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## **ADVOCATES IN ITALY FRANCE AND GERMANY**

*Dr Giovanni Tamburini iz Rima, inače spoljni saradnik Instituta za uporedno pravo, govori o tome kako je organizovana advokatura u Italiji, Francuskoj i Nemačkoj. U stvari on pokušava da nam da odgovore na nekoliko pitanja koja smo mu mi postavili, a kroz koje se može sagledati položaj advokata i njihovih komora. Prvo pitanje bilo je pitanje da li u Italiji, Francuskoj i Nemačkoj na nacionalnom nivou postoji samo jedna komora, ili postoji mogućnost da bude osnovano više komora? Drugo pitanje bilo je pitanje da li strani advokati mogu da nastupaju (zastupaju) pred domaćim sudovima u Italiji, Francuskoj i Nemačkoj? Pitali smo dr Tamburinija takođe i to da li advokati u ovim zemljama rade u malim kancelarijama ili su organizovani u velikim kancelarijama – kompanijama, te koliki procenat njih radi u malim, a koliki procenat njih radi u velikim kompanijama? Interesovalo nas je i pitanje da li je advokatima u ove tri zemlje EU zabranjeno da se reklamiraju u novinama i na televiziji?*

**Ključne reči:** advokatske komore, advokatske kancelarije; strain advokati; Italija, Francuska; Nemačka; reklame

**1. How bar associations are organized? On the national level, is there one organization, or there are organizations on the level of provinces? Is it possible to organize two or three bar associations on the level on the whole country ? – For example You and some of Your colleagues are not satisfied with the work of regular, existing chamber and You want to establish the new one – is it possible, and what is necessary for that?**

a. Italy

In Italy, it is possible to distinguish two kinds of bar organization.

On one hand, one has bar organizations expressly established by the law and with a “public law” status. They are considered as compulsory, independent, and exponential, all together forming a national institution with its own managing board: the *Consiglio Nazionale Forense (CNF)*<sup>1</sup>.

On the other hand, one has bar organizations freely established by lawyers and, therefore, with a “private law” status.

The differences between the first and the second kind of bar organizations concern above all the functions they are expected to exert.

To understand the structure and the role of the bar organizations established by the law, it is helpful to provide a brief summary of their evolution.

The story of these bodies dates back to the Roman Empire, when a strict distinction between *advocati* and *procuratores* was envisaged by the *Corpus Iuris Civilis*.

The latter did not represent a defined category. They were just people that substituted the party in the trial as the latter could for example be ill or excessively old. Accordingly, the *Corpus Iuris Civilis* provided a set of rules aimed at regulating the relationship party-procurator within the steps of the process.

The former represented a real professional class. Differently from the *procuratores* they were not merely charged with substituting the party; actually they did not substitute or represent the part in the trial; they were rather supposed to provide a legal-technical defense before the Court on behalf of the party or, as most of the time used to happen,

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<sup>1</sup> In English it would sound like National Bar Board.

to provide legal consultancies outside the process<sup>2</sup>. The fact that the *advocati* represented a class was confirmed by those *constitutiones* of the *Corpus Iuris Civilis* which prescribed precise requirements for enabling people to act as *advocati*<sup>3</sup>. There were a number of legislative expressions to refer to the category of *advocati*: *collegia*, *matricula*, *consortium advocatum*, *corpus togatorum*.

It is very important to remark that these “bar” registers were organized on a local level. This is proved by an Emperor *Augustus* law which envisaged that the *advocati* belonging to a certain tribunal, could not exert their profession in another one.

During the Early Middle Age, while the *procuratores* did not organize themselves into *corporazioni* (guilds), the *advocati* did. The *corporazioni* were independent entities through which the *advocate* – but also other persons belonging to a certain category of occupation/profession - exerted a control over the category. The most important aspect of this controlling activity was the limitation of the access into the guilds. Also in the Early Middle Age, therefore, the *advocati* demonstrated a tendency to distinguish themselves from the *procuratores*, deeming these as lower-rank professionals [Rasi, 1957; p. 1666].

The high reputation of the *advocati* progressively lost its value. This was due to the fact that the *advocati* began to use their technical knowledge and their skill to protect the powerful politicians of the moment. Thus, during the Late Middle Age (XVI century), in France the *advocati* decided to re-qualify their profession and instituted the “*Ordres*”. This tendency was followed also in Italy [Del Frate, No Date].

Hence, differently from the *corporazioni*, which aimed at economic protection, mutual solidarity and assistance of its members and at influencing the public policy making processes, the “*Ordres*” were meant to emphasize the dignity and the probity of its subscribers as well as the cultural and moral prestige that had historically characterized their profession [Ricciardi, 1990].

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<sup>2</sup> See voice *advocati and procuratores* in *Dizionario Giuridico Romano* [AA.VV.; 2000; p. 46 and 412].

<sup>3</sup> The most significant among these *constitutiones* was the *Constitutio de Postulando* issued by Emperor Valentiniano III (442).

The “*Ordres*” were very concerned by the French revolution (1789) which immediately caused their suppression<sup>4</sup>. The revolution even abolished the title of “*avocat*”.

Anyway, in 1810, Napoleon having become emperor, the “*Ordres*” were re-established. Such initiative was not taken to defend the interests of the category, rather it reflected the State’s intention to control and to discipline the members. Also in that case, the tendency influenced the Italian peninsula where the majority of the States maintained the French legislation<sup>5</sup>. Other States, as for example the Reign of Sardinia, restored the middle age *corporazioni*, ensuring independence and autonomy to the category.

After the Italian unification, occurred in 1861, a political debate was initiated in order to provide a uniform normative over the whole territory.

Thus, in 1874, the *Regio Decreto* n. 1938, at article 4 stipulated that in every Court of Appeal and civil or correctional Tribunal a “*Collegio di Avvocati*” had to be constituted. The third paragraph of the same article clearly provided that for every Court of Appeal and civil or correctional Tribunal placed in the same city only one “*Collegio*” could be instituted. Each “*Collegio*” had its own *Albo*. The *Albo* was indeed a list of the lawyers belonging to a certain “*Collegio*”. Lawyers had to register themselves in the *Albo* of the *Collegio* that covered their place of residence<sup>6</sup>. The same criteria were envisaged for the *procuratori*<sup>7</sup>.

Moreover, for each “*Collegio*” there was a “*Consiglio dell’Ordine*” made up of a certain number of members (art. 16), depending on the number of the lawyers enlisted in the *Albo* [Scarselli, 2009].

<sup>4</sup> Several Decrees were adopted between the 1790 and 1791 [Ricciardi, 1990]

<sup>5</sup> From 1796 to 1815, Italy was indeed dominated by France, *see* Balduino [1990]

<sup>6</sup> It is important to underscore that the law n. 1938/1874 used the term “*residenza*” and not “*domicilio*”. Also today the *avvocato* can register himself only in the “*Consiglio dell’Ordine*” where he/she has the residence. Therefore, if an *avvocato* holds a private law firm in Florence, but his residence is in Rome, he will not be able to register himself in the “*Consiglio dell’Ordine*” of Florence.

<sup>7</sup> The figure of the *Procuratore* has been abolished in 1997, law n. 27/1997. The difference between the *Avvocati* and *Procuratori* have been represented by the fact that only the *Avvocati* had the *ius postulando* before the major Courts. The *Procuratori*, anyway, differently from the Roman period, became a real class of professionals: they needed a legal background to be allowed to perform their activity. A very clear explanation on the functional difference between *Procuratori* and *Avvocati* is provided by Carnelutti [1959; p. 645]

With the law 25 March 1926, n. 453 the Italian Government instituted the “*Consiglio Superiore Forense*”, that is a national body which would have decided on the appeals against the measures issued by the “*Consigli dell’Ordine*” on the following subjects:

- a) maintenance of the *Albi*;
- b) discipline of the members of the “*Collegio*”.

The *Consiglio Superiore Forense* provided also legal opinions on bills/drafts concerning the exertion of the bar profession.

The “*Consiglio Superiore Forense*” was successively concerned by several legislations which were basically aimed at changing the election system of its members: the Fascist government – that was established in 1923 – was meant to directly appoint the members in order to maintain the category of the lawyers under the State’s control. The changes related to the election system also involved the change of the name of the “*Consiglio Superiore Forense*”.

The last of these Fascist legislations<sup>8</sup> was the ***Regio Decreto Legge 1578/1933*** which introduced the “*Commissione Centrale per gli Avvocati*”, made up of 15 members nominated by the Ministry of Justice together with the Ministry of the *Corporazioni*<sup>9</sup>.

The Fascist intention of centralizing the control of category of the lawyers went beyond the provision of a central commission subordinated the political power.

In fact, although the law 453/1926 itself had confirmed the existence of the “*Collegi*” and of the relevant “*Consigli dell’Ordine*”, two months later, in May, the *Regio Decreto* 747/1926, that was expected to execute the law 453/1926, stipulated that:

- a) (art.3) only the legally acknowledged lawyers’ unions could exert the functions related to the protection of the interests of the category and to the exertion of disciplinary actions (art. 4);

<sup>8</sup> The legislations that passed during the Fascist regime were:

- a) the regulation executing the *Regio Decreto* 747/1926, which replaces the “*Consiglio Superiore Forense*” with a “*Commissione*” and provides that all the 15 members are appointed by the Ministry of Justice. The law 453/1926 provided instead that the 32 members of the “*Consiglio Superiore Forense*” had to be elected half by the lawyers and half by the Ministry of Justice;
- b) the *Decreto-legge* 2580/1928 which restores the “*Consiglio Superiore Forense*” but reduces the number of its members from 32 to 24, all appointed by the Ministry of Justice.

<sup>9</sup> These *corporazioni* were of course not the same of the ones of the middle age. The Fascist *corporazioni* were completely subordinated to the State’s control. They were State bodies [Riva-Sanseverino, 1962].

b) (art.7) within the term of one month from the coming into force of that legislation, the “*Consigli dell’Ordine*” were to be dissolved and replaced by Royal Extraordinary Commissions, that is public bodies;

Actually, not all the “*Consigli dell’Ordine*” were dissolved. Some of them, indeed, resisted the rule [Meniconi, 2007; p. 130]. Those that resisted the rule, continued to exert only the functions related to the maintenance of the *Albi*.

Anyway, in 1928 such resistance did no longer make sense as the law n. 2580, at art.1, moved all the remaining functions of the “*Consigli dell’Ordine*” to permanent and ordinary commissions<sup>10</sup>.

Successively, with the above-quoted law 1578/33, it was established that the permanent and ordinary commissions had in turn to be replaced by the lawyers’ Fascist unions. The reasons of such replacement were represented by the fact that the – ordinary and permanent – commissions, although appointed by the executive power, from a substantial point of view, still were a reflection the previous “*Consigli dell’Ordine*”. The acknowledgment of the Fascist unions as the body charged with all the functions that historically belonged to the “*Consigli dell’Ordine*”, that is protecting the interests of the lawyers, administrating the *Albi* and exerting the disciplinary power, ensured a stronger control from the *Partito Nazionale Fascista*.

With the fall of the Fascist dictatorship, the Italian Parliament approved the D.lgs. 23 November, 1944, n. 382. According to this Statute, the “*Consigli dell’Ordine*” were re-established and, therefore, the fascist unions dissolved. Art. 1 of this law indeed set that the “functions related to maintenance of the *Albo* and to disciplinary actions [...] are conferred to the *Consigli dell’Ordine*”

In addition, the “*Consiglio Superiore Forense*”, which later – law n. 1578/1933 – became the “*Commissione centrale per gli avvocati e procuratori*” – abolished by the law n. 369/1944 –, was re-defined as “*Consiglio Nazionale Forense*” (art. 21).

The functions of the “*CNF*” are therefore those that were envisaged in the law n. 1578/1933 for the *Commissione centrale per gli avvocati e procuratori*”(art. 51):

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<sup>10</sup> It is necessary to remark that the 1928 legislation did not formally suppressed the “*Consigli dell’Ordine*”, rather it just transferred all their functions to the permanent and ordinary commission.

- a) to decide on the claims launched under the law n. 1578/1933 itself;
- b) to promote the disciplinary action.

Currently, there is a political debate to transform the *CNF* from a mere controlling body to an executive body, that a self-governing body of the *avvocati*. Hence, where the transformation takes place, the *CNF* would be expected to issue regulations (secondary source of legislation), within of course the limits established by the law (primary source of legislation).

It is very important to underscore how the process of “incorporation” as “public law” entities of the group of professionals has maintained a local base. In Italy, in the case of the *avvocati* and *procuratori*<sup>11</sup>, all the legislations concerning their professional order, since the 1874 one, passing through the Fascist ones, until the 1944 one, **have always introduced and/or presented a local based structure**. In particular, the Italian “*Collegi*” have been constituted for every civil or penal tribunal and for every Court of Appeal<sup>12</sup>.

**As seen in the beginning of this discussion, although there is a “collegio” for every civil or penal tribunal and for every Court of Appeal, all of them belong to the same *ordine* [order or institution]. The structure of this *ordine* is therefore set by the law<sup>13</sup>.**

The *ordine* is the official bar organization in the sense that it is the only body charged by the law with the administration of the questions related to the forensic professions.

Still, the principle of freedom of incorporation allows to establish other bar organizations/associations as “private law” entities in order to contribute for the protection of the rights of the *collegi*'s members, for the improvement of their working conditions and for the representations of the complaints and exigencies.

These bar associations may exert a very important role as not always the institutional *Consigli dell'Ordine* prove successful in

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<sup>11</sup> The difference between them has been abolished, *see* note 7

<sup>12</sup> In Italy there is one Court of Appeal for every Administrative Region. Italy is constituted by 20 Administrative Regions.

<sup>13</sup> The Courts of Appeals are placed in the capitals of the Italian Regions. For example, Rome is the capital of Lazio Region. In Rome, therefore, although there is a Court of Appeal and a Tribunal (either civil and penal), there is only one Collegio/Ordine (*See* at p. 2 the quotation of paragraph 3, art. 4 of the law 1938/1874).

performing all their duties, especially those operating in very big judicial centers. It may well happen and it uses to happen, therefore, that the “*Consigli dell’Ordine*” reach agreements and conventions with such private bodies for facilitating the exertion of their functions.

b. France

The organization of the bar associations in France is quite similar to the Italian one. In France, in fact, the “*Ordres des Avocats*” present a “public law” status. More accurately, they are considered as “public establishments”<sup>14</sup> [Hamelin and Damien, 1995; p. 33].

Also in France, moreover, bar organizations are organized on a local basis. Art. 1 of the Décret n°91-1197 du 27 novembre 1991, provides that lawyers are grouped in “orders” for every Tribunal “*de grande instance*”, that is every Tribunal which has a “higher” competence for civil and penal law issues.

A small difference with Italy concerns the organization of the “*ordres*” in the relation to the Court of Appeal. Art. 2 of the *Décret* n. 91-1197/1991 stipulates, in fact, that lawyers registered in the Tribunals “*de grande instance*” for which is competent the same Court of Appeal, can gather themselves in only one “*Ordre*”. As seen, in Italy that is compulsory for tribunals and Court of Appeal placed in the same locality.

Just like in Italy, also in France the official bar organizations are flanked by “private law” entities, these being represented by associations and unions incorporated under *loi du 1 juillet 1901* and *loi du 21 mars 1884* respectively.

Such organizations are allowed, under certain conditions, to take part of the trials in order to defend the general interests of the profession and the particular interests of the lawyers as well as those of the “*orders*” whose decisions have been challenged.

In France, the National Board for the Forensic Profession (*Conseil National des Bureaux*) has been introduced only in 1990 with the law n. 90-1259 which has modified the law n°71-1130 du 31 décembre 1971.

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<sup>14</sup> “*établissements publics*”.



## c. Germany

Under art. 60 of the *BRAO*, bar associations (*Rechtsanwaltskammer*) are established in the territorial jurisdictions of the Courts of Appeal (*Oberlandesgericht*). The members of these *collegia* are represented by the lawyers or companies of lawyers that have their legal place within such territories. The bar organization is a “public law” entity like in France and in Italy. There is a total of 27 bar organizations plus the bar organization competent for the Federal Court of Justice. All the organizations form the Federal Order of the Lawyers (*Bundesrechtsanwaltskammer*).

Therefore, also the German bar organizations are structured on a local basis level, but differently from France and Italy, the territorial extent of each local organization is wider as it involves all the lawyers “belonging” to the same Court of Appeal. For this reason, it would be more correct to say that in Germany bar organizations are structured on a regional level.

Next to the “public law” bar organizations, also in Germany lawyers have the possibility to create private entities.

The most important “private law” professional association is the *Deutscher Anwaltverein*, joined by about half of the lawyers currently in activity in Germany (142.800). This association has been existing since 1871 and represents the economic and professional interests of the category within the legislative process, either national and European.

**2. Is it possible for foreign advocates to work in Italy (France, Germany). Especially to be engaged to work in front courts. For example one advocate from Spain - could he work in Italy and if he could does it mean in all cases, or only in criminal, civil, corporate cases, or he has to have an office registered in Italy? Or may be foreign advocates could work as notaries in Italy (France, Germany) but they can not be engaged to appear on courts?**

a. Italy

Within the framework of the free movement of persons, the EC and the EU Treaties protect the free movement of professionals. The system of EC Directives on the acknowledgment of professional titles has rendered effective the mentioned protection. In reference to self-employment workers the EC Treaty distinguishes two situations, the

right of establishment, governed by articles 43-48 (consolidated version) and the free performance of services, articles 49-55 (consolidated version) which shall be examined with specific focus on the lawyer's profession.

While the right of establishment concerns the professional who is meant to reside in a Member State - different from the one where he/she was previously residing - to exert an economic and autonomous activity, the performance of services regards the chance benefited by the professional to provide his/her performance in Member State which is different from the one where he/she is residing, without moving to the State where the performance is addressed (one may think to the case of a lawyer which provides consultancy to a client who resides in another Member State).

This difference justifies the existence of two disciplines.

Provided that, generally, for the independent worker it is better to act as free services provider than to move her/himself into the other State and, consequently, to bear major burdens, it is very important to clearly distinguish the two situations mentioned above, and in particular the fundamental concept of the temporariness of the activity performed by a professional in a certain State, whereas the free services provider is allowed to exert his/her activity "for the execution of his/her performance", hence in an occasional way.

The ECJ denied the possibility to operate in a free services performance system to "individuals that operate prevalently" within the interested Member State, and has maintained that if the activity of an individual presents aspects of stability and permanence, the activity shall be carried out complying with the discipline related to the right of establishment.

Moreover, it is even true that the temporary character of the performance does not exclude that the service provider can establish a certain infrastructure (as for example a small law firm office) in the hosting Member State, if such infrastructure is necessary for the exertion of the activity.

In the EC law, the first important step on subjects related to the free performance of services from lawyers is represented by the Directive 77/249/CEE (2 March 1977), implemented in Italy by the law 31/1982, which disciplines the temporary and occasional exertion of the lawyer profession from lawyers who are citizens of other Member States.

Under this legislation, still in force and confirmed by the Directive 98/75/CE (which shall be successively analyzed), for what regards the free performance of services, lawyers in possession of one of the professional titles specified by art. 1 of the law 31/1982 are first of all expected to use their professional title in the original language, indicating the professional organization they belong to or the jurisdictional authority where they are admitted to exert their profession.

The activities that can be carried out by an “EC” lawyer acting as free performance provider consist either in judicial and extrajudicial services. In particular, as concerns the first, lawyers have to communicate the engagement to the concerned authority and to the President of the *Ordine degli Avvocati* which is territorially competent and, anyway, they must always execute their performances together with a lawyer registered in the *Albo* and enabled to exert the profession before the concerned authority.

The “local” lawyer ensures the relationship with the concerned authority and the observance of the relevant norms.

As concerns the extrajudicial performances it is not necessary to involve a local lawyer, while it is of course required the compliance with the law in force concerning the correct exertion of the forensic activity.

Under art. 9 of the law 31/1982, the “EC” lawyers, before initiating their professional activity in Italy, must send to the president of the competent *Ordine degli Avvocati* a communication in Italian language containing all the important data regarding their identity and professionalism.

Whereas a EU citizen – as for example a lawyer – means rather to exert his/her right of establishment, the conditions of such right are to be evaluated in function of the activities he is supposed to exert in the hosting Member State.

Paragraph 2 of art. 43 (consolidated version) of the EU Treaty specifies indeed that the freedom of establishment is exerted in compliance with the conditions defined by the interested Member State envisaged for its own citizens. Therefore, if the specific activities that the EC lawyer intends to exert in a certain State are not addressed by legislation, then the lawyer has the right to establish her/himself in the territory of the interested State and to exert such activities.

The foregoing discussion leads to an important observation on the consultancy activities that are allowed to be exerted in Italy from

other States lawyers, either Member or non-Member, given that in Italy such an activity is not regulated in an exclusive way and, therefore, it is free. Of course, the prohibition to use the title of “*avvocato*” remains, unless a successful application for the acknowledgment of the foreign title has been submitted. Still, the foreign lawyer can use his/her title in the original language and specifying the bar organizations he/she belongs to.

On the contrary, when a foreign lawyer intends to exert the professional activity in Italy, including all the activities reserved for the Italian lawyers who are registered in the *Albo*, there are three possibilities; the first two have been actually underscored by the decision 146/99 of the Unit Sections of the Italian Supreme Court (*Corte di Cassazione*) according to which the EC lawyer can “apply to the *Consiglio dell’Ordine degli Avvocati* for the inscription in the *Albo* under art. 12 of the law 31/82, law that implements the CEE Directive 77/249, to freely exert the profession; or apply for the inscription in the *Albo* under the law 115/92, which implements the CEE Directive 89/48 after the acknowledgment of its title from the Ministry of Justice and the successful passing of the aptitude test before the *Consiglio Nazionale Forense*.

The third possibility can be detached into the 98/5/CE Directive aimed at facilitating the permanent exertion of the lawyer profession in a Member State which is different from the one where the professional qualification was obtained.

The Directive 89/48/CEE, decided on the December 1988 the 21<sup>st</sup> by the EC Council and come into force the 4<sup>th</sup> January 1991, on a general system for the acknowledgment of the superior education diplomas, at the 1<sup>st</sup> recital, confirms the fundamental principle according to which, under art. 3, let. C of the EU Treaty, one of the objectives of the Community is the elimination among the Member States of the obstacles to the free movement of individuals and services, and this involves for the EU citizens that “the faculty to exert a profession, paid or self employment, in a Member State which is different from the one they have obtained their professional qualifications”.

The general system is based on an innovative legal construction according to which, if an individual is eligible to exert a profession in a Member State, it is presumed that its educational background allows him/her to exert the same profession in all the other Member States, existing the necessity of being addressed by “integrative measures” that may consist in an internship or aptitude tests, and that are required in order to fill possible vacuums characterizing the academic-

professional background of the EC professional in the light of the correspondent Italian professional figure.

In the specific case of lawyer profession, such integrative measure always consist in an aptitude exam which normally involves a written and an oral test.

Given that the aptitude test is established case by case according to the academic-professional career

of the applicant, it is worth to remark that system of acknowledgment is such that the demonstration from the interested individual of the knowledge of the fundamental subjects of Italian law – knowledge obtained in Italian universities and during a significant experience in private Italian legal firms – is take into account to reduce the substance of the required integrative measures.

The competent body for execution of the examination is the CNF, which is placed in the Ministry of Justice.

Basically, for the acknowledgment of the *avvocato* for a foreign lawyer meant to exert the profession in Italy, it is necessary to comply with the procedure of acknowledgment of the professional titles as provided by the Decreto Legislativo n. 115/1992 which has implemented the Directive n. 89/48/CEE. Under this legislation it is possible to apply for the acknowledgment of the professional title to the Ministry of Justice.

The application for acknowledgment can be submitted on the basis of an annexed fac-simile, supported by the required documentation as described on the website [www.giustizia.it](http://www.giustizia.it), under the links “*professioni*” and “*riconoscimento titoli professionali*”.

It is important to remark that the acknowledgment of the title is accomplished evaluating if the presented documentation is sufficient to demonstrate that the individual is legally enabled to exert the activity in the Member State from which he/she comes from.

Whereas the public administration has not decided on identical cases of professional acknowledgment yet, the case is brought to the “*Conferenza di servizi*”. Here, under the D.lgs. 115/92, the case is analyzed by the competent officers and by a representative of the interested professional category. These officers shall take the decision of the case.

The acknowledgment decree issued by the Ministry of Justice, once accomplished the integrative examination, represents a valid title for the inscription in the professional *Albo* and for the exertion of the profession in Italy.

The 98/5/CE Directive aimed at facilitating the permanent exertion of the lawyer profession in a Member State which is different from the one where the professional qualification was obtained, finally offers a concrete execution of the right to exert in a steady way the forensic profession within the European Community.

Said Directive integrates the EC legislation which was specifically concerned with the forensic profession, that is 77/249/CEE Directive.

Articles 3, 40 and 47 of the EU Treaty establish a real right of establishment for European lawyers, much simpler than what envisaged by the general system set by the 89/48/CEE Directive.

As regards the relationship between the two forensic Directives, it is expressly established that the Directive 98/5 does not concern the performances of services disciplined by the Directive 77/249/CEE; moreover, the obligation of registration at the competent authority of the hosting Member State – envisaged for the lawyers who are meant to exert in a Member State which is different from the one where the professional qualification was obtained – other than representing a form of consumers' protection, eliminates the problems that could previously arise: in fact, under the 1977 Directive, and in the absence of an obligation of registration in a professional *Albo*, it was possible that a lawyer, regardless of his/her residence, moved daily from a Member State to another in order to exert his/her activity in a stable way.

From the analysis of the discipline it is possible to observe that, while some lawyers can integrate themselves into the profession of the hosting Member State, in particular by passing the aptitudes tests envisaged by the Directive 89/48/CEE, other lawyers presenting all the prescribed qualifications have the right to obtain such integration after a certain period of exertion of the profession in the hosting Member State with the original professional title, or to continue their activity with the original professional title itself.

In the recital it is also underscored how the directive offers to the lawyers, differently from general acknowledgement system, a simpler way to integrate themselves into the profession of the hosting Member State, complying at the same time with the exigencies of the consumers that, "because of the growing flow of the commercial activities, due basically to the institution of the Internal Market, ask consultancies in occasion of transnational operations within which national, international and EC laws are often strictly connected".

The directive, elaborated upon the impulse of the *Conseil des Barreaux de la Communauté Européenne* (CCBE, body that

represents the European forensic orders) is clearly aimed at facilitating the acknowledgment of the professional qualifications of the sector; moreover, it takes full advantage of the professional experience obtained in the hosting Member State, being supported by the ECJ case law on art. 39 and 43 of the EU Treaty.

The Decreto Legislativo n. 96/2001 which has finally implemented the Directive 98/5/CE, disciplines in the *Titolo I* the crucial issue of the Directive, that is the permanent exertion of the profession by Member State citizens as “*avvocato stabilito*” (*Capo II*) or “*avvocato integrato*” (*Capo III*).

As regards the first category, articles 6 and following allow EC lawyers who are in possession of one of the titles indicated by article 2 to exert the lawyer profession in Italy by registering in Special Section of the Lawyers’ *Albo*, using their own original professional title and specifying the professional organization that they belong to in the Member State from which they are from.

The “*Consiglio dell’Ordine degli Avvocati*” has to accomplish the registration in the Special Section of the Lawyers’ *Albo* within thirty days from the submission of the application supported by necessary documentation, and in case of dismissing, its decision must be motivated as well as the interested individual has the right to be heard before said decision is taken.

On one side, in the exertion of performances of judicial nature, the “*established*” lawyer must act together with a professional with the title of *avvocato* enabled to exert the profession in Italy. The local lawyer shall look after the relationships with the authorities and shall be responsible of the compliance with the duties prescribed by the laws in force.

It is hence liberalized the exertion of all the activities that can be carried out by the lawyers in the relevant countries of origin, even as paid employee, regardless of the residence, with the obvious exception of the activities involved in the public powers. In addition, as concerns the residence, it has to be observed the provision of art. 16 of the law n. 526/1999 concerning the requirements for the registration in the professional *Albi*, according to which “for the EU citizens, the professional domicile and the residence are considered the same way for purposes of registration in lists, *albi*, books”.

This norm represents a further step towards the liberalization, as it allows to Italian and EC citizens to separate the option to register into the professional *albo* from their residence, without hence depriving

the *Consiglio dell'Ordine* of the power of control, which remains connected to the professional domicile.

On the other side, as regards extrajudicial performances, the “established” lawyer can provide legal consultancy on the law of his/her own Member State, on EC and International law, and on the domestic law, without the necessity to act together with a lawyer registered in the professional *albo*. He/she has anyway to comply with the domestic and country of origin deontological rules and he is protected against discriminative and unfair treatments under art. 9 of the Directive 98/5/CE.

Also this article has been implemented by the Decreto Legislativo n. 96/2001, according to which the decisions through which the registration in the books maintained by the authorities is denied, as well as the disciplinary decisions, must always be motivated and challengeable under the domestic law.

The situation of the “integrated lawyer” reflects the tendency of the ECJ case law that, in the decision Vlassopoulou, n. 340/89 had remarked the existence of a “substantial correspondence between the educational background of the lawyer coming from a third Member State and the one from the hosting Member State”.

In such perspective, in the light of the acknowledgment of the titles and in the respect of the professional exigencies, it has been envisaged a simplified system for the assimilation of the EC lawyer to the local lawyer.

Thus, art. 10 of the Directive envisages that the lawyers exerting with his/her own professional original title and having provided evidence, through all the necessary documentation and information, that he/she has exerted a regular and effective activity for at least three years in the hosting Member State, activity related to the law of said State, including EC law, is exempted to the necessity of sitting for the aptitude test set by art. 4 par. 1 lett. B of the Directive 89/48/CEE in order to be enabled to exert the lawyer profession in the hosting Member State.

Article 12 and following of the Decreto Legislativo n. 96/1991 literally reproduces the text of the European Directive, hence defining the hypothesis of the “integration in the lawyer profession”, and specifying that for effective and regular exertion of the profession one means “the actual exertion of the professional activity , exerted without interruptions, except those due to the daily life happenings”.

The “established lawyer” who has been exempted for the aptitude test becomes an “integrated lawyer” and, whereas he/she meets all the



other conditions envisaged by the forensic order, he/she can register him/herself in the *Albo degli Avvocati* and, therefore, exert the profession with the title of “*avvocato*”.

The 4 paragraph of article 12 of the Decreto Legislativo n. 96/2001 does not break the provision of the Decreto Legislativo n. 115/1992 which has implemented the Directive 89/48/CE, according to which the lawyer that exerts the profession in Italy with his/her own original title may always apply for the acknowledgment of his/her title under the Directive itself, in order to be enabled to exert the lawyer profession in Italy, complying with the “normal” procedures that have been indicated above.

Art. 14 of the Decreto Legislativo n. 96/2001 also disciplines the situation of the established lawyer who, even having at least three years of professional experience reached in Italy with the original professional title and even being enrolled into the special section of the *albo*, has anyway a shorter experience specifically with the Italian law. In this case, the access to the exertion of the profession with the professional title of “*avvocato*”, without sitting for the aptitude test provided by article 4 of the Directive 89/48, is subordinated to the following modalities and conditions:

- the “*Consiglio dell’Ordine degli Avvocati*” takes into account the activity which has been regularly and effectively exerted, other than the professional knowledge and experiences related to the Italian law;
- on the basis of all the useful information and documents provided to the interested lawyer in relation to his/her own overall professional qualification, the *Consiglio dell’Ordine* itself, in occasion of an interview, accomplishes an evaluation of the realized activity.

As concerns the procedure, art. 13 of the Decreto Legislativo n. 96/2001 establishes that the requests of exemption from the aptitude test are to be submitted to the *Consiglio dell’Ordine* where the established lawyer is registered.

The individual encloses to the application all the appropriate documentation to prove the exertion of the professional activity accomplished in the national and EC law, and every information which is useful for procedural purposes.

The “*Consiglio dell’Ordine degli Avvocati*” decides on the exemption within three months from the submission of the application integrated with the necessary documentation, and against such decision – which is motivated – it is possible to institute an appeal at the *Consiglio Nazionale Forense*.

Finally, it has to be noted that the “integrated” lawyer is acknowledged with the right to use either the original professional title and the one of the hosting member State.

The discipline on the common exertion of the profession represents a further news introduced by the Directive: without mandating peculiar legal forms (it is indeed defined as “collective law firm” every association of lawyers that jointly exert their professional activity and under a common name), art. 11 of the Directive 98/5/CE envisages the obligation for the hosting State to allow lawyers coming from one or more Member States the joint exertion of the profession, in compliance with legislative, regulatory and administrative modalities defined by the State itself.

It is moreover envisaged the right, for every law firm organized under a Member State legislation, to open branches or agencies in the EU.

The 98/5/CE Directive represents the concrete answer to the need of a different discipline for the forensic profession, characterized by the necessary knowledge of the domestic law of the respective Member States and by the simultaneous importance of the experience reached in the sector; it is a new and simplified form of integration of the EC lawyer in a Member State which is different from the one where the lawyer has obtained his/her habilitation for the exertion of the profession. The most significant aspect of this discipline has to be identified in the immediate possibility to exert the profession, in a different form from the performance of services, on the exclusive basis of the own original title.

As it is easy to guess, this Directive has already created strong expectations in the European dimension of the lawyer’s profession, above all in relation to the not few EC lawyers who already exert professional activity in Italy under the regime of free performance of services and with their own original title and who shall be able to improve their position within the EC market of law services.

According to the recent normative on immigration – the 3<sup>rd</sup> November 1999 has been published the D.P.R. 394/99, containing the executive Regulation of the Decreto Legislativo n. 286/1998 (consolidated text on the immigration discipline and rules on the condition of the foreigner) – the foreigners in possession of a professional title obtained in a non-EU country can apply for the acknowledgment of the title, in order to exert the correspondent activity in Italy.

Actually, art. 49 of the D.P.R. 394/99 provides that the European Directives on acknowledgment of titles – 89/48/CEE and 92/51/CEE – and the relevant implementation decrees (Decreto Legislativo 115/92 and 319/94) are addressed to every foreign citizen that is interested in the acknowledgment.

Considering that there are several cases of Italian citizens, or anyway EC citizens, that have obtained their professional title outside the EU, article 1 paragraph 2 of the Decreto Legislativo n. 286/1998 envisages that the normative has to be applied also to the other Member State citizens who are in possession of an outside EU title as long as they are more favorable norms.

From a procedural point of view, the documentation that is required for professionals with a non-EU background is extremely detailed either on the substantial and the formal side, provided the evident necessity to have clearness concerning the academic-professional situation of the applicants.

Several modalities are envisaged for the sending of the application for the acknowledgment. In order to identify the correct modality one has to take into account if the application is submitted by a foreigner who is regularly staying in Italy or by a foreigner who sends the application from abroad and who is meant to use the acknowledgment of the professional title in order to obtain the visa to ingress into Italy for self-employment:

- foreign citizens who are already regularly staying in Italy or who have already obtained a visa to enter into Italy, as well as all the EC citizens in possession of a professional title obtained in a non-Member State, must apply to the Ministry of Justice for the acknowledgment of the title itself for the registration in the professional *albo* and for the exertion of the profession. The application has to be sent through the fac-simile detachable on the internet website [www.giustizia.it](http://www.giustizia.it), where it is also indicated the documentation that has to be attached.

- Foreign citizens who are not European citizens and who are still residing abroad and who are meant to move to Italy to exert their professional activity have – in order to obtain the visa for self-employment – to ask to the Ministry of Justice a declaration certifying that there are not obstacles to the issue of the habilitation title for the exertion of the professional activity in Italy, under art. 39 of the D.P.R. 394/99.

Such application can be submitted also through an agent.

The declaration is issued when all the conditions and requirements envisaged by the law for the issue of the habilitation title

are met. The declaration is anyway subject to the verification of the appropriateness of the submitted documentation, which basically reflects the documentation required for the above mentioned case.

The necessity to attach such documentation is justified by the fact that the declaration issued by the Ministry of Justice anticipates in the substance the content of the decree of acknowledgment of the professional title. The decree shall be formally issued only when the foreigner shall be able to demonstrate to have obtained a regular residence authorization.

After having obtained by the Ministry of Justice the declaration certifying that there are not obstacles for the exertion of the profession in Italy, in order to get the permission to ingress into Italy, the foreigner – under article 39 of the D.P.R. 394/99 – shall have to submit to the Police headquarter which is territorially competent:

- the mentioned declaration certifying that there are not obstacles;
- copy of the application and copy of the attached documentation for the issue of said declaration;
- the certification of the parameters concerning the availability of financial resources which are necessary for the exertion of the activity, issued by the competent professional Order.

Once the documents are submitted to the Police headquarter, the foreigner obtains the security clearance.

Finally, the declaration, the certification and the security clearance are submitted to the diplomatic or consular authority for the issue of the permission of ingress, provided further verifications which are deemed as necessary by the authority itself.

The ascertainment of the regularity of the requirements presented by the applicants is accomplished by the Ministry of Justice, upon hearing the “*Conferenza dei servizi*”, together with the other competent Administrations and with the representatives of the interested Professional Order, under article 12 of the Decreto Legislativo n. 115/1992, or article 14 of the Decreto Legislativo n.319/1994.

The Ministry of Justice, once heard the “*Conferenza dei servizi*”, can establish with decree that the acknowledgment is subordinated to the successful passing of an integrative measure consisting in the aptitude test, under article 49 paragraph 3 of the D.P.R. 394/1999.

The same decree defines how the integrative measure is to be organized, as well as the contents of the exam and the structures where the exam has to be sit for. The integrative measure aims at

verifying the knowledge of the fundamental subjects related to the exertion of a certain profession in Italy.

The possible knowledge of some subjects from the applicants – either under the educational and the professional experience profile – is taken into consideration, if duly proved, in order to reduce the substance of the integrative test.

As concerns the professions controlled by the Ministry of Justice, the procedure of acknowledgment of the title takes place at the International Sector of the Office III of the General Administration of the Civil Justice – Justice Affairs Department (Tel. 06-68852314; Fax 06-68897350), and follows the criteria envisaged by the above mentioned Directive 89/48 and 92/51/CEE which are already concerned with EC citizens.

In case of the acknowledgment of the title, the non-EU foreigner can apply for the registration in the professional *albo* by submitting the copy of the acknowledgment decree issued by the Ministry of justice.

The registration in the *albo* is subordinated to the verification – from the competent professional Order – of the compliance with the maximum number of foreigners allowed to reside in the Italian territory for working purposes. The number is annually determined by the Prime Minister decree.

In order to allow said verification, foreign citizens that have obtained the decree of acknowledgment from the Ministry must apply to the Provincial Work Office for the declaration that certifies the compliance with the number, under art. 39 paragraph 7 of the D.P.R. 394/1999.

Under article 6 of the Decreto Legislativo 286/1998 and articles 14 and 39 paragraph 7 of the D.P.R. 394/1999, the verification of the compliance with the number is not required for foreign citizens who already in possession of a work permit for self-employment, paid employment or familiar reasons.

In the overall, it comes out clear that socio-economic importance of the discussed normative, which allows citizens of whatever country to obtain the acknowledgment of the professionalism reached in their original countries and, consequently, the right to exert their profession by registering in the appropriate *albo*.

The quantity of applications for acknowledgment coming from all the world is expected to increase significantly in the time.

b. France

It has to be firstly observed that under article 11 comma 1, 1° of the *loi du 31 décembre 1971*, a non-EU or non-Economic European Area (EEA) foreign lawyer is allowed to exert the profession in France only if there exists a condition of reciprocity with his/her original Member State<sup>15</sup>.

The rules which are directly concerned with the possibility for a foreign lawyer to exert the profession in France are established by art. 99 and 100 of the *Décret n°91-1197 du 27 novembre 1991*. These articles provide a different discipline depending on the European (or European Economic Space) or non-European obtainment of the lawyer "title".

To begin with, to be registered in the tableau<sup>16</sup> it should be necessary to present a theoretical and practical background as well as the pass of a bar exam as described by articles 11 et 12 de *la loi du 31 décembre 1971*.

Yet, art. 99 provides some exceptions for those applicants that have one side accomplished post-second degree studies, whose access is subordinated to the accomplishment of studies which enable to teach in the universities or equivalents and, on the other side:

1) Have been enabled to exert the profession in a Member or in a EEA State, or in a non-Member or non-EEA State and – in this latter case – that demonstrate a practice of at least three years.

**OR**

2. Have exerted for at least two years (in the last ten years) the lawyer profession in a State which does not discipline the access (this could be the example of Spain).

While in these cases the applicants are not concerned by the conditions envisaged by articles 11 et 12 de *la loi du 31 décembre 1971* concerning the theoretical, practical and bar exam requirements, still they may be asked to sit for an aptitude examination whereas their

<sup>15</sup> A detailed discussion on the condition of reciprocity has been provided by the *Conseil National des Bureaux* at [http://archives.cnb.avocat.fr/PDF/2003-12-13\\_Reciprocite.pdf](http://archives.cnb.avocat.fr/PDF/2003-12-13_Reciprocite.pdf). At p. 11 of such document, there is a specific reference to the **Yugoslavia**.

<sup>16</sup> That is what in Italy is defined as "Albo".

professional and educational backgrounds do not substantially reflect the ones “regularly” envisaged for access to the profession.

The Ministry of Justice and the *Conseil National des Bureaux* are competent for evaluating the admission of foreign *avocats*.

Last paragraph of article 11 of the *loi du 31 décembre 1971* prescribes a further requirement for non-Member or EEA lawyers. These are indeed required to sit for an examination aimed at verifying their knowledge of French law.

Basically, it can be maintained that the French discipline concerning the exertion of the lawyer profession by foreigners does not really differ from the Italian one as long as both the legislations provide the “integrative” or “aptitude” test in order to put the foreign lawyers on the same level of the French ones.

Finally, it is very important to underscore that with the Decree 91-1997 the functions of the *Conseil Juridique* have been absorbed in the lawyer (*avocat*) one. The functions of the *Conseil Juridique* were those of extrajudicial assistance and consultancy [Berlinguer, 2008]. This means that the foreign legal professional wishing to establish him/herself in France only in order to provide the *Conseil Juridique* functions, is concerned by the above mentioned rules concerning the “*avocats*”, that is art. 99 and 100 of the *Décret n°91-1197 du 27 novembre 1991*.

### c. Germany

In Germany, the discipline concerning the possibility for a foreign lawyer to exert the profession in the domestic territory is contained in the *EuRAG*<sup>17</sup>, that is a legislation which has implemented the European Directives - 89/48/CEE and 98/5/CE.

The *EuRAG* is made up of 42 articles and it is divided into 8 parts. The first one contains general provisions (§ 1), the second one disciplines the exertion of the “established lawyer” (§§ 2-10), the third one concerns the admission to the lawyer profession for the EC lawyer (§§ 11-15). The fourth part deals with the aptitude test; the fifth regulates the temporary performance of services (§§ 25-35). Part sixth

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<sup>17</sup> *Gesetz zur Umsetzung von Richtlinien der Europäischen Gemeinschaft auf dem Gebiet des Berufsrechts der Rechtsanwälte* of the 9th March 2000.

contains procedural norms (§§ 36-39), the seventh envisages administrative norms, and the last part present final provisions.

The *EuRAG* is moreover accompanied by an executive regulation<sup>18</sup>.

As seen in the discussion concerning the Italian discipline, the European law has left Member States two alternatives in order to admit foreign lawyers – that (of course) have already obtained their title in their home countries – to exert the profession:

- a) the accomplishment of a training;
- b) the envisagement of an aptitude test.

The German legislative power has opted for the second solution (art. 16 *EuRag*). The motivation seems to be the fact the German policy makers have deemed the German legal order as very different from those of the other Member States<sup>19</sup>.

While Germany does offer an examination (the *Eignungsprüfung*) to EU lawyers to prove their knowledge of German law, and thereby qualify to practice German law in Germany, they do not make this examination available to lawyers from outside the EU. Thus, for those third countries lawyers who want to practice German law in Germany, there are basically two options available. One option is to complete the full educational program required of all Germans seeking admission to the profession of *Rechtsanwalt*, a program that generally requires a seven or eight year commitment. Such an alternative is not feasible for most foreign lawyers, especially since there are few opportunities to pursue a legal education in the evening. A second option is to gain admission to the legal profession in another EU Member State where admission standards are less stringent, and then sit for the *Eignungsprüfung* to be admitted to the profession of *Rechtsanwalt*<sup>20</sup>.

### **3. Do advocates in Italy works in small, individual offices, or they are organized in big enterprises like in the USA? How many of**

<sup>18</sup> *Verordnung über die Eignungsprüfung für die Zulassung zur Rechtsanwaltschaft* of the 18 December 1990.

<sup>19</sup> See Sangiovanni Valerio on

[http://www.deontologiaforense.it/deontologia%20new/Avvocato\\_italiano\\_in\\_germania\\_DF.htm](http://www.deontologiaforense.it/deontologia%20new/Avvocato_italiano_in_germania_DF.htm)

and Grannemann on

[http://www.drgrannemann.de/Gesetzliche\\_Grundlagen/Acquisition\\_German\\_Title\\_Rechtsanwalt](http://www.drgrannemann.de/Gesetzliche_Grundlagen/Acquisition_German_Title_Rechtsanwalt)

<sup>20</sup> See James Quinn on

<http://www.austlii.edu.au/au/journals/MqBLJ/2004/6.html>



**them (approximately in percentage) work in small offices, and how many of them in big offices, and what usually they do? For example criminal lawyers usually work individually and civil lawyers usually work in big companies. (What is the situation in France and Germany?)**

a. Italy

In the last ten years Italian law firms have been concerned by the grouping.

Above all in the big cities, traditional law firms headed by only one professional have step by step lost their centrality in favor of structures made up of several professionals who share places and libraries and, sometimes, in favor of very big Anglo-American-style enterprises, made up of many partners, collaborators and employees.

The digital administration of the files, of the researches and of the draft of the acts, together with the creation of law firms more and more shaped on the model of society of services rather than the atelier of an artisan, have rendered the world of the Italian *foro* more similar to the world of the business firms.

The role of the lawyer is changing, above all because of the opening of the markets; the fanatics of the market consider the Italian world of the profession as the paradigm of the self-referential corporatism which is not fit to face the new dimensions of globalization, risk and flexibility.

The fanatics of the market deem the legal professions as sectors of unjustified monopoly, causing inefficiencies and costs, whereas the institution of big law firms is seen as an important as well as necessary innovation.

The supporters of the free competition and of the opening of the legal professions to such free competition rules think that, for the forensic profession becomes more and more business firm-like, it is necessary a globalization of the legal services and a greater administering and organizational competence. Only in this way the Italian law firms shall be able to be competitive on the market, either European and global.

The establishment of foreign law firms in Italy, principally American and English ones, has led the Italian law firms to undertake the way of the restructuration of their internal organization just like the international competition models.

Italian law firms are now experiencing what has happened in the US between the 80's and the 90's. The forensic professions market has reached a global dimension due to the internationalization of the business firms. The law firm structure changes according to the managerial and organizational models of the business firms. The United States of America were the first to develop the necessity of a capillary presence of professional structure to assist business firms in each State of the Federation.

On the basis of what has happened in the US, also in Europe a similar tendency is taking concreteness and law firms are presenting themselves as an integrated system.

Just like the American example, also in Italy there is a tendency towards the specialization in fields and sectors tighter and tighter, interweaving a series of relational connections with other specialists and, therefore, providing a higher quality and quantity of the services to the clients (in particular, business corporations).

According to "The American Lawyer" editor, Steven Brill, the most successful law firms in the next years shall not be constituted by a group of professionals with general competences, but by a group of specialists that shall not count less than 500 units in order to efficiently satisfy the clients' exigencies.

The cause of this phenomenon is surely connected with the increase of the legal offices inside the corporations: since they already have lawyers concerned with the several legal questions, corporations became more selective in the choice of the external law firm for consultancies.

This has, first of all, brought a movement of the competences, so that law firms have addressed themselves to those sectors of the law that were overlooked by the internal legal offices of the corporations, or sector that were of peculiar technical complexity or anti-economic given their rare influence in the concrete cases.

A direct consequence of such evolution is represented by the different nature of the relationships between law firms and clients: while previously these relationships were characterized by durability and generalness, today they are less exclusive and more oriented for specific consultancies.

Modern times are distinguished by the passing of the economy on politics as well as the globalizing boost of the technological and scientific progress.

In this model, the traditional lawyer is supported by the super-lawyer with very different skills. The professional equipped with noteworthy

prestige and power, whose knowledge and whose technicals have been obtained through a specific train ( the study of the law and of the legal opinions) is flanked by a new model of professional, more concentrated on the final results of his/her job than on the coherence of his/her legal reasoning.

The establishment of the big enterprises for legal services is obtaining more and more importance, so that they are now the new centers of legal knowledge, of solutions production, of law rules and models. The “super-lawyers” are creating a new body of experts which shall confer new perspectives to the traditional sources of law of the western law systems, competing with jurisprudence and legal literature.

The important aspect is the internationality. This dimension facilitates the movement of the legal models; through their branches, in fact, the law firms continuously exchange their “law products”.

Italian law firms – but also the continental European ones – have proved unqualified when asked to assist the multinational enterprises operating in the globalization context. In order to assist these international business corporations it has been necessary to hire professionals that used to work outside continental Europe, in particular United States.

This has of course brought a significant advantage for the big US law firms, which could rely on solid financial basis and tested skills of marketing as well as on important contacts inside the multinational enterprises.

In the beginning of the globalization, only the UK law firms demonstrated themselves ready to face the new economic dimension of the business. These firms began to take over continental Europe law firms, establishing therefore a capillary structure within Europe. To the great change of the legal profession panorama corresponds a noteworthy growth of law firms’ turnover. In some countries it has even been reached an increase of 100%. In the US the total paid for legal services in 1995 was about 114 billions of dollars, corresponding to 1.6% of the Pil. The first hundred law firms reached a turnover of 16.2 billions of dollars, corresponding to one seventh of the total. From 1980 to 1995 the value of the legal services, without taking into consideration the inflation, is increase of the 148%, passing from 0.9% to 1.6% of the Pil. Yet, what has to be taken into account is the growth of the turnover of the big law firms in relation to the services provided abroad. Great part of the incomes of the US law firms, in fact, is due to the big law firms which have branches in other countries. From

1986 to 1996 the total of the incomes of the first hundred firms is increased of 75%, while the incomes for the average lawyer have increased only of the 14% and for a partner of an average law firm only 13%. The phenomenon can be summed up in as follows: the bigger is the law firms, the better it succeeds to take advantage of the international synergies which allow him a global expansion. The starting conditions of the US law firms and successively of the UK ones were such that these structure could much more competitive than their European counterparts; in addition, these law firms are localized in the most important financial places, like London and New York, and have tightened their relationship with the most prestigious investing banks.

To conclude, it is possible to say that also in Italy law firms are experiencing a change towards models of organizations typical of the business enterprises. Yet, it is important to remark that these Italian units have been most of the time taken over by foreign large law firms. An example is represented by the experience of professor Marcello Clarish. He began his professional activity in a grouping. The 2002 was a difficult year for law firms, especially the medium size ones as the Clarish's. Therefore, the law firm was obliged to take a decision: to maintain the medium size and to continue their tradition or expand their structure. After several meetings and discussions they decided to be absorbed by the English law firm Freshfields Bruckhaus Deringer.

Although they represent a small percentage, there exist Italian law firms organized as big enterprise. One of the first and also of the most famous is the Grimaldi law firm.

Another important thing to observe is that, differently from the European tendency, according to the Italian law, law firms are not considered as enterprise, but as intellectual organizations. This means that lawyers can not organize themselves into corporations and benefiting of the limited liability. Yet, currently there is a debate in the Parliament aimed at reforming the Italian Forensic Order and one of the proposal concerns the envisagement of a legal form that would allow lawyers to act as corporations. The foregoing discussion underscores how the phenomenon of big law firms concerns most of the time professional involved with commercial/civil/administrative law issues.

**b. France**

According to a very recent statistic on the lawyer profession in France, the 35% of the lawyers has his/her own law firm, the 31% of the lawyers is associated with other lawyers, the 28% is a lawyer-collaborator and the 6% represents the salaried lawyers.

This statistic underscores how the lawyer-collaborator has increased of the 59% in the last 10 years.

The fact that only the 6% of the lawyers is hired on a salary basis, clearly demonstrates and confirms that law firms are not that big, even those which are made up of lawyers in association.

**c. Germany<sup>21</sup>**

All forms of legal practices are common in Germany. The dominating form of running the business is in small offices. 88% lawyers practice in offices with nine or less employees, including non-legal staff. 9,1 % you can find in middle-sized law firms with 10 to 19 employees. Only 2,9 % employees of the sector work in law firms with 20 and more employees.

**a) Solo practice**

Solo practice is especially common in rural areas. Often solo practicing lawyers share an office with one or two colleagues. Main motivation for this is a reduction of cost for office space, office equipment and non-legal staff. They distribute incoming clients among them depending on workload, specializations and interests. Every lawyer runs his or her own business and operates independently on own risk and benefit.

**b) Partnerships**

More than half of all lawyers work in a partnership with other lawyers. For this joint practice or partnership various legal structures are used. The partners of this law firm control the business together and appear to the outside with one name. Normally just a few of the lawyers in the firm are partners. All other lawyers in the company are employed. It is quite common, that bigger law firms have offices in several cities and even several hundred partners. Some of those bigger law firms are parts of international law firms. Many US and British law firms operate on the German market. German partners have often

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<sup>21</sup> These information have been copied from the ocse website:  
[http://www.osce.org/documents/odihr/2009/02/36500\\_en.pdf](http://www.osce.org/documents/odihr/2009/02/36500_en.pdf)

linked up with those international law firms and quite often took the name of the international partner.

**c) Co-operations**

Co-operations between solo practicing lawyers and small joint practicing lawyers are more and more common as an answer to the challenge these lawyers face with the big law firms. These co-operations are often not legally definite and appear just as a vague connection. The lawyers co-operate from time to time or even just suggest the services of other to their own client, when they cannot and are not willing to provide this service.

In such co-operations every lawyer practices on own risk and benefit. Often lawyers with different areas of specialty link up to be able to offer to their clients all kind of high level advisory services in all fields of the law. They also can offer services in several locations in Germany and abroad. Especially in the common market of the EU it is important for middle size businesses to be able to have legal service providers, which

can assist them in the whole area they operate their business in. There are also few franchise companies operating, which appear with the same logo and advertisement campaign, but operate independently. From the legal perspective they are not more than a co-operation. Still in all these forms of co-operations every lawyer practices on own risk and benefit.

**d) Challenges for the legal service market**

The existing structure of the German market for legal services is in constant change.

The pressure towards big law firms as in all other industrialized countries is substantial. As mentioned above there is a need for companies which limit their business not only to an regional, local market, but to all over Germany, the Europe Union or even beyond the borders of the EU to get comprehensive and coherent legal assistance at all locations of their business.

Another challenge the German lawyer market is facing is the enormous increase of lawyers in the recent years. In the year 1995 unified Germany had 75,000 practicing lawyers. This was in the years after the unification, when the public structures and economy in the New Laender of East Germany was still in transformation. Privatization of state owned companies and property claims were a substantive market for lawyers.

Today after most of these issues have been solved, Germany will have 150,000 practicing lawyers soon. The number has doubled in less than 15 years.

This dramatic increase of practicing lawyers has led to reduction of incomes for lawyers in Germany. The average income for practicing lawyers went down from 1994 to 2006 by 17%. The biggest falls within one year were reported in 1997 with -5,1 % and in 1999 with -4,2 %. It has to be mentioned that these figures do not consider the impact of inflation on the incomes of lawyers.

#### **e) Segmentation of the market**

The result of this challenge is the segmentation of the market, which seems to be a common phenomenon in industrialized countries. Big, in parts multinational law firms dominate the market for business related law consulting and services. The German Federal Statistical Office considers companies of the legal services sectors with and more employees already as “big”. So it is even more astonishing, that those companies

with just 2,9 % of the workforce in the legal service sector, have 38,5 % of the total revenue of the sector in Germany. Middle size law firm with 10 to 19 employees with 9,1 % of the sector’s workforce have just a share of 22,5 % in the total revenue of the business sector of legal services. The still typical, locally embedded offices for the ordinary client of solo practicing lawyers or small partnerships with nine or less

employees only create 39,1 % of the total revenue, although they employ 88 % of the workforce in the whole sector of legal services.

These small offices run the burden of all the day-to-day business for the ordinary citizens. Traditionally their main area of business to gain revenue is the civil law practice for small and middle size businesses.

The small private business for individual clients is a solid source for practicing, but does not create high revenue. Civil, public and criminal law cases for private clients are not the issues where lawyers earn much

money in Germany. Usually lawyers can run their business in a long run successfully when they can combine both: Serve private and business clients. As the law firms are taking over more and more of the business related legal services, including for middle size businesses, it is getting harder for the traditional lawyer to survive on the money they earn by providing their services. The cross-subsidization, which worked for decades, is less and less effective. As a result the segmentation of the market continues.

Large law firms have the full-size businesses as clients and broaden their activities more and more towards middle-size businesses. Middle and small law offices are left with the rest, what cannot generate large revenues. At the same time the number of solo practicing lawyers and small office increase as the numbers of lawyer have increased dramatically in recent years as already mentioned. Therefore potential business and income for these lawyers has diminished dramatically in recent years.

Another form of segmentation in the market is the specialization of law firms and lawyers. The old styled lawyer, who works in all areas of law, becomes more and more exceptional. The law as such has become too detailed and the volume of regulation is so huge, that an individual lawyer can hardly cover all areas. As the market is also so overwhelmed with lawyers it is also necessary to present a unique selling point.

Therefore more and more lawyers reach out for the title of a "Specialized Lawyer" (*Fachanwalt*), which is been granted by the chamber after substantive court practice, additional training and an examination by a special commission of the chamber.

**4. Is it forbidden for advocates to make advertisement in media, or it is free, or they have to get some special permission by their chamber if they want to appear in media, especially on television?**

a. Italy

To find out if Italian lawyers can advertise themselves or their legal services one has to look at the deontological forensic code.

To begin with, it must be said that the force of the norms contained in such code of conduct has been several time affected by the Supreme Court decisions. Previously, in fact, these norms were not considered as official sources of law<sup>22</sup> and, therefore, their binding dimension was not so strong.

Later on, the Supreme Court itself changed its tendency and considered the norms of the code as real sources of law<sup>23</sup> and as such they had to be considered as binding for the category of lawyers<sup>24</sup>.

<sup>22</sup> Cass. sez. unite 23 July 1993, n. 8239 and Cass. sez. unite, 17 January 1991 n. 401.

<sup>23</sup> Corte di Cass. sez. unite n. 8225 of 2002 and n. 5164 of 2004.

<sup>24</sup> For a more detailed discussion on the force of the deontological norms of the code see [http://www.avvocatitriveneto.it/tematiche\\_zoom.php?target=1035](http://www.avvocatitriveneto.it/tematiche_zoom.php?target=1035)



The articles concerned with the possibility of lawyers to advertise themselves, their activities, their competence etc. are the n. 17, 17-bis, 18 and 19.

The original text of article 17 reflected the typical and traditional Italian approach to the forensic profession. It was in fact absolutely forbidden for lawyers to advertise themselves.

It was only allowed:

- to indicate, in the relationships with third parties, peculiar fields of one's activity through letters, databases, telephonic and professional lists;
- to inform clients and colleagues on the organization of the law firm and on professional activity exerted;
- to indicate the name of a deceased lawyer, that worked in the law firm, as long as the professional had provided this in his will or there was an unanimous consent of all the heirs.

The provision of the allowed information had anyway be exerted in a fair way and in compliance with the duties of dignity and decency.

Until the recent modifications of the mentioned norm<sup>25</sup>, Italy had remained one of the few European countries to envisage the absolute prohibition of advertisement for the lawyers.

The current text of article 17 establishes that the lawyer can provide information on his professional activity.

Moreover, the provisions present rules concerning the form, the content and the modalities through which the information must be provided.

Although the systematic of the text is a little bit messy, it can be said that all these must comply with purposes related to the protection of the community's reliance as well as with the dignity and decency of the profession. In addition, criteria of transparency and truthfulness have to be met. Anyway, the advertisement must not be comparative, misleading and praising.

For example, in a very recent decision, the Italian Supreme Court has condemned a law firm from Brescia, maintaining that the advertisement accomplished by the latter had not complied with the dignity and decency of the lawyer profession. The law firm from

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<sup>25</sup> The text of article 17 has been modified in 1999, 2002, 2006 and 2008. For a more detailed discussion on the evolution of the text article 17 *see*:

Relazione Illustrativa sulle modifiche apportate al Codice dopo il decreto legge n.223/06;

La c.d. pubblicità informativa dell'avvocato;

Brescia had indeed used the acronym ALT to mean “*Assistenza Legale per Tutti*”<sup>26</sup>.

Article 17 provides also that the lawyer cannot take advantage of the name of his/her clients, even if these agree. The old norm – seen above – concerning the deceased lawyer is maintained.

Finally lawyers can organize seminars and course without seeking profits.

The black letter of art. 17-bis, which has been introduced in 2006<sup>27</sup> but whose text has been modified in 2008<sup>28</sup>, says: “Modalities of Information”. Other than the modalities, anyway, the text of the article concerns also the content of the information.

Article 17-bis specifies which information the lawyer must necessarily provide in promoting his/her professional activity and which information are facultative.

The first category, envisaged at paragraph 1, concerns the legal place, the *albo* where the lawyer is registered and the name of the law firm (and of its members). The legislative choice to oblige the lawyer to mention the above said information has basically reflected the spirit of the Directive n. 2006/123/CE that, at article 22, invites Member States to envisage that also the services providers registered in professional *albi* must provide the above specified information.

The second category, envisaged at paragraph 2 concerns qualifications, specializations, courses, etc.

Finally, article 17-bis also allows lawyers to have their own website. Such website anyway has to be authorized by competent “*Consiglio dell’Ordine*”; it must present the compulsory information envisaged in the 1 paragraph and can not contain advertisements and commercial allusions.

Art. 18 disciplines the relationship between the lawyer and the press or other mass media. In particular it envisages that the lawyer has to comply with criteria based on equilibrium and self-control in occasion of interviews and declarations. The lawyer has therefore to pay attention to his/her duties of respecting the privacy and the discretion.

If the information given in occasion of interviews or declarations in general concern the client, the information themselves must be

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<sup>26</sup> The Decision is the n. 23287/2010. “*Assistenza Legale per Tutti*” means “Legal Assistance for Everybody”.

<sup>27</sup> See <http://www.altalex.com/index.php?idnot=10367>

<sup>28</sup> See <http://www.altalex.com/index.php?idnot=1497>

authorized by the client him/herself and must be given in the interest of the latter. The lawyer can not take advantage of interviews and declarations for underscoring and promoting his/her skills, competences etc. The lawyer is also forbidden to organize press conferences as well as promoting the publication of articles so long as that is not necessary to protect the exigencies of the client.

The lawyer can participate in TV or radio programs as well as to be the editor of reviews, but he/she has to be firstly authorized by the competent *Consiglio dell'Ordine*.

Art. 19 is strongly concerned with the behavior that lawyers can perform in order to hunt clients.

It is in fact prohibited for the lawyers to offer professional performances which are specifically directed to third parties when this has not be required by the parties themselves. It is neither possible to offer general professional performances at other people domicile, in public venues, etc.

Moreover, the lawyer can not pay to a colleague, or to another individual, a fee, a commission or whatever sum of money as consideration for introducing a client.

Finally, it is against the law to offer free performances or performances to third parties as well as the to promise or to provide advantages to obtain engagements or jobs.

The prohibition envisaged by article 19 aims at disciplining a phenomenon which is different from the advertisement considered as such. The clients hunting can be in fact accomplished through unfair means, means that do not present any connection with one's own professional competences and that are employed only in order to obtain jobs and clients. A typical example is represented by offering services to victim of accidents through distributing business cards in hospitals venues.

b. France

The very first difference between France and Italy in relation to the deontological norms is represented by the fact that in France such norms are official sources of law and not "soft" law as in Italy.

The discipline concerning the deontology of the French lawyers is in fact contained in the "*Règlement Intérieur National (RIN) de la profession d'avocat*" (décret n° 2005-790 du 12 juillet 2005).

The norms concerning the advertisement are envisaged at art. 10 of said decree.

These basically present similar aspects to the Italian ones. In particular, the lawyer cannot advertise her/his services on the media, like tv or radio. Also, he/she cannot do door-to-door offers as well as direct proposals to specific clients.

Yet, he/she can have a website (as the Italian lawyer, he/she has to communicate the intention to the competent “*ordre*”) and he/she can use letters, email, plates in the building (so long as these present a reasonable dimension) where he/she is allowed to describe the nature of the activity, the competences, the specialization, etc.

Just like the Italian legislation, also in France the lawyer is obliged to provide certain information as for example the name of the law firm, the address, the bureau etc.

d. Germany

As concerns the German norms on the advertisement of lawyer profession, they are contained in the *BRAO* (*Bundesrechtsanwaltsordnung*) - that is the federal legislation on the lawyer profession – and, the majority of them, in a regulatory provision: *Berufsordnung*.

It is first of all established the principle according to which the advertisement must provide objective information either from a point of view of the form or a point of view of the content. Just like Italy and France, moreover, the German lawyer can not advertise him/herself to obtain a specific commitment (§ 43b *BRAO*).

In the *Berufsordnung* it is provided that lawyer can provide information on his/her services and on his/her own person to the extent to which such information are correct and concerned with the profession.

Lawyer can not specify numbers related to the success of the activity and to the turnover of the law firm. References to professional commitments and to clients are admitted only into informative brochures, letters and similar means of information, or upon request, under the condition that the client has expressly given the consent. Set aside the specialized lawyer, only those who can demonstrate their specific competences, for example through publications, are allowed to provide information on their specialism (§ 7). Mentions of professional collaborations are allowed only when these take place in the form of professional association (*Sozietat*) or in other way (paid employment or free collaboration) with individuals who are suitable to form a professional association or in the form of a long term and effective cooperation (§ 8).

Concerning the possibility to make advertisement through media, the Court of Appeal of Munichen has set that so long as the advertisement complies with the principle established at § 43b BRAO, then the advertisement is lawful<sup>29</sup>. The German law, in fact, has not dedicated any specific rules concerning the form of advertisement.

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<sup>29</sup> For a more detailed discussion see Sangiovanni [1999].

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**ADVOCATS IN ITALY FRANCE AND GERMANY**

*Mr Giovanni Tamburini PhD from Italy, is external, foreign expert, who expressed his wish to cooperate with our Institute – the Institute of Comparative Law from Belgrade. For the first time he answers on some questions that we have made about the advocates and their bar associations in Italy, France, Germany. First of all, we asked him: how bar associations are organized? On the national level, is there one organization, or there are organizations on the level of provinces? Is it possible to organize two or three bar associations on the level of the whole country? The second question was: is it possible for foreign advocates to work in Italy (France, Germany). Especially to be engaged to work in front of courts. The third question was: Do advocates in Italy work in small, individual offices, or they are organized in big enterprises like in the USA? How many of them (approximately in percentage) work in small offices, and how many of them in big offices, and what usually they do? Is it forbidden for advocates to make advertisement in media, or it is free, or they have to get some special permission by their chamber if they want to appear in media, especially on television?*

**Key words:** *advocats; bar associations, advocat offices, advertisement; Italy, France, Germany*