are always on the side of their clients. We know that this is not the only way to characterise the relationship. Of course trust must be there, but money matters as well. What we observe is lack of rivalry which originates not always from oligopolistic markets (lawyers are numerous), but also from a lack of competition on the demand side, sometimes reinforced by restrictive regulation.

Professor Van den Bergh suggests that information asymmetries in the markets for legal services may justify regulation to prevent quality deterioration and ensure the integrity of the professionals. He suggests that several legal rules support the provision of high-quality legal services:

- The requirement of a university education;
- The requirement of on-the-job work placement;
- Professional training; and
- Regulatory oversight.

The fact is that occasionally customers need protection. That is the problem to address throughout this Roundtable.

1. Entry barriers

The number of law schools in a country may be limited, as may be the number of graduates. The problem is that the number of graduates may be quite limited because the legal professions control law schools or because Bar exams are too rigorous. Ireland is an example of a country where the process of education for lawyers is strictly controlled by the profession. The Law Society of Ireland is both the regulator of training for solicitors and the sole provider of professional training to become a solicitor. But how are these powers actually managed? Are the numbers of solicitors in Ireland limited because of this monopoly assigned to the Law Society? Is there any prospect for change?

A delegate from Ireland stated that the answer to the questions is by definition "yes". The number of solicitors is limited because of the monopoly that the Law Society has. By definition, if there is only one provider then the number of places is limited to the capacity provided by that provider. The Law Society does have a legal monopoly based on statutes, but there is also a licensing possibility in this legislation. The Law Society was supposed to develop criteria by which other providers could be established. They never did so; they always claimed there was no need because there was no demand. Potential providers on the other hand were too nervous to apply, according to the competition authority's understanding. However, since this problem was raised in the public domain some potential providers have come forward.

It is difficult to arrive at a correct number of lawyers in an economy. What is the right number? The Law Society did expand the number of places many years ago, but that was after legal action by unsuccessful applicants. So the Law Society does operate a very highly-regarded well-resourced law school, but there is only one. This may manifest itself in high course fees and inefficiency.

The Law Society is responsible for only one half of the profession in Ireland, the solicitor's profession; the other professions are advocates or barristers and there is again a monopoly provider of the course leading to the title of barrister. Again the number of barristers is limited by definition by the capacity of the sole single training school in Dublin. That of course defines the number of graduates. There is little sign of King's Inns, which is the monopoly provider of education for barristers, being willing to license or allow other providers to set exams.

The Chair moved to the United States where the American Bar Association (ABA) is in charge of the accreditation of law schools. In 1996 it signed a consent decree with the DoJ in order to make sure that denials to access to law schools would not be based on market interest of the associated lawyers. In 2006 the ABA was found to have violated the decree, even if the number of accredited law schools in the US grew quite a bit. Isn't there a conflict of interest inherent in the function assigned to the ABA?

A delegate from the United States stated that according to the case filings the ABA is the world's largest professional association. Back in 1893 the ABA created a section of legal education and admission to the Bar which, since 1921, has been an accrediting agency and accredits law schools. An ABA accreditation for a law school is absolutely critical to the life of the law school because some 40 of the 50 US states require an ABA approved law school degree in order to sit for the state Bar exam. This particular ABA section not only sets the standards for what a law school has to meet, they also conduct on-site visits to law schools and every seven years law schools have to go through the accreditation process again and they have a group from the ABA committee that visits. They used to discuss everything from salaries for professors to the number of volumes of books in the library to the size of the classrooms. A law suit filed back in 1995 alleged a section I violation, charging that the accreditation process had been captured. In effect this accreditation committee was behaving like a guild to protect its own interests, interests of law school deans and faculty members. Current and former law school deans and faculty dominated the accreditation section and the on-site visit teams. They set the standards for faculty membership and for compensation and salary of faculties and law schools basically through peer group requirements, i.e. to get

accreditation, faculty salaries had to be equivalent to salaries at peer group schools. This had the effect of increasing the salaries at all law schools. Similarly, there were a number of rules which required law schools to boycott non-ABA approved schools and for-profit law schools. No credits would be allowed at ABA approved schools for any work done at these other law schools. A 1996 consent decree prohibited much of this activity. 10 years later, it emerged that the ABA had been ignoring many of these provisions. Last year the court filed another order requiring the ABA to comply with these provisions. The ABA did not contest this contempt hearing and was ordered to pay all the costs of the particular investigation. The various terms of the provisions that they had not been following included annual certification that they had complied; they had not proposed changes to the accreditation standards, they had not given changes to the Department of Justice for review; they didn't obtain certification from ABA staff that they agreed to abide with the decree. They had not ensured that more than ½ of the membership of the standard review committee were comprised of law school faculties so they continued to have committees that were dominated by law school members.

The Chair observed that in Brazil there are almost 550 000 lawyers and over 100 000 law school graduates every year. The Bar exam is quite selective according to the submission. Last year only 16% of those graduates passed the exam. The submission suggests that the problem of Brazil is to increase the quality of its lawyers. What exactly is meant by that? Don't a high number of lawyers ensure that legal services are made available at a reasonable price for all and that price and advertising restrictions are abolished?

A delegate from Brazil stated that in Brazil most people who go to law school do not intend to become professional lawyers but do want a high degree. There is an idea in Brazil that having a law degree is respectable and opens options for different types of jobs. For example if a person wants to become a manager of a supermarket he could go to a private law school in the evening that would give him a law degree and this could improve his chance of becoming a supermarket manager.

The problem is Brazil's wish to increase the supply of legal services is not necessarily linked to the increase of supply of graduates in law school. It is necessary to change the Brazilian law to prevent the law association from controlling minimum prices for legal services and to abolish restrictions on advertising.

The Chair moved on to Bar exams. In many jurisdictions the number of lawyers is low because the Bar exam is very rigorous. In Chinese Taipei for example only 8% of law school graduates pass the Bar exam. We will come to Chinese Taipei later. Also in Poland, law school education is only a step in the long and difficult process of becoming a lawyer. Indeed the number of advocates in Poland in 2005 was around 6 000, a very small number for a country of 40 million people, while the number of law school graduates is around 8 500. The Polish report refers to a 2005 reform. The Chair asked Poland to describe the changes that had been introduced to the access regime in Poland and the results that are expected?

A delegate from Poland stated that one thing that has to be clarified in advance is the number of professional lawyers in Poland. It's true that there are around 6 000 advocates, but there are also legal advisors who have basically the same rights as advocates excluding criminal and family law cases. So the true number would be closer to 23 000 advocates, although when it comes to criminal law cases the number would be 6 000.

In Poland not everybody studying law wants to be an advocate or legal advisor; the number of graduates going on to pass the Bar exam and become a legal advisor trainee may be 15-20%.

The changes to the access regime would entail 3 important phenomena:

1. The pool of people eligible for legal professions would be enlarged, i.e. new avenues would be created for people who want to become a legal advisor or an advocate. Before the reform only highly trained academics could skip entry examinations, training and professional examination. Right now this pool has been enlarged to people who pass the prosecutor's examination and judge's examination. It was especially important in Poland because there were a relatively high number of people who would go through judge or prosecutor training without obtaining a post in government administration, i.e. they would be highly trained but they would not be able to use their skill. Basically the rights to practice law were the same as the ones for law graduates, so it was a big change.

2. Remove the exclusive control over entry process from legal associations because up until 2005 they had exclusive control over the process. The exams were prepared by the associations and the exams were graded by the associations. There was no outside control over the process except for the veto of the Minister of Justice which was rarely used. This was the most important issue.

3. Expressly provide for the possibility of legal advice being provided by less trained lawyers, excluding court appearances. This possibility which was based rather vaguely on the general provisions of economic activity has been put into law explicitly. But there is a problem with all these methods because many of the reforms were successfully challenged before the Constitutional Tribunal. The problem is that the Polish constitution provides for the possibility of creating a self government which would regulate a profession in the public interest; so any provisions which take away too much from self government powers may be deemed unconstitutional, so some of them were considered unconstitutional by the tribunal. With regard to enlarging the pool, the tribunal said that people who passed the judges' or prosecutors' examination but who didn't practice long enough are barred from getting into the profession, the precise requirements must be spelt out in legislation. Exclusive control was also touched upon. The tribunal said that there must be some control by the associations; it can't go into the hands of the Minister exclusively. The third possibility – providing for some low cost legal advice - was also held as unconstitutional because it was too vague. But general consensus in Poland is that it is not really a question of those changes not being introduced into the legislation, it is more a technical issue, i.e. the Constitutional Tribunal stated that all these changes may be put into law in a much more adapted way. Drafting the legislation is the challenge. The Minister of Justice is working to introduce changes that will preserve the spirit without infringing the constitution.

The Chair moved on to Korea where apparently there is a *numerus clausus* on the maximum number of lawyers allowed to pass the Bar exam every year. Who establishes this number and how? What are the prospects for reform?

A delegate from Korea stated that the number of people passing the Bar exam every year is determined by the Minister for Justice, based on the consideration of the Korean Bar Exam Management Committee as well as the opinion of the Supreme Court and the Korean Bar Association. Since 1999 about 1 000 applicants per year have passed the exam. Reform is not an easy task. The discussion and debate started in 2003, and the bill includes the establishment of an American-style law system which is still on-going in the National Assembly. There is a strong possibility of fundamental changes in the legal profession service market in the near future.

A delegate from the UK commented on education systems. He noted that he had been a practising lawyer for about 36 years. When he qualified there was only one law school run by the Law Society which had 2 branches and it was almost impossible to get into it. There were then about 23 000 solicitors, there are now about 110 000. What has happened in the UK is that the system of education has been franchised out to a variety of different institutions. There is an evolving pattern of different courses. Law firms can

put their students through a variety of different courses which are more suited to needs. For instance, quite a number of commercial law firms in the City and in the country have actually selected course designs that are most suited to the kind of work they do, a laudable development.

A delegate from Ireland observed that it is always in the interest of the profession to limit the number of entrants to the profession. One way to do that is by continuing to raise the standards and raise quality to a level beyond what is necessary. One of the consequences of that is that it prevents the emergence of other types of para-professions.

A delegate from Brazil stated that in Brazil the increasing number of law schools was not accompanied by quality. The government was not able to control the quality of the law schools. So the Bar Association took this responsibility. Similarly, in some other professions there has been a problem of rapid increase in the number of their universities without quality control by central government. So sometimes, oversight by the professional associations may be a second best alternative when the first best does not work.

A delegate from Poland noted that access may be discouraged in many ways. In Poland a person who becomes an advocate has to pay an administrative fee to the local association. The pattern that emerges is very interesting, especially among advocates, because it seems that advocate trainees either do not pay these fees or pay very low fees, whereas people coming from other professions like those who gained those rights on the basis of their reference are charged exorbitant fees, up to € 2 000, only for the right to establish themselves in the local area.

2. Exclusivity

The Chair moved on to consider exclusivity. In most jurisdictions, but not in all, the only exclusivity lawyers have is legal representation in courts. For example, this is the case of Italy. No exclusivity exists for legal advice or for out-of-court activity. New Zealand has given lawyers exclusivity even for tenancy contracts which in many countries are free. The system in New Zealand will change in 2008 and a new profession, the conveyancing practitioner, is being created. In the process will some of the exclusivities be eliminated? How is the change being accepted by the legal profession? What prompted reform?

A delegate from New Zealand stated that exclusivity will be eliminated. In 2008 when the Lawyers and Conveyance Act comes into operation the exclusivity of conveyancing will be shared between lawyers and conveyance practitioners. The reserved areas of work generally relate to advice outside court proceedings, preparation of court documents etc. Accountants and other advisors will be able to give advice on contracts, wills, tax and tenancy agreements as long as they do not claim they are lawyers. Giving such advice does not have the same privileges and protection that applies to legal advice. The legal profession made some opposition to opening up conveyancing which was expressed as a concern about quality; however the legal profession was mollified to some extent by the fact that they will be able to share exclusivity in real estate work with real estate agents and reforms to do with the Real Estate Act. They were pleased that exclusivity was retained in specific areas to do with drafting court documents, providing legal advice in the direction and management of court proceedings. They do not like the fact that for Queen's Council they were opening up the appointment process to include lawyers and law firms, whereas before it was restricted to barristers only, arguing this undermines independence.

The Chair observed that Latin notaries have exclusivity on acts that are put in public registries. As such, Latin notaries provide legal certainty on property rights and are themselves responsible for the validity of the transaction, not just for certifying the mere identity of the parties. There is no need for insurance in Latin notary countries on the regularity of the transaction. Notaries are quasi-public officials and entry is restricted. In Italy, to become a notary, you need to have a law degree and pass a competition

for available positions. Recently, tariffs are no longer fixed by government decree and price competition is now common. The Netherlands has a much longer history of market liberalisation for notary services. Could the Dutch delegation briefly explain the substance of the reform and the achieved results? Why has entry been slower than expected?

A delegate from The Netherlands stated that there had been some major reforms in the notary profession. The two main ones are the abolishment of tariff regulation and the abolishment of the limit on the number of notaries. Tariffs are now completely free and this has led to a decrease in tariffs and a wide diversity of tariffs for different notaries. The cross subsidy between different notary services has decreased. After abolishing the limit on the number of notaries, there has been entry of new practices and the growth of some existing practices. The entry is slower than expected and there are a number of reasons for this. One is that a notarial firm must offer all notarial services, so there is no room for specialisation that might be desired by a new practice. The other one is that a new practice has to get permission based on a detailed business plan. There are reviews by commission and the administrator has to give his permission to start a new practice. This might be a barrier to entry due to regulation, but there is also some evidence that junior notaries find it risky to start a new practice and they prefer to join existing practices rather than start a new one. A survey showed that junior notaries want to become employees of an existing practice.

The Chair stated that in Australia the legal profession was liberalised as part of the national competition policy reforms of the 1990's. Entry to the profession is still administered at the local level. Why do the States and Territories not recognise the admission to the Bar granted in another one?

A delegate from Australia noted that as a result of the federal system, the states and territories look after the regulation of the legal professions. Historically, the eight different states and territories have separate rules, different thresholds and different regulations for the market in each jurisdiction. Under the constitution it is not possible to have a national approach as such, but the Commonwealth government works closely with the states' and territories' governments to try and come up with a harmonised legislation at least with the legal professions. The national practising certificate regime was created within a context where states and territories all had different rules. It was created to provide for mutual recognition on a case by case basis. The next stage of the reform that Australia is undertaking at the moment is to actually develop a model bill legislation for the legal professions; that has been completed by the Attorney Generals of all the states and territories and the Commonwealth. Most of the states and territories have made input into that model bill, so now there is a situation where regulation guiding the entry and the market conduct are basically similar or harmonised to the extent possible.

The Chair stated that in Switzerland the legal profession, like other professions, continues to be regulated at the regional level. However in 2002 a federal law introduced free movement of attorneys between Cantons. With respect to notaries however some cantons have public office notaries and others have only private notaries. As the Swiss say in their submission, prices are substantially higher where notaries are private. Has the internal market, described in the submission, introduced competition with respect to notary services? Can a person close a transaction in a canton where notary services are cheaper?

A delegate from Switzerland stated that regulation of legal professions is complicated given that there are 26 cantons in such a small area. For attorney services, a federal law has liberalised the whole market so that advertising is permitted, fees are regulated less rigorously, there are no quantitative limits and lawyers can move between the cantons. However for notary services, every canton has its own system. Different cantons have different regulations. Some cantons have fixed fees that prohibit advertising. In theory, notaries could move according to internal market law between cantons; but this is difficult when they are not allowed to advertise and the fees are fixed by cantonal ordnance. Basically 2 types of notary systems exist in these 26 cantons. Some cantons have public service notaries where civil servants provide the notary services to the clients. Obviously in these cantons there is no competition at all because clients go to

the public office and the officers are employed by the state. In other cantons they have Latin notaries as a regulated profession and there the private sector notaries compete. However their fees, advertising and so on are usually regulated very rigorously. Interestingly, in those cantons notarial services tend to be more expensive than in those cantons with public service notaries.

Public service notaries do not compete with private sector notaries, and it would not be possible for a public sector notary in Zurich to provide a service for a canton where private sector service exists. The variation of regulation between the cantons makes competition more difficult. For example if a canton decides to regulate the fee for one service, then in this canton no price competition can exist, even if a notary comes from another canton, they must apply the cantonal regulation.

For some notary services, like incorporating of enterprise, regulations are relatively loose. For this service, notaries are providing a standardised service over the internet. They set a fixed fee. When regulation is relaxed, it appears that competition develops. Another anecdote on cross-border competition relates to competition from Swiss notaries to foreign markets. For example, many German companies cross the border to consume or buy notary services. Without knowing the details of regulation in Germany it seems to be the case that some notary services are cheaper in Switzerland than in Germany. The Swiss have some examples of this.

The Chair observed that in continental Europe, the present conveyancing service continues to be a problem, in so far as consumers are affected by a differentiated degree of regulation across jurisdictions. The European Commission recently issued a comparative study on conveyancing services, comparing market outcomes in more or less heavily regulated markets. The results of this study show that consumers buying a property of the same value pay more, the more regulated the markets are. However, Italy is a country where the price in the survey is revealed to be quite high. Because of the widespread tax evasion, practically nobody declares the true value of a purchased property. Consequently that comparison is rather misleading. The comparison is made on a 250 000 euro apartment but it depends on the actual price paid for the apartment. In some countries the true value has been revealed, but in Italy it is not revealed so an apartment which is claimed to be worth only 250 000 euros is really worth 700 000 euros; which means that fees in proportion to the true value of the apartment are much cheaper. The comparison is nonetheless quite interesting.

A delegate from the European Commission stated that they had hoped to be able to report the findings of their study but it is still on-going. They take the point that the Chair mentioned about Italy and transaction costs and the fact that people don't generally pay notary fees on the basis of a full transaction. But of course in the study of this nature they have to take what is publicly available. The study tries to compare a series of transactions in terms of home values of 100 000 EUR, 250 000 EUR and 500 000 EUR in order to get some comparison across the 21 countries. As a colleague presented at the last WP meeting, the preliminary findings of the study showed that where there is a low level of regulation in this market, fees are lower. In the Latin notary profession which exists in continental Europe, fees are higher than in the more liberalised market such as perhaps in Northern Europe.

Prof. Van den Bergh noted that for real estate closings, there are at least 5 different models:

- The heavily regulated Latin notary profession as it still exists for instance in Germany, in Greece or several law jurisdictions;

- The deregulated Latin notary model as it has been introduced in The Netherlands;

- The model of competition between different lawyers, and potentially a specialised conveyancer profession, as in the UK and as will be the case in New Zealand;

- Solutions where transactions are made by non-lawyers. For instance in Scandinavian countries, real estate agents may engage in these transactions;

- The US model, where basically all the different services are split: there are title insurance companies; there are attorneys who may give advice to both sellers and buyers; here are companies that can take deposits and there are witnesses for signatures.

What is lacking is a comparison of these 5 models. A study that just confronts levels of regulation and prices is too easy and may lead to biased conclusions. There is a need for a study which looks at these 5 models and also tries to cope with the assessment of quality. Professor Van den Bergh suggested that there is a potential conflict of 2 religions: on the one hand the idea that more competition is always better, on the other hand the idea that Latin notaries provide the highest possible level of legal certainty and should therefore be kept as a profession which combines characteristics of the legal profession and also public officials. Evidence is needed on the value in terms of legal certainty in different models. Comparing levels of regulations and prices does not provide sufficient information. Quality could be assessed, for instance, by looking at a number of legal disputes and frequency of invalidity of transactions of real estate. This may be easy to say from the point of view of an academic; it may be quite difficult to gather up these data. But as long as these data are not available we risk a debate between religions when real hard core evidence could be developed.

A delegate from the European Commission noted that the study is attempting to look at not just price but also other factors that influence the market.

A delegate from the United States stated that in the U.S., states regulate who can carry out real estate conveyancing. In about 8 to 10 states, an attorney must be present at the closing. In those states consumers do not have much of a choice. The other states vary: some have dual systems, for example Virginia has licensed regulated settlement services that are not performed by an attorney. Most states do not require consumers to buy title insurance, but it is, in effect, a requirement for all consumers because the lender - the mortgage company – would not give you the mortgage without title insurance. The federal lending agency, the Housing and Urban Development Department, is actually considering a rule that will allow packaging of these kinds of settlement services by lenders. The benefit of this will be that the lenders will then be putting together these packages and advertising them at a single prices rather than different fees that the consumer has to figure out.

A delegate from Ireland noted that they would be interested in evidence of the impact of introducing licensed conveyancer professions.

A delegate from Australia noted that under the national competition policy reform that Australia carried out, the legislative review did achieve the removing of the exclusive right of practitioners to provide conveyancing services. Following that, Australia's independent research agency, the Productivity Commission, did a review of the effectiveness of the reform and there was an assertion in the report that suggested that prices for conveyancing services did go down as a result of the review and the reform.

A delegate from Mexico stated that exclusivity provides a good incentive for collusion. In Mexico, notaries have basically the same tariffs. The competition authority investigated and sanctioned the practice. The case went all the way to the Supreme Court. The Supreme Court found that notaries were not economic agents and it was not possible for the Mexican authority to regulate and sanction them in this particular case.

A delegate from the European Commission noted that the Mexican point is an important matter of debate in the European Union. Notaries and member states have claimed that notaries have to be exempted

from the economic treaty articles because they exercise public authority. The Commission took a position on this last year, arguing that they do not in fact exercise public authority and that notaries are performing economic activities and therefore should be brought within the EC internal market rules and competition rules as the economic treaty articles.

A delegate from BIAC stated that on the subject of exclusivity and opening up particular areas of the legal profession and even more specifically on the particular study of prices and the impact of lowering prices by opening up broader participation in the profession, BIAC maintains - in various parts of BIAC's relatively brief paper - that this is an area where quality of service is of equal or greater importance than price. When consumers are purchasing a home, they are making the most important investment in their life-time. Saving 5 or 10% on the conveyancing price may not be worthwhile if they are not properly protected on that purchase. A very critical consideration must be made at all times against other usual benefits obtainable by improved competition.

3. Conduct regulation and antitrust enforcement/advocacy

The Chair moved on to discuss conduct regulation and antitrust enforcement/advocacy. He noted that Italy has recently eliminated mandatory minimum tariffs, the prohibitions on advertising and on contingency fees. In practice, as of January of this year the legal profession has achieved a much greater degree of liberalisation. Can the Italian Authority tell us what steps the Authority has undertaken to make sure that private, restrictive practices will not be substituted for the eliminated legal provisions?

A delegate from Italy stated that this reform introduced a lot of changes for the professions. The three main areas of reform were in fact the areas where the advocacy reports of the Competition Authority had focused, in particular: tariffs, advertising and the possibility to set multidisciplinary firms. These three areas have now been liberalised as a result of the reform. In Italy as in other countries there is a 2-level regulation for professions, so there are laws and also self-regulation by the professional associations. The reform has eliminated the restrictions contained in the law but some restrictions were contained in the deontological rules of the professional associations, the profession's code of conduct. So the authority is now monitoring the activity of the professional associations in changing their code of conduct in order to introduce the changes required by the law. In particular, the Competition Authority has opened a general enquiry and is thoroughly examining the code of conduct. The Authority is also holding meetings with the professional associations' representatives in order to discuss with them the implementation of the process. The purpose of the enquiry is to make sure that the restrictions eliminated with the reform are not maintained or reintroduced in different forms in the self-regulation by the professions.

The Chair noted that there have been a number of judgements by the ECJ on the legitimacy of national laws fixing minimum tariffs by law. The European court concluded by allowing ministers to impose minimum tariffs. What are the possibilities now for EC originating prohibitions on minimum tariffs in other countries?

A delegate from the European Commission stated that in the ECJ case law on fixing of minimum tariffs by state law, the major cases are Arduino and Macrino and Cipolla judgements. Macrino and Cipolla basically reaffirmed what the Court said in Arduino. The Court undertook a detailed examination of the procedure in which the state arrived at adopting the tariff. On the basis of the procedure in these cases the Court concluded that the Italian state, because it basically exercised the final decision in terms of adopting the tariff, had not delegated its power to the professional body who had in fact come up with the draft tariff and given it to the state, but it kept the powers of decision-making to itself and therefore was not to be found liable for adopting the decisions or agreements contrary to the rules of free competition. What is interesting in the Cipolla judgement is that the Court also went further and also went to see if tariffs breeched the rule on the freedom to provide services and freedom of establishment, which of course are

also very powerful economic treaty articles. In this instance, the Court actually did say that in its view minimum fees rendered access to the Italian legal services market more difficult for lawyers established outside Italy and therefore, in its view, it was a restriction on the freedom to provide services and the freedom of establishment; but the Court went on to note that there could be reasons of public interest for which a member state could adopt such a restricted measure. For example, a minimum fee tariff, in order to protect consumers and to ensure the proper administration of justice. These could be seen as overriding requirements relating to the public interest capable of justifying a restriction on the freedom to provide services. Overriding requirements had to be subjected to a 2-fold proportionality test, i.e. (1) that the national measure was suitable for attaining the objective that it was set out to pursue and (2) that the action did not go beyond what was necessary to achieve that objective. The Court set out a number of factors for the National Court to consider in arriving at a view on that, and these included whether there was a correlation between the level of fees and the quality of the service provided as regards the Italian market, whether or not the asymmetry of information between clients consumers and lawyers necessitated a tariff of this type or whether or not there were other means assuring quality, i.e. professional rules in respect to lawyers' behaviour, ethical conduct, etc.. There has not yet been a ruling from the National Court on whether or not the proportionality test is satisfied. The European Commission would likely argue that a minimum fee tariff scale is not justified, as there are other ways to protect consumers and ensure quality.

The Chair noted that in Chinese Taipei the FTC, uncertain on whether it had jurisdiction, decided instead to open a case against minimum tariffs to consult with the Ministry of Justice in 1999. In 2001 the Ministry changed the regulation suggesting that the fees were only recommended. If you look at the substance of the issue it does not matter if it was recommended or not, they are quite binding anyway. In retrospect it would not have been better to open a case in such instances?

A delegate from Chinese Taipei stated that in responding to this question they would like to first point out that the regulatory agency enjoys a wide discretion of power in the making and interpretation of the rules governing the industry they are overseeing. According to article 46 of the Fair Trade Act which is the antitrust statute in CT, the FTC can challenge those regulations when they are clearly in violation of the spirit of the Fair Trade Act. The wording in that statute has created an unsettling controversy in terms of the meaning/spirit of the Fair Trade Act and how to interpret it. It means that when the FTC sees a regulation imposing a standard or set up the requirement for entry, it would be in violation of the spirit of the Fair Trade Act or it could be allowed that they could consider some kind of justification or more function-oriented analysis given the process of analysis. Based on this they think there are four possible reasons that they do not open the case directly in terms of the minimum fee of the Bar association. The first reason has to do with the requirement of the law. In the case of the Bar association setting up a minimum fee, the fee is only suggested and what is more important is that there is no penalty clause in the regulation. The second reason is that there are always justifications for information asymmetry or legal service is credence good. The third reason has to do with the judicial system. Chinese Taipei follows the civil law system. Under this system, the judge will look at the authorisation clause; so if the agency is following the authorisation clause, then it will win the case; it is relatively difficult for us to challenge or to persuade a court that even though regulations are authorised by the statute, the outcome of the regulation is anticompetitive. It is difficult for us to persuade a judge that, given that there is no penalty for this minimum fee requirement, they will tend to create a de facto preclusion in the market. The fourth reason is lobbies.

The Chair noted that in Indonesia the Bar association prohibits advertising by advocates. They rightly say that any decision of the Bar association is subject to the antitrust law. So why has the authority not intervened yet on the advertising restrictions?

A delegate from Indonesia stated that what is prohibited in advertising is an advertisement exploiting the commercial image. The problem in Indonesia is that the price now is an entry barrier for the young and

new entrants, the certification is monopolised by the Bar association. The university has the capacity to organise the certification training at a low price but it is prohibited by the regulation. The FTC is more concentrated on these aspects than on the advertising.

The Chair noted that the U.S. FTC intervenes quite often against Bar associations that try to regulate advertising in their ethical codes. The submission suggests that decisions by the Bar associations would be subject to antitrust enforcement. So why does the U.S. use advocacy and not enforcement? A final question is related to the concept of deceptive comparative advertisement. Suppose law office A claims it is friendlier than law office B. This would be a deceptive advertisement in Italy because it can't be proved objectively whether law office A is friendlier than law office B. Is it the same in the U.S.?

A delegate from the United States stated that it is correct to say that the agencies proceed most often through advocacy regarding these Bar proposals. That is often because the Bar is proposing a rule to their regulators, so it would either be to the State Supreme Court or to the legislature. If a regulator then takes that action and it becomes a sovereign state action, we cannot enforce against the action of the sovereign state. The Noerr-Pennington doctrine protects the ability of private actors to lobby a state to take action. If a voluntary bar association or a subunit within a mandatory state bar that regulates attorneys adopts and enforces the rule, the conduct may not be protected by State Action doctrine. Accordingly, the agencies may take action and have taken action in a number of cases. The U.S. has actually had substantial success in convincing Bar associations, states' courts and legislature not to adopt any anticompetitive restrictions. In fact, in the autumn of 2006 there was a comment to the Supreme Court of the state of New York and afterwards they did not adopt a restrictive advertising regulation under consideration.

Regarding the question on comparative deceptive claims, the FTC's position on attorney advertising is the same position as on any advertising. Basically, the question is whether, from a consumer's point of view, the claim is deceptive. The FTC's view is that forms of comparative advertising should not be banned outright unless they are actually or inherently deceptive. Potentially deceptive advertising should be handled with disclosures rather than outright prohibitions.

The Chair noted that in Turkey the Bar Association establishes minimum tariffs that are then sent to the Minister that approves them by silence. That is, if the Minister does not say anything it means they are approved. The Turkish authority intervened against this practice with an advocacy report which I understand very well as being a domestic authority. In the European Union, according to the Arduino and Cipolla judgements, since the Minister's behaviour is simply accepting the decision of the Bar association, the price fixing practice (even if imposed by a law) could be prohibited directly by a national antitrust authority. Are these powers available in Turkey?

A delegate from Turkey stated that these powers are not available for the competition authority in Turkey. In the Turkish legal system, if an anticompetitive practice is enabled by another law, then the competition authority cannot prohibit this practice. In case of conflict of laws, the competition authority can only use its advocacy powers before the Parliament, the Prime Ministry, and the other ministries in order to remove the relevant clause for such an anticompetitive practice. For instance, in an earlier case the Turkish competition authority asked the Union of Chambers of Engineers and Architects to stop the practice of fixing a minimum level of tariffs. However, upon appeal the Council of State stayed the execution of the decision of the competition authority. Therefore caution is needed to employ only advocacy powers where an anticompetitive practice has a legal basis like the one where the Union of Bar Associations is empowered to establish minimum level of the fees by the Attorneyship Law.

The Chair noted that in Belgium the Judicial Code imposes moderation on lawyers' fees, whatever this may mean. Does the Order in Belgium sanction lawyers for excessive fees that are imposed without moderation?

The delegate from Belgium noted that there is jurisprudence against excessive fees. What is important is, that consumers know in advance what sorts of fees will be applied**.** One of the Bar associations applied an order requiring that lawyers effectively inform their clients of the fashion in which the payments will be set.

The Chair stated that in Portugal lawyers are subject to the law on misleading advertising but, contrary to other businesses, are not allowed to advertise on fees. This means they can use evocative advertising for example. But do they actually do it? Do lawyers advertise like a car manufacturer? Furthermore the self-regulatory professional bodies are responsible for initiating disciplinary proceedings on misleading advertising. Who is in charge of misleading advertising in general in Portugal? Is the case law on misleading advertising different for the legal profession and the rest of the economy?

A delegate from Portugal stated that lawyers are indeed subject to the law on misleading advertising, but are not allowed to advertise their fees. Evocative advertising is often done, particularly by large law firms. The Portuguese competition authority has no responsibility for consumer protection, to address the other issue. This responsibility lies at the moment with an across-the-board Directorate-General under the Ministry of Economy and Innovation. As to enforcement powers of self-regulatory bodies, in this case the Bar Association, they relate mainly to the enforcement of rules which are specific to the profession. Penalties for violation are also somewhat distinct. Whereas they mostly take the form of fines in the case of misleading advertising falling under consumer protection, in the case of the penalties taken by professional bodies, for example lawyers, they are more likely to take the form of disciplinary measures, i.e. suspension or revoking of a licence as the case may be.

The Chair observed that in most countries lawyers' fees are freely determined between the parties. In Lithuania the Minister of Justice fixed both the minimum and the maximum fee a notary can charge. Since notaries perform a public interest function why should the government fix the minimum fee? Did the Authority have anything to say on the matter?

A delegate from Lithuania stated that the Ministry of Justice is responsible for setting fees for notaries and there are new notary fee rates since April. The original purpose of the change was actually the setting of a maximum fee and it was stated in the government program. The competition authority actively promoted this change and their opinion is that there is no justification for minimum fees. This opinion was expressed to the Ministry of Justice and also to the Notary Chamber also in written form, but still there are now minimum and maximum fees for notaries. That was the decision of the Ministry of Justice without explicit explanation. Before these new fees, there were mostly fixed rates. Now there is more space for competition according to the legal act, but the situation is not ideal.

The Chair turned to Spain. For lawyers there is apparently a margin of negotiation of 12% and 10% for notaries. The Chair asked for clarification.

A delegate from Spain indicated that the translation of 'procuradore' is solicitor, a profession different from the lawyer profession. So the 12% margin of negotiation is related to solicitors' fees, not lawyers' or advocates' fees. The solicitor performs a task of 'representation in court' which is different from legal advice or legal defence of the client in court. Both functions – legal defence of clients in court and legal advice - are only performed by lawyers, not solicitors. The solicitors are empowered by clients to deal with courts over documents and proceedings. The 12% margin of negotiation concerns the solicitors' fees fixed by the state following the consultation of the professional association of solicitors.

In the case of notaries there is also this margin of negotiation. The fees are also fixed by the state following consultation with the notary professional association.

In Spain there is an investigation by the competition service of the recommended fees of lawyers and also solicitors' fees fixed by the state. Along with this the Competition Court is preparing a new report on professional services in general; it is an important report to be issued at the end of this year and it has a general study on different professional services and specific analysis on some professional services including legal services such as notaries.

The main novelty is related to notaries; for the first time the report analyses notaries and registries from an economic point of view. The Competition Court's report studies them as organisers of productive factors deriving regulated profits with an extraordinary rate of return.

The Chair observed that in the Czech Republic in 2007 the Office for the Protection of Economic Competition submitted a report to the Czech Government on the necessary restrictions of competition for the professions. On fees, the Office suggested that prices of legal services should reflect their relative quality. In particular, the Office suggested some move away from linear prices to some sort of a two-part tariff structure. Whatever the value of this new system is, why didn't the Office suggest simply liberalising prices and fees which would have been much easier?

A delegate from the Czech Republic said that at the time of the OECD meeting, the report had not yet been submitted to the government. They are still in the very early stages of discussion. Whenever the competition authority suggests the possible removal of the tariffs or adjustments to tariffs, some parties state that it is absolutely necessary to have tariffs or that competition law does not apply to some legal professions at all. The authority decided to start with some moderate claims to change the tariffs from a pure linear system to a more qualitative one. The reason for choosing this was due to the fact that the constitutional court of the Czech Republic decided it this way in a decision concerned with the executers, which is another lawyers' profession regulated by special rules.

The Chair noted that in Romania the Competition Council, through a number of advocacy interventions, was able to convince the Parliament to eliminate minimum tariffs for legal services. Advocacy on eliminating advertising restrictions however was unsuccessful. What is the explanation for this?

A delegate from Romania said they had considered that fixing the minimum tariffs was the most important issue that needed change. So, most interventions insisted on the removal of such a provision in the case of lawyers as well as in the case of other legal professions. In the case of lawyers, the Competition Council was successful. Support of the Bar association played an important role in this success. In 2004, the regulatory framework for lawyers was amended, the incremented provisions were removed. The dialogue with the Bar association continued and advertising was one issue that continued to be discussed. However, the restrictions on advertising are still strongly supported by the Bar association. Lawyers consider that, since the ban on advertising says that they may not use advertising to attract customers, notoriety and fame will prevail as a means of finding a lawyer. According to them, it is a breach of the deontological code to advertise since financial resources do not necessarily mean excellent professional expertise and therefore customers might be misinformed into choosing a law firm that might not necessarily address their specific needs. The lawyers were concerned about big law firms, especially foreign firms, that have significant financial resources and this concern determined a strong lobby activity as well to force foreign law firms to partner with domestic lawyers if they desired to enter the market.

The Chair stated that in Canada the Bureau was asked in 2006 to draft a written opinion on a proposed fee schedule for Ontario lawyers. The first question to Canada is the circumstances under which the Bureau drafts a written opinion and the legal value it has. On the substance, the Bureau said that should this fee schedule be only a recommendation or a suggestion on prices without the schedule having any binding nature or any penalty related to the fact that lawyers did not comply with the recommendation, there was

no conspiracy, nor price fixing. According to the Bureau, what was the real reason for publishing the fee schedule for lawyers and the alternative purpose you think it might have had?

A delegate from Canada stated that it is long established practice that any person can demand an opinion from the Bureau about the application of the law and that this opinion will later be binding on the Bureau provided the practice was not in place at the time of the demand, all relevant facts that could influence the decision were disclosed and the practice was substantially similar to that in the demand for a legal opinion.

The opinion viewed suggested prices as not illegal as such, based on the information given by the party and jurisprudence of that time. There was nothing to suggest a price fixing conspiracy or collusion. Nevertheless, the Bureau made clear that such a price list could facilitate collusion between members and that if members were found to discipline members who contravened the price list or tried to make the price list obligatory, the price list could be used as a factor of proof.

The Chair noted that in Hungary the prohibition of advertising originates directly from a decision of the Bar. As a consequence the Competition Council decided that the restriction was a violation of article 81 of the EC treaty, paragraph 1 and could not be exempted under the provisions of article 81, paragraph 3. The case was decided in September 2006. The case, since the Bar did not have any justification in the law for prohibited advertising, is straightforward. Does the Competition Council decision imply that lawyers will from now on be subject only to the rules of misleading advertising available in the rest of the economy? Or does the decision imply that some restrictions are acceptable? Do lawyers advertise in Hungary now?

A delegate from Hungary stated that the answer to the first question would be that primarily the attorneys are subject to the rules on misleading advertising, so they can advertise only in a fair manner. However some restrictions could be acceptable which originate from the specific characteristics of the legal profession like independence of attorneys, secrecy, confidentiality or avoidance of conflicts of interest. When the Competition Council brought this decision, there was a total ban on advertising which was made by the Hungarian Bar Association. The Competition Council did not insist on an elimination of all restrictions, accepting that proportionate and indispensable restrictions could be justified. Now it's up to the Hungarian Bar to establish a new code of conduct on advertising if they wish. Attorneys still do not advertise. The Hungarian Bar appealed the decision of the Competition Council so it is now under judiciary review and the execution is pending.

A delegate from Ireland expressed doubts about the importance of the information asymmetry in professions. Sometimes the existence of information asymmetry is an excuse for doing nothing. It is also symptomatic of a feeling that somehow liberal professions and particularly the legal profession are special and unique. This is an argument that is not convincing. Legal services provided by lawyers are no different in principle than most professional services offered to consumers. The delegate did not believe that there is a need for unique or special standards to apply.

As it happens in Ireland advertising restrictions that currently exist are even worse than most from this morning. For one branch of the legal profession, i.e. court advocates, barristers, there is a total ban on advertising and that ban is imposed not by the state but by the profession itself. The state has not intervened on this. The Irish Competition Authority sees no reason to restrict advertising by barristers other than advertising which is not factual or truthful. There is legislation in Ireland in relation to solicitors. A solicitor cannot advertise by way of a cartoon in a newspaper. A solicitor may not advertise on a bus, train or taxi. The professional bodies make strenuous efforts to justify these restrictions on the basis that they protect consumers. The Irish Competition Authority's view is that competition authorities or other government bodies should take these restrictions seriously and do everything possible to remove them.

A delegate from BIAC stated that this is an area where BIAC agrees specifically with many of the comments that have been made including the most recent comments by Ireland. The BIAC paper states that restrictions on competition between and among members of the legal profession should be eliminated, subject to that which is absolutely necessary to protect the parallel public interest in quality and those exceptions are very limited. BIAC sees very little reason to encourage the state regulator to intervene and limit competition either through advertising restrictions or setting pricing rules.

The Chair asked Professor Francis Kramarz to give a brief analysis of regulation and productivity in the service industry.

Professor Francis Kramarz, sitting with the French delegation, noted that the discussion up until this point had focused largely on the potential for benefits from re-regulation (deregulation is not the most appropriate term and can unjustifiably scare some listeners). There is often a fear that reforms will generate unemployment. In fact, in France, about 30,000 people lose employment every day and about 30,000 begin new employment. The market for jobs, in short, is very active. More particularly, reforms through re-regulation can create new jobs, so should not be viewed as destructive of employment. While there is little evidence on the employment effects of reforming legal professions, there is evidence about employment effects in France on changes to road freight transport regulations. When Balladur was prime minister, he eliminated a previously existing requirement that a government-issued license was needed to transport merchandise more than 150km. After the reform, prices for road transport fell and margins fell, suggesting that there had been high rents in the sector. In terms of employment in the sector, employment had been growing at a rate of 1-1.5% per year prior to the reform. During the years after the reform, employment grew at 5% and now grows around 4% per year. There were strikes (1992, 1995) because of the reform and how it was implemented. But in fact, the net effect was the creation of jobs. (on all this, see Cahuc and Kramarz, « De la Précarité à la Mobilité : vers une Sécurité Sociale Professionnelle, » Report to the Minister of Economics and the Minister of Labor, June 2005, La Documentation Française, Paris.)

4. Regulation of conduct for the protection of consumers

The Chair turned to the last part of the roundtable. He noted that Denmark has a complex system of legal aid for the poor. The special situation of Denmark is that legal aid is quite extensive. There is legal aid 1, legal aid 2 and 3, all differentiated according to the income of the recipient. Furthermore certain proceedings are always paid by the State, for example matrimonial affairs or custody proceedings, matters where competition could really make a difference. Given the extent of legal aid in Denmark, much wider than in most other countries, fees should be not too far off market prices, otherwise why should lawyers accept providing legal aid. The question for Denmark is how would you characterise the market for legal service in your country: regulated or free? What part of the market is open to competition, only legal services for the sophisticated consumer or also legal services for everybody? Aren't you concerned that fees in legal aid represent the focal point for the free market?

A delegate from Denmark stated that the biggest issue has been the exclusive rights of lawyers to plead before the court. But modifications to these exclusive rights have been considered so that people other than lawyers would be able to plead before the court as well. Furthermore, fees are freely negotiated in Denmark and there is no ban on advertising. In general, the market for legal services is relatively free. It is true that legal aid is regulated and fixed fees exist in the area of legal aid, but it is up to the client to choose which lawyer he/she wants to engage in the case and there may not be competition on price but there will be on quality as well as on the amount of work done by the lawyer within the fixed fee. Addressing the last question, the Danish competition authority has not carried out any survey on this matter, but they have not seen any indications that fees in legal aid represent the focal point for the free market of legal services.

The Chair turned to South Africa where the Law Society applied for an exemption to the Competition Commission for a number of provisions including the provision that legal service fees must be reasonable and just. The exemption was requested in 2004 and the Commission has not taken a decision yet. Why does it take so long? As for the substance of the question how is the reasonableness or equity of a price assessed unless you have some standard of what is the right price which is very similar to price fixing in some sense? How can you be sure that reasonableness or equity means low prices?

A delegate from South Africa stated that the Competition Commission has not yet taken a decision for a combination of reasons. The delegate started off by saying that the practising legal profession in SA has got advocates and attorneys. What has happened unfortunately for the Commission is that the profession has an unparalleled ability to litigate, so the General Council of the Bar, which is the advocate, has tied the Commission up for a number of years in High Court litigation. The issues raised in the Bar application were also very similar to the ones raised by the Law Society of South Africa. So the Commission wanted to get a ruling first on some of the issues that were tied up in High Court to enable it to guide the Commission on how to proceed.

Ever since the democratic government came into place there has been a desire and an intent to transform the legal profession and amongst other things to improve access of the majority to the profession. However the process has not been completed because there are a lot of differences in the profession about how to proceed with the transformation and, in particular, who is going to be regulating the profession.

As for reasonableness of the price, the Commission itself is also debating on the question of reasonableness. The question is when guidelines may constitute price fixing.

The Chair moved on to the United Kingdom. The UK competition authority has been quite thoroughly involved in the reform of the profession for a number of years. Indeed the liberalisation of the legal profession started in 1970 with a report of the Monopolies and Mergers Commission. As a result, a number of exclusivity restrictions and access were removed. In 2001 a report by the OFT on competition in the professions led to a second wave of reforms, particularly concentrated on conduct. The restrictions that persist are linked to the business structure and in particular to the prohibition for barristers to enter into a partnership with solicitors and vice-versa. A bill is now being discussed in Parliament where an external regulator is being proposed. It is not clear what the purpose of an outside regulator is. Why would issues like quality of services not be left to existing to bodies through self-regulation? In any case, who else but lawyers could assess service quality or access requirement to the profession?

A delegate from the UK stated liberalisation has been an on-going process in the UK for a long time now, having gone on since the late 60's/early 70's. Although the Chair referred to the second wave, many would argue that there were many waves of change. It's important to understand that there are 3 jurisdictions in the UK: England and Wales, Northern Ireland and Scotland. The position is slightly different in each. This intervention will focus on England and Wales mainly because that is the area for the legal service bill described in the UK contribution.

The Chair posed a question that assumed that there were still restrictions on advertising and this could be dealt with under the general law, that is more or less the position now. The Bar and the Law Society in Scotland and Wales have given up their traditional restrictions and do now, by and large, follow provisions based on misleading advertising.

The proposals related to the legal services' Bill try to get the best use or professional skill resources but also the best regulatory infrastructure overseeing a number of different, competing self-regulatory organisations. The structure is designed to create a single external oversight regulator for all legal

professions: solicitors, barristers, trademark attorneys, patent agents, conveyancers, etc.. One of the objectives is that the board will be composed of a majority of individuals who are not lawyers and it will have a non-lawyer chairman. That board will set minimum quality requirements for all the self-regulatory organisations that sit underneath it. The professional bodies themselves – and there are a number of them – retain their own regulatory role over the professions subject to the oversight of the legal services board. But they are required to separate their representative from their regulatory functions and they are also required to have a competition objective. A key point also is that they are also required to separate claims handling so there will be in the future a single body, the Office for Single Complaints, dealing with consumer complaints. So what it allows for is essentially an umbrella body that sets minimum standards and has a series of broad range objectives which sits on top of and supervises a group of professional bodies who exercise their regulatory functions and then a separate claims handling body.

The Chair asks: why not leave quality to the existing bodies? The answer is that this approach really has not worked. The number of complaints has risen, and the speed at which they have been dealt with and the efficacy with which they have been addressed has not been satisfactory.

The delegate said he would question the fundamental premise that lawyers are the best people to judge complaints. Experience in the legal profession and for many professions, including the medical profession, demonstrates that actually what is needed is a combination of professional skills from the relevant sector combined with a range of external and independent people who will be able to get to the bottom of the problem, who will not allow a professional obfuscation to get in the way of decisions that look properly at consumer complaints. It is very important in the UK that service quality and complaints are dealt with by an appropriate combination of skills, through a separate organisation, and the profession itself is regulated by its own body but subject to a high level of oversight.

The Chair noted that this roundtable had not discussed how fees should be recommended. In Italy fees were recommended on an input basis, i.e. lawyers had a minimum tariff based on the number of acts they were bringing to court or the time they were spending in litigation independently of the result they were trying to achieve, whether it was a divorce or any other job brought in front of them. So this recommended fee indeed did not increase at all the transparency of the service that was being provided because consumers had no idea of the input that was provided by lawyers on a given case. Consumers know the output: go to a lawyer for a certain purpose. If fees are recommended, the way they are recommended also makes a big difference and that is important to take into account.

A delegate from South Africa stated that the South African Legal Practice Society is going to be composed of all the members who are enrolled as members of the society as lawyers and there is going to be another council which is the National Legal Council. There they will put 24 legal practitioners of whom 16 must be practising, the rest is non-practising and 2 additional people appointed by the Minister, one of whom must be representing consumer issues.

A delegate from Ireland stated that in relation to fees, they are not the main issue in this debate at all, because fees and the controversy about fees are the outward sign of the number of restrictions on competition that exist. There is a deeper underlying set of structural issues which prevent competition from happening.

There are too many conflicts of interest between the interests of the legal profession on the one hand and the public interest on the other. There are too many conflicts of interest to have a regulatory role and a representative role vested in the same body. That is essentially the reason why the Irish competition authority believes that an external independent regulator should be appointed.

A delegate from BIAC stated that they maintain that there should be a minimal interference or restrictions on competition within the profession and that the governing body should recognise the benefits of competition which indeed many regulators do through jurisdictions across North America. At the same time there are real issues of qualification to practice, real issues of access, real issues that pertain to qualifications from members of the legal profession from other countries if they want to practice in that jurisdiction. BIAC submits that these are best judged primarily - but not only exclusively - by members of the legal profession who are to exercise a degree of vigilance in the public interest, not in the interest of the profession. There is an additional consideration at hand when discussing regulations of the legal profession: that is to ensure that nothing is done that upsets the fundamental role that has been recognised by various courts that lawyers have in a free and democratic society. Note that protection of the independence of the Bar helps to protect the rule of law. There has to be a balance between the important benefits of competition and other specific public interest mandates.

The Chair thanked participants in the discussion. He noted that, while at the beginning, he thought jurisdictions would be very similar, there are many notable differences that exist. But it is interesting to note that in the past 10 years there have been some major developments in most of our countries; there is more competition now than before. In many countries there are no restrictions on prices or advertising and this is an important way forward. Of course issues remain, they are related to access to the profession. The UK has a significant proposal to place an independent authority in charge of setting the standards and then have different professional associations adhere to those standards or even increase those standards as they wish and this would certainly increase competition.

Furthermore, there is the question of the occasional consumer and also here the idea of not having the occasional consumer protected by the profession itself but by an outside regulator. This is probably a good idea because it ensures independence and it is very difficult to be independent when you are part of the profession as is suggested by the ABA case.

While there have been a few cases on the part of our competition authorities, most of our authorities have been advocates for greater competition. As legal restrictions are being eliminated, more and more cases will be brought because these professional associations will no longer be backed up by the statutes that have existed until very recently.

COMPTE RENDU DE LA DISCUSSION

Le Président, Alberto Heimler, note que le Groupe de travail a discuté des professions juridiques dans le contexte plus vaste des services professionnels il y a quelques années. Pourquoi les avocats sont-ils si importants ? La principale raison est que les, dans tous les pays, les entreprises comme les particuliers utilisent des services juridiques, parfois très souvent et tantôt par la voie judiciaire, tantôt par la voie extra-judiciaire, c'est-à-dire dans le cadre d'un procès ou non. Les autorités de la concurrence sont parfois préoccupées par le fait que les services juridiques sont payés trop cher par la clientèle, soit parce que les tarifs sont excessifs, soit parce qu'elle est mal informée des qualités relatives des prestations qui lui sont fournies. Un grand nombre de raisons sont avancées pour expliquer le niveau excessif des prix : les avocats sont rares (soit parce que les universités en forment trop peu, soit parce que l'examen du barreau est trop rigoureux), ils peuvent s'entendre de manière à fixer des prix excessifs, les clients sont mal informés des prix pratiqués sur le marché ou de la qualité des prestations et ne mettent pas les avocats en concurrence. Par conséquent, même dans le cas où il existe un nombre suffisant d'avocats et où la concurrence est réelle, les prix peuvent être élevés du simple fait qu'ils ne sont pas transparents et que la clientèle ne met pas les prestataires en concurrence. Du point de vue économique, les services juridiques sont des biens dont la valeur repose sur une croyance et un grand nombre de clients peuvent être induits en erreur, soit parce que les services rendus sont inadéquats, soit parce que le prix qu'ils paient n'est pas limité par la discipline de l'expérience.

Le Président s'interroge à titre liminaire sur le rôle des biens fondés sur une croyance et la manière dont les consommateurs peuvent être protégés. Contrairement aux magasins qui exposent en devanture des vêtements et leur prix, les cabinets des avocats n'ont pas de vitrine dans laquelle seraient présentés leurs prestations et les honoraires correspondants. Que peut-on faire pour aider les consommateurs à effectuer leur choix de manière plus rationnelle ? Ce problème ne se pose pas aux grandes entreprises, qui savent exactement ce qu'elles veulent et mettent en concurrence plusieurs sociétés d'avocats, ce qui est une procédure largement employée, même pour les affaires de concurrence.

Les avocats ont abordé le problème en disant que la relation entre un avocat et son client repose sur la confiance. Cette réponse sous-entend qu'officiellement, pour les avocats, – et l'expérience le confirme en Italie – l'argent est secondaire et les avocats sont toujours du côté de leurs clients. Nous savons que la confiance n'est pas la seule caractéristique de la relation entre un avocat et son client. Elle doit bien entendu être présente, mais l'argent a aussi son importance. On constate une absence de rivalité qui n'est pas toujours due à des marchés à caractère oligopolistique (les avocats sont nombreux), mais aussi à l'absence de concurrence du côté de la demande, parfois aggravée par une réglementation restrictive.

Le Professeur Van den Bergh suggère que les asymétries d'information sur le marché des services juridiques peuvent justifier l'adoption d'une réglementation destinée à empêcher une détérioration de la qualité et à garantir l'intégrité des professionnels. Il suggère que la fourniture de services juridiques de haute qualité soit garantie par plusieurs règles légales :

- L'exigence d'une formation universitaire ;
- L'exigence d'un stage de formation sur poste ;

- La formation professionnelle ;
- Et la surveillance des autorités de tutelle.

Le fait est que la clientèle a parfois besoin d'être protégée. C'est le problème dont cette Table ronde se préoccupera tout au long de ses travaux.

1. Barrières à l'entrée

Le nombre de facultés de droit est parfois limité, de même que celui de diplômés. Le faible nombre de diplômés s'explique par le fait que les facultés de droit sont contrôlées par les professions juridiques ou que les examens du barreau sont trop rigoureux. L'Irlande est un pays où le processus de formation des avocats est strictement contrôlé par la profession. La Law Society of Ireland (Société des professionnels du droit d'Irlande) est à la fois l'autorité de tutelle et le dispensateur exclusif de la formation professionnelle permettant de devenir avocat. Quel est, en réalité, l'usage qu'elle fait de ses pouvoirs ? Est-ce à cause du monopole de la Law Society que le nombre d'avocats est limité en Irlande ? Existe-t-il des perspectives de changement ?

Un délégué de l'Irlande précise que, par définition, la réponse à ces questions est affirmative. C'est bien à cause du monopole de la Law Society que le nombre d'avocats est limité. Par définition, s'il n'existe qu'un seul fournisseur, le nombre de places ne peut excéder la capacité offerte par celui-ci. Le monopole de la Law Society est consacré par la législation, mais cette dernière prévoit aussi la possibilité que des licences soient accordées à d'autres organismes. La Law Society est censée définir des critères que d'autres fournisseurs devraient respecter pour proposer eux aussi une formation. Mais aucun ne s'est lancé et ils ont tous renoncé car, à leurs yeux, il n'existait pas de besoin, la demande étant inexistante. L'autorité de la concurrence croit savoir que les organismes qui auraient pu proposer une formation s'en sont abstenus de peur de prendre des risques excessifs. Cependant, depuis que cette question a fait son apparition dans le débat public, quelques candidats se sont manifestés pour proposer une formation en droit.

Il est délicat de déterminer le nombre approprié d'avocats dans un pays. Quel est le nombre optimal ? La Law Society a accru le nombre de places offertes il y a longtemps, mais uniquement après que des étudiants dont la candidature avait été écartée l'eurent attaquée en justice. En conséquence, la Law Society dirige une faculté de droit très prestigieuse et bien dotée, mais elle n'a pas de concurrent. C'est peut-être ce qui explique le niveau élevé des frais de scolarité et une certaine inefficacité.

La Law Society ne forme que la moitié des professionnels du droit en Irlande, en l'occurrence les solicitors, qui coexistent avec les advocates et les barristers, la formation de ces derniers étant elle aussi assurée par un monopole. Comme celui des solicitors, le nombre de barristers est, par définition, limité par la capacité de la seule école qui les forme et est sise à Dublin. Bien entendu, cette contrainte détermine le nombre de diplômés. Rien n'indique que King's Inns, qui jouit du monopole de la formation des barristers, soit disposé à accorder à des concurrents une licence d'exercice ou le droit de faire passer des examens.

Le Président s'est rendu aux États-Unis, où l'American Bar Association (ABA) est chargée d'accréditer les facultés de droit. Elle a signé en 1996 un consent decree avec le ministère de la Justice américain afin de s'assurer que les candidatures aux facultés de droit ne soient pas rejetées à cause des intérêts commerciaux des avocats associés. L'ABA a été reconnue coupable de violation du consent decree en 2006 en dépit du fait que le nombre de facultés de droit accréditées aux États-Unis avait sensiblement augmenté. La mission assignée à l'ABA n'est-elle pas génératrice de conflits d'intérêts ?

Un délégué des États-Unis rappelle que, selon les pièces versées au dossier, l'ABA est le plus grand syndicat professionnel du monde. Dès 1893, l'ABA avait créé un service de la formation juridique et de

l'admission au barreau qui, depuis 1921, est une agence d'accréditation et donne son visa aux facultés de droit. L'accréditation de l'ABA est vitale pour toute faculté de droit parce que 40 États de l'Union sur 50 interdisent de se présenter aux examens du barreau à qui n'est pas diplômé d'un établissement agréé par l'ABA. Non seulement ce service de l'ABA édicte les normes auxquelles doivent se conformer les facultés de droit, mais il effectue des contrôles sur place dans les facultés de droit qui, tous les sept ans, doivent se soumettre à nouveau au processus d'accréditation, ce qui leur vaut la visite de membres du comité de l'ABA. Tous les thèmes sont abordés, du salaire des professeurs au nombre d'ouvrages dont dispose la bibliothèque en passant par la taille des salles de classe. Il a été allégué, dans un procès intenté en 1995, que l'ABA avait violé l'article I [du consent decree] et que le processus d'accréditation avait été détourné. Selon les plaignants, le comité d'accréditation se comportait comme une corporation ayant pour objet de protéger ses propres intérêts, ceux des doyens des facultés de droit et ceux des membres du corps enseignant. Les doyens et professeurs des facultés de droit, qu'ils soient en activité ou en retraite, jouaient un rôle prépondérant dans le service des accréditations et les équipes procédant aux visites sur place. Ils fixaient les critères d'admission et de rémunération des enseignants de la faculté en se fondant essentiellement sur des comparaisons avec les pairs (c'est-à-dire que, pour être accréditée, une faculté devait offrir des salaires équivalents à ceux des écoles comparables). Ces pratiques aboutissaient à une inflation des salaires dans toutes les facultés de droit. De même, un certain nombre de règles faisaient obligation aux facultés de droit de boycotter les écoles qui n'avaient pas reçu l'agrément de l'ABA ainsi que les facultés de droit à but lucratif. Les facultés de droit accréditées par l'ABA refusaient de prendre en compte le travail accompli dans celles qui ne l'étaient pas. Une grande partie de ces pratiques a été prohibée par un consent decree en 1996. Mais il s'est avéré 10 ans plus tard que l'ABA n'avait tenu aucun compte d'un grand nombre de ces dispositions. La Cour a rendu l'an dernier un autre arrêt exigeant de l'ABA qu'elle applique ces dispositions. L'ABA, qui n'a pas nié son refus d'obtempérer, a été condamnée à prendre à sa charge la totalité des frais de l'enquête. Les obligations dont elle ne s'était pas acquittée étaient celles de remettre une attestation annuelle selon laquelle elle les avait respectées, de proposer une modification des critères d'accréditation, de soumettre les changements proposés au ministère de la Justice pour examen et d'obtenir du personnel de l'ABA une attestation selon laquelle il acceptait de se conformer au consent decree. L'ABA n'avait pas veillé à ce que plus de la moitié des membres du comité de révision des normes soit composée de professeurs de faculté de droit, si bien que les membres de la faculté de droit continuaient à y jouer un rôle prédominant.

Le Président fait observer qu'au Brésil près de 550 000 avocats sont en exercice et plus de 100 000 diplômés sortent des facultés de droit tous les ans. Selon les représentants du Brésil, l'examen du barreau est très sélectif. L'an dernier, 16 % seulement des diplômés l'ont passé avec succès. Le compte rendu du Brésil suggère que le problème est d'améliorer la qualité des avocats. Que faut-il entendre exactement par là ? N'est-il pas vrai que l'existence d'un nombre élevé d'avocats garantit que les services juridiques sont mis à la disposition de tous à un prix raisonnable et que les pratiques restrictives en matière de prix et de publicité ont été abolies ?

Un délégué du Brésil déclare que, dans ce pays, la plupart des étudiants en droit veulent seulement un bon diplôme et n'ont pas l'intention de devenir avocat. Au Brésil, une opinion couramment répandue veut qu'un diplôme de droit confère du prestige à son titulaire et soit un bon passeport pour différents types d'emplois. Par exemple, si l'on désire être directeur de supermarché, on peut suivre des cours du soir dans une faculté de droit privée pour obtenir un diplôme de droit qui confère de meilleures chances d'obtenir cet emploi.

La difficulté vient de ce que le souhait du Brésil d'étoffer l'offre de services juridiques ne sera pas obligatoirement satisfait en augmentant le nombre de diplômés des facultés de droit. Il est indispensable de modifier la législation brésilienne pour abolir les restrictions sur la publicité et empêcher que l'association des professionnels du droit ne fixe un tarif minimum pour les services juridiques.

Le Président en vient aux examens du barreau. Dans de nombreux pays, le nombre d'avocats est faible parce que l'examen du barreau est très rigoureux. Par exemple, au Taipei chinois, seuls 8 % des diplômés en droit réussissent l'examen du barreau. Nous reviendrons plus loin sur le cas de ce pays. En Pologne aussi, la formation en droit n'est qu'une étape de la marche longue et ardue vers la qualification d'avocat. De fait, en 2005 la Pologne ne comptait que 6 000 avocats environ, ce qui est fort peu pour un pays de 40 millions d'habitants, tandis que le nombre de diplômés des facultés de droit tourne autour de 8 500. Le compte rendu de la Pologne fait allusion à une réforme datant de 2005. Le Président demande à la Pologne de décrire les modifications qui ont été apportées aux conditions d'accès à la profession dans ce pays et les résultats qui en sont escomptés.

Un délégué de la Pologne souligne qu'il convient de clarifier par avance le nombre de personnes exerçant la profession d'avocat dans ce pays. Il est vrai que près de 6 000 avocats sont en exercice, mais les conseillers juridiques ont des droits pratiquement identiques à ceux des avocats, hormis celui de plaider dans les affaires pénales et familiales. Le nombre d'avocats est donc en réalité plus proche de 23 000 bien qu'en matière pénale, ils ne soient que 6 000.

En Pologne, tous ceux qui font des études de droit ne souhaitent pas devenir avocat ou conseiller juridique ; la proportion de diplômés qui présentent l'examen du barreau et deviennent conseiller juridique stagiaire est probablement comprise entre 15 % et 20 %.

Les modifications des règles d'accès auraient 3 conséquences importantes :

1. le nombre de personnes habilitées à exercer une profession juridique serait accru, ce qui signifie que de nouvelles voies d'accès seraient ouvertes aux personnes désireuses de devenir avocat ou conseiller juridique. Avant la réforme, seuls les universitaires très bien formés étaient dispensés de passer l'examen d'entrée, de suivre la formation et de passer l'examen professionnel. À l'heure actuelle, ce vivier s'est enrichi des personnes qui ont passé avec succès les examens d'accès aux fonctions de procureur et de juge. Cette mesure revêt une importance particulière en Pologne parce que le nombre de personnes qui suivent une formation de juge ou de procureur sans obtenir de poste dans l'administration est assez élevé (c'est-à-dire qu'elles sont très bien formées mais ne peuvent utiliser leurs compétences). Fondamentalement, ces personnes ont le même droit d'exercer une profession juridique que les diplômés en droit et ce changement est donc important.

2. Les associations de professionnels du droit, qui jouissaient jusqu'en 2005 du contrôle exclusif de la procédure d'accès, se le verraient retirer. Les examens étaient préparés et notés par ces associations. Le processus n'était soumis à aucun contrôle extérieur, hormis le droit de veto du ministre de la Justice, qui n'était que rarement exercé. C'était là le problème le plus important.

3. La possibilité serait offerte à des juristes ayant reçu une formation moins approfondie de dispenser des conseils juridiques, mais non de plaider devant les tribunaux. Cette possibilité, qui repose sur les bases assez vagues des dispositions générales relatives à l'activité économique, est explicitement prévue par la loi. Toutes ces solutions posent cependant un problème en ceci qu'un grand nombre des réformes envisagées ont été contestées avec succès devant le Tribunal constitutionnel. En effet, la Constitution polonaise prévoit la possibilité de créer une institution autonome qui régulerait une profession dans l'intérêt du public ; par conséquent, toute disposition retirant trop de pouvoirs à une institution autonome peut être frappée d'inconstitutionnalité et, de fait, certaines ont été jugées contraires à la Constitution par le tribunal. En ce qui concerne l'augmentation de la population susceptible d'exercer la profession d'avocat, le tribunal a considéré que les personnes qui ont réussi les examens de juge ou de procureur mais n'ont pas exercé suffisamment longtemps ne peuvent devenir avocat et qu'il appartient à la loi d'énoncer

quels critères précis sont exigés. La question du contrôle exclusif a aussi été abordée. Le tribunal a déclaré que les associations professionnelles doivent exercer un certain contrôle, ce dernier ne pouvant être la prérogative du seul ministre. La troisième possibilité, à savoir la fourniture de conseils juridiques à bas prix, a aussi été jugée inconstitutionnelle car trop vague. Mais le consensus qui prévaut en Pologne est que l'important n'est pas l'introduction de ces changements dans la législation mais qu'il s'agit surtout d'un problème technique ; c'est-à-dire que le Tribunal constitutionnel a déclaré que ces changements pouvaient avoir force de loi à condition d'y apporter beaucoup d'adaptations. C'est la rédaction de la législation qui est délicate. Le ministre de la Justice travaille à l'instauration de changements préservant l'esprit des réformes sans violer la Constitution.

Le Président passe à la Corée, où il semble que le nombre d'avocats autorisés à se présenter à l'examen du barreau au cours d'une année donnée soit limité par un *numerus clausus*. Comment ce nombre est-il fixé et par qui ? Quelles sont les perspectives de réforme ?

Un délégué de la Corée précise que, tous les ans, le nombre de candidats à l'examen du barreau est fixé par le ministre de la Justice en se fondant sur les avis du Comité de gestion des examens du barreau coréen, de la Cour suprême et de l'Association du barreau coréen. Depuis 1999, près de 1 000 candidats par an ont passé l'examen. Réformer n'est pas aisé. Les discussions ont débuté en 2003 et le débat sur le projet de loi prévoyant l'instauration d'un système juridique inspiré de celui des États-Unis est encore en cours à l'Assemblée nationale. Il est très probable que des changements très importants seront apportés au marché des services juridiques à bref délai.

Un délégué du Royaume-Uni émet des commentaires sur les systèmes d'enseignement. Il fait remarquer qu'il exerce la profession d'avocat depuis près de 36 ans. Quand il a obtenu son diplôme d'avocat, il n'existait qu'une seule faculté de droit, gérée par la Law Society, qui disposait de 2 établissements, et il était quasiment impossible d'y entrer. À l'époque, il y avait environ 23 000 solicitors alors qu'ils sont à présent près de 110 000. Cette augmentation s'explique par la délégation de la fonction de formation à de nombreux établissements La composition des cours proposés évolue. Les cabinets d'avocats peuvent inscrire leurs étudiants à un grand nombre de cours différents qui conviennent mieux à leurs besoins. Par exemple, un grand nombre de cabinets de province ou de la City de Londres spécialisés dans le droit commercial ont sélectionné des cours conçus en fonction du travail qu'ils accomplissent, ce qui est une évolution dont il y a lieu de se féliciter.

Un délégué de l'Irlande fait remarquer que la profession a toujours intérêt à limiter le nombre d'entrants. Un moyen d'y parvenir est de continuer à durcir les critères et à porter la qualité à un niveau plus élevé que nécessaire. Ce comportement a pour effet d'empêcher l'apparition d'autres professions de type para-juridique.

Un délégué du Brésil fait remarquer que, dans son pays, l'augmentation du nombre de facultés de droit ne s'est pas accompagnée d'une amélioration de la qualité. Le gouvernement a été incapable de contrôler la qualité de l'enseignement dispensé par les facultés de droit. C'est pourquoi l'Association du barreau s'est chargée de cette responsabilité. De même, on constate dans d'autres professions une augmentation rapide du nombre d'universités sans que l'État central assure le contrôle de la qualité de leur enseignement. Il arrive donc parfois que la supervision de ces établissements par les associations de professionnels soit un pis-aller acceptable quand la solution que l'on préférerait ne fonctionne pas.

Un délégué de la Pologne souligne que l'accès à la profession d'avocat peut être découragé de bien des manières. Dans ce pays, quiconque souhaite devenir avocat doit payer une redevance administrative à l'association locale. Il en résulte un schéma très intéressant, en particulier chez les avocats, parce qu'il semblerait que les avocats stagiaires n'acquittent pas ces droits, ou qu'ils ne paient qu'un montant

symbolique, tandis que ceux qui sont issus d'autres professions, notamment ceux qui ont été admis au vu de leurs références, se voient réclamer des frais exorbitants, qui peuvent atteindre 2 000 €, et ce juste pour avoir le droit de s'établir dans une zone géographique donnée.

2. Exclusivité

Le Président en arrive à la question de l'exclusivité. Dans la plupart des pays, mais non dans tous, le seul droit exclusif dont jouissent les avocats est celui de la représentation devant les tribunaux. C'est notamment le cas en Italie. En revanche, il n'existe aucune exclusivité pour les activités extrajudiciaires ou de conseil juridique. La Nouvelle-Zélande reconnaît aux avocats un droit d'exclusivité pour les contrats de location alors qu'il est permis de se passer de leurs services dans de nombreux pays. Le système néo-zélandais changera en 2008 avec l'apparition d'une nouvelle profession, les conveyancing practitioners (rédacteurs d'actes translatifs de propriété). Certains droits d'exclusivité disparaîtront-ils à cette occasion ? Quel accueil les professions juridiques réservent-elles à cette réforme ? Quelles sont ses causes ?

Un délégué de Nouvelle-Zélande affirme que l'exclusivité sera éliminée. En 2008, quand le Lawyers and Conveyance Act entrera en vigueur, l'exclusivité dont les avocats jouissaient pour les actes translatifs de propriété sera partagée avec les conveyance practitioners. En général, les domaines réservés concernent les conseils donnés en dehors d'une procédure devant les tribunaux, la préparation de documents pour un tribunal, etc. Les comptables et autres professionnels du conseil seront habilités à dispenser des conseils sur les contrats, les testaments, la fiscalité et les contrats de location à condition de ne pas prétendre qu'ils ont la qualité d'avocat. Le fait de dispenser ces conseils ne confère pas les mêmes privilèges ni la même protection que ceux qui s'appliquent au conseil juridique. Les avocats ont montré quelques signes d'hostilité à l'ouverture des actes translatifs de propriété à une autre profession en faisant part de leurs craintes pour la qualité ; ils ont néanmoins été rassurés, dans une certaine mesure, par le fait qu'ils partageront l'exclusivité des contrats immobiliers avec les agents immobiliers et par les réformes instaurées par le Real Estate Act (Loi sur l'immobilier). Ils ont constaté avec satisfaction que l'exclusivité était maintenue dans certains domaines spécifiques concernant la rédaction de documents destinés à être produits devant les tribunaux, le conseil juridique et la direction et la gestion des procédures judiciaires. Ils déplorent que le Queen's Council ouvre la procédure de désignation aux avocats et sociétés d'avocats alors qu'auparavant elle était limitée aux seuls barristers, et y voient une menace pour leur indépendance.

Le Président observe qu'en Amérique latine les notaires ont le monopole des actes consignés dans un registre public. En cette qualité, ils garantissent la sécurité juridique des droits de propriété et, loin de se borner à certifier l'identité des parties, ils sont responsables sur leurs biens propres de la validité de la transaction. Les pays d'Amérique latine qui appliquent le modèle du notariat latin n'ont pas besoin d'assurances garantissant la régularité des transactions. Les notaires sont des officiers publics et l'entrée dans leur profession est soumise à des restrictions. En Italie, il est nécessaire, pour devenir notaire, d'être diplômé en droit et de passer un concours pour obtenir l'un des postes vacants. Depuis peu, les tarifs ne sont plus fixés par un décret du gouvernement et la concurrence sur les prix est aujourd'hui la règle. La libéralisation du marché des services de notariat est beaucoup plus ancienne aux Pays-Bas. La délégation néerlandaise pourrait-elle expliquer succinctement le contenu de la réforme et les résultats obtenus ? Pourquoi les rangs de la profession ont-ils grossi plus lentement que prévu ?

Un délégué des Pays-Bas rappelle que la profession notariale a fait l'objet de plusieurs réformes majeures. Les deux principales sont l'abolition de la réglementation tarifaire et du numerus clausus. Les tarifs sont dorénavant complètement libres, si bien qu'ils ont diminué et qu'ils varient dans des proportions considérables d'un notaire à l'autre. Il existe moins de subventions croisées entre les différentes prestations fournies par les notaires. Depuis que le nombre de notaires n'est plus plafonné, de nouvelles études se sont créées et certaines de celles qui existaient auparavant se sont développées. Plusieurs raisons expliquent que les rangs de la profession s'étoffent moins vite qu'escompté. Premièrement, toute étude doit offrir tous les

services de notariat, de telle sorte que, même si elle le souhaite, une nouvelle étude ne peut se spécialiser. Deuxièmement, les nouveaux offices notariaux doivent obtenir un agrément en présentant un plan de développement détaillé. Il est examiné par une commission et l'ouverture d'un nouvel office est subordonnée à l'autorisation de l'administrateur. Cette réglementation pourrait constituer une barrière à l'entrée, mais certains signes portent à croire que les jeunes notaires craignent les risques liés à l'ouverture d'un nouvel office et préfèrent s'associer à un office existant déjà. Il ressort d'une enquête que les jeunes notaires préfèrent devenir salariés d'un office existant.

Le Président rappelle qu'en Australie les professions juridiques ont été libéralisées dans le cadre des réformes de la politique nationale de concurrence entreprises dans les années 90. L'entrée dans la profession est toujours administrée à l'échelon local. Il demande pourquoi les États et Territoires ne reconnaissent pas les avocats reçus au barreau d'un autre État ou Territoire.

Un délégué de l'Australie rappelle qu'à cause du système fédéral, la réglementation des professions juridiques est du ressort des États et Territoires. Historiquement, les huit États et Territoires ont toujours appliqué à leur marché des règles, des seuils et une réglementation différents. La Constitution n'autorise pas une démarche nationale en tant que telle, mais le gouvernement fédéral collabore étroitement avec ceux des États et Territoires pour produire une législation harmonisée, au moins pour les professions juridiques. Le régime du certificat de pratique national a été instauré alors que les États et Territoires appliquaient tous des règles différentes. Il a été institué afin d'assurer une reconnaissance mutuelle au cas par cas. La prochaine étape de la réforme que l'Australie est en train de lancer consiste à concevoir effectivement une législation type pour les professions juridiques ; cette tâche a été accomplie par les ministres de la Justice (Attorney Generals) de tous les États et Territoires et par celui du gouvernement fédéral. La plupart des États et Territoires ont participé à la rédaction de ce projet de loi, de telle sorte qu'aujourd'hui la réglementation régissant l'entrée dans la profession et le comportement sur le marché est quasiment similaire ou, à tout le moins, harmonisée dans toute la mesure du possible.

Le Président déclare qu'en Suisse la réglementation des professions juridiques, à l'instar des autres professions, est élaborée à l'échelon régional. Une loi fédérale a néanmoins instauré en 2002 la liberté de circulation des avocats entre les Cantons. Cependant, en ce qui concerne les notaires, certains cantons disposent d'offices notariaux publics tandis que d'autres ne disposent que de notaires privés. Les Suisses déclarent dans leur compte rendu que les tarifs des notaires privés sont sensiblement plus élevés. Le marché intérieur décrit dans leur compte rendu a-t-il instauré la concurrence dans les services de notariat ? Est-il possible de conclure une transaction dans un canton où ces services sont moins onéreux ?

Un délégué de la Suisse souligne que la réglementation des professions juridiques est complexe parce que le territoire exigu de la Confédération est divisé en 26 cantons. En ce qui concerne les services d'avocat, une loi fédérale a libéralisé l'ensemble du marché de telle sorte qu'il est permis de faire de la publicité, que la réglementation des honoraires est moins stricte, qu'il n'existe pas de limites quantitatives et que les avocats peuvent déménager d'un canton à l'autre. Mais chaque canton a conservé son propre système pour les services de notariat. La réglementation n'est pas la même d'un canton à l'autre. Certains appliquent une tarification fixe et interdisent la publicité. Les notaires sont théoriquement libres de déménager d'un canton à l'autre en vertu de la loi sur le marché intérieur, mais cela est difficile dès lors qu'ils n'ont pas le droit de faire de la publicité et que leurs tarifs sont fixés par une ordonnance cantonale. Fondamentalement, les 26 cantons appliquent l'un des 2 systèmes de notariat suivants. Dans certains cantons, le notariat est une activité de service public dans le cadre de laquelle les services de notariat sont fournis à la clientèle par des fonctionnaires. Il est clair que dans ces cantons la concurrence est inexistante puisque le notariat est une administration publique et que les notaires sont employés par l'État. D'autres cantons appliquent le système latin, dans lequel le notariat est une profession réglementée et les notaires font partie du secteur privé et sont en concurrence les uns avec les autres. Mais, en général, leurs honoraires, la publicité etc. sont soumis à une réglementation très stricte. On notera que, dans ces cantons,

les services de notariat sont généralement plus coûteux que dans les cantons où les notaires font partie du service public.

Les notaires du service public ne font pas concurrence à ceux du privé et il serait impossible à un notaire du service public travaillant à Zurich de fournir un service pour un canton dans lequel le notariat relève du secteur privé. Les différences de réglementation entre les cantons rendent la concurrence plus difficile. Si, par exemple, un canton décide de réglementer la tarification d'un service donné, il ne peut pas exister de concurrence par les prix car, même si un notaire d'un autre canton vient s'y établir, il est tenu d'appliquer la réglementation cantonale.

La réglementation est assez souple pour certains services de notariat tels que la constitution de sociétés. Les notaires ont standardisé ce service et le fournissent sur Internet. Il est rémunéré par des honoraires fixes. Il semble que la concurrence se développe lorsque la réglementation est assouplie. La concurrence exercée par les notaires suisses sur les marchés étrangers est un autre exemple de concurrence transfrontalière. Ainsi, nombre de sociétés allemandes franchissent la frontière pour consommer ou acheter des services de notariat. Sans que l'on connaisse le détail de la réglementation allemande, il semble en effet que certains services de notariat soient moins chers en Suisse qu'en Allemagne. Les Suisses sont en mesure de citer quelques exemples l'attestant.

Le Président observe qu'en Europe continentale le service actuel des actes translatifs de propriété pose toujours problème en ceci que les consommateurs sont soumis à une réglementation plus ou moins stricte d'un pays à l'autre. La Commission européenne a récemment publié une étude sur ce type de services qui compare les prix pratiques sur les différents marchés selon que la réglementation y est plus ou moins stricte. Il en ressort que les consommateurs achetant un bien de valeur identique paient un prix d'autant plus élevé que le marché est plus fortement réglementé. Le prix dont l'enquête fait état pour l'Italie est toutefois très élevé. Comme la fraude fiscale est une pratique très répandue, presque personne ne déclare le bien qu'il achète à sa valeur réelle. Il s'ensuit que la comparaison est plutôt trompeuse. Elle porte sur un appartement de 250 000 euros, mais son coût dépend du prix effectivement payé pour cet appartement. Si, dans certains pays, la valeur réelle est révélée, ce n'est pas le cas en Italie, si bien qu'un appartement dont on prétend qu'il ne vaut que 250 000 euros en vaut 700 000 en réalité ; cela signifie que, rapportés à la valeur réelle du bien, les honoraires sont beaucoup plus faibles dans ce pays. La comparaison n'en livre pas moins des conclusions fort intéressantes.

Un délégué de la Commission européenne déclare qu'elle avait espéré parvenir à publier les conclusions de l'étude, mais que celle-ci n'est pas encore achevée. La Commission prend acte de la restriction que le Président a mentionnée à propos de l'Italie et du fait que le prix sur lequel sont assis les frais de notaire est généralement sous-évalué. Mais, par la force des choses, toute enquête de cette sorte doit se contenter des données à la disposition du public. L'étude compare une série de transactions portant sur des logements dont la valeur est de 100 000 EUR, 250 000 EUR et 500 000 EUR pour effectuer une comparaison entre les 21 membres. Les conclusions préliminaires de l'étude, présentées par un collègue à la dernière réunion du Groupe de travail, montrent que plus la réglementation est légère, plus les frais de notaire sont bas. Dans les pays d'Europe continentale où le notariat suit le modèle latin, les frais sont plus lourds que sur les marchés où la libéralisation est plus avancée comme, par exemple, en Europe du Nord.

Le Prof. Van den Bergh note que, pour les transactions immobilières, il existe au moins 5 modèles différents :

- Le modèle de notariat latin, très réglementé, qui existe notamment en Allemagne, en Grèce et dans plusieurs pays de droit écrit ;

- Le modèle latin déréglementé tel que les Pays-Bas l'ont institué ;

- Un modèle dans lequel la concurrence règne entre différents avocats, et éventuellement aussi une profession spécialisée dans les actes translatifs de propriété, qui existe au Royaume-Uni et prochainement en Nouvelle-Zélande ;

- Des solutions dans lesquelles les transactions sont effectuées par des intervenants qui n'ont pas la qualité d'avocat. Par exemple, les agents immobiliers sont habilités à effectuer ces transactions dans les pays scandinaves ;

- Enfin, le modèle américain, dans lequel la quasi-totalité des divers services sont séparés : on y trouve des sociétés d'assurance garantissant les titres de propriété, des avocats qui conseillent tant les vendeurs que les acheteurs, des sociétés habilitées à recevoir les dépôts et des témoins de la signature des actes.

Il manque une comparaison entre ces 5 modèles. Une étude qui se limiterait à comparer les niveaux de réglementation et les prix serait simpliste et pourrait aboutir à des conclusions biaisées. Il est nécessaire de mener une étude de ces 5 modèles s'efforçant de traiter également l'évaluation de la qualité. Le Professeur Van den Bergh fait observer qu'il risque d'y avoir un conflit entre deux conceptions : l'une veut qu'une intensification de la concurrence soit toujours souhaitable, l'autre que, dans le modèle latin, les notaires soient les meilleurs garants de la sécurité juridique, si bien qu'il faut préserver la spécificité de leur profession, qui allie les caractéristiques de la profession d'avocat et du service public. Le degré de sécurité juridique assuré par les divers modèles en présence doit être vérifié. La comparaison des niveaux de réglementation et de prix n'est pas suffisamment éclairante. L'évaluation de la qualité pourrait être effectuée, par exemple, en examinant un certain nombre de procès et la fréquence des cas où des transactions immobilières sont invalidées. Si, aux yeux d'un universitaire, cette tâche ne présente pas de difficulté, recueillir ces données peut être très ardu. Mais tant que l'on ne disposera pas de ces données, le débat risque de tourner à la guerre de religions alors que l'on pourrait obtenir des éléments tangibles.

Un délégué de la Commission européenne déclare que l'étude porte non seulement sur les prix, mais aussi sur les autres facteurs influant sur le marché.

Un délégué des États-Unis rappelle que dans ce pays, les États de l'Union décident qui peut réaliser des actes translatifs de propriété dans l'immobilier. La réglementation exige dans 8 États sur 10 qu'un avocat soit présent au moment de la conclusion de la transaction. Dans ces États, les consommateurs n'ont pratiquement pas le choix. La situation est variable dans les autres États : certains, comme la Virginie, ont un système dual dans lequel les services de règlement peuvent être effectués par des intervenants n'ayant pas la qualité d'avocat à condition d'être titulaires d'une habilitation à cet effet. La plupart des États ne font pas obligation aux consommateurs de souscrire une assurance titre de propriété mais, en pratique, celle-ci est indispensable parce que le prêteur, c'est-à-dire la société de crédit hypothécaire, n'accorderait pas de crédit en l'absence de cette assurance. L'Agence de prêt fédérale, à savoir le Housing and Urban Development Department, envisage d'autoriser les prêteurs à proposer ces types de services de règlement dans le cadre d'une formule globale. Le mérite de cette approche est que les prêteurs concevraient de telles formules et en feraient la publicité en affichant un prix unique alors qu'actuellement, c'est au consommateur qu'incombe l'évaluation comparative des honoraires des différents intervenants.

Un délégué de l'Irlande déclare qu'il aimerait disposer d'éléments tangibles mesurant l'impact de la création de professions de spécialistes agréés des actes translatifs de propriété (conveyancers).

Un délégué de l'Australie fait remarquer que, dans le cadre de la réforme de la politique nationale de concurrence de son pays, l'examen de la législation a abouti au retrait du droit exclusif pour les praticiens d'offrir des services de titres translatifs de propriété. Ensuite, la Productivity Commission (Commission de la productivité), agence de recherche indépendante, s'est penchée sur l'efficacité de la réforme et son compte rendu suggère que les prix des services d'actes translatifs de propriété ont effectivement baissé à la suite de cette étude et de la réforme.

Un délégué du Mexique déclare que l'exclusivité incite puissamment à la collusion. Dans ce pays, les notaires appliquent pratiquement le même tarif. L'autorité de la concurrence a sanctionné cette pratique à l'issue d'une enquête. L'affaire est remontée à la Cour suprême. Cette dernière a jugé que les notaires n'étaient pas des agents économiques et que les autorités n'avaient pas le droit de les soumettre à une réglementation et de les sanctionner à ce propos.

Un délégué de la Commission européenne déclare que le cas du Mexique est un sujet de débat important dans l'Union européenne. Les notaires et les États membres ont argué que les articles du Traité CEE ne doivent pas s'appliquer aux notaires parce que ces derniers sont dépositaires de l'autorité publique. La Commission a pris position à ce sujet l'an dernier et déclaré qu'en réalité les notaires n'exercent pas une autorité publique mais une activité économique et qu'en conséquence ils relèvent des réglementations du marché interne de la CE et des règles de la concurrence, qui font partie du Traité CEE.

Un délégué du BIAC déclare qu'en ce qui concerne l'exclusivité et l'ouverture de certains secteurs des professions juridiques et, de manière encore plus spécifique, la question des prix et de la baisse des prix résultant de l'ouverture d'une profession à un plus grand nombre de participants, il est toujours d'avis – et le rappelle dans diverses parties de son rapport, qui est assez bref – que dans ce domaine la qualité du service rendu est une considération au moins aussi importante que le prix. Quand un ménage achète un logement, il effectue l'investissement le plus important de sa vie. Il n'est pas forcément rentable d'économiser 5 % ou 10 % sur le prix de cession si l'achat n'est pas sécurisé correctement. Il faut en permanence s'interroger avec un regard très critique sur les autres avantages qui résultent ordinairement d'une augmentation de la concurrence.

3. Règles de bonne conduite et défense/promotion de la concurrence

Le Président aborde le débat sur les règles de bonne conduite et la défense/promotion de la concurrence. Il remarque que l'Italie a récemment aboli le tarif minimum obligatoire et l'interdiction de la publicité et des honoraires conditionnels (contingency fees). En pratique, depuis le mois de janvier de cette année, la libéralisation des professions juridiques a fortement progressé. Les autorités italiennes pourraient-elles indiquer quelles sont les mesures qu'elles ont prises pour veiller à ce que des pratiques restrictives clandestines ne se substituent pas aux dispositions légales qui ont été abrogées ?

Un délégué de l'Italie déclare que cette réforme a été un grand changement pour les professions juridiques. Ses trois axes principaux sont ceux que l'Autorité de la concurrence avait indiqués dans les rapports dans lesquels elle avait réclamé des mesures, notamment : les tarifs, la publicité et la possibilité de créer des firmes multidisciplinaires. Ces trois domaines ont été libéralisés du fait de la réforme. En Italie comme dans d'autres pays, les professions juridiques sont soumises à deux niveaux de réglementation, à savoir la législation et l'autodiscipline des associations professionnelles. La réforme a éliminé les restrictions prévues par la loi, mais d'autres font partie des règles déontologiques des associations professionnelles, qui sont réunies dans le code de bonne conduite de la profession. C'est pourquoi l'autorité surveille à présent le remaniement du code de bonne conduite par les associations

professionnelles, qui doit intégrer les modifications exigées par la loi. En particulier, l'Autorité de la concurrence a ouvert une enquête générale et elle procède à un examen approfondi du code de bonne conduite. Elle organise en outre des réunions avec les représentants des associations professionnelles afin de discuter avec eux de la mise en œuvre du processus. Cette enquête a pour but de s'assurer que les restrictions éliminées par la réforme ne sont pas maintenues ou rétablies sous d'autres formes par les professionnels du droit dans le cadre de l'autodiscipline.

Le Président relève que plusieurs arrêts sur la légitimité d'une législation nationale fixant un tarif minimum ont été rendus par la CJE. La Cour de justice européenne a autorisé les ministres à imposer des tarifs minimum. Quelles chances y a-t-il aujourd'hui pour que la CJE interdise la fixation d'un tarif minimum dans d'autres pays ?

Un délégué de la Commission européenne répond que les arrêts Arduino, Macrino et Cipolla sont les pièces maîtresses de la jurisprudence de la CJE sur la fixation de tarifs minimum par la loi. Fondamentalement, les arrêts Macrino et Cipolla ont confirmé les décisions de la Cour dans l'arrêt Arduino. La Cour a entrepris un examen détaillé de la procédure que l'État avait suivie pour adopter un tarif minimum. Au vu de la procédure suivie dans ces affaires, la Cour a conclu que l'État italien, parce que la décision finale sur l'adoption du tarif minimum lui appartenait, n'avait pas délégué son pouvoir à l'organisme professionnel qui, en fait, avait proposé le tarif minimum à l'État, lequel s'était réservé le pouvoir de décision de telle sorte qu'il n'a pas été jugé coupable d'adopter des dispositions contraires aux règles de la libre concurrence. Ce qu'il y a d'intéressant dans l'arrêt Cipolla, c'est que la Cour est allée plus loin et s'est demandé si le tarif minimum était contraire à la liberté de prestation de services et la liberté d'établissement qui, bien entendu, sont aussi des articles très importants du Traité CEE. Dans cette affaire, la Cour a effectivement déclaré qu'à son avis le tarif minimum rend l'accès au marché italien des services juridiques plus difficile pour les avocats établis dans les autres pays et que, par conséquent, il constitue une entrave à la liberté de prestation de services et à la liberté d'établissement ; mais la Cour a cependant noté que des considérations d'intérêt public pouvaient justifier qu'un État membre adopte une telle mesure restrictive. Par exemple, un tarif minimum peut être instauré afin de protéger les consommateurs et d'assurer la bonne administration de la justice. En l'espèce, on peut considérer que ces considérations d'intérêt public sont déterminantes et justifient que l'on restreigne la liberté de prestation de services. Ces nécessités impérieuses doivent être soumises à un double test de proportionnalité, à savoir (1) que les mesures nationales soient appropriées pour atteindre l'objectif qu'elles sont censées viser et (2) que ces mesures n'aillent pas au-delà de ce qui est nécessaire pour atteindre cet objectif. La Cour a énuméré un certain nombre de facteurs que les tribunaux nationaux doivent prendre en compte pour se forger une opinion, notamment, en ce qui concerne le marché italien, l'existence d'une corrélation entre le niveau des honoraires et la qualité du service rendu et le fait que l'asymétrie d'information entre clients et avocats nécessite ou non l'instauration d'un tarif de ce type et qu'il existe ou non d'autres moyens permettant de garantir la qualité des prestations, c'est-à-dire des règles professionnelles s'appliquant au comportement des avocats, à leur déontologie, etc. À ce jour, le tribunal national n'a pas encore statué sur le fait que le critère de proportionnalité soit satisfait ou non. Il est probable que la Commission européenne soutiendrait qu'un tarif minimum est injustifié parce qu'il existe d'autres moyens de protéger les consommateurs et de garantir la qualité des prestations.

Le Président note qu'au Taipei chinois, la FTC, n'étant pas sûre d'être compétente en la matière, a décidé, au lieu d'attaquer le tarif minimum, de consulter le ministère de la Justice en 1999. En 2001, le ministère a modifié la réglementation en indiquant que les honoraires du tarif ne sont qu'une recommandation. Mais, sur le fond, peu importe que le tarif ne soit qu'une simple recommandation car en réalité il est tout à fait contraignant. Avec le recul, ne peut-on pas dire qu'il aurait été préférable d'intenter une action en justice dans cette affaire ?

En réponse à cette question, un délégué du Taipei chinois déclare qu'il aimerait rappeler au préalable que l'autorité réglementaire jouit d'un large pouvoir discrétionnaire pour l'élaboration et l'interprétation des règles régissant la branche dont elle a la charge. En vertu de l'article 46 de la Loi sur les pratiques commerciales loyales, qui régit la lutte contre les atteintes à la concurrence au Taipei chinois, la FTC peut contester ces règlements dès lors qu'ils sont manifestement contraires à l'esprit du Fair Trade Act. La manière dont ce texte est rédigé a suscité une controverse à propos de la signification/de l'esprit de la Loi sur les pratiques commerciales loyales et de son interprétation. Cela signifie que, si la FTC découvre qu'une réglementation impose une norme ou des critères d'accès, soit cette norme ou ces critères sont contraires à l'esprit de la Loi sur les pratiques commerciales loyales, soit on peut admettre qu'ils peuvent se justifier à l'issue d'une analyse fonctionnelle. Partant de là, la FTC pense que quatre considérations peuvent l'inciter à ne pas attaquer directement le tarif minimum de l'association du barreau. La première a trait aux exigences de la loi. S'agissant du tarif minimum fixé par l'association du barreau, ce tarif n'est qu'une suggestion et, surtout, la réglementation ne l'assortit d'aucune pénalité. La deuxième est qu'il existe toujours des justifications pour l'asymétrie d'information parce que la valeur des services juridiques repose sur une croyance. La troisième concerne le système judiciaire. Le Taipei chinois a un système de droit écrit. Dans ce système, le juge examine la clause d'autorisation ; par conséquent, si l'agence suit cette clause, elle gagnera son procès ; il nous est assez difficile de contester des règlements en justice ou de persuader un tribunal que, même si ces règlements sont conformes à la loi, ils ont un effet anticoncurrentiel. Nous pouvons difficilement convaincre un magistrat que, comme le tarif minimum n'est assorti d'aucune pénalité, il limite de facto les possibilités de prendre pied sur le marché. Les groupes de pression sont la quatrième raison.

Le Président relève qu'en Indonésie, l'association du barreau interdit aux avocats de faire de la publicité. Elle souligne avec raison que toute décision de l'association du barreau est soumise à la législation antitrust. Pourquoi donc l'autorité de la concurrence n'est-elle pas intervenue pour sanctionner les restrictions sur la publicité ?

Un délégué de l'Indonésie déclare que ce qui est interdit dans la publicité est une annonce exploitant l'image commerciale. Le problème est qu'en Indonésie le prix est devenu une barrière à l'entrée pour les jeunes et les nouveaux arrivants alors que la certification revient exclusivement à l'association du barreau. Quoique l'université ait la capacité d'organiser la formation débouchant sur la certification pour un prix peu élevé, la réglementation le lui interdit. La FTC se soucie davantage de cet aspect que de la publicité.

Le Président fait remarquer qu'aux États-Unis la FTC intervient très fréquemment contre les associations du barreau qui essaient de réglementer la publicité dans leur code de déontologie. Le compte rendu suggère que les décisions des associations du barreau sont soumises à la législation antitrust. Pourquoi donc les États-Unis préfèrent-ils recourir à des recommandations plutôt qu'à des sanctions ? La dernière question concerne la notion de publicité comparative trompeuse. Supposons qu'un cabinet d'avocats A se dise plus convivial que le cabinet B. En Italie, une telle publicité serait considérée comme trompeuse parce qu'il est impossible de prouver objectivement si le cabinet A est plus chaleureux que le cabinet B. En va-t-il de même aux États-Unis ?

Un délégué des États-Unis répond qu'il est juste de dire que, le plus souvent, les agences recourent à la persuasion pour amender les propositions du barreau. Cela est souvent dû au fait que, dans la mesure où le barreau propose une règle à ses autorités de tutelle, il doit en référer soit à la Cour suprême, soit au Parlement. Si une autorité de tutelle prend une mesure qui devient un acte de l'État souverain, la FTC ne peut s'opposer aux décisions de cet État. La doctrine Noerr-Pennington préserve la possibilité, pour les acteurs privés, de faire pression sur un État pour qu'il prenne des mesures. Si une association du barreau à laquelle il n'est pas obligatoire d'adhérer ou si une section de l'association du barreau d'un État à laquelle il est obligatoire de s'affilier et qui a autorité sur les avocats adopte et met à exécution une règle, il se peut que cette décision ne soit pas protégée par la doctrine de l'Action de l'État. C'est pourquoi les agences

peuvent intenter un procès dans un certain nombre de cas et ne s'en privent pas. En fait, les autorités de la concurrence américaines réussissent fréquemment à convaincre les associations du barreau, les tribunaux des États et le Parlement de ne pas adopter de mesures limitant la concurrence. De fait, à l'automne 2006, l'État de New York a déclaré à la Cour suprême (et confirmé par la suite) qu'il renonçait à adopter une réglementation limitant la publicité.

S'agissant des publicités comparatives trompeuses, la FTC a la même position vis-à-vis des avocats que de toutes les autres professions en matière de publicité. Fondamentalement, la question est de savoir si, du point de vue des consommateurs, une publicité est trompeuse. La FTC est d'avis que la publicité comparative ne doit pas être interdite purement et simplement, sauf si elle est effectivement trompeuse. La réponse à apporter aux publicités susceptibles d'être trompeuses passe par des mises au point plutôt que par une interdiction pure et simple.

Le Président relève qu'en Turquie, l'association du barreau établit un tarif minimum qui est soumis au ministre et approuvé tacitement par ce dernier. Cela signifie que l'absence de réponse du ministre vaut approbation. L'autorité de la concurrence turque s'est élevée contre cette pratique dans un plaidoyer qui émane vraisemblablement d'une autorité nationale. En vertu des arrêts Arduino et Cipolla, dans le cadre de l'Union européenne, comme le ministre se borne à entériner la décision de l'association du barreau, la pratique constitutive d'une entente sur les prix (même si elle est imposée par la loi) peut être prohibée directement par une autorité antitrust nationale. Les autorités turques ont-elles ce pouvoir ?

Un délégué de la Turquie répond que l'autorité de la concurrence de son pays ne dispose pas de ce pouvoir. Le système juridique de la Turquie fait que, si une pratique anticoncurrentielle est autorisée par une loi, l'autorité de la concurrence ne peut s'y opposer. En cas de conflit de lois, l'autorité de la concurrence ne peut user de son pouvoir de consultation que devant le Parlement, le Premier ministre et les autres ministres afin d'obtenir la suppression de la clause autorisant une pratique anticoncurrentielle. Il est par exemple arrivé dans une affaire antérieure que l'autorité turque de la concurrence demande à l'Union des Chambres des ingénieurs et architectes de mettre fin à la fixation d'un tarif minimum. Mais le Conseil d'État a accordé en appel un sursis à l'exécution de la décision prise par l'autorité de la concurrence. La prudence est donc de mise et l'autorité ne peut user que de son pouvoir de persuasion si une pratique anticoncurrentielle a un fondement juridique tel que celui qui autorise l'Union des associations du barreau à faire consacrer par la Loi sur la profession d'avocat une disposition instaurant un tarif minimum.

Le Président relève qu'en Belgique, le Code de justice prescrit aux avocats de faire preuve de modération dans la fixation de leurs honoraires, encore que cette formulation soit très vague. L'Ordre des avocats de ce pays sanctionne-t-il ses membres lorsqu'ils facturent des honoraires excessifs ?

Le délégué de la Belgique déclare que la jurisprudence sanctionne les honoraires excessifs. Ce qui importe, c'est que les consommateurs sachent par avance combien ils auront à payer. L'une des associations du barreau fait obligation à ses affiliés d'informer effectivement leurs clients du mode de calcul de leurs honoraires.

Le Président déclare qu'au Portugal, les avocats sont soumis à la loi sur la publicité mensongère mais, contrairement aux autres entreprises, ils ne sont pas autorisés à faire de la publicité sur leurs honoraires. Cela signifie que, par exemple, ils peuvent recourir à la publicité évocatrice. Mais le font-ils vraiment ? Les avocats font-ils de la publicité comme les constructeurs automobiles ? En outre, les organismes professionnels d'autodiscipline sont chargés d'ouvrir des procédures disciplinaires contre ceux qui se rendent coupables de publicité mensongère. Qui est chargé de la publicité mensongère en général au Portugal ? La jurisprudence sur la publicité mensongère est-elle différente pour les avocats ?

Un délégué du Portugal déclare que les avocats sont effectivement soumis à la loi sur la publicité mensongère, mais qu'ils n'ont pas le droit de faire de publicité sur leurs honoraires. Le recours à la publicité évocatrice est fréquent, en particulier de la part des grandes sociétés d'avocats. L'autorité de la concurrence portugaise n'est pas responsable de la protection des consommateurs, à laquelle ressortit l'autre question. Cette responsabilité revient actuellement à une Direction générale horizontale rattachée au ministère de l'Économie et de l'innovation. Quant aux pouvoirs de sanction des organismes d'autodiscipline, à savoir l'Association du barreau dans le cas qui nous occupe, ils portent essentiellement sur l'application des règles spécifiques à la profession. Les pénalités en cas de violation sont aussi assez différentes. Si, en général, elles prennent la forme d'amendes dans les cas où l'affaire de publicité mensongère relève de la protection des consommateurs, les pénalités infligées par les organismes professionnels, notamment à des avocats, sont généralement des mesures disciplinaires telles que la suspension ou l'interdiction d'exercer.

Le Président observe que, dans la plupart des pays, les honoraires d'avocat sont librement fixés par les parties. En Lituanie le ministre de la Justice fixe le plancher et le plafond d'honoraires que les notaires ne peuvent franchir. Comme les notaires accomplissent une mission d'intérêt public, pourquoi le gouvernement devrait-il fixer un tarif minimum ? L'Autorité a-t-elle quelque chose à dire à ce sujet ?

Un délégué de la Lituanie précise que c'est le ministère de la Justice qui est chargé de déterminer les honoraires des notaires et qu'un nouveau barème est entré en vigueur en avril. À l'origine, cette procédure, qui figurait dans le programme du gouvernement, avait pour but de plafonner les honoraires. L'autorité de la concurrence, qui y a activement concouru, est d'avis que rien ne justifie l'instauration d'un tarif minimum. Cet avis a été transmis par écrit au ministère de la Justice et à la Chambre des notaires, mais les minima et maxima sont maintenus pour les honoraires des notaires. C'est le ministère de la Justice qui en a décidé ainsi sans fournir d'explication. Auparavant, les tarifs étaient généralement fixes. Aujourd'hui, le champ de la concurrence est élargi selon la loi, mais la situation n'est pas idéale.

Le Président se tourne vers l'Espagne. Il semble que les avocats et les notaires disposent d'une marge de négociation respective de 12 % et 10 %. Le Président demande des éclaircissements.

Un délégué de l'Espagne indique que « procuradore » se traduit par solicitor (avoué), une profession qui ne doit pas être confondue avec celle d'avocat. Par conséquent, la marge de négociation de 12 % concerne les honoraires des avoués, mais non ceux des avocats. L'avoué accomplit une tâche de « représentation devant les tribunaux », qui se distingue du conseil juridique ou de la défense d'un client devant les tribunaux. Ces deux fonctions, à savoir la défense d'un client devant les tribunaux et le conseil juridique, sont du ressort exclusif des avocats, mais non des avoués. Les avoués sont habilités par leurs clients à les représenter devant les tribunaux pour des documents et procédures de justice. La marge de négociation de 12 % porte sur les honoraires des avoués qui sont fixés par l'État après avoir consulté leur association professionnelle.

Les notaires disposent aussi de cette marge de négociation. Leurs honoraires sont également fixés par l'État après avoir consulté l'association professionnelle des notaires.

En Espagne, le service de la concurrence a ouvert une enquête sur le barème recommandé pour les honoraires des avocats et sur ceux des avoués qui sont fixés par l'État. Parallèlement, le Tribunal de la concurrence prépare un nouveau rapport sur les services fournis par les professions libérales en général ; ce document important, qui sera publié à la fin de cette année, contient une étude générale de différents services fournis par les professions libérales et une analyse spécifique de certains d'entre eux, notamment les services juridiques tels que le notariat.

La principale nouveauté concerne les notaires ; c'est la première fois que ce rapport étudie les notaires et les services d'enregistrement sous l'angle économique. Le rapport du Tribunal de la concurrence les étudie en tant qu'organisateurs de facteurs de production auxquels les tarifs administrés procurent un taux de rentabilité exceptionnel.

Le Président observe qu'en 2007, dans la République tchèque l'Office pour la protection de la concurrence économique a remis au gouvernement un rapport sur les restrictions nécessaires à la concurrence entre les professionnels. À propos des honoraires, l'Office a suggéré que le prix des services juridiques reflète leur qualité relative. Il a notamment proposé de s'éloigner d'un système de prix linéaire pour adopter une structure tarifaire en deux parties. Quels que soient les mérites de ce nouveau système, pourquoi l'Office n'a-t-il pas simplement proposé de libérer les prix et les honoraires, ce qui aurait été beaucoup plus facile ?

Un délégué de la République tchèque déclare que le rapport n'avait pas encore été présenté au gouvernement à la date de la réunion de l'OCDE. Les discussions viennent tout juste de commencer. Toutes les fois que l'autorité de la concurrence propose de supprimer le tarif ou les ajustements qui lui sont apportés, certains partis déclarent qu'ils sont absolument indispensables ou que le droit de la concurrence ne s'applique en aucune façon à certaines professions juridiques. L'autorité a opté pour une approche graduelle en vue de faire évoluer les tarifs d'un système purement linéaire vers un dispositif prenant davantage en compte la dimension qualitative. Le choix de cette approche est motivé par le fait que le tribunal constitutionnel de la République tchèque en a décidé ainsi dans un arrêt portant sur les exécuteurs, qui sont une autre catégorie de juristes soumis à une réglementation particulière.

Le Président note qu'en Roumanie, le Conseil de la concurrence est parvenu, au moyen de plusieurs recommandations, à convaincre le Parlement d'éliminer le tarif minimum pour les services juridiques. Son plaidoyer en faveur de la levée des restrictions sur la publicité est cependant resté infructueux. Quelle en est la raison ?

Un délégué de la Roumanie déclare que les autorités étaient d'avis que la question du tarif minimum était la plus urgente. C'est pourquoi la plupart des interventions insistaient sur le retrait d'une telle disposition, tant pour les avocats que pour les autres professions juridiques. Le Conseil de la concurrence a obtenu satisfaction vis-à-vis des avocats. Le soutien de l'association du barreau y a beaucoup contribué. La réglementation applicable aux avocats a été amendée en 2004 de telle sorte que les dispositions ajoutées en ont été retirées. Le dialogue avec l'association du barreau s'est poursuivi, notamment au sujet de la publicité. L'association du barreau reste cependant très attachée aux restrictions sur la publicité. Les avocats considèrent que, puisque la publicité leur est interdite, la notoriété et la réputation sont les principaux critères qui guident le choix de leurs clients. Selon les avocats, faire de la publicité reviendrait à enfreindre le code déontologique parce que les moyens financiers ne sont pas obligatoirement synonymes de compétence professionnelle et les clients risquent donc d'être mal informés et de choisir un cabinet d'avocats qui ne répond pas nécessairement à leurs besoins spécifiques. Les avocats se sont inquiétés à propos des grandes sociétés d'avocats, en particulier celles qui sont étrangères, et qui disposent de moyens financiers non négligeables ; c'est pourquoi ils ont exercé de vives pressions et se sont efforcés de contraindre les sociétés d'avocats étrangères de s'associer avec des avocats du pays pour prendre pied sur le marché national.

Le Président déclare qu'au Canada, le Bureau a été invité en 2006 à fournir un avis écrit sur un projet de barème pour les avocats de l'Ontario. La première question posée au Canada porte sur les circonstances dans lesquelles le Bureau rédige un avis écrit et sa valeur juridique. En substance, le Bureau a déclaré que, si ce barème d'honoraires n'était qu'une recommandation ou une suggestion sur les tarifs sans valeur contraignante et sans qu'une quelconque pénalité soit appliquée aux avocats qui ne se conforment pas à cette recommandation, on ne pouvait conclure ni au complot, ni à une entente sur les prix. Selon le Bureau,

quelle est la véritable raison pour laquelle le barème d'honoraires des avocats a été publié et quel autre but pourrait-il avoir visé ?

Un délégué du Canada déclare qu'en vertu d'une pratique ancienne, toute personne peut demander au Bureau un avis sur l'application de la loi et que cet avis engage le Bureau par la suite, à condition que la pratique concernée n'ait pas existé avant la date de la demande, que tous les faits pertinents susceptibles d'influer sur la décision du Bureau aient été divulgués et que la pratique en question soit sensiblement identique à celle qui est décrite dans la demande d'avis juridique.

Dans son avis, et compte tenu des informations fournies par la partie demanderesse et de la jurisprudence à cette époque, le Bureau ne considérait pas que les prix étaient illégaux en tant que tels. Rien ne permettait de conclure à l'existence d'une collusion ou d'une entente sur les prix. Le Bureau n'a cependant pas caché qu'un tel barème pouvait faciliter la collusion entre les membres de la profession et que, s'il s'avérait que certains d'entre eux ne l'avaient pas appliqué et avaient fait l'objet de sanctions disciplinaires ou que des tentatives pour le rendre obligatoire avaient été faites, ce barème constituerait un élément de preuve.

Le Président relève qu'en Hongrie l'interdiction de la publicité est due à une décision du barreau. En conséquence, le Conseil de la concurrence a décidé que cette restriction constituait une violation de l'article 81 alinéa 1 du traité des Communautés européennes et qu'elle ne pouvait faire l'objet d'une dérogation en vertu des dispositions de l'article 81 alinéa 3. L'affaire a été jugée en septembre 2006. Elle est simple parce que le barreau était incapable de justifier l'interdiction légale de la publicité. La décision du Conseil de la concurrence signifie-t-elle que dorénavant les avocats ne seront soumis qu'aux règles de la publicité mensongère qui s'appliquent aux autres secteurs de l'économie ? Ou cette décision implique-t-elle que certaines restrictions sont acceptables ? Les avocats font-ils actuellement de la publicité en Hongrie ?

Un délégué de la Hongrie déclare en réponse à la première question que les avocats sont soumis aux règles sur la publicité mensongère et ne peuvent donc faire de la publicité que si elle est loyale. On pourrait cependant accepter quelques restrictions si elles sont dues aux caractéristiques spécifiques des professions juridiques telles que l'indépendance des avocats, le secret, la confidentialité ou la prévention des conflits d'intérêts. Lorsque le Conseil de la concurrence a rendu cette décision, la publicité était totalement prohibée par l'Association du barreau hongrois. Le Conseil de la concurrence n'a pas exigé la suppression de toutes les restrictions et il a reconnu qu'à condition d'être proportionnées et indispensables, certaines d'entre elles pouvaient se justifier. Il appartient à présent au barreau hongrois de rédiger un nouveau code de bonne conduite sur la publicité s'il en a le désir. Les avocats ne font toujours pas de publicité. Le barreau hongrois a exercé un recours contre la décision du Conseil de la concurrence, qui est donc en cours d'examen par les tribunaux de telle sorte qu'elle n'est pas encore exécutée.

Un délégué de l'Irlande fait part de ses doutes sur l'importance de l'asymétrie de l'information dans les professions juridiques. Elle sert parfois d'excuse pour ne rien faire. Elle est aussi symptomatique d'un état d'esprit selon lequel, pour une raison ou pour une autre, les professions libérales, et en particulier les professions juridiques, sont un cas à part. Cet argument n'est pas convaincant. Les services juridiques fournis par les avocats ne sont en principe pas différents de la plupart des services offerts aux consommateurs par des professionnels. Ce délégué ne croit pas qu'il soit nécessaire d'appliquer des normes spéciales ou particulières.

Il se trouve qu'en Irlande les restrictions sur la publicité actuellement en vigueur sont encore plus sévères que la plupart de celles qui ont été évoquées ce matin. L'interdiction de publicité est totale pour toute une branche des professions juridiques, à savoir les avocats à la Cour (barristers), et cette interdiction a été instaurée non par l'État mais par la profession elle-même. L'État s'est abstenu d'intervenir à ce sujet.

L'Irish Competition Authority (Autorité irlandaise de la concurrence) ne voit pas pourquoi la publicité devrait être interdite aux barristers dès lors qu'elle est factuelle et véridique. Il existe en Irlande une législation relative aux solicitors. Ils n'ont pas le droit d'insérer d'encart publicitaire dans les journaux. Ils n'ont pas non plus le droit de faire de la publicité sur les autobus, dans les trains ou sur les taxis. Les organismes professionnels s'efforcent désespérément de justifier ces restrictions au motif qu'elles protégeraient les consommateurs. Au contraire, l'Irish Competition Authority pense que les autorités de la concurrence, ou tout autre organisme d'État, doit prendre ces restrictions au sérieux et faire tout son possible pour les supprimer.

Un délégué du BIAC déclare que, dans ce domaine précis, ce Comité souscrit à nombre de commentaires qui ont été faits, notamment les plus récents qui ont été émis par l'Irlande. Le rapport du BIAC soutient que les entraves à la concurrence entre et parmi les membres des professions juridiques doivent être éliminées à l'exception de celles qui sont absolument indispensables pour préserver la qualité, qui est d'intérêt public, et ces exceptions sont très limitées. Le BIAC ne voit guère de motifs d'inciter les autorités réglementaires de l'État à intervenir pour limiter la concurrence au moyen soit de restrictions sur la publicité, soit de règles de tarification.

Le Président demande au Professeur Francis Kramarz d'analyser brièvement la réglementation et la productivité du secteur des services.

Le Professeur Francis Kramarz, qui siège dans la délégation française, relève que jusqu'ici les débats ont essentiellement porté sur les avantages susceptibles de découler d'une re-réglementation (le terme de déréglementation n'est pas le plus approprié et il pourrait effrayer à tort certains auditeurs). La crainte que les réformes engendrent le chômage est très fréquente. En réalité, tous les jours près de 30 000 personnes perdent leur emploi en France, tandis qu'environ 30 000 autres en trouvent un. Autrement dit, le marché de l'emploi est très actif. Plus précisément, la réforme par la voie de la re-réglementation peut créer des emplois nouveaux et il ne faut donc pas croire qu'elle en détruit. Bien que l'on dispose de peu d'éléments sur les effets d'une réforme des professions juridiques sur l'emploi, ces effets ont bien été mesurés dans le cas de la refonte de la réglementation sur le transport de fret par la route. Quand M. Balladur était Premier ministre, il a supprimé le régime d'autorisation préalable pour le transport de marchandises sur une distance de plus de 150 km. Le prix et les marges du transport de fret par la route ont baissé dans le sillage de cette réforme, ce qui tendrait à prouver que cette branche bénéficiait auparavant d'une rente de situation élevée. Les effectifs du secteur progressaient au rythme de 1 %-1.5 % par an avant la réforme. Ils ont crû de 5 % dans les années qui ont suivi la réforme, et ils augmentent encore de près de 4 % par an aujourd'hui. Des grèves ont eu lieu en 1992 et 1995 pour protester contre la réforme et ses modalités d'application. Mais en réalité elle s'est soldée par des créations d'emplois. (à ce propos, on se référera à Cahuc et Kramarz, « De la Précarité à la Mobilité : vers une Sécurité Sociale Professionnelle », Rapport au ministre de l'Economie et au ministre du Travail, juin 2005, La Documentation Française, Paris.)

4. Règles de comportement visant à protéger les consommateurs

Le Président en arrive à la dernière partie de la table ronde. Il note qu'au Danemark le dispositif de l'aide juridique aux plus démunis est complexe. Ce pays est un cas particulier en ceci que le champ de l'aide juridique y est très vaste. On distingue les niveaux 1, 2 et 3 selon le niveau des revenus du bénéficiaire de l'aide juridique. De plus, le coût de certaines procédures comme, par exemple, en matière matrimoniale ou de garde d'enfants, est toujours supporté par l'État et ce sont autant de domaines où l'avènement de la concurrence pourrait avoir des effets considérables. Compte tenu du champ de l'aide juridique au Danemark, qui est beaucoup plus vaste que dans la plupart des autres pays, les honoraires ne devraient pas être trop éloignés du prix du marché, sinon les avocats n'accepteraient pas de travailler pour l'aide juridique. Comment le Danemark qualifierait-il son marché des services juridiques : est-ce un marché réglementé ou un marché libre ? Quels sont les secteurs ouverts à la concurrence : uniquement les

services juridiques destinés aux consommateurs avertis ou ceux qui sont utilisés par tout un chacun ? Le Danemark ne craint-il pas que les honoraires de l'aide juridique ne servent de référence au marché libre ?

Un délégué du Danemark déclare que le problème le plus important est le droit exclusif des avocats de plaider devant les tribunaux. Il a cependant été envisagé d'apporter des changements à cette exclusivité de telle sorte que d'autres intervenants que les avocats puissent aussi plaider devant les tribunaux. Au surplus, les honoraires sont librement négociés et il n'existe pas d'interdiction de publicité. Dans l'ensemble, le marché des services juridiques est relativement libre. Il est vrai que l'aide juridique est réglementée et qu'elle est rémunérée par des honoraires fixes, mais il appartient au client de choisir son avocat et la concurrence ne porte peut-être pas seulement sur le prix, mais aussi sur la qualité et sur la quantité de travail effectuée par l'avocat pour un honoraire donné. Pour répondre à la dernière question, l'autorité de la concurrence danoise n'a réalisé aucune étude sur ce sujet, mais rien n'indique que les honoraires de l'aide juridique servent de point de référence au marché libre des services juridiques.

Le Président se tourne vers l'Afrique du Sud, où la Law Society a demandé que la Competition Commission accorde des dérogations pour plusieurs dispositions, notamment celle selon laquelle la rémunération des services juridiques doit être juste et raisonnable. Bien que cette dispense ait été sollicitée dès 2004, la Commission n'a pas encore pris de décision. Pourquoi faut-il si longtemps ? Pour en venir au cœur de la question, comment le caractère raisonnable ou équitable du prix fixé est-il déterminé si l'on ne se réfère pas à une norme quelconque pour apprécier quel est le juste prix, laquelle, d'une certaine manière, ne diffère guère d'une entente sur les prix ? Comment peut-on être sûr qu'un prix doit être bas pour être raisonnable ou équitable ?

Un délégué de l'Afrique du Sud déclare que la Competition Commission n'a pas encore tranché pour plusieurs raisons. Il rappelle au préalable qu'en Afrique du Sud il existe deux sortes de praticiens du droit, à savoir les advocates et les attorneys. Malheureusement pour la Commission, la profession est passée maître dans l'art de la chicane, si bien que le General Council of the Bar (Conseil général du barreau), qui représente les advocates, a lié la Commission pendant des années dans le cadre d'un procès devant la High Court. Les questions que le barreau a soulevées dans sa requête sont d'ailleurs très proches de celles qui ont été posées par la Law Society of South Africa. C'est pourquoi la Commission a souhaité obtenir préalablement un jugement sur plusieurs questions pendantes devant la High Court afin qu'il guide sa ligne de conduite.

Depuis l'avènement d'un gouvernement démocratique, les autorités souhaitent transformer les professions juridiques, et notamment faciliter l'accès de la majorité de la population à ces métiers. Mais ce processus est inachevé parce qu'il existe de nombreux différends entre professionnels sur la manière dont il convient de mener à bien cette transformation, et en particulier sur l'identité de l'autorité qui assumera la tutelle de la profession.

Quant au caractère raisonnable du prix, la Commission elle-même est en train de débattre de ce sujet. La question qui importe le plus est de savoir à partir de quel point des lignes directrices peuvent constituer une entente sur les prix.

Le Président en vient au Royaume-Uni. L'autorité de la concurrence britannique s'est beaucoup impliquée dans la réforme de la profession depuis plusieurs années. En effet, la libéralisation des professions juridiques a débuté en 1970 lorsque la Monopolies and Mergers Commission a publié un rapport à ce propos. Plusieurs droits d'exclusivité et restrictions d'accès ont été supprimés à la suite de ce rapport. En 2001, un rapport de l'OFT sur la concurrence dans les professions libérales a débouché sur une deuxième vague de réformes portant principalement sur les règles de conduite. Les restrictions qui subsistent concernent l'organisation des entreprises, et en particulier l'interdiction, pour les barristers, de s'associer avec des solicitors et vice versa. Le Parlement est en train de discuter d'un projet de loi

proposant de désigner une autorité de réglementation externe. On ne voit pas très bien quelle est la finalité d'une autorité de réglementation externe. Pourquoi faudrait-il dessaisir les organismes existants qui sont chargés de l'autodiscipline de certains problèmes tels que la qualité des prestations ? En tout état de cause, qui, en dehors des avocats, est capable d'évaluer la qualité des prestations ou les règles d'accès à la profession ?

Un délégué du Royaume-Uni déclare que la libéralisation est un processus qui a débuté dès la fin des années 60/le début des années 70. Bien que le Président parle d'une deuxième vague de changements, on pourrait soutenir qu'il y en a eu beaucoup d'autres. Il rappelle qu'il existe 3 juridictions au Royaume-Uni : ce sont, premièrement, l'Angleterre et le pays de Galles, deuxièmement, l'Irlande du Nord et, troisièmement, l'Écosse. La situation varie légèrement de l'une à l'autre. Ce délégué consacrera son intervention à l'Angleterre et au pays de Galles, surtout parce que c'est cet espace que le projet de loi sur les services juridiques décrit dans le compte rendu du Royaume-Uni a pour objet.

Le Président pose une question supposant qu'il existe encore des restrictions sur la publicité et souligne que ce problème pourrait être réglé par la législation générale, ce qui est plus ou moins le cas aujourd'hui. Le barreau et la Law Society d'Écosse et du pays de Galles ont renoncé aux restrictions qu'ils appliquaient traditionnellement et, à l'heure actuelle, ils appliquent à peu près les dispositions relatives à la publicité mensongère.

Les propositions relatives au projet de loi sur les services juridiques tentent de tirer le meilleur parti possible des compétences des professionnels ainsi que des meilleures infrastructures réglementaires qui assurent la surveillance d'un certain nombre d'organismes d'autodiscipline concurrents. Le schéma retenu vise à soumettre toutes les professions juridiques à une seule autorité de réglementation externe, qui assumerait donc la tutelle des solicitors, barristers, trademark attorneys (avocats spécialisés dans le droit des marques), patent agents (agents spécialisés dans les brevets), conveyancers, etc. L'un des buts de cette réforme est que la commission, dont le président ne sera pas un avocat, soit majoritairement composée de personnes qui ne sont pas des avocats. Cette commission édictera les critères de qualité minimum que devront remplir tous les organismes d'autodiscipline qui lui sont subordonnés. Quant à ces organismes – et ils sont nombreux –, ils conserveront leur mission de réglementation de leur profession mais seront soumis au contrôle du legal services board (commission des services juridiques). Ils sont néanmoins tenus de dissocier leurs fonctions de représentation de leurs fonctions réglementaires et doivent en outre se fixer un objectif en matière de concurrence. Il importe également de remarquer qu'ils doivent aussi mettre à part le traitement des réclamations de telle sorte qu'à l'avenir un organisme unique, l'Office for Single Complaints, traite toutes les réclamations des consommateurs. Ce schéma tend donc essentiellement à instaurer un organisme chapeau édictant des normes minimum et fixant toute une série d'objectifs assez larges qui coiffe et supervise un ensemble d'organismes professionnels exerçant leurs fonctions réglementaires ainsi qu'un organisme distinct chargé du traitement des réclamations.

Le Président demande : pourquoi ne pas laisser la question de la qualité aux organismes existants ? En réalité, cette approche s'est révélée inopérante. Le nombre de plaintes a augmenté et leur délai de traitement, de même que l'efficacité avec laquelle il y a été répondu, ne sont pas satisfaisants.

Le délégué déclare qu'il doute du principe généralement admis selon lequel les avocats sont les mieux placés pour statuer sur les réclamations. Dans les professions juridiques comme dans beaucoup d'autres, y compris les professions médicales, l'expérience prouve qu'il est nécessaire de combiner les compétences de la profession avec celles de personnalités indépendantes venant de l'extérieur qui sont capables d'aller au fond des choses et refusent de laisser les professionnels brouiller les pistes quand elles ont à prendre des décisions apportant une réponse adéquate aux réclamations des consommateurs. Il importe beaucoup au Royaume-Uni que la question de la qualité des prestations et les réclamations soient traitées en combinant

les compétences nécessaires dans un organisme séparé et que la profession soit elle-même réglementée par un organisme issu de ses rangs mais soumis à une stricte surveillance.

Le Président note que cette table ronde n'a pas encore discuté des modalités des recommandations d'honoraires. En Italie, les honoraires recommandés sont déterminés en fonction des intrants, ce qui signifie que les avocats appliquent un tarif minimum fondé sur le nombre d'actes qu'ils produisent devant les tribunaux ou le temps qu'ils consacrent aux procès indépendamment des résultats qu'ils essaient d'obtenir et quelle que soit la nature de l'affaire (divorce ou autres) qui leur est confiée. Par conséquent, le tarif recommandé n'améliore en aucune façon la transparence du service rendu parce que les consommateurs n'ont aucune idée du travail fourni par les avocats pour une affaire donnée. Ce sont les résultats que les clients connaissent : ils vont voir un avocat dans un certain but. S'il existe un tarif recommandé, la manière dont il est recommandé a aussi des conséquences non négligeables et il importe d'en tenir compte.

Un délégué d'Afrique du Sud déclare que la South African Legal Practice Society sera composée de tous les avocats qui en sont membres et qu'un autre organisme sera mis sur pied : le National Legal Council. Celui-ci sera composé de 24 praticiens du droit, dont 16 devront être en exercice, ainsi que de 2 personnalités qualifiées nommées par le ministre, dont l'une devra représenter les intérêts des consommateurs.

Un délégué de l'Irlande déclare que les honoraires ne sont absolument pas le thème principal de ce débat parce que leur montant et la controverse à leur sujet ne sont que les manifestations extérieures des entraves à la concurrence qui existent. Il faut creuser plus profondément pour découvrir les obstacles structurels à la concurrence.

Il existe trop de conflits d'intérêts entre, d'une part, les professions juridiques et, de l'autre, l'intérêt public. Les conflits d'intérêts sont trop nombreux pour qu'un même organisme soit investi d'une fonction de réglementation et d'une fonction de représentation. C'est essentiellement pour cette raison que l'autorité de la concurrence irlandaise pense qu'une autorité de réglementation extérieure et indépendante doit être désignée.

Un délégué du BIAC déclare que ce Comité est toujours d'avis qu'il faut s'immiscer le moins possible dans les affaires de la profession et réduire au strict minimum les entraves à la concurrence au sein de cette dernière et que l'autorité de tutelle doit prendre la mesure des bienfaits de la concurrence, ce que nombre d'entre elles font d'ores et déjà en Amérique du Nord. Mais des problèmes réels se posent : qualifications requises pour exercer, conditions d'accès, qualification des professionnels du droit issus d'autres pays. Le BIAC pense que le mieux est de soumettre ces questions en priorité aux membres des professions juridiques – mais en priorité seulement et non exclusivement –, qui doivent faire preuve de vigilance en défendant l'intérêt public et non celui de leur profession. La réglementation des professions juridiques met en jeu une autre considération : il ne faut rien faire qui soit de nature à modifier le rôle fondamental que les tribunaux reconnaissent aux avocats dans une société libre et démocratique. On notera que préserver l'indépendance du barreau contribue à la protection de l'état de droit. Il convient de trouver un juste équilibre entre les avantages de la concurrence, qui sont importants, et les autres impératifs qui concourent spécifiquement à l'intérêt public.

Le Président remercie les participants à ces débats. Alors qu'il croyait au début que la situation était très proche d'un pays à l'autre, il découvre qu'il existe de nombreuses différences significatives. Il convient toutefois de noter, qu'au cours des 10 dernières années, des changements majeurs se sont produits dans la plupart des pays membres et que la concurrence est aujourd'hui plus intense qu'auparavant. Il n'existe pas de restrictions sur les tarifs ou sur la publicité dans un grand nombre de pays est c'est un grand progrès. Bien entendu, des difficultés subsistent, qui concernent l'accès aux professions juridiques. Le Royaume-Uni a conçu un projet innovant et qui ne manquera pas d'intensifier la concurrence, lequel consiste à confier à une autorité indépendante le soin d'édicter des normes et de faire respecter ces dernières par les diverses associations professionnelles, qui seront libres de les rendre plus strictes si elles le souhaitent.

Il reste la question des consommateurs occasionnels, d'où l'idée de faire assurer leur protection non par la profession elle-même, mais par une autorité de réglementation extérieure. Ce schéma est probablement judicieux parce qu'il garantit l'indépendance de l'autorité de réglementation et, comme le montre le cas de l'ABA, il est très difficile d'être indépendant si l'on fait partie de la profession dont on assure la tutelle.

Bien que les autorités de la concurrence participant aux débats n'aient pas fait part d'un grand nombre de cas d'entraves à la concurrence, la plupart souhaitent qu'elle s'intensifie. À mesure que les restrictions légales sont éliminées, le nombre d'affaires portées devant la justice ne peut qu'augmenter parce que les associations professionnelles ne pourront plus s'appuyer sur les lois qui existaient jusqu'à une époque très récente.