

COMPETITION LAW AND PROFESSIONAL PRACTICE

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*Liberty means responsibility.
That is why most men dread it.*

G. Bernard Shaw.

I. PROFESSIONS AND COMPETITION: TRADITION AND MODERNITY— REGULATORY TRADITION VERSUS LIBERALIZING TREND

Professional practice has traditionally distinguished itself for being subject to strong regulation, characterized by containing severe restrictions on competition between professionals. These restrictions, among which it is necessary to emphasize limitations on fee fixation, advertising or on associated practice, have been justified arguing that professional activity peculiarities and, especially, their impact on essential values of general interest make it necessary to restrict competition in order to guarantee the quality of professional services, with the ultimate aim of protecting consumers' interest and, in general, guarding the public interest.

In this respect, a deep and clear separation has been established between the regulatory regime of professionals and that of business enterprises, by having subjected the first ones to a special statute clearly different from the one applicable to the latter ones, excluding in a radical form the subordination of professional practice to Competition Law.

Nevertheless, in actuality, and product of a long process, the trend goes clearly in the direction of holding professional activity entirely to the rules of free competition. This trend has been encouraged by the idea that the improvement of the quality of professional services is not obtained by restricting competition, but by promoting it, since competition has precisely among its principles objectives increasing the efficiency of markets improving the quality of services interchanged in the same, all in the benefit of consumers and of society in general. Nonetheless, it must be said that the above-mentioned trend does not try to eliminate in absolute form all of the restrictions, but only those that do not effectively serve the objective of guaranteeing the quality of professional services.

In any case, the full application of Competition Law in professional practice constitutes, undoubtedly, one of the most eloquent manifestations of the convergence that is taking place between the regime of professionals

and business enterprises. To the effects of the application of the said branch of the legal system, this convergence has been taken to its final consequences by having taken refuge in a wide concept of enterprise that clearly also includes professionals.

The application of competition rules to professional activity still finds an even greater justification, if such fits, in view of the deep transformations this activity has experimented in recent times, and that have been translated into a strong expansion of this sector and in its increasing influence on the economy.

This way, traditionally, professional practice has characterized itself by constituting an intellectual activity developed in an individual, personal and independent form in a territorial sphere of essentially local character and directed overall at individual consumers. In actuality, this traditional paradigm is in crisis, largely provoked by the impact of powerful trends such as, among others, the mass-production and specialization of the professions, the internationalization of the economy and the development of new technologies. These trends have forced professionals to modify the traditional forms of practice and to assume new challenges that allow them to react to the changes.

Thus, professional practice, without ceasing to be an intellectual activity, today tends to be carried out by using typically business organizational methods, in such a way that each time providing professional services collectively is more frequent, often in a multidisciplinary environment in which members of diverse professions partake, in a territorial area of national and, also, international character and essentially directed at, more than at individual consumers. All of the above allows affirming that the professional sector has changed more in this latter decade than in the last one hundred years.

II. TRANSFORMATIONS IN PROFESSIONAL PRACTICE

A. *Concept of Profession*

1. *Traditional Paradigm of Profession*

The analysis of professional activity's subjection to Competition Law demands, as a first step, delimiting the concept of profession.¹ In this

1. Regarding this delimitation, in our administrative doctrine, see Fernando Sainz Moreno, *Artículo 36. Colegios Profesionales [Article 36. Professional Associations]*, in 3 COMENTARIOS A LAS LEYES POLÍTICAS: CONSTITUCIÓN ESPAÑOLA DE 1978 [COMMENTARIES TO POLITICAL LAWS: SPANISH CONSTITUTION OF 1978] 507, 511-32 (Editoriales de Derecho Reunidas [Reunited Laws Editorials] 1983); GASPAR ARIÑO ORTIZ & JOSÉ MARÍA SOUVIRÓN MORENILLA, *CONSTITUCIÓN Y COLEGIOS PROFESIONALES: UNA REFLEXIÓN SOBRE LAS CORPORACIONES REPRESENTATIVAS* [CONSTITUTION

regard, it is necessary to begin by stating that this delimitation is not, by any means, an easy task, neither from the sociological point of view, nor from the legal point of view. In this respect, it has rightly been affirmed that the concept of profession is a dynamic concept, not a static one.²

From the legal perspective, it must be noted that our legal system does not contain a specific or general concept of profession. In fact, the existence of different branches in our legal system, each with a particular purpose, that regulate professional activity (administrative, civil, commercial, tax, labor law, etc.), result in the term profession being used in our legal system for designating multiple distinct concepts, depending on the purpose of a specific rule.

AND PROFESSIONAL ASSOCIATIONS: A REFLECTION ON THE REPRESENTATIVE CORPORATIONS] 97-111 (Unión ed. 1984); JOSÉ MARÍA SOUVIRÓN MORENILLA, LA CONFIGURACIÓN JURÍDICA DE LAS PROFESIONES TITULADAS EN ESPAÑA Y EN LA COMUNIDAD ECONÓMICA EUROPEA (CEE) [THE LEGAL CONFIGURATION OF PROFESSIONAL DEGREES EARNED IN SPAIN AND THE EUROPEAN ECONOMIC COMMUNITY (EEC)] 23-78 (Consejo de Universidades [Universities' Council] 1988); Antonio Fanlo Flores, *Enquadre Histórico y Constitucional. Naturaleza y Fines. La Autonomía Colegial [Historical and Constitutional Frame. Nature and Purposes. Professional Associations' Autonomy]*, in LOS COLEGIOS PROFESIONALES A LA LUZ DE LA CONSTITUCIÓN [PROFESSIONAL ASSOCIATIONS IN LIGHT OF THE CONSTITUTION] 67, 104-16 (Lorenzo Martín-Retortillo coordinator, Civitas 1996).

By its own accord, in our private law doctrine, see MARIANO YZQUIERDO TOLSADA, LA RESPONSABILIDAD CIVIL DEL PROFESIONAL LIBERAL [THE CIVIL RESPONSIBILITY OF THE LIBERAL PROFESSIONAL] (Hammurabi S.R.L. 1989); ANTONIO FRANCISCO DELGADO GONZÁLEZ, LAS SOCIEDADES PROFESIONALES: EL EJERCICIO COMÚN DE LAS PROFESIONES EN ESPAÑA: SUS ASPECTOS ADMINISTRATIVOS, CIVILES Y TRIBUTARIOS [PROFESSIONAL CORPORATIONS: COLLECTIVE PRACTICE OF THE PROFESSIONS IN SPAIN: THEIR ADMINISTRATIVE, CIVIL AND TRIBUTARY ASPECTS] 1-27 (Editoriales de Derecho Reunidas [Reunited Editorials of Law] 1996); AURORA CAMPINS VARGAS, LA SOCIEDAD PROFESIONAL [THE PROFESSIONAL CORPORATION] 1 & 63-83 (Civitas 2000); MARIA DOLORES CERVILLA GARZÓN, LA PRESTACIÓN DE SERVICIOS PROFESIONALES [THE RENDERING OF PROFESSIONAL SERVICES] 23-52 (Tirant lo Blanch 2001).

From a sociological perspective, see María Teresa Alonso Pérez, *Notas Para un Estudio Sociológico y Económico de las Profesiones Liberales [Notes for a Sociological and Economic Study of the Liberal Professions]*, in EL EJERCICIO EN GRUPO DE PROFESIONES LIBERALES [THE PRACTICE IN GROUPS OF LIBERAL PROFESSIONALS] 15-82 (Bernardo Moreno Quesada et al. eds., 1993); Ángel J. Gallego Morales, *Profesionalización, Desprofesionalización y Fórmulas Organizativas [Professionalization, Deprofesionalization, and Organizational Formulas]*, in EL EJERCICIO EN GRUPO DE PROFESIONES LIBERALES [THE PRACTICE IN GROUPS OF LIBERAL PROFESSIONALS] 83-122 (Bernardo Moreno Quesada et al. eds., 1993).

In comparative literature, see JOCHEN TAUPITZ, DIE STANDESORDNUNGEN DER FREIEN BERUFE: GESCHICHTLICHE ENTWICKLUNG, FUNKTIONEN, STELLUNG IM RECHTSSYSTEM [THE CONDITION OF THE ORDER OF LIBERAL OCUPATIONS: HISTORICAL DEVELOPMENT, FUNCTIONS, AND POSITION IN THE LEGAL SYSTEM] 11-151 (Walter De Gruyter Inc. 1991).

2. Cf. Claus-Dieter Ehlermann, *Concurrence et Professions Libérales: Antagonisme ou Compatibilité?* [Competition and Liberal Professions: Antagonism or Compatibility?], REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPEENNE [R.M.C.U.E.] [REV. OF THE COMMON MARKET & THE EU], No. 365, at 136, 138 (1993).

From the sociological perspective, there is also no existence of a unanimously accepted, specific or general concept that accurately establishes the common features of this social reality. In this regard, the Royal Academy Dictionary defines the term “profession” as “[e]mployment, faculty, or trade someone practices and for which he perceives a remuneration.”³ In this extraordinarily broad definition, profession would be synonymous with occupation in general. Notwithstanding, to the effects of the present study, this wide definition does not aid in delimiting the concept of profession, making it necessary to use a more restricted definition. In this sequence, it is fitting to affirm that traditionally the term profession has been identified with all activities that possess the following characteristics:

- 1) *Intellectual activity*, consistent in the application of a higher level of knowledge to reality. This characteristic allows for profession and occupation to be distinguished, a distinction that is otherwise found gathered in article 35 of the Constitution, establishing as a fundamental right “the freedom to choose a profession or occupation.” Thus, while profession is essentially an intellectual activity, occupation is primarily a manual activity. In this regard, it must be indicated that the intellectual component traditionally has granted considerable prestige and social recognition to professionals.
- 2) *Independent activity*, in a double sense. On one hand, the professional or internal independence, consistent with criterion discretion or freedom the professional possesses in the development of his activity, and concretely, in the application of his knowledge in conformity with his *lex artis* (law of skill technique), as well as in the selection of the means he considers most adequate in order to obtain the sought after result. On the other hand, the economic or external independence, in the sense of performance of his own account in freedom regime or organizational autonomy, lacking of any dependence or subordination link before another entity.
- 3) *Individual activity*, in consideration of how the client essentially selects the professional for his *intuitu personae* (personal characteristics), which implies a personal and individual execution of the requested services, the birth of a fiduciary relationship based on confidence, and the generation of personal responsibility.

3. DICCIONARIO DE LA REAL ACADEMIA ESPAÑOLA [SPANISH ROYAL ACADEMY DICTIONARY] (22d ed. 2001), available at <http://buscon.rae.es/diccionario/drae.htm>.

- 4) *Altruistic activity*, directed at satisfying the general interest, more than the individual interest, motive by which the remuneration traditionally has not been an essential element of professions, without prejudice that evidently could exist in reality. An eloquent manifestation of this characteristic constitutes the fact that, while remuneration of services is termed "price" in mercantile traffic, a term that expresses the idea of materiality and concretion; in the professional area the term for this concept has been coined as "fees" which possesses a spiritual and intangible component.
- 5) *Regulated activity* and, in numerous suppositions, *autoregulated* by the actual professionals, structured often around a professional organization that organizes the exercise of its activity, establishing an exclusive area of performance and a deontological code directed at safeguarding the profession's values.
- 6) *Local activity*, the fact that providing professional services constitutes an individual and personal activity, causes it to generally be executed only in a territorial area limited by local borders.
- 7) *Generalist and unidisciplinary activity*, in the sense that professionals render, in general, all the services that are linked to a specific profession and do so in an isolated way with respect to the services rendered by other professions.

2. *Crisis of the Traditional Paradigm*

In recent times, and as it has been advanced, the traditional paradigm of profession described above has entered a crisis because of the profound transformations experienced by our current society. This crisis of the professions should not be mistaken by any means as a weakening or a decline of professional activity, since in this respect the opposite is occurring: the number of professionals and the diversity of professions does not stop increasing and the rendering of professional services is presently in full summit, experiencing high growth spurts superior to those of other economic sectors. The crisis rather refers to the erosion process that the traits traditionally defining the classic paradigm of profession are suffering and force a revision of this paradigm. This erosion process is characterized by the following elements.

- 1) *Regarding intellectual activity*, although undoubtedly it continues being one of the defining principal features of the profession, its virtuosity has been qualified, since the universalized access to a university education, the increase of the university degrees, and the increasing specialization

of work have resulted in a mass-production of professions, blurring the previously clear separation between professional activity and other activities, particularly the distinction between professions and occupations. On the other hand, the mentioned phenomena have reduced the enormous prestige and social recognition that has traditionally characterized the professions.

- 2) In reference to the *independent activity* feature, although professional or internal independence is retained in a discretionary sense in the application of *lex artis*, the economic or external independence has remained blurry enough due to the trend towards the so-called *proletarianization* of the professionals. By virtue of this trend, as opposed to the classic liberal professionals, who practice by their own accord and of independent form, every day more wage-earning professionals are designated, who act by foreign account under labor or civil servant regime. Therefore, professionals of a sole client (such as the in-house lawyer) and professionals without clients (such as the pro bono attorney or one of an insurance company that offers legal defense insurance) are proliferated.
- 3) In relation to *individual activity*, it must be indicated that multiple phenomena, among which social reality sophistication, professional specialization and economic globalization stand out, have generated the need for professionals to associate with other professionals belonging to the same or different profession to obtain a more efficient rendering of services. This trend towards *corporatization* of professions is leaving the traditionally individual character of professional activity on another level. In this context, the professional's personal responsibility is tinged by the presence of a professional corporation, similar as to what happens in professionals under labor or civil servant regimes. Parallel to this, advancement in technologies has increased the quantity and speed of information at users' disposal and permits them to do without the physical barriers that corporeal providing of services demands, which facilitates providing services by professionals via new technologies by means of a virtual activity, including providing professional services within the general category of electronic trade.
- 4) With respect to *altruistic activity*, professional practice suffers a *bequeathing* process that is manifested in two ideas. On one hand, the confirmation that professional services are susceptible to economic valuation, in spite of relapsing on abstract or spiritual values, such as life, liberty, or justice. And, on the other hand, the fact that profess-

sionals develop their activity in onerous form and with encouragement for profit and, therefore, with a private interest, without this being incompatible with recognizing that said activity possesses an enormous public transcendence and, as a consequence, is of general interest. This evolution reverts into a process of professional mercantilization or commercialization, which is also reflected in professionals' resort to human and material resource organizational techniques increasingly similar to those business enterprises use to develop their economic activity.

- 5) In reference to *regulated activity*, the trend towards deregulation is spreading its effects on professional organizations as well, limiting and modulating their traditional competencies in professional practice regulation matters.
- 6) As for *local activity*, improvements in communications and telecommunications, as well as economic globalization, result in professionals breaking the traditional local barriers and developing increasingly *national or international activity*, which in turn has favored the search for alliances and strategies at national, regional, or even international levels.
- 7) In reference to the *generalist and undisciplinary activity*, the trend is directed rather towards a *specialized and multidisciplinary activity*, since our civilization's increasing social, economic and legal complexity causes citizens to have increasingly sophisticated problems, at the same time that they are more informed and protected by consumer law, which makes them each time more demanding. This complex demand of professional services forces professionals to specialize and collaborate with other professionals in multidisciplinary structures.

These transformations do not imply the professional's absolute disfiguration. The professions essentially continue being an intellectual activity and subjected to regulation. What occurs is these characteristics are tinged. The new circumstances are translated in the appearance of a heterogeneous reality of professionals before the traditional homogeneity. The individual, independent, generalist and undisciplinary professional model does not have to disappear. What happens is that different models arise. Concretely, a professional model that works in a collective, specialized and multidisciplinary environment. Law must respond to new challenges this new social reality poses, facilitating the necessary legal structures to practice professions in a form in accordance with the current situation. In good part, putting forth these structures demands, as will be shown later on,

the elimination of some of the competition restrictions currently imposed on professional activity.

B. *Professional Regulation*

1. *Competition Regulation and Restrictions*

In repetition, one of the principal characteristics of the regulation of professions is the establishment of severe restrictions to free competition among professionals. In most cases, Professional Associations impose these restrictions, exercising their power to regulate the professions, though some of them are established directly by the legislator. In other cases, in turn, they are not gathered in a legislative or professional norm, but rather they originate in the practice or conduct of a professional organization, a professionals' group or, even, from an individual professional.

In any case, it is interesting to emphasize there exists an enormous variety of possible restrictions to competition, which can be grouped into two big categories, depending on which of the following two free enterprise principle manifestations are affected: access or entry freedom, by virtue of which every person has the right to freely fulfill an economic activity; and practice freedom, according to which any person has the right to develop said economic activity in the conditions he or she considers appropriate.

- 1) *Professional activity access restrictions*, by means of which access or entry freedom is limited to the furnishing of certain professional services, demanding fulfillment of predetermined requirements, motive for which economic literature calls them "entry barriers."
- 2) *Professional activity practice restrictions*, by virtue of which practice freedom is limited establishing specific conditions for furnishing predetermined professional services, essentially gathered in deontological codes of conduct, whose supervision and control is attributed to Professional Associations via the exercise of disciplinary powers.

Among the restrictions relative to professional activity access, it is worth mentioning the following:

- 1) *Demand for degrees*, by way that certain professional activities can only be realized by those who confirm to possess the necessary knowledge for it, through the obtainment of the corresponding academic degree;
- 2) *Obligatory professional admittance* as a necessary requisite to be able to practice a certain professional activity;

- 3) *Entrance tests implementation* that credit the possession of certain professional knowledge, as prior requisite to be able to become a member of an association, being at the same time a prior requisite to be able to practice a professional activity;
- 4) *Practice periods implementation* that credit the possession of a certain level of professional experience, also as prior requisite to be able to become a member of an association, being at the same time a prior requisite to be able to practice a professional activity;
- 5) The establishment of *numerus clausus (limits)*, through which is limited the number of candidates who can accede to the profession;
- 6) The *fulfillment of specific requirements for becoming a member of an association*, such as paying membership fees, obtaining civil liability insurance or joining a social prevision mutuality;
- 7) The *fulfillment of specific requirements after becoming a member of an association*, such as the imposition of test completions as a mechanism of continued education directed at guaranteeing the continued necessary knowledge to develop a specific professional activity;
- 8) The establishment of the designated *activity reserve*, which consists in exclusive assignment to the members of a specific profession the furnishing of a few predetermined professional services, preventing therefore any other profession from providing those services;
- 9) *Prohibition of creating Professional Associations*, preventing thus the existence of diverse Associations with powers in the same territorial area.

As for the *restrictions relative to professional activity practice*, the following must be outlined:

- 1) The *limitation of uninhibited fee fixation*, which certainly constitutes one of the most serious restrictions, given the importance that price possesses in a market economy,⁴ being able to adopt this restriction in multiple forms, direct or indirect, among which fits to mention the following ones:

4. Regarding the importance of price as one of the basic elements for the formulation of offer and demand, see FELIPE PALAU RAMÍREZ, DESCUENTOS PROMOCIONALES: UN ANÁLISIS DESDE EL DERECHO CONTRA LA COMPETENCIA DESLEAL Y LA NORMATIVA DE ORDENACIÓN DEL COMERCIO [PROMOTIONAL DISCOUNTS: AN ANALYSES FROM THE UNFAIR COMPETITION LAW AND THE RULES OF COMMERCE REGULATION] 89–104 (Marcial Pons ed., Idelco 1998).

- a) The *collective fee fixation*, be they fixed, maximums, minimums or, inclusive, orientative;
 - b) The exigency of *professional projects' visas*, whose discharge is conditioned to the fulfillment of association fee rules (typical restriction of technical professions such as architects, riggers and engineers);
 - c) The *obligatory fee collection* through the Professional Association (also a typical restriction of the above-mentioned technical professions);
 - d) The exigency of *permissions or authorizations to substitute a professional*, conditioned to the prior satisfaction of fees earned by the professional who had previously assumed the professional contract (typical restriction of the legal profession, but also existent in some technical professions);
 - e) The *prohibition of fixing fees depending on the result*, as occurs for example in the legal profession with the so-called contingency fee (*fee payment to the professional is done after the proceedings' success*), by virtue of which fees are fixed as a percentage of the value of the object of the professional contract;
 - f) The *imposition of economic considerations* by the Professional Associations, different from membership fees, for providing services or fulfilling certain acts, such as the obligatory fee collection in the architect's case or the official acceptance of the authority credentials of an attorney in the attorney's case;
 - g) The *prohibition of the payment of economic considerations to third parties* for referring clients to a professional;
- 2) *Advertising restrictions*, either directly prohibiting the use of advertising media, or restricting this possibility, submitting it to essence or form requirements, such as prior authorization or content limitations, or the dispersion or size of the advertising media;
 - 3) *Associated practice restrictions*, limiting the organizational structures available to practice the profession collectively, either directly prohibiting this possibility, or restricting it by limiting the number of associated professionals, the association entities, the requisites to be a partner or a director therein, the multidisciplinary grouping of members of different professions or the participation of non professionals as partners or directors of the association entity;
 - 4) The *imposition of territorial restrictions*, consistent in limiting the circulation freedom of services, restricting the activity of an associated member in a territory different to the one of membership demanding, the (double) association membership in the place of performance, the payment of

economic considerations, and/or the completion of administrative procedures in authoritative or communicative form.

It is necessary to warn that the restrictions to access and practice have been the object of a different valuation on behalf of authorities in control of the competition. This way, said authorities generally value access restrictions in a more permissive way, tending to admit them, in consideration that in principle they are justified by possessing a direct relation with the need to guarantee the quality of professional services. The typical example is the degree requirement, whose basic function is, precisely, to credit the existence of the knowledge that permits the guarantee of the quality of such services. On the other hand, the competition authorities have generally shown a more belligerent attitude towards the restrictions on professional practice, by making it more difficult to justify their existence for the sake of guaranteeing the quality of the professional activity, especially in relation with all the above-mentioned restrictions, directly or indirectly, to the uninhibited fee fixation.

2. *Trend Towards Deregulation*

Such as has also been pointed out, professional activity has been experiencing in recent times a deregulation or liberalization process. This process is situated in the context of a general trend towards the deregulation of economic activity. This trend originated in the United States during the sixties' decade, when the first critical reviews on excess public intervention in the economy began to arise. In this context, the University of Chicago economists began analyzing this phenomenon under the theory of prices prism, to refute the traditional doctrine that assumed public intervention in the economy was justified by the need to protect the general interest.⁵ Yet, to the contrary, the conclusion they came to is that public intervention often constituted an instrument to transfer wealth to regulated undertakings via organized pressure groups, in exchange for economic contributions to politicians who conducted the denominated "capture" of the regulator by the regulated undertakings. The need to find a solution to the seventies' crisis finally imposed the adoption of a liberalizing policy based on deregulation.

5. Regarding the deregulation phenomenon, see the classical work of George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3 (1971).

Between us, see JOSÉ EUGENIO SORIANO GARCÍA, DESREGULACIÓN, PRIVATIZACIÓN Y DERECHO ADMINISTRATIVO [DEREGULATION, PRIVATIZATION, AND ADMINISTRATIVE LAW] 1-61 (Publicaciones del Real Colegio de España [Spain Royal C. Publ'n] 1993); Amadeo Petitbò Juan, *Desregular para Competir y Ganar Eficiencia* [*Deregulate to Compete and Gain Efficiency*], GACETA JURÍDICA DE LA COMPETENCIA Y DE LA UE [GJ] [JURID. J. OF COMPETITION & THE EU], 1999, No. 200, at 31-41.

In this regard, it is suitable to distinguish between deregulation and liberalization. In this regard, it has been affirmed that

liberalization policy should not be confused with deregulation, understood in a wide sense, that is, as policy tending to the elimination of rules that organize a sector or the disappearance of the State's intervention in the economy. Liberalization means, on the contrary, limiting or reducing the State's normative intervention to what should be its true function: on one hand, the guardianship of the public interest, for example, the safety, health, or well-being of the citizens; in this regard rules of administrative policy, security, inspection and technical control, environmental protection, etc., and no one proposes their derogation. And, on the other hand, competition control, a task to which are obligated all Public Administrations and which must not be left in hands of affected economic operators.⁶

For this reason, liberalization, unlike what is understood in *stricto sensu* (strict sense) for deregulation, does not imply the absolute suppression of economic regulation, but rather a neo-regulation or re-regulation of the same.⁷

The concrete terms in which this trend towards regulation has projected itself on the professional sector constitute the central subject of chapters three and four of the present study, referring to the international and national arenas, respectively. For now it is sufficient to state that this projection has not been produced pacifically, due to the enormous tension existing between the extensive regulatory tradition and the powerful liberalization trend.

6. Cf. Ricardo Alonso Soto, *Competencia y Desregulación Económica: los Informes del Tribunal de Defensa de la Competencia sobre la Liberalización de los Servicios* [Competition and Economic Deregulation: the Competition Defense Court Reports on the Liberalization of Services], in 1 ESTUDIOS JURÍDICOS EN HOMENAJE AL PROFESOR AURELIO MENÉNDEZ [LEGAL STUDIES IN HOMAGE TO PROFESSOR AURELIO MENENDEZ] 653, 658–59 (Juan Luis Iglesias Prada coordinator, Civitas 1996); see also TRIBUNAL DE DEFENSA DE LA COMPETENCIA [TDC] [COMPETITION DEFENSE COURT], LA COMPETENCIA EN ESPAÑA: BALANCE Y NUEVAS PROPUESTAS [COMPETITION IN SPAIN: BALANCE AND NEW PROPOSALS] (1995), available at <http://www.tdcompetencia.es/frames.asp?menu=5>.

7. Cf. SORIANO GARCÍA, *supra* note 5, at 9–13 & 57–60.

III. EVOLUTION IN THE INTERNATIONAL ARENA

A. *Supranational Organizations*1. *Organization for Economic Co-operation and Development (OECD)*

In 1985, the OECD's Committee on Competition Law and Policy presented a Report titled *Competition Policy and the Professions*.⁸ This report concluded that in the majority of countries professions were not subject to competition rules and, in consequence, recommended to the States to eliminate existing restrictions regarding access, price, advertising and association structure, with the aim that "exceptions of competition Laws not go beyond what is necessary and only serve to reach public interest aims."⁹

Regarding access, it recommended that access systems be objective and equitable, and that policies be created that would afford foreign professionals the right to provide their services in both temporary and permanent fashion. With regard to advertising, it suggested the adoption of measurements to assure that consumers be afforded sufficient information to choose between different professionals. In reference to fees, it recommended that the mandatory tariff fixations be submitted to review to avoid diversion from the price setting freedom principle. In relation to professional corporations, it emphasized that the use of new business structures to provide professional services could allow for a greater efficiency.

In the latest years, the OECD has insisted on the need to reduce restrictions to the rendering of professional services, as the Conferences and Round Tables celebrated on this issue in 1995, 1996, 1997 and 1999 demonstrate. As a consequence of these Conferences and Round Tables, the Committee on Competition Law and Policy has elaborated diverse Reports, among which stand out the following two: *Report on Regulatory Reform: Chapter 3, Regulatory Reform and Professional Business Services*, of 1997; and *Competition in Professional Services*, of 2000.¹⁰

It is indicated in the above-mentioned Reports that, although the concrete details vary according to the corresponding country, all of the

8. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], *COMPETITION POLICY AND THE PROFESSIONS* (1985).

9. *Id.*

10. The documentation relative to the OECD's activities in this subject may be consulted at <http://www.oecd.org/daf/clp> (last visited Apr. 10, 2005).

OECD, *REPORT ON REGULATORY REFORM. VOLUME I: SECTORAL STUDIES 117 et seq.* (1997) [hereinafter *REGULATORY REFORM REPORT*]; OECD DIRECTORATE FOR FIN., FISCAL & ENTER. AFF. [DAF], *COMM. ON COMPETITION L. & POL'Y, COMPETITION IN PROFESSIONAL SERVICES*, DAF Doc. DAF/CLP(2000)2 (Feb. 23, 2000), available at <http://www.oecd.org/dataoecd/35/4/1920231.pdf> [hereinafter *COMPETITION IN PROFESSIONAL SERVICES*].

OECD countries regulate certain professional activities, either directly or by delegating normative legal authority to the professional organizations. Likewise, in many of these countries the fact that regulation of professions produces the effect of restricting free competition in the professional services market, resulting in the rise of their prices, reducing their variety and limiting innovation, is of special concern. In particular, professional organizations' use of the normative legal authority they are delegated to develop competition restrictive practices is worrisome. In this regard, it is observed that in New Zealand it has been proposed to create an autonomous entity whose purpose would be to supervise the norm approved by the attorneys' professional association (New Zealand Law Society¹¹). In view of the previous, the Committee has proposed the following recommendations:

- 1) An activity must only be exclusively reserved to a profession when there exists no other less restrictive competition mechanism to guarantee the quality of professional services. In the event that there exists no other remedy but to reserve an activity to a profession, the access requirements to the same must not be disproportionate with respect to the qualities necessary to adequately develop the corresponding activity. Along this line, when the aptitudes necessary for providing different services differ substantially, new professions must be created with different access requirements.
- 2) The regulation of professions must center on protecting smaller consumers, since larger consumers, such as large corporations, are in the position to assess the quality of professional services.
- 3) The restrictions on competition between members of a profession must be eliminated. These restrictions include agreements directed at determining the price, dividing the markets, increasing the access requirements, or limiting advertising. Likewise, the recognition of other countries' professional degrees must be promoted, eliminating nationality and residency requirements.
- 4) Professional organizations must not possess exclusive authority in deciding the access requirements, mutual recognition, or delimiting activities exclusively reserved.
- 5) Competition between professional organizations must be promoted, provided mechanisms are established to assure that the access requirements to a profession do not reduce

11. NEW ZEALAND LAW SOCIETY, at <http://www.nz-lawsoc.org.nz/hmaboutus.asp> (last visited Mar. 31, 2005).

the aptitudes required to practice the corresponding professional activity.

Likewise, the Committee recognizes the progress that has taken place in this matter and this is manifested in that nowadays almost all the OECD states promote the competition of professional services and, with a few exceptions, the competition law applies to the professional sector. In spite of it, an emphasize exists that changes in this sector are still slow partly due to the higher benefits that the professions obtain from the restrictions to competition and to the resistance of professional organizations to liberalization.

2. *World Trade Organization (WTO)*

The WTO is, as known, a supranational organization created in 1994 after the commercial negotiations developed in the Uruguay Round, at the core of the General Agreement on Tariffs and Trade (GATT), with the purpose to facilitate international cooperation on commercial and economic relations.¹² The extraordinary growth of furnishing services in the international arena and the interest to open the national service markets enticed the United States, the largest exporter of services at a worldwide level, to propose and finally obtain, in spite of some developing states' strong reticence, the incorporation of services among the objects subject of the international cooperation. This is the origin of the adoption, incident with the WTO's creation, of the General Agreement on Trade in Services (GATS),¹³ by virtue of which WTO members States pledged to initiate a process of multilateral negotiation, supervised by the WTO, with the purpose to design a frame of principles and rules directed towards liberalizing the so called trade in services.¹⁴

12. WTO, *What is the WTO?*, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 4, 2005); WTO, *GATT and the Goods Council*, at http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (last visited Mar. 4, 2005). Spain ratified the agreement by which the WTO is established on December 30, 1994. Instrumento de Ratificación del Acuerdo por el que se establece la Organización Mundial del Comercio y del Acuerdo sobre Contratación Pública, Hechos en Marrakech el 15 de abril de 1994 [Ratification Instrument of the Treaty which establishes the WTO and the Agreement on Public Contracting, Actions in Marrakech Apr. 15, 1994], (Boletín Oficial del Estado [B.O.E.] [Official Bulletin of the State] 1995, 20) (Spain).

13. WTO, *GATS – Fact and Fiction*, at http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm (last visited Mar. 4, 2005).

14. WTO, *Services Trade*, at http://www.wto.org/english/tratop_e/serv_e/serv_e.htm (last visited Mar. 4, 2005). Regarding the liberalization of services of international commerce, see MANUEL LÓPEZ ESCUDERO, *EL COMERCIO INTERNACIONAL DE SERVICIOS DESPUÉS DE LA RONDA URUGUAY* [INTERNATIONAL COMMERCE OF SERVICES AFTER THE URUGUAY ROUND] (Tecnos 1996); RICARDO GARCÍA LÓPEZ, *LA LIBERALIZACIÓN DEL COMERCIO DE SERVICIOS EN LA OMC: UNA PERSPECTIVA*

Among the services object of the above-mentioned Agreement are included professional services, among which those of law and audit are expressly mentioned. This circumstance presumes to compare professionals to other economic operators who provide services and can clearly be classified as business enterprises, in relation to which they perform in mercantile areas, such as banking, insurance, telecommunications, transport, etc.¹⁵ To this effect, a Work Group was created in the heart of the WTO with the task to analyze professional services. This Work Group has already begun to study the law and audit services sector.

Parallel to what the GATT does in commodity trade matters, the GATS proposes to liberalize international services trade by eliminating unnecessary barriers such as, among others, import prohibitions or restrictions and the imposition of surcharges or fiscal charges. In the professional services area, it is worth mentioning the barriers consisting in the exigency of nationality, residency and degree or local university education requirements. In order to eliminate these barriers, the GATS predicts the introduction of diverse principles, among which stand out those that intend to avoid discrimination of foreign services providers in lieu of nationals and, concretely, the beginning of a national treatment, of a most favored nation and of free market access. In the realm of professional services, the GATS embraces the mutual recognition of degrees principle, by virtue of which Member States will recognize professional degrees obtained in one of the named States. Nevertheless, this principle possesses a very weak base, since it allows the States to individually establish degree recognition criteria. In spite of the previous, the Agreement foresees the possibility of multilaterally adopting common international standards in matters of professional degrees' recognition and professional practice.

EUROPEA [THE LIBERALIZATION OF THE COMMERCE OF SERVICES IN THE WTO: A EUROPEAN PERSPECTIVE] (Tirant lo Blanch, 2000). In this subject matter, it is necessary to point out that, unlike the General Agreement on Trade in Services [GATS], the European Community Treaty reserved the term "commerce" to mercantile commerce. Regarding this matter and its legal and political implications, see GARCÍA LÓPEZ, *supra*, at 152-53.

15. On the international liberalization of professional services and, particularly, legal services, see John Toulmin Q.C., Commentary, *A Worldwide Common Code of Professional Ethics*, 15 FORDHAM INT'L L.J. 673 (1992); Kenneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT'L L. 269 (1994); Spencer A. Sherman, *Yankee Go Home: What's Left for Lawyers After the GATT Debacle*, 14 CAL. LAW. 65 (1994); Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941 (1995); Mary E. Footer, *The International Regulation of Trade in Services Following Completion of the Uruguay Round*, 29 INT'L LAW. 453 (1995); Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 HAMLINE L. REV. 667 (1997).

The importance of this international liberalization of professions, though still in a very incipient phase, takes root in that it also supposes a liberalization of the professions in the national arena, because it facilitates the elimination of competition restrictions of national character and the establishment of common competition policies.¹⁶

3. *European Community*

The impact Community law has had exposing the professional sector to free competition has been demonstrated essentially in two areas: the professionals' movement freedom of in the community market and, more recently, the application of Community Competition law to them.¹⁷ Though it is true that, in principle, these two areas have directly influenced competition in the community market, and not the national markets of each Member State, it must be recognized that Community law has exercised considerable "indirect" influence on the latter's markets, to such a degree it has incited the States to advance in the direction of applying competition rules to professionals in their respective internal markets. Concretely, as stated by Mario Monti, the former Commissioner responsible for competition policy, the European Commission intends its action to serve as a catalyst of the reforms the states must accomplish regarding this matter.

Before analyzing the two mentioned areas separately, it is necessary to state it has been particularly since the nineties when policies, as well as community legislation and jurisprudence, have given a major impulse to the

16. Cf. Jesús Olavaria & Javier Viciano, *Profesiones liberales y Derecho de la Competencia: Cronica de la situacion* [*Liberal Professions and Competition Law: Chronicle of the situation*], *Derecho Privado y Constitución* [*Private Law and Constitution*], 1997, No. 11, at 201-348, esp. 244-45. Regarding the interaction between competition policy and international commerce, see Miguel Montaña Mora, *La OMC y el Derecho de la Competencia: ¿Hacia un Derecho de la Competencia Mundial?* [*The WTO and Competition Law: Towards Worldwide Competition Law?*], *GJ*, 1999, No. 200, at 67-80.

17. In this respect, see Ehlermann, *supra* note 2; Maria-José Bicho, *Professions libérales: aspects essentiels de l'action de la Commission en matière d'application des règles de concurrence* [*Liberal Professions: Essential Aspects of the Commissions Actions in Matters Concerning the Application of Competition Rules*], *COMPETITION POL'Y NEWSLETTER*, No. 2, at 24 (1999); Maria-José Bicho, *Concurrence dans les professions libérales: quels avantages pour le consommateur?* [*Competition of the liberal professions: what advantages for the consumer?*], Speech before the European Commission at the Journée européenne de la concurrence [European Day of Competition], Lisbon (June 9, 2000), available at http://europa.eu.int/comm/competition/speeches/text/sp2000_017_fr.pdf; Alexander Schaub, *Europäisches Wettbewerbsrecht und anwaltliches Berufsrecht* [*European Competition Law and Lawyer Professional Law*], anlässlich des Parlamentarischen Abends des Deutschen Anwaltsvereins [at the Occasion of the Parliamentary evening of the German lawyer association] (Sept. 26, 2001), available at http://europa.eu.int/comm/competition/speeches/text/sp2001_017_de.pdf; Olavaria & Viciano, *supra* note 16, at 229-43.

application of competition rules to professionals and, therefore, have influenced national legal systems more powerfully.

a. Professionals' Movement Freedom

By virtue of the European Community Treaty,¹⁸ professionals enjoy movement freedom (article 3.1.c) and, as a complement of the previous, establishment freedoms (articles 43–48, former articles 52–58) and to provide services in any Member State (articles 49–55, former articles 59–66).¹⁹ In theory, recognition of professionals' movement freedom supposed a substantial competition increase in the community professional services market. Nevertheless, in practice the force of this freedom was observed to

18. The mentions made to this Treaty are referred to by the resulting new numeration of the Treaty of Amsterdam, ratified by Spain by means of the Organic Law No. 9/1998 of Dec. 16, 1998. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]; Ley Orgánica [Organic Law] 9/1998, of Dec. 16 (B.O.E. 1998, 301) (Spain).

19. Regarding professionals' movement freedom, see Nemesio Vara De Paz, *La libertad de establecimiento y la libre prestación de servicios [Establishment Freedom and the Uninhibited Rendering of Services]*, REVISTA DE DERECHO MERCANTIL [RDM] [COMMERCIAL L. REV.], No. 159, at 457–521 (1981); SANTIAGO MUÑOZ MACHADO ET AL., LA LIBERTAD DE EJERCICIO DE LA PROFESIÓN Y EL PROBLEMA DE LAS ATRIBUCIONES DE LOS TÉCNICOS TITULADOS [THE FREEDOM OF PROFESSIONAL PRACTICE AND THE PROBLEM OF THE ATTRIBUTIONS OF QUALIFIED TECHNICAL PROFESSIONALS] 177–205 (Instituto de Estudios de Administración Local [Inst. of Local Admin. Stud.] 1983); I. Borrajo Iniesta, *Las libertades de establecimiento y de servicios en el Tratado de Roma [The Liberties of Establishment and of Services in the Treaty of Rome]*, in 2 TRATADO DE DERECHO COMUNITARIO EUROPEO: ESTUDIO SISTEMÁTICO DESDE EL DERECHO ESPAÑOL [TREATY OF EUROPEAN COMMUNITY LAW: A SYSTEMATIC STUDY FROM SPAIN'S LAWS] 190–200 (Eduardo García de Enterría et al. dirs., Civitas 1986); MARIANO BAENA DEL ALCÁZAR, LA LIBRE CIRCULACIÓN DE PROFESIONALES Y SU INCIDENCIA EN ESPAÑA (EJERCICIO DE PROFESIONES TITULADAS Y PLANES DE ESTUDIO) [PROFESSIONALS' MOVEMENT FREEDOM AND ITS INCIDENCE IN SPAIN (PROFESSIONAL PRACTICE & STUDY CURRICULUMS)] (Ministerio de Educación y Ciencia, Consejo de Universidades [MEC] [Educ. & Sci. Dep't, Universities' Council] 1987); MARIANO BAENA DEL ALCÁZAR, EUROPA Y LAS PROFESIONES LIBERALES [EUROPE AND THE LIBERAL PROFESSIONS] (1989); SOUVIRÓN MORENILLA, *supra* note 11, at 181–274; LIBRE CIRCULACIÓN DE PROFESIONALES LIBERALES EN LA CEE [MOVEMENT FREEDOM OF LIBERAL PROFESSIONS IN THE EEC] (Justino F. Duque Domínguez coordinator, Lex Nova 1991); ANDREU OLESTI RAYO, LA LIBRE CIRCULACIÓN DE LOS PROFESIONALES LIBERALES EN LA C.E.E. [MOVEMENT FREEDOM OF LIBERAL PROFESSIONS IN THE E.E.C.] (Promociones y Publicaciones Universitarias [PPU] [Univ. Promotions & Publ'ns] 1992); LUIS FERNÁNDEZ DE LA GÁNADARA & ALFONSO-LUIS CALVO CARAVACA, DERECHO MERCANTIL INTERNACIONAL: ESTUDIOS SOBRE DERECHO COMUNITARIO Y DEL COMERCIO INTERNACIONAL [INTERNATIONAL TRADE LAW: STUDIES ON COMMUNITY LAW AND INTERNATIONAL COMMERCE] 17–126 (Tecnos 2d ed. 1995); Juan Francisco Mestre Delgado, *Libertad de Establecimiento y Libre Prestación de Servicios Profesionales en la Unión Europea [Establishment Freedom and Uninhibited Rendering of Professional Services in the European Union]*, DERECHO PRIVADO Y CONSTITUCIÓN [DPC] [PRIVATE LAW & CONST.], No. 11, at 131–55 (1997); Olavarria & Viciano, *supra* note 16, at 230–31.

be notably hindered by the subsistence of considerable access barriers, manifested in the exigency of nationality and domicile requirements in the receiving State, as well as in the diversity of access conditions and the exercise of professional activities.

In this context, in the mid seventies the European Community's Court of Justice (ECJ), in setting judgments in the *Reyners*²⁰ and *Binsbergen*²¹ cases, expressly indicated that, independent of the absence of legal rules derived in the Treaty's development, it possesses a direct effect when it recognizes professionals have a right to establish themselves and provide their services in any Member State under the same conditions as natives of the receiving State, without requiring them to acquire nationality and domicile in the latter State. In applying these rights, the Court declared, in the *Reyners* case, the invalidity of the national rules requiring professionals of other members States to possess the receiving State's nationality as an access requisite to the profession in said State;²² and, in the *Binsbergen* case, the incompatibility with Community law of national rules consisting of imposing residency in the receiving State to national professionals of said State and legally competent in the profession in accordance with said State's discipline, but with residence in another.²³

Notwithstanding the previous jurisprudence, the practical virtuosity of professionals' movement freedom continued being hindered by diverse access and professional practice conditions. With the aim of eliminating these restrictions, on December 18, 1961, the Council approved a general program for suppressing restrictions to establishment freedom. In the program's framework, the Council adopted a series of sectarian Directives for the mutual recognition of professional degrees.²⁴

20. Case 2-74, *Jean Reyners v. Belgian State*, 1974 E.C.R. 631.

21. Case 33-74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299.

22. *Reyners* was a Dutch citizen who, in spite of having obtained a Belgium law degree, was denied the right to practice in Belgium because he was not a Belgian citizen.

23. In this case, the legal practice was denied to a Dutch lawyer for having moved his residence from a Member State where he was admitted into practice to another where he was not.

24. This way, for example, Council Directive 77/249/EEC, 1977 O.J. (L 78) 17, directed at facilitating the effective practice by *lawyers* of freedom to provide services, incorporated via Real Decreto [R.D.] [Royal Decree] 607/1986 of Mar. 21 (B.O.E. 1986, 78) (Spain); Council Directive 67/43/EEC, 1967 J.O. (10) 140 relative to establishment freedom and freedom of providing services for non wage-earning activities included in the *real-estate business* sector, incorporated via R.D. 1464/1988 of Dec. 2 (B.O.E. 1988, 294) (Spain); Council Directive 78/1026/EEC, 1978 O.J. (L 1026) 1 and Directive 81/1057/EEC, 1981 O.J. (L 385) 25, relative to the mutual recognition of diplomas, certificates and other *veterinarian* degrees, and Council Directive 78/1027/EEC, 1978 O.J. (L 362) 7, on coordination of legislative, regulative and administrative dispositions relating to veterinarians' activities, incorporated via R.D. 331/1989 of Mar. 17 (B.O.E. 1989, 81) (Spain); Council Directive 85/384/EEC,

Later, the Council approved a general system of mutual degree recognition, through the adoption of Directive 89/48/EEC, of the Council, of December 21, 1988, relative to a general system of recognition of higher education degrees that sanction professional trainings of a three years minimum duration.²⁵ This Directive has been subsequently complemented by the Directive 92/51/EEC, of the Council, of June 18, 1992, relative to a second general system of recognition of professional trainings.²⁶ The 1989 Directive, which has been incorporated into the Spanish order via Royal Decree 1665/1991, of October 25 and the Ministerial Order of April 30, 1996, covers all the degrees not included in the sectarian Directives referring to superior advancement educations with a three years minimum duration, and allows professionals of a Member State to practice their profession in any other Member State after having passed an exam or having fulfilled the advancement complements eventually demanded by the

1985 O.J. (L 223) 15, Council Directive 85/614/EEC, 1985 O.J. (L 376) 1, and Council Directive 86/17/EEC, 1986 O.J. (L 27) 71, relative to the mutual recognition of diplomas, certificates and other degrees in the *architecture* sector, including measures tending to facilitate the effective right to establishment and freedom of providing services, incorporated via R.D. 1081/1989 of Aug. 28 (B.O.E. 1989, 214) (Spain); Council Directive 85/433/EEC, 1985 O.J. (L 253) 37, and Council Directive 85/584/EEC, 1985 O.J. (L 372) 42; relative to the mutual recognition of diplomas, certificates and titles of *pharmaceutics*, including measures tending to facilitate the effective right to establishment for certain pharmaceutical activities, and the Council Directive 85/432/EEC, 1985 O.J. (L 253) 34, and Council Directive 85/584/EEC, *supra*, on coordination of legislative, regulative and administrative dispositions for certain pharmaceutical activities, incorporated via R.D. 1667/1989 of Dec. 22 (B.O.E. 1989, 4) (Spain); Council Directive 75/362/EEC, 1975 O.J. (L 167) 1, Council Directive 81/1057/EEC, *supra*, and Council Directive 82/76/EEC, 1982 O.J. (L 43) 21 relative to the mutual recognition of diplomas, certificates and degrees of *medicine*, and the Council Directive 75/363/EEC, 1975 O.J. (L 167) 14, and Council Directive 82/76/EEC, *supra*, on coordination of the legislative, regulative and administrative dispositions relative to medical activities, incorporated via R.D. 1691/1989 of Dec. 29 (B.O.E. 1989, 13) (Spain); Council Directive 78/686/EEC, 1978 O.J. (L 233) 1, Council Directive 78/687/EEC, 1978 O.J. (L 233) 10, Council Directive 81/1057/EEC, *supra*, Council Directive 89/594/EEC, 1989 O.J. (L 341) 19, and Council Directive 90/658/EEC, 1990 O.J. (L 353) 73, relative to the mutual recognition of diplomas, certificates and other *dentistry* degrees, including measures destined to facilitate the effective practice of right to establishment and freedom of providing corresponding services within the community area, incorporated via R.D. 675/1992 of June 19 (B.O.E. 1992, 178) (Spain).

25. Council Directive 89/49/EEC for Council recommendation of 21 December 1988 concerning nationals of Member States who hold a diploma conferred in a third State, 1989 O.J. (L 19) 24. In this respect, see A. Carnamelutti, *L'Europe des professions libérales: la reconnaissance mutuelle des diplômes d'enseignement supérieur* [*The Europe of Liberal Professions: the mutual recognition of diplomas of higher education*], REVUE DU MARCHÉ UNIQUE EUROPEEN [R.M.U.E.] [UNIQUE EUROPEAN MARKET REV.], No. 1, at 23-46 (1991).

26. Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, 1992 O.J. (L 209) 25.

receiving State.²⁷ This Directive is based, thus, on the mutual confidence between the members States and on the supposed equivalence of their professionals' advancement levels.

In actuality, and in the Project SLIM's framework, of Simplification of the Market Interior's Legislation, a Parliament and Council Directive Proposal is being discussed, by which the Council Directives 89/48/EEC and 92/51/EEC are modified, as well as sectarian Directives relative to the nurse responsible for general citizens, dentist, veterinarian, matron, architect, pharmacist and doctor professions.²⁸

A step forward in eliminating obstacles to professionals' movement freedom is constituted by the automatic degree recognition system, in which the recognition stops being determined by exam completions or supplementary practice periods. An example of this system, though referred exclusively to the legal profession, is the Directive 98/5/EC, of the European Parliament and the Council, of February 16, 1998, destined to facilitate an attorney's permanent professional practice in a Member State different from the one where the degree has been obtained.²⁹

An early precedent of this community norm is constituted in the Council Directive 77/249/EEC, of March 22, 1977, directed at facilitating the effective practice of attorneys' freedom of providing services,³⁰ that has been incorporated in Spain via the Royal Decree 607/1986, of March 21, and in benefit of which community attorneys can provide their services with a degree originating in any Member State, though only in the occasional practice regime, not permanent.

More ambitious than the latter, Directive 98/5/EC, that has been incorporated in Spain via Royal Decree 936/2001, of August 3, recognizes community attorneys have, essentially, two rights, referring to the permanent legal practice in a Member State different from the one where the degree has been obtained: on one hand, the right to practice with the

27. R.D. 1665/1991 of Oct. 25 (B.O.E. 1991, 280) (Spain); Orden de 30 de abril de 1996 por la que se desarrolla el R.D. 1665/1991, de 25 de octubre, en lo que afecta a las profesiones de abogado y procurador [Order of Apr. 30, 1996 by which the R.D. 1665/1991, of Oct. 25, is developed in what it affects the lawyer and barrister professions] (B.O.E. 1996, 112) (Spain).

28. See Rafael Pellicier, *Directiva que modifica los sistemas de reconocimiento de las calificaciones profesionales* [Directive that modifies the systems that recognize the qualifications of professionals], UNIÓN PROFESIONAL [UP] [PROFESSIONAL UNION]?, No. 66, at 13 (2001); Directive 92/51/EEC, *supra* note 26.

29. Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, 1998 O.J. (L 77) 36.

30. Council Directive 77/249/EEC, *supra* note 24.

degree of origin; and, on the other hand, the right to acquire attorney status in the receiving State.³¹

Parallel to the approval of the mentioned Directives, the ECJ has been considered to be opposite to community norm, for weakening the professionals' movement freedom, some of the competition restrictions gathered in the national legal systems.³²

Along this line, the Judgment of July 12, 1984,³³ considered incompatible with Community law the so-called "cabinet unit" requisite, grouped in the French norm, in virtue of which it is possible to have only one principal attorney's office opened to the public or, inclusive, secondary offices, but all of which must always be inside the territorial limits of the "grand instance" Courts. According to the Court, establishment freedom means that all professionals, without abandoning their office, may open a new one in another Member State. This was confirmed anew in the Judgment of May 20, 1992,³⁴ in relation with account auditors; and in that of June 16, 1992,³⁵ in relation with doctors. It was indicated in the latter, additionally, that so-called "clinic unit" requirement is not justified by the attention to the patient, given that the proximity between doctor and patient is not continuously necessary. More recently, the Judgment of January 18, 2001, declared that subordinating the enrollment in the dentists' Association and, therefore, their professional practice, to the requirement to reside in the territorial area allotted to the Professional Association in which they

31. In as much as it refers to the first right, its exercise requires the attorney's inscription before the receiving State's competent authority (art. 3), who will then be able to develop in such State the same professional activities as the attorneys who practice with the diploma of said State and, particularly, to give legal advice in legal matters of the originating State, Community Law, International Law and the receiving State's Law (art. 5.1). Notwithstanding, the Directive does not recognize unconditionally the right to practice with the originating diploma, since it authorizes the Member States to limit this right establishing some restrictions as, for example, demanding that the attorneys who intend to perform before jurisdictional entities do it concertedly with an attorney of the receiving State (art. 5.3). Directive 98/5/EC, *supra* note 29.

In as much as it refers to the right to acquire attorney status in the receiving State, the Directive dispenses of the aptitude test established by the Directive 89/48/EEC of professional degree recognition, substituting this requisite for a period of legal practice in the receiving State with the diploma from the originating State, for which is necessary the justification of an effective and consistent activity before the receiving State's competent authority, with a minimal three year duration, in the receiving State in its State Law ambit, including Community Law (art. 10). Council Directive 89/48/EEC, 1989 O.J. (L 19) 16.

R.D. 936/2001 of Aug. 3 (B.O.E. 2001, 186) (Spain).

32. See Olavarria & Viciano, *supra* note 16, at 232-33.

33. Case 107/83, *Ordre des Avocats au Barreau de Paris v. Onno Klopp*, 1984 E.C.R. 2971.

34. Case 106/91, *Claus Ramrath v. Ministre de la Justice, and l'Institut des réviseurs d'entreprises*, 1992 E.C.R. I-3351.

35. Case 351/90, *Commission v. Grand Duchy of Luxembourg*, 1992 E.C.R. I-3945.

seek to register, such as occurs in Italy, constitutes a restriction to the worker's establishment and movement freedom, to the extent that such requirement prevents dentists established or resident in another Member State from opening another office or practicing their activity on their own in the first State's territory.³⁶ This same judgment established that a national norm that exclusively reserves the right to maintain their enrollment in the Association to dentists that are nationals of the Member State in case they relocate their residence to another European Community Member State is discriminatory because of the nationality requirement, contrary to the Treaty provisions.

The Judgment of July 25, 1991,³⁷ rejected as disproportionate the exclusive reservation of industrial property agents' activity to certain professionals. In this same approach, but in relation with pharmacists, two Judgments of March 21, 1991, should be mentioned.³⁸ Likewise, the Judgments of February 26, 1991,³⁹ and of May 4, 1991,⁴⁰ also rejected as disproportionate the mandatory association membership to engage in the tourist guide activity. In all these cases, the Court has applied the so-called criterion of proportionality with the general interest the above-mentioned restrictions aim to achieve.⁴¹

Nonetheless, in other cases the ECJ has confirmed the community legality of traditional professional associations. In this manner, the Judgment of January 19, 1988, considered the compulsory association membership of attorneys was not contrary to Community law, as long as it was required of the State's nationals, pointing out that the specific purpose that justifies the compulsory nature is "the guarantee of morality and respect for deontological principles, as well as disciplinary control of the attorney's activities."⁴² Pronounced in the same sense were the judgments of September 22, 1983,⁴³ and of April 30, 1986,⁴⁴ allowing the compulsory

36. Case C-162/99, *Commission v. Italian Republic*, 2001 E.C.R. I-541.

37. Case C-76/90, *Manfred Sager v. Denemeyer & Co. Ltd.*, 1991 E.C.R. I-4221.

38. Case C-60/89, *Criminal proceedings against Jean Monteil and Daniel Samanni*, 1991 E.C.R. I-1547.

39. Case C-154/89, *Commission v. French Republic*, 1991 E.C.R. I-659.

40. Case C-340/89, *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 1991 E.C.R. I-2357.

41. See Francisco Vicent Chuliá, *Poderes Públicos y Derecho de la Competencia [Public Powers and Competition Law]*, REVISTA GENERAL DE DERECHO [RGD] [GEN. L. REV.] 3313, 3326-27 (1993), who mentions a duty of loyalty of the Member States to the community Treaties and, especially, to the rules on competition freedom.

42. Case 292/86, *Claude Gullung v. Conseil de l'Ordre des Avocats du Barreau de Colmar et de Saverne*, 1988 E.C.R. 111.

43. Case 271/82, *Vincent Rodolphe Auer v. Ministère public*, 1983 E.C.R. 2727.

association membership of veterinarians, doctors and dentists, indicating that practicing these professions in the territory of other States must be subject to rules in force in the receiving State.

The above-mentioned Judgment of July 12, 1984, pointed out that the existence of a second professional domicile in another Member State does not hinder the application of the deontological rules of the receiving Member State. And, finally, the also mentioned Judgment of January 19, 1988, pointed out that the access prohibition or expulsion from the profession for motives of dignity, good reputation and integrity established in a Member State constitute valid obstacles to practice the same profession in another Member State.

In spite of the fact that theoretically the Directives mentioned above enormously facilitate the professionals' movement freedom in the Community ambit, it is true that in practice the mobility of such professionals in said ambit is still, in general, scarce enough and, thus, it must evolve considerably in order to answer the needs of undertakings in a market without national borders.⁴⁵ In view that the numerous measurements the Community has adopted and is adopting with the purpose of obtaining this objective seem to not be sufficient; competition policy can play a decisive role in this aspect.⁴⁶

b. Application of Competition Law

The application of the Community Competition law to the professional sector constitutes a relatively recent policy that is still in an incipient phase of its development. This circumstance is explained, fundamentally, by the fact that in the majority of cases professional practice is characterized for spreading out in a territorial area generally limited to local borders or, as much, national ones, which prevents in principle the application of community competition norm, one of whose assumptions is the cause of harm to commerce among the States.⁴⁷

Since the beginning of the nineties, and in the framework of a policy promoted at the request of the European Parliament, the Commission is applying directly to professionals and their associations the competition defense rules contained in the Treaty (articles 81–86, former articles 85–

44. Case 96/85, *Commission v. French Republic*, 1986 E.C.R. 1475.

45. *Cf. Ehlermann, supra* note 2, at 142.

46. *Cf. id.*

47. *Cf. id.* at 143.

90).⁴⁸ This policy replaces the restriction that supposed the fact that, to eliminate a competition restriction, it would be necessary to justify that the restriction constituted an obstruction to professionals' movement freedom. On the contrary, the direct application of Community competition law does not require the existence of an obstruction to professionals' movement freedom, which undoubtedly supposes a substantial advancement in this matter.

In relation with this matter, it is worth a mentioning that the Commission, in their XXIX Report on Competition Policy,⁴⁹ established the following:

The Commission is developing its approach towards the issues involved in applying the competition rules to the professions. In the case of several of the professions, services are as yet still provided on a national or even local level, and the condition that intra-Community trade must be appreciably affected for the EC Treaty rules on competition to apply is therefore not met in most of the cases encountered by the Commission.

Competition policy in this area pursues to main objectives: (1) putting an end to restrictive practices; and (2) promoting forms of cooperation that facilitate access to other geographic markets, thereby enabling members of the professions to operate at Community or international level. The Commission's action focuses primarily on cases that have a Community dimension in that they concern the rules governing the same profession in all or at least several Member States or, in the case of the members of a profession in a single Member State, relate to a restrictive practice that has a significant impact in several Member States.

The Commission is endeavouring gradually to draw the dividing line between purely ethical rules which lie outside the scope of the competition provisions and rules or practices whose object or effect is contrary to Article 81 of the Treaty. The goal of promoting competition in the professions is thus, in each individual case, reconciled with the objective of maintaining purely ethical rules specific to each profession.

48. Cf. Olavarria & Viciano, *supra* note 16, at 235; VALENTINE KORAH, INTRODUCCIÓN AL DERECHO Y PRÁCTICA DE LA COMPETENCIA EN LA C.E.E. [INTRODUCTION TO COMPETITION LAW AND PRACTICE IN THE E.E.C.] 29 (Alejandro Fernández de Aráoz Gómez-Acebo trans., Ariel 1988).

49. EUROPEAN COMMISSION, XXIX REPORT ON COMPETITION POLICY 1999 (Brussels-Luxembourg 2000), available at http://europa.eu.int/comm/competition/annual_reports/1999/en.pdf [hereinafter XXIX REPORT].

The Commission has so far published four decisions concerning the application of Article 81 of the Treaty to the behavior of a professional body (CNSD, COAPI and EPI).⁵⁰ In the first three decisions, the Commission found that collective price-fixing was incompatible with the common market, irrespective of the national regulatory framework The fourth decision relates . . . particularly [to] restrictions on advertising and unsolicited offers of services

The above cases have already made it possible to develop the main principles governing the application of the competition rules to the professions:

Members of the professions are normally undertakings within the meaning of Article 81 of the Treaty where they carry on their activities as self-employed persons, and their professional bodies or associations, to which all the members of a given profession belong, may according to the circumstances be regarded as associations of undertakings.

The collective fixing of prices and the prohibition of certain forms of advertising by a professional association may constitute restrictions of competition within the meaning of Article 81(1) of the Treaty.

Rules which are necessary, in the specific context of each profession, in order to ensure the impartiality, competence, integrity and responsibility of the members of that profession or to prevent conflicts of interest and misleading advertising are not considered to be restrictions of competition within the meaning of Article 81(1) of the Treaty.

The legal framework within which agreements are made and the classification given to that framework under the various national laws are irrelevant as far as the applicability of the Community rules on competition are concerned. The Court of Justice has repeatedly confirmed this principle⁵¹.

50. Commission Decision 93/438/EEC of 30 June 1993 (IV/33.407 – CNSD) (only the Italian text is authentic), 1993 O.J. (L 203) 27; Commission Decision 95/188/EC of 30 January 1995 (IV/33.686 – Coapi) (only the Spanish text is authentic), 1995 O.J. (L 122) 37; Commission Decision 1999/267/EC of 7 April 1999 (IV/36.147 EPI code of conduct) (Text with EEA relevance) (notified under document number C(1999) 494), 1999 O.J. (L 106) 14; Commission Decision 2005/8/EC of June 24 2004 (COMP/A.38549 – Belgian Architects’ Association) (notified under document number C(2004) 2180), 2005 O.J. (L 004) 10.

51. *Inter alia* Joined Cases 43/82 and 63/82, VERENIGING TER BEVORDERING VAN HET VLAAMSE BOEKWEZEN, VBVB, AND VERENIGING TER BEVORDERING VAN DE BELANGEN DES BOEKHANDELS, VBBB, v. COMMISSION, 1984 E.C.R. 19; CASE 123/83, Bureau national

Even if by delegating to a professional association power to fix the prices to be charged by its members a Member State may be infringing the rules of the Treaty, the association's exercise of that power does not escape the application of Article 81 of the Treaty^{52 53}.

In their XXX Report on Competition Policy, the Commission has progressed along the same line calling on the Member States, the professionals, the Professional Associations, as well as consumers and their organizations.⁵⁴ On the Member States, in order to progress via the liberalization of the sector, to clarify the norm to prevent it from being applied solely to protect the economic interests of the liberal professions members without guaranteeing, however, the quality of the services. On the professionals, in order for them to compete in an effective and loyal manner by means of individual and free establishment of their prices, to inform precisely on the conditions of the services they provide and their specific technical knowledge, through innovation in their services and their way of providing them and through penetrating cross-border markets. On the Professional Associations, in order that they give up the pressures they exercise on sovereign powers with views on preventing liberalization and guaranteeing economic advantages whose benefits are illusory in the long term, to take into account the worldwide evolution of the service markets. And on the consumers and their organizations, to be more demanding regarding the information available on the professional services and the price to be paid, so they can compare before making a decision and also denounce to the national authorities or the European Commission the practices that falsify the competition game.

Recently, the EU Commission launched a review proposal of professional regulation by commissioning an independent study to compare the regulations affecting lawyers, notaries, accountants, architects, engineers and pharmacists in all Member States which was published in March 2003. Issuing a Report to set out the Commission's view as to the potentiality of modernizing professional regulation which was adopted in February 2004⁵⁵. The study showed significantly different levels of

interprofessionnel du cognac v. Guy Clair, 1985 E.C.R. 391; and, Case C-35/96, Commission v. Italian Republic, 1998 E.C.R. I-3851.

52. Commission Decision 95/188/EC of 30 January, 1995 O.J. (L 122) 37.

53. XXIX REPORT, *supra* note 49, at 53–54.

54. EUROPEAN COMMISSION, XXX REPORT ON COMPETITION POLICY 2000, at 48 (Brussels 2001), available at http://europa.eu.int/comm/competition/annual_reports/2000/en.pdf.

55. See INSTITUT FÜR HÖHERE STUDIEN [*Institute for High Studies*] (IHS), *Economic impact of regulation in the field of liberal professions in different Member States. Regulation of Professional*

regulation between Member States and also between different professions. It also found that there was no indication of malfunctioning of markets in relatively less regulated countries. On the contrary, the conclusion of the study was that more freedom in the professions would allow more overall wealth creation. The Commission identified those *groups of regulatory restrictions* in the professions which have the biggest potential to harm competition without being *objectively justified*: (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi-disciplinary practices. Accordingly, *the Commission would like to see those restrictions reviewed and, where they are not objectively justified, removed or replaced by less restrictive rules. The Commission, therefore, invited, first, the regulatory authorities of the Member States to review the legislation or regulations within their report, and also invited all professional bodies to start a similar review of their rules and regulations.*

In this context, it is of interest to make a more detailed analysis of the Commission's Decisions aforementioned. In the first three Decisions the Commission determined that the adopted fixing of fees for professional services, in the first case, by the Italian Consiglio Nazionale degli Spedizionieri Doganali (CNSD, National Council of Customs Agents)⁵⁶; in the second one, by the Spanish Colegio Oficial de Agentes de la Propiedad Industrial (COAPI, Official Association of Industrial Property Agents),⁵⁷ and in the third one by the Belgian Ordre des Architectes OA (Architects' Association), constituted a decision by an association of undertakings prohibited by article 81 (former article 85) of the Treaty.⁵⁸ In relation with these Decisions, it is worth emphasizing the following aspects relative to the subjective and objective area of application of the community competition norm.

First, in relation with the subjective area, the Commission affirms that the mentioned professionals (customs agents, industrial property agents and architects) are undertakings to the effects of article 81 (former article 85) of the Treaty, without their consideration as professionals modify such affirmation. This qualification is based on the adoption of a broad under-

Services, Vienna 2003; and EUROPEAN COMMISSION, *Report on Competition in Professional Services*, Brussels, February 9, 2004.

56. CONSIGLIO NAZIONALE DEGLI SPEDIZIONIERI DOGANALI [CNSD] [NATIONAL COUNCIL OF CUSTOMS AGENTS], at <http://www.cnsd.it/> (last visited Mar. 27, 2005).

57. COLEGIO OFICIAL DE AGENTES DE LA PROPIEDAD INDUSTRIAL [COAPI] [OFFICIAL ASSOCIATION OF INDUSTRIAL PROPERTY AGENTS], at <http://www.coapi.org/home.htm> (last visited Mar. 27, 2005).

58. Commission Decision 93/438/EEC, *supra* note 50; Commission Decision 95/188/EC, *supra* note 50; TREATY OF AMSTERDAM, *supra* note 18, at art. 81 (old art. 85).

taking concept and, concretely, of the adopted Judgment of April 23, 1991 in the case *Höfner*, by virtue of which “the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”⁵⁹ It deals, hence, with a concept that gives priority to functional or economic aspects of the activity, dispensing with the formal or legal aspects. In consequence, the Associations that group those professionals consider themselves associations of undertakings, without altering said qualification the fact that its status is that of public law entities or of public interest associations and that the public powers attribute to them control and discipline functions of their respective professions.

It is interesting to emphasize also that the Commission’s conclusion is not hindered by the fact that the agreement of fixing fees is permitted by Law and is approved subsequently by the Government. This because, on one hand, the Law does not force the regulation of fees, it merely permits it, which does not prevent the application of competition rules; and, on the other hand, because the approval by the Government does not prevent the previous and autonomous existence of an agreement by an association of undertakings. In this regard, it should be recalled that, according to constant E.C.J. jurisprudence, the community competition norm not only links undertakings, but also the Members States, who cannot adopt or keep in effect measures capable of eliminating the useful purpose of the mentioned norm. This happens when States impose or favor the adoption of behaviors contrary to free competition on the part of the economic operators, or when they delegate to these operators the regulation of their economic relationships.⁶⁰ For this motive, the Commission began violation proceedings against Italy in relation to the Italian legislation that regulates the customs agents’ profession, proceedings that gave rise to the ECJ Judgment of June 18, 1998,⁶¹ which determined that Italy had violated the obligations imposed by the Treaty regarding competition by adopting and maintaining a Law that gives the CNSD the power of adopting a decision adverse to article 81 of the Treaty, thus confirming the Commission’s resolution. Likewise, it must be pointed out that the judgment regarding the

59. Case C-41/90, *Klaus Höfner and Fritz Elser v. Macroton GmbH*, 1991 E.C.R. I-1979.

60. *Id.* at ¶ 21. On the existing relations between national and community competition laws, see Luis Fernández de la Gándara & Alfonso Luis Calvo Caravaca, *Política y Derecho de la Competencia en la CEE: Una Aproximación* [*Politics and Competition Law in the EEC: An Approximation*], RGD, No. 583, at 3379–3447 (1993).

61. Case C-35/96, *Commission v. Italian Republic*, 1998 E.C.R. I-3851.

CNSD was appealed before the Court of First Instance, which on March 30, 2000, rendered a verdict confirming the Commission's decision.⁶²

Secondly, with regard to the objective area of application, the Commission affirms that in these cases fixing fees constitutes a restrictive competition agreement that can notably harm commerce between Member States. It deals with a restriction, because the Association agreements are binding on all its members and are applied by exercising sanctioning powers attributed to such Associations, preventing the professionals from individually establishing remuneration for their services. In the Belgian architects' case the Commission declared that even the recommended fee scale is against competition, because it facilitates price coordination of the conduct of the members of the association in accordance with the terms of the recommendation.

Furthermore, the clear requisite of harm to Community commerce is interpreted extensively, in considering that such requirement is met, in case of customs agents, because the restriction spreads its effects on all the imports to Italy and all the exports from Italy; in the industrial property agents' case, because it reaches all the demand volume coming from clients residing abroad, monopolized by the Spanish agents, and a considerable part of the Spanish clients' demand directed abroad, in which the Spanish agents held a predominant position; and in the architects' case, since the restriction applies throughout Belgium and to any other architect in the country, including nationals of other Member States registered with the Association.

The Commission's fourth Decision of April 7, 1999, EPI, is the first that deals with the restrictions to advertising and professional services offers and, specifically, the provisions contained in the code of conduct of the European Patent Institute (EPI),⁶³ a professional organization that groups at the European level agents authorized by the European Patent Office.⁶⁴ This Decision distinguishes in the aforementioned code of conduct between provisions that possess a deontological nature and those that restrict competition. Among the first, it enumerates all those necessary to guarantee impartiality, aptitude, integrity and agents' responsibility, to avoid conflicts of interests and misleading advertising or to guarantee the effective functioning of the European Patent Office. These rules are not

62. Case T-513/93, Consiglio Nazionale degli Spedizionieri Doganali v. Commission, 2000 E.C.R. II-1807.

63. INSTITUTE OF PROFESSIONAL REPRESENTATIVES BEFORE THE EUROPEAN PATENT OFFICE [EPI], THE EUROPEAN PATENT INSTITUTE, at <http://216.92.57.242/patentepi/english/100/index.php> (last modified Mar. 1, 2005); EPI, CODE OF CONDUCT (Nov. 13, 1979), at <http://216.92.57.242/patentepi/english/100/120/121/>.

64. Commission Decision 1999/267/EC, *supra* note 50.

considered restrictive of competition in the context of the mentioned profession. On the other hand, the rules that prohibit performing comparative advertising under the conditions contemplated in Directive 97/55/CE⁶⁵ and providing services to former clients of other agents are considered competition restrictions that that infringe on article 81(1) (former article 85) of the Treaty.⁶⁶ By means of the Judgment of March 28, 2001, the Court of First Instance decided on the appeal EPI raised against the cited Decision, confirming the legality of the same in considering the absolute prohibition of comparative advertising to be restrictive, although disallowing it in regards to the prohibition on the offering of services to former clients of other agents, having understood that said prohibition's objective is to prevent that while offering services to a client, an agent denigrates a colleague, questioning the intervention of the latter in a concluded matter.⁶⁷

Still, it is necessary to recall, as pointed out above, the recent controversy the Commission and the European Parliament confront regarding this matter. On one side, in March, 2001, the Commission announced the initiation of an investigation on professional practice competition restrictions contained in the legislation of diverse Member States, with the purpose of proposing their elimination and, especially, the ones relating to the fixing of fees, including the establishment of guidance scales. Yet, on April 5, 2001, the Parliament approved a Resolution, initiated by its Commission on Legal Matters and Domestic Markets, in which it expressly emphasized "the importance . . . [of] compulsory tariffs with a view to granting high quality services to citizens and to create trustful relationships between liberal professions and their clients."⁶⁸ For this motive, it was

65. Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, 1997 O.J. (L 290) 18.

66. In this respect, it must be indicated that the Commission agreed to an exemption of the prohibition of the restrictive conduct mentioned for a transitory period that ended April 23, 2000. This exemption was justified with the purpose of avoiding risks of confusion for consumers that could be brought about by the brusque transition of the traditional regime of almost absolute advertising prohibition to a system of freedom in this matter, with it allowing professionals as much as consumers to have a transitory period of adjustment to a new situation.

67. Case T-144/99, *Institute of Professional Representatives before the European Patent Office v. Commission*, 2001 E.C.R. II-1087.

68. European Parliament resolution on scale fees and compulsory tariffs for certain liberal professions, in particular lawyers, and on the particular role and position of the liberal professions in modern society, EUR. PARL. DOC. (52001IP0247) (2001); *Ana Palacio Vallelersundi Motion for a Resolution on Compulsory Tariffs for Certain Liberal Professions, in Particular Lawyers*, Eur. Parl. Doc. PE298.398/1-37 (Feb. 15, 2001), at ¶ 5.

affirmed that “[only a] few compulsory tariffs . . . established by professional bodies or associations of all members of a given profession may according to the circumstances, be regarded as decisions adopted by associations of undertakings submitted to the competition rules,” so that

Members States are authorized to establish obligatory tariffs taking into account the general interests (and not only the interest of the profession), and to protect the high moral, ethical and quality standards that lawyers, tax consultants, accountants, doctors, psychotherapists, architects and other liberal professions stand for in which their clients trust.⁶⁹

In view of this, the mentioned Resolution “calls upon the European Commission to follow strictly the interpretation of the Court of Justice in the application of competition rules to the obligatory tariffs of liberal professions, specially lawyers . . .”⁷⁰

Finally, in the area of jurisprudence, it is worth mentioning two recent Judgments of the Community’s Court of Justice, both with date of February 19, 2002, in which the subjugation of professionals to the community competition regime was discussed.⁷¹

In the first of the judgments (Arduino case⁷²), the question of collective fixing of professional fees was thoroughly examined. In this case, an Italian court, in the frame of a liquidation of procedural costs, raised to the Community Court the issue of whether fixing a scale that establishes the minimum and maximum limits for attorneys’ fees infringes on Community Competition law. Previously, it is necessary to mention that the Italian legislation envisages that the National Council of Bar Associations, composed exclusively of attorneys chosen by their own colleagues, proposes an attorney’s fees scale, which should be approved by the Department of Justice after an advisory process before two public bodies.

On this resolution, see José Luis Berenguer, *Deontología Profesional y Libre Competencia [Professional Deontology and Free Competition]*, EXPANSIÓN, Apr. 27, 2001; Rafael Pellicer, *Propuesta de Resolución del Parlamento Europeo de 7 de marzo de 2001 Relativa a la Aplicación del Derecho de la Competencia al Sector Profesional [Resolution Offer from the European Parliament of March 7, 2001 Relative to the Application of Competition Law in the Professional Sector]*, IP, No. 66, at 20–21 (2001).

69. EUR. PARL. DOC. (52001IP0247), *supra* note 68; Eur. Parl. Doc. PE298.398/1-37, *supra* note 68, at ¶¶ 7–8.

70. EUR. PARL. DOC. (52001IP0247), *supra* note 68; Eur. Parl. Doc. PE298.398/1-37, *supra* note 68, at ¶ 6.

71. Case C-35/99, Criminal proceedings against Manuele Arduino, 2002 E.C.R. I-1529; Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, intervenier: Raad van de Balies van de Europese Gemeenschap, 2002 E.C.R. I-1577.

72. Case C-35/99, Criminal proceedings against Manuele Arduino, 2002 E.C.R. I-1529.

The Luxembourg Court resolved the case issuing the following doctrine: Community Competition law is not opposed to Member States adopting legislative or regulatory measures that approve, based on a project elaborated by the Council of Bar Associations, a scale that fixes minimum and maximum fee limits of members of the professions, provided the aforementioned measure is adopted in the framework of a proceeding such as that envisaged by the Italian legislation. Specifically, the Court declared the fact that a State assigns to a professional organization the development of a fee scale project does not automatically deprive the scale of its state character. Though it is true that the Italian legislation does not contain substantive or procedural standards that guarantee the Council of attorneys follow general interest criteria at the time of developing the scale, the state has not renounced its right to exercise its authority of deciding as the last resort or to control the application of the scale. On the one hand, the scale project lacks in itself compulsory force, since it does not come into effect without the approval of the Department of Justice, allowing the Department to force the Council to modify the scale project or simply not approve it. On the other hand, in the judicial application of the scale, the courts may, via a duly motivated decision, move away from the maximum and minimum limits fixed by the scale.

In the second of the Judgments (Wouters case⁷³), mentioned above, it was judged whether the prohibition of practicing multiple disciplines by attorneys and auditors was compatible with the community competition rules, contained in the multidisciplinary practice Regulation approved in 1993 by the Dutch Council of the Legal Profession. The Court, following its own jurisprudence, recognized that for the purpose of article 81 (former article 85) of the Treaty, the attorneys constitute undertakings and the attorneys' professional associations constitute associations of undertakings. Parting from this base, it understood the prohibition of multidisciplinary collaboration of attorneys and auditors constitutes a restrictive agreement on competition. Specifically, this prohibition limits the production and technical development in the legal and auditing services sector, preventing advantages linked to multidisciplinary practice, such as the increase in the quality and diversity of services, their cost reduction or centralization in one organization (one-stop shopping).

Nevertheless, the Court found that not every decision of an association of undertakings that restricts competition is necessarily included in the prohibition of article 81.1 of the Treaty. In this manner, it declared it is necessary to analyze the global context in which the decision is placed and,

73. Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap, 2002 E.C.R. I-1577.

particularly, its objectives, which in this case were concentrated on the function of guaranteeing the respect of the deontological principles of the legal profession and, especially independence and professional secrecy. In this regard, the Judgment indicated that “there may be a degree of incompatibility between the advisory activities carried out by a member of the Bar and the supervisory activities carried out by an accountant.”⁷⁴ For this reason, the Dutch Council of the Legal Profession was able to consider that the prohibition discussed was necessary to guarantee the proper practice of the law, without being able to obtain the same objective by less restrictive means. The Court concluded the prohibition of multidisciplinary practice of attorneys and auditors by the Regulation of the Dutch Council of the Legal Profession “does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that the regulation, despite the effects restrictive of competition inherent in it, is necessary for the proper practice of the legal profession, as organized in the Member State concerned.”⁷⁵

B. Comparative Law

1. The United States

The United States is, undoubtedly, the country where the trend to subject professional activity to free competition originated.⁷⁶ Not

74. *Id.* at ¶ 104.

75. *Id.* at ¶ 110.

76. Among the vast bibliography on this matter, see *The Applicability of the Sherman Act to Legal Practice and Other “Non-Commercial” Activities*, 82 YALE L.J. 313 (1972); Thomas D. Morgan, *Where Do We Go From Here with Fee Schedules*, 59 A.B.A. J. 1403 (1973); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Philip C. Kissam, *Antitrust Law and Professional Behavior*, 62 TEX. L. REV. 1 (1983); Panel, *Antitrust and the Professions: Conflict or Accommodation?*, 52 ANTITRUST L.J. 161 (1983); Stephen H. Sachs, *Antitrust, the States, and the Professions*, 52 ANTITRUST L.J. 189 (1983); Geoffrey C. Hazard, Jr., et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1084 (1983); Dennis R. Bartholomew, Comment, *Antitrust and the Professions: Where Do We Go From Here?*, 29 VILL. L. REV. 115 (1984); John S. Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 TEX. L. REV. 451 (1989) (reviewing RICHARD L. ABEL, *AMERICAN LAWYERS* (Oxford Univ. Press 1989)); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 594–656 (1989); John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301 (1991); Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559 (1992); Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415 (1998); Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315 (1998); Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical*

withstanding, traditionally the professions found themselves exempt from the application of regulatory competition rules, contained in the Sherman Act of 1890.⁷⁷ An example of this exemption, the denominated learned profession exemption, is given by the 1931 Supreme Court Judgment in *Federal Trade Commission v. Raladam Co.*⁷⁸ In this case, the mentioned Commission was accusing diverse doctors of committing acts of unfair competition by misleading advertising, consisting in announcing a weight-loss cure as effective and safe. However, the Court rejected the accusation by expressly declaring that, to the effects of competition rules, professional practice does not constitute a commercial activity (trade).

However, already at the beginning of the forties decade, the first symptoms of a change in direction took place. In this manner, in *American Medical Association v. United States*, the Supreme Court recognized Competition Law is applicable to the professional services doctors provide.⁷⁹ In this case, an Association offered sanitary services to its members in exchange for a periodic quota payment, reason for which the Association contracted diverse doctors. Under the argument that this form of providing sanitary services was weakening the deontological rules of the American Medical Association, this organization persuaded diverse hospitals to not admit patients from the previously mentioned Association. In terms of Competition Law, this practice was incurring clearly in a classic case of a boycott. Still, the District Court denied the existence of a restrictive act on competition by understanding that, to the effects of competition rules, medical practice cannot be qualified as commercial activity. By contrast, the Supreme Court, though avoiding the direct affirmation that medical practice constituted a commercial activity, declared that the American Medical Association's behavior was an act of obstruction and restriction contrary to the Sherman Act.

In spite of the fact that this Judgment could be extrapolated to all the professions in general, during a long period of time it dealt, simply, with an

Evidence, 27 J. LEGAL STUD. 503 (1998); Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000); Marina Lao, Comment, *The Rule of Reason and Horizontal Restraints Involving Professionals*, 68 ANTITRUST L.J. 499 (2000); Robert Pitofsky, Self Regulation and Antitrust, Prepared Remarks for the D.C. Bar Association Symposium (Feb. 18, 1998), at <http://www.ftc.gov/speeches/pitofsky/self4.htm>. See also the Report from the AMERICAN ANTITRUST INSTITUTE [AAI], CONVERGING PROFESSIONAL SERVICES: LAWYERS AGAINST THE MULTIDISCIPLINARY TIDE (Feb. 9, 2000), available at <http://www.antitrustinstitute.org/books/multidisc.cfm>.

Between us, see Olavarria & Viciano, *supra* note 16, at 232–33.

77. Sherman Act, 15 U.S.C. § 1 et seq. (2004).

78. 283 U.S. 643 (1931).

79. 317 U.S. 519 (1943).

isolated case, it being necessary that more than thirty years pass to find a new pronouncement in the same sense. This new pronouncement was the 1975 Supreme Court Judgment in *Goldfarb v. Virginia State Bar*.⁸⁰ Goldfarb was an attorney, who also worked for the Federal Trade Commission, who wanted to acquire a house, which required contracting an insurance that, in turn, required the production of an opinion by an attorney. With this purpose, Goldfarb contacted an attorney, who requested to be paid the same fees as the local Bar Association had published as minimal fees. In an attempt to obtain a better price, he contacted a good number of attorneys, all of which estimated their services in the same amount, without any of them considering the possibility of providing them for a lower amount. Some of them even affirmed that they did not know any attorney who offered a price lower than that fixed. Though the very Association qualified its fees as mere guidelines, it expressly established that repeated and intentional breach of the same constituted an infraction of the professional rules. In light of this situation, Goldfarb sued the Bar Association for price fixing in opposition to the competition rules.

With respect to the learned profession exemption, the Supreme Court was clear in affirming that the prohibition to carry out restrictive conducts contained in the Sherman Act does not contemplate any exception and, in essence, that independent of the fact that the professional legal activity possesses other additional characteristics, it becomes evident that it deals with a service, and that the exchange of such service for money is a “trade” in the ordinary use of the word.⁸¹ Likewise, it added that:

It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect In the modern world it cannot be denied that the activities of attorneys play an important part in commercial intercourse, and that anticompetitive activities by attorneys may exert a restraint on commerce.⁸²

The rejection of the learned profession exemption has been confirmed in diverse resolutions following the Goldfarb case. This way, for example, in 1979, in *National Society of Professional Engineers v. United States*,⁸³ the Court qualified as restrictive practice the prohibition contained in the deontological rules of engineers, of participating in contests in which the price was part of the initial selection criteria. The sued association based

80. 421 U.S. 773 (1975).

81. *Id.* at 787–88.

82. *Id.* at 788.

83. 435 U.S. 679 (1978).

this prohibition alleging that participation in this kind of contests would reduce the professionals' fees and also lead to reduce the quality of their services, in prejudice of all of the general interest. However, the Court declared that this potential risk does not justify the grant of monopolistic privileges, affirming that although competition does not facilitate the fulfillment of the deontological professional, it is not a sufficient reason to prevent competition. On its part, in 1982, in *Arizona v. Maricopa County Medical Society*,⁸⁴ it understood that fixing maximum prices by part of a group of doctors constitutes an act contrary to free competition.

In 1977, only two years after *Goldfarb*, the Supreme Court established in *Beats v. State Bar of Arizona* that the absolute prohibition of advertising imposed by a Bar Association on its members, was unconstitutional for hindering the freedom of expression contemplated in the First Amendment.⁸⁵ The same declaration was reiterated in 1982 in *American Medical Association v. Federal Trade Commission*.⁸⁶

Notwithstanding, the courts have not always admitted the application of competition rules to professionals. In some cases, this denial comes motivated because an act restrictive on competition has not really been committed. As, for example, in *Hester v. Martindale-Hubbell, Inc.*,⁸⁷ an attorney's lawsuit was rejected where his request to appear in the prestigious attorneys' directory of *Martindale-Hubbell Law Directory* had been refused for not reaching the required standards. In this case, the court understood that the determination of admission criteria was adopted in a unilateral way, which prevented the existence of a restrictive act in the form of a boycott.

Nevertheless, the most important reason that justifies the inapplicability of the antitrust rules to professionals is, without a doubt, the denominated state action exemption,⁸⁸ by virtue of which the competition restrictions carried out in the exercise of a public authority are exempt from the application of the mentioned rules. Such exception originated, in the forties, in *Parker v. Brown*,⁸⁹ establishing the Sherman Act neither expressly prohibits the restrictions carried out by the State, nor permits an inference that such restrictions were meant to be prohibited. Precisely this exemption justified that the competition rules be found applicable in the *Goldfarb* case, since the legal practice regulation approved by the Virginia

84. 457 U.S. 332 (1982).

85. 433 U.S. 350 (1977).

86. 455 U.S. 676 (1982).

87. 659 F.2d 433 (4th Cir. 1981).

88. *Parker et al. v. Brown*, 317 U.S. 341, 351-54 (1943).

89. *Id.*

Supreme Court was not forcing the Bar Association to establish minimal fees, whereas in the Bates case such rules were not found applicable, since it was the legal practice regulation promulgated directly by the Arizona Supreme Court, and not one approved by the corresponding Bar Association, which specifically prohibited advertising by attorneys. This was the reason why the illicitness of the advertising prohibition of professionals in the latter case had to be based on the infraction of freedom of expression, instead of looking for it in the violation of competition regulation.

In fact, the state action exemption has justified the accomplishment of diverse competition restrictions. Thus, in *Hoover v. Ronwin*,⁹⁰ the establishment of a numerus clausus in the access to legal practice; in *Lawline v. A.B.A.*,⁹¹ the reservation of activity in favor of attorneys, preventing that a corporation made up of attorneys and other professionals secure clients to pass them along to certain attorneys, in exchange for a commission; and, more recently, in *Massachusetts School of Law at Andover, Inc. v. A.B.A.*,⁹² the American Bar Association's fixing of the accreditation criteria of Law Schools whose graduates can practice law, by rejecting in this case to accredit a School that intended to offer a lesser curriculum than that of recognized Schools.

Definitively, the state action exemption has brought as consequence that the impact of free competition on professional activities has been sensibly lower than that to which other economic activities have been exposed. This circumstance has motivated such exemption to tend to be an object of criticism, claiming a more restricted interpretation of the same and an attitude more reflective of the public power at the moment of recognizing competition restrictions. Also heading in this direction is the trend to broadly interpret the constitutional freedoms of expression and association, with the goal to invalidate deontological rules that establish competition restrictions and are covered by the state action exemption.

2. The United Kingdom

The United Kingdom is, along with the United States, one of the countries that has advanced the most in the direction of projecting competition rules on professional activity.⁹³ On this subject it is,

90. 466 U.S. 558 (1984).

91. 956 F.2d 1378 (7th Cir. 1992).

92. 107 F.3d 1026 (3d Cir. 1997).

93. In this respect, see Gordon Borrie, *The Professions: Expensive Monopolies or Guardians of Public Interest?*, J. BUS. L. 111, 111-25 (1984); Kenneth Button & Michael Fleming, *The Changing Regulatory Regime Confronting the Professions in Europe*, 37 ANTITRUST BULL. 429 (1992); Ehlermann, *supra* note 2, at 141.

undoubtedly, the most liberal Member State of the European Community. Notwithstanding, traditionally, the professions were not subject to the rules of Competition Law that prohibited restrictive conducts, although they were subject to the ones related to monopolies. Thus, the professional rules and practices were excluded from the area of application of the Restrictive Trade Practices Act of 1976.⁹⁴

At present, however, the two principal laws on competition, the Fair Trading Act of 1973⁹⁵ and the Competition Act of 1998,⁹⁶ are fully applicable to the professional sector. In this respect, the professional organizations and individual professionals can be considered undertakings or associations of undertakings, to the effects of the application of the mentioned legislation. Yet, the Competition Act foresees two categories of exemptions that are susceptible of application to professional activity. First, the restrictive conducts carried out in the application of a Law (schedule 3) are found exempt. Secondly, a procedure is established that allows certain professions to request an exemption to the State Secretary of Trade and Industry. Though no profession has yet initiated this procedure, if anyone did, the grant of the exemption would operate automatically (schedule 4).

The application of the competition norm to professional activity has been motivated to a great extent by the policies stemming from the two bodies that control such norm: the Monopolies and Mergers Commission, presently named the Competition Commission, and the Office of Fair Trading (OFT).⁹⁷ By 1970, the Monopolies and Mergers Commission emitted a general Report in which it completed an exhaustive analysis of all kinds of restrictions referring to a great number of professions.⁹⁸ Precisely due to the general scope of said Report, it failed to reach an in depth valuation of the contemplated restrictions' effects on competition, though it did contain some general directives to evaluate the justification of the same.

Recently, see LAW & ECON. CONSULTANT GROUP, LTD. [LECG LTD.], RESTRICTIONS ON COMPETITION IN THE PROVISION OF PROFESSIONAL SERVICES. A REPORT FOR THE OFFICE OF FAIR TRADING (2000).

Between us, see Olavarria & Viciano, *supra* note 16, at 250–52.

94. Restrictive Trade Practices Act, 1976 (U.K.).

95. The Fair Trading Act, 1973 (U.K.).

96. Competition Act, 1998 (U.K.).

97. Monopolies and Mergers Commission, presently named the Competition Commission, at <http://www.competition-commission.org.uk/index.htm> (last visited Mar. 27, 2005), and the *Office of Fair Trading [OFT]*, at <http://www.oft.gov.uk/default.htm> (last visited Mar. 27, 2005).

98. See MONOPOLIES & MERGERS COMM'N, OFT, 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 (1970) (U.K.).

Among the competition restrictions analyzed by the Commission stood out the entry barriers consisting in the demand of title documents; the reservations of activity; the fixing of compulsory or guiding fee scales; the prohibition of certain business structures, especially in the shape of limited liability companies; the restrictions referring to the multidisciplinary professional practice; and the limitations in advertising material. In general, the Report recognized the harmful impact that the analyzed restrictions could have, potentially, on competition and the public interest, understanding that in many cases existed alternative mechanisms to obtain the intended purposes. In this sense, the Commission recommended a cause-and-effect analysis of every specific restriction, in order to examine the existence or not of reasons that justify its imposition.

In another way, the Report was referring to some specific restrictions in the following terms: it allowed, in principle, the entry barriers consisting of the demand of title documents; it forcefully condemned the fixing of compulsory fee scales; it showed itself in favor of liberalizing restrictions related to the structure of business; it understood that the conflicts of interest risks raised by multidisciplinary practice did not justify its prohibition, noting its advantages, which were materialized in terms of scale economies and of sole offering of services; and, finally, it positioned itself in favor of liberalizing the restrictions in advertising material.

Throughout the seventies' decade, the Monopolies and Mergers Commission complemented its general Report through the elaboration of nine sectional reports, centered on analyzing specific competition restrictions referring to specific professions and, particularly, relative to the advertising of members of different legal professions (solicitors, barristers and advocates), and to the book-keepers, veterinarians and stockbrokers, as well as those referring to the fixing of fees by architects and topographers.⁹⁹ In nine of eleven Reports, the Commission concluded the restrictions produced negative effects on the public interest.

99. See A REPORT ON THE SUPPLY BY HER MAJESTY'S COUNSEL ALONE OF THEIR SERVICES, 1976, HC 512 (U.K.); A REPORT ON THE SUPPLY BY SENIOR COUNSEL ALONE OF THEIR SERVICES, 1976, HC 513 (U.K.); A REPORT ON THE SUPPLY OF BARRISTERS' SERVICES IN RELATION TO RESTRICTIONS IN ADVERTISING, 1976, HC 559 (U.K.); A REPORT ON THE SUPPLY OF SERVICES OF SOLICITORS IN SCOTLAND IN RELATION TO RESTRICTIONS ON ADVERTISING, 1976, HC 558 (U.K.); A REPORT ON THE SUPPLY OF ADVOCATES' SERVICES IN SCOTLAND IN RELATION TO RESTRICTIONS IN ADVERTISING, 1976, HC 560 (U.K.); A REPORT ON THE SUPPLY OF SERVICES OF SOLICITORS IN ENGLAND AND WALES IN RELATION TO RESTRICTIONS ON ADVERTISING, 1976, HC 557 (U.K.); A REPORT ON THE SUPPLY OF ACCOUNTANCY SERVICES IN RELATION TO RESTRICTIONS IN ADVERTISING, 1976, Cmnd. 6573 (U.K.); A REPORT ON THE SUPPLY OF ARCHITECT'S SERVICES WITH REFERENCE TO SCALE FEES, 1977, HC 4 (U.K.); A REPORT ON THE SUPPLY OF SURVEYOR'S SERVICES WITH REFERENCE TO SCALE FEES, 1977, HC 5 (U.K.).

Afterwards, in 1986, the OFT emitted diverse Reports on competition restrictions existing in diverse professions, such as the limitations on advertising of professional services in general and, especially, on the services related to the construction industry; as well as the limitations related to business structures and those applicable to the industrial property agent profession.¹⁰⁰

In March 2001, the OFT presented a Report titled *Competition in Professions*, which in turn includes another Report, elaborated in December, 2000, by a consulting company at the request of the mentioned agency, and denominated *Restrictions on Competition in the Provision of Professional Services*.¹⁰¹ This last Report analyzes the answers of professional organizations, of representatives of corporations and consumers, as well as of independent experts, among others, to the Consultation Paper distributed in May 1990 by the OFT. In the above mentioned Reports it was recommended that professional activity be held totally and completely subject to the competition rules, such as it occurs in other economic activities; and, as a consequence, its proposes eliminating all the restrictions that are not justified as being necessary to obtain economic efficiency or the protection of consumers. In essence, it recommends the elimination of the procedure of exemption previously mentioned, contained in the Competition Act, which allows the request to exclude certain professional rules from the area of application of free competition Law.

In particular, the mentioned Report also carries out an exhaustive analysis of the principal restrictions on competition in three particularly relevant sectors: the legal services, those of auditing and those of architecture. In the area of legal services, the reservations of activity in favor of solicitors or barristers stand out; the limitations relative to the business structure and, especially, those referring to multidisciplinary practice; as well as restrictions in the subject of advertising and fees. In the auditing area, the norm that requires the auditing corporations' partners and directors to be auditors is denounced, as are limitations on advertising and that which prohibits receiving commissions for referring clients to professionals. Finally, in the architecture area, the restrictions related to the collective fixing of fees were especially stressed.

100. See *ADVERTISING BY THE PROFESSIONS – A REVIEW OF THE REMAINING SIGNIFICANT RESTRICTIONS*, 1986 (U.K.); *REVIEW OF RESTRICTIONS ON THE PATENT AGENTS' PROFESSION*, 1986 (U.K.); *RESTRICTIONS ON THE KIND OF ORGANISATION THROUGH WHICH MEMBERS OF PROFESSIONS MAY OFFER THEIR SERVICES*, 1986 (U.K.); *THE ADVERTISING AND CHARGING RULES OF THE PROFESSIONS SERVING THE CONSTRUCTION INDUSTRY*, 1986 (U.K.).

101. OFT, *COMPETITION IN PROFESSIONS 1*, (Mar. 7, 2001), available at <http://www.of.gov.uk/NR/rdonlyres/B08439C8-C5F6-4946-8AFF-71C050D34F46/0/or328.pdf>; LECG LTD., *supra* note 93, at 24.

The competition policy developed by the Monopolies and Mergers Commission and the OFT has provoked a deregulation process whose result has been the elimination of a considerable part of the existing restrictions on the professional services market, particularly those consisting in the collective fixing of prices or the limitation on advertising. All this, in spite of the fact that the implementation of the proposed recommendations by such entities in their numerous Reports has found difficulty, to a certain degree, from the fact that some competition restrictions find support in rules with legal ranking.

In spite of the above, the mentioned deregulation process has been manifested as much in state norm of legal and regulatory origin, as well as in the professional rules approved by the diverse professional organizations. In the first aspect, it must be pointed out that the British legislator and government have carried out substantial reforms directed at suppressing the competition restrictions contemplated in legal or regulatory rules. This way, for example, in the area of legal professions, it is worth noting the Courts and Legal Services Act of 1990¹⁰² and the Access to Justice Act of 1999,¹⁰³ by virtue of which a large part of the exclusive reservations of activities for solicitors and barristers is eliminated, stimulating thus the competition between these two professions, by creating areas of common performance; and suppressing existing legal restrictions regarding the multidisciplinary professional practice. As for the deregulation in the area of professional rules, it should be mentioned that the Law Society, the professional organization that regulates the main legal profession, solicitors, created in 1999 a Working Group called Regulation Review Working Party, with the assignment of revising the deontological rules contained in the Guide to the Professional Rules of Solicitors,¹⁰⁴ in order to consider the liberalization proposals carried out by the OFT. In this direction, in April, 2002, the OFT published a new Working Document in which it showed the advances accomplished in the twelve months past since the publication of the Report on professional competition, stating that significant advancements had been made since some restrictions had been eliminated and others justified, but at the same time manifesting its concern over the continuous existence of numerous restrictions lacking justification. In 2004 an independent review proposal carried out for the UK government recommended a reform of the regulation of the legal profession that would make *it less restrictive and more effective, by allowing new ways of*

102. Courts and Legal Services Act, 1990 (U.K.).

103. Access to Justice Act, 1999 (U.K.).

104. THE LAW SOCIETY, GUIDE TO THE PROFESSIONAL RULES OF SOLICITORS: 1999 (Law Soc'y Publ'ns 1999); *see also* The Law Society, *at* <http://www.lawsociety.org.uk/professional/conduct/guideonline.law> (last visited Apr. 10, 2005).

delivering legal services to the public. 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. Such *practices could be owned by the professionals involved or by third parties, such as banks, motoring organizations, or supermarkets.*

3. Italy

In Italy, unlike what has occurred in the Anglo-Saxon countries, the subordination of professional activity to Competition Law is a question that just began to appear strongly in the nineties' decade. Nevertheless, in these last years this question is provoking a wide debate, stemming especially, on one hand, from a Report elaborated in 1997 by the Italian working group about control of competition regulation; and, on the other hand, from a Law Project of reform presented by the Italian Government in 1998.¹⁰⁵

Until relatively recent, the most widespread opinion effectuated a clear distinction between professional and business activity, such that professionals were neither considered to be business enterprises, nor did they find themselves subject to the business enterprise statute and, certainly, not to competition regulation. This opinion found regulative support in articles 2229 through 2238 of the Codice civile (Civil Code), which submit professionals to a regime distinct from the one applicable to business enterprises, somehow excluding the subordination of the former to the latter's statute.¹⁰⁶

Nonetheless, the transformation professional practice has experienced lately shows us that, in a majority of cases, the professionals utilize organizational forms typically corporations, which has produced a coming

105. Regarding this debate, see 11 CARLO IBBA ET AL., *LE PROFESSIONI INTELLETTUALI* [THE INTELLECTUAL PROFESSIONS] (UTET 1987); Giorgio Oppo, *Antitrust e Professioni Intellettuali* [*Antitrust and Intellectual Professions*], RIVISTA DI DIRITTO CIVILE [RIV. DIR. CIV.] [CIV. L. REV.] 124, 124–27 (1999); Simone Morandi, *Applicazione ai Liberi Professionisti delle Norme a Tutela della Concorrenza e del Mercato e Legittimità delle Tariffe Professionali Inderogabili* [*Application of the Guardianship Rules of Competition and the Market to Liberal Professionals and Legitimization of the Unavoidable Professional Tariffs*], RIVISTA DI DIRITTO COMMERCIALE E DEL DIRITTO GENERALE DELLE [RIV. DIR. COM.] [COM. L. & GEN. L. REV.] 35, 35–40 (1999); Carlo Ibba, *Sulla Riforma delle Libere Professioni* [*On the Reform of Liberal Professionals*], RIVISTA DI DIRITTO PRIVATO [RIV. DIR. PRIV.] [PRIVATE L. REV.] 165, 165–84 (2000); Raffaele Lener, *Modelli di Comportamento Professionale e Organizzazione degli Studi nel Contesto Europeo* [*Models of Professional Behavior and Organization of Studies in European Context*], RIV. DIR. PRIV. 209, 209–20 (2001).

Between us, see Olavarria & Viciano, *supra* note 16, at 254–58.

106. CODICE CIVILE [C.C.] [Civil Code] arts. 2229–2238 (Italy).

together between business and professional activity. This situation is reflected in the new regulatory legislation of economic activity, which does not differentiate between business and professional activity. All of this has permitted affirmation of the existence of a trend toward the commercialization of the professions. For this reason, in actuality it tends to be thought that professional activity is a manifestation of the freedom of enterprise recognized in article 41 of the Italian Constitution.¹⁰⁷ In this same procession, the position that identifies professional activity as business activity is becoming less of a minority position, be that they qualify it as a civil enterprise or, even, directly as a commercial enterprise.

A point of inflexion in this evolution was the promulgation of the Italian Competition Defense Act, number 287/1990, of October 10, 1990.¹⁰⁸ Article 4.1 of this Act establishes that it should be interpreted in light of the principles of community competition rules, which requires acknowledgment of the broad concept of undertaking coined by the community jurisprudence and, therefore, also supposes that professional practice must be considered as a business activity to the mentioned Act's effects. In this regard, it has been affirmed that the undertaking concept welcomed by the community jurisprudence is not opposed to the one gathered by the Italian legislator in article 2082 of the Codice civile, which establishes that "someone that professionally exercises an economic activity organized with the purpose to produce or distribute goods or services is a business enterprise."¹⁰⁹ It would also, as such, deal with a broad concept, which would allow the incorporation of professional practice in its core. In any case, it has been alleged that, even if it were admitted that the Codice civile encumbers a restricted undertaking concept that excludes professional activity from its field, it would fit to defend that the legislator constructs diverse undertaking concepts, according to the concrete purposes it tries to attain in each case and, as for defense of competition material, it would have encumbered a broad concept that includes professional practice.

In this context, as it has been advanced, the Italian authority in charge of controlling the competition rules, the *Autorità garante della concorrenza e del mercato* (AGCM, Guarantee Authority of Competition and the Market), presented on October 9, 1997, a broad Report on competition in the professional sector, titled *Indagine conoscitiva nel settore degli ordini*

107. COSTITUZIONE [COST.] [Constitution] art. 41 (Italy).

108. Norme per la Tutela della Concorrenza e del Mercato [Norm for the Guardianship of Competition and the Market], Legge 10 ottobre 1990 n. 287 [Law No. 287 of Oct. 10, 1990], art. 4.1 (Gazz. Uff. Serie Generale n. 240, Oct. 13, 1990) (Italy).

109. C.C. art. 2082 (Italy).

and collegi professionali.¹¹⁰ In general, this Report proposes to the legislator to revise in depth the professional activity regulation, emphasizing that public transcendence of the aforementioned activity does not justify its exclusion from free competition.

In this Report, the need to liberalize the professional sector is justified when it is affirmed that, in the current context of globalization of the economy, the value of professional services imported to Italy is superior to those exported, circumstance that is explained not for the lack of professional resources in this country, but for the inflexibility of the Italian regulation of professions, which halts the development of professional activity and allows professionals from other countries with more flexible regulation to enjoy a competitive advantage in the exportation of their services. The Report illustrates that Italian regulation is particularly restrictive in comparison to that of other European countries, especially in regards to fees, advertising and professional corporations.

In the task of restructuring the professional regulation and the duties of the Professional Associations, the Report identifies the principal restrictions to competition contained in the above-mentioned regulation, and proposes criteria for their review. In order to accomplish this task, it carries out an exhaustive analysis referred to, as much as to the general aspects of professions as a whole, as to the divisional aspects relative to some of the most prominent professions, grouped in diverse categories: legal (notaries and attorneys), economic (mercantile experts and labor advisers), sanitary (pharmacists and doctors) and technical (engineers, architects and geologists). The following recommendations stem from said analysis:

- 1) The establishment of exclusive activities' reserves and mandatory professional associations must re-dress exceptional quality, admitting itself only when the activity affects interests of constitutional relevancy, such as health or justice;
- 2) In relation to the restrictions referred to regarding the entry into the professions, the entrance exams must be ruled by the principle of impartiality, the periods of mandatory practices must be accessible to all the possible candidates and it is unnecessary to establish a numerus clausus of people that can gain admittance to the profession;

110. L'AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO [AGCM] [THE SECURING AUTHORITY OF COMPETITION & THE MARKET], INDAGINE CONOSCITIVA [COGNITIVE INVESTIGATION], *Provvedimento n. 5400 (IC15) Settore degli ordini e collegi professionali* [Provision No. 5400 (IC15) *Sector of the classifications and professional associations*], Oct. 9, 1997 (Bollettino n. 42/1997) [hereinafter AGCM COGNITIVE INVESTIGATION No. 5400]. This report may be consulted at <http://www.agcm.it>, under: Tutela della Concorrenza | Indagini conoscitive | Anno 1997.

- 3) In reference to the restrictions relating to professional activity practice, it proposes to eliminate the legal authority of Associations to collectively fix the fees of their members; limit the object of deontological rules to the proper ethical aspects, excluding from the same the establishment of competition restrictions between professionals; reject the advertising prohibition, realizing it is an excellent source of information for consumers; and admit the professional practice in a corporate form and, especially, in capital-based corporation form, which allow the creation of structures of greater dimensions.

As consequence of the Report's publication about professional competition, dated July 3, 1998, the Ministers' Council approved a Legal Project delegating to the Government the restructuring of intellectual professions.¹¹¹ The *Relazione* (Exposition of Motives) that accompany this Project indicate that its objective is to establish general principles common to all the professions, principles that subsequently must be adapted to the particularities of every specific profession.¹¹² In spite of the fact that it distinguishes among the professions organized around Professional Associations (*Ordini professionali*) and those that are not, it is not indicated which professions should be constituted in Associations, nor which activities are exclusivity reserved to a certain profession.¹¹³ It is convenient to indicate that the above-mentioned *Relazione* affirms expressly that the Project tries to obtain the "elimination of all obstacles to competition between professionals."¹¹⁴ Due to all this, the Project delegates to the Government the regulation of professional activity and professional organizations (article 1) and it establishes the general principles that this regulation must take into account (article 2), among which must be emphasized the following ones:

- 1) Protection of the public interest, bearing in mind, on one side, the beginning of pluralism and competition; and, on

111. Progetto di legge n. 5092, Disegno di legge Delega al Governo per il Riordino delle Professioni Intellettuali [Law Project No. 5092, Law Design Delegates to the Government for the Reform of Intellectual Professions], July 9, 1998 (Italy), available at http://www.camera.it/_dati/leg13/lavori/stampati/sk5500/frontesp/5092.htm.

112. Progetto di legge n. 5092, Relazione [Law Project No. 5092, Relation], July 9, 1998 (Italy), available at http://www.camera.it/_dati/leg13/lavori/stampati/sk5500/relazion/5092.htm [hereinafter *Relazione*].

113. Economia Lavoro [Job Economy], *Ordini professionali* [Professional Associations], at <http://lavoro.economia.virgilio.it/categorie/?ccat=4134> (last visited Apr. 6, 2005).

114. *Relazione*, *supra* note 112.

the other side, the deontological principles referring to the personal character of professional services, the independence and the responsibility of the professionals;

- 2) Freedom of access, prohibiting the establishment of *numerus clausus*, except in professions that exercise public functions, and demanding that the practice periods be characterized by flexibility and efficiency;
- 3) Elimination of fixed and binding fees, with exception of the obligatory professional presentations;
- 4) Legal authority of Professional Associations to elaborate a deontological code;
- 5) Regulation of the professional corporations based on the limitation of participation of non-professional partners and the establishment of joint responsibility between the corporation and the professional partners; and
- 6) Abolishing the advertising prohibition directed at providing correct information.

It is interesting to emphasize that in this last rule a distinction is expressly established between professional and business activity (article 2.e), parting from the idea that the first one possesses some “intrinsic and prevalent” characteristics that distinguish it from the second one, although it is not identified what these characteristics are. In this matter, a relative comparison of these two types of activity is done by community authorities, affirming that the aforementioned comparison possesses an exceptional characteristic and comes motivated by specific purposes that do not answer to a systematic approach of the undertaking concept.

By request of the Department of Justice, on February 5, 1999, the AGMC issued a Report (*Parere*) on the Legal Project of the professional restructuring.¹¹⁵ In general, the mentioned branch is critical of the Project alleging that it fails to take advantage of the opportunity to carry out a true liberalization of the fundamental aspects of the professional services market, reason why it proposes a reformulation of the same in order to adapt it to the principles of competition rules. In concrete terms, among the aspects that are the object of the criticism, it is worth emphasizing the following ones:

- 1) It is opposed to the distinction between professional and business activity, recalling the community jurisprudence

115. AGCM, RIORDINO DELLE PROFESSIONI INTELLETTUALI [REFORM OF THE INTELLECTUAL PROFESSIONS] (Feb. 5, 1999). This report can be consulted at <http://www.agcm.it/tema0121.htm>, under: Tutela della Concorrenza | Pareri e segnalazioni – Cronologico | 05/02/1999.

- and the reference to the same contained in the Italian competition legislation;
- 2) It considers the Project to be excessively vague when it justifies the creation of Professional Associations, recalling also that the establishment of activity reserves and of Professional Associations must possess exceptional character;
 - 3) As it refers to the requirements of access to a profession, it criticizes that the Project does not sufficiently limit the different systems of access. This way, it does not establish the fundamental criteria that must inform the aptitude tests, does not limit the duration of the practice period, nor does it generally prohibit the *numerus clausus* fixing, after allowing it in case of professions that involve private practice of public functions;
 - 4) With regard to professional practice regulation, the AGCM is opposed to the collective fixing of fees, though they possess a merely orienting characteristic; it demands limiting the content of ethical codes to the aspects relative to correct professional practice, excluding precisely the dispositions that restrict free competition; it explicitly claims that advertising must refer to the types, characteristics and prices of professional services; it proposes to recognize a wide possibility of associated practices, expressly admitting multidisciplinary corporations; and,
 - 5) It objects to the absence in the Project of a reference to the incompatibilities in professional practice, demanding that all those not necessary be eliminated and proportional with regard to the aims they pursue.

Independently of the proposed legislation referred to, it must be said that the AGCM has emitted diverse Resolutions in which it applies the Competition Law to professional organizations, as well as to certain professionals. In this respect, the recent Resolution of January, 2000, must be emphasized, which sanctioned the *revisori contabili* (auditors) professional association and the main auditing associations established in Italy (Arthur Andersen, KPMG, Price Waterhouse Coopers, Deloitte & Touché and Ernst & Young), for carrying out restrictive conducts consistent with coordinating their performance in the market by, among other actions, the collective fixing of fees and distribution of professional assignments.¹¹⁶

116. Associazione Nazionale Revisori Contabili [National Association of Auditors], at <http://www.anrev.it/> (last visited Apr. 6, 2005); Arthur Andersen, at <http://www.arthurandersen.com/> (last visited Mar. 27, 2005); KPMG, at <http://www.kpmg.com/> (last visited Mar. 27, 2005); Price Waterhouse Coopers, at <http://www.pwcglobal.com/> (last visited Mar. 27, 2005); Deloitte & Touche, at

Likewise, it is worth highlighting that the AGCM, in exercising its power to propose to public authorities the approval of reforms in the rules containing competition restrictions, is proving to be remarkably active in relation to the professional sector; since it has carried out some proposals in this sense referring to access restrictions, activity reserve and fee fixation that affect diverse professions.

Conversely, the most recent Italian jurisprudence is geared in essence to confirm the evolution marked by the AGCM, in considering, to the effects of applying competition rules, that professionals are undertakings and professional organizations are associations of undertakings, without allowing the fact that such organizations developing public functions prevent the application of that norm. Regarding this should be mentioned the Judgment of the Appeals Court of Turin of July 11, 1998, relative to the collective fixing of attorneys' fees;¹¹⁷ the Judgment of the Appeals Court of Milan of September 29, 1999, referring to the anticompetitive performance of the *consulenti del lavoro* (council of labor advisers) consistent in inciting their members to boycott a private business enterprise dedicated to creating labor issues management programs;¹¹⁸ and the Judgment of Tar del Lazio of January 12, 2000, relative to fee fixation by the professional organization that groups *periti commerciali* (commercial experts).¹¹⁹

Before this situation, diverse professional organizations have begun to liberalize their deontological rules, eliminating especially the existing restrictions in the advertising field. This has been done, notably, by the Councils of Associations of attorneys, doctors, or architects.

4. Spain

In reference to the evolution of this issue in Spain, it is imperative to emphasize the position of the Tribunal de Defensa de la Competencia (TDC, Competition Defense Court) as true promoter and author of the proposition of antitrust regulation on professional practice.¹²⁰ The prominence of this Court has manifested itself as much in the impulse of the reform of the Professional Associations Act, as in the adoption of an

<http://www.deloitte.com/dtt/home/> (last visited Mar. 27, 2005); Ernst & Young, [at http://www.ey.com/global/content.nsf/International/Home](http://www.ey.com/global/content.nsf/International/Home) (last visited Mar. 27, 2005).

117. Corte app. di Torino [Appeals court of Turin], sez. I, 11 July 1998, n. 791, *Giur. It.*, available at http://www.foroeuropeo.it/art/tariffe_internet/torino1.htm (Italy).

118. Corte app. di Milano [Appeals court of Milan], sez. (session), 29 Sept. 1999, *Giur. It.*, (Italy).

119. Trib. Di Tar di Lazio [Tar of Lazio Tribunal], sez. prima, 28 Jan. 2000, n. 466, *Giur. It.*, available at http://www.foroeuropeo.it/art/tariffe_internet/tarlazio.htm (Italy).

120. Despite its name, the Competition Defense Court is not a judiciary authority, but an administrative one.

interpretation favorable to subordinating the professions to free competition.

In the first aspect, it must be recalled that the origin of the above mentioned reform is found in the Report this Court issued in 1992 titled Report on the Freedom of Professional Practice: Proposal to adapt the regulation on associated professions to the regime of free competition in force in Spain.¹²¹ In this Report, after carrying out an exhaustive analysis of professional activity from the perspective of free competition, the Court wrote an articulated reform proposal of the Professional Associations Act, in which it expressly declared the subordination of this activity to Competition Law and, distinctly, omitted the restrictions to the same related to fees, advertising, business structure and professional activity outside the territory of association.

After an intricate pre-legislative process, marked by strong opposition by professional organizations, Court's proposal was finally introduced by means of the Law-Decree 5/1996, confirmed later by the Act 7/1997, of liberalization of Professional Associations.¹²²

The crux around which this reform revolves constitutes of, undoubtedly, the general principle of submitting professional activity to Competition Law. Specifically, this general principle is formulated in the following terms: "[t]he practice of degree professions will be conducted in a regime of free competition and will be subject to, regarding the offer of services and fixing of remuneration, the Competition Defense Act and the Unfair Competition Act."¹²³ Nevertheless, the Act itself immediately limits the scope of this principle by establishing that "[t]he other aspects of professional practice will continue to be governed by general and specific legislation on the proper substantive classifications of each applicable profession."¹²⁴

On this point, it is fundamental to note that the current draft of Act 7/1997 is the result of a process of progressive watering down or diluting of the liberalizing content the initial proposal formulated by the TDC possessed, a process manifested through the legislative and pre-legislative

121. TDC, INFORME SOBRE EL LIBRE EJERCICIO DE LAS PROFESIONES [REPORT ON THE FREEDOM OF PROFESSIONAL PRACTICE] (1992), *available at* <http://www.tdcompetencia.es/otrosinformes/otrosinformes.asp> [hereinafter PROFESSIONAL PRACTICE FREEDOM REPORT].

122. Real Decreto-Ley [R.D.L.] [Royal Law-Decree] 5/1996, of June 7 (B.O.E. 1996, 139) (Spain), confirmed by the Ley Ordinaria [L.O.] [Ordinary Law] 7/1997, of Apr. 14 (B.O.E. 1997, 90) (Spain).

123. Art. 5.1 of R.D.L. 5/1996 of June 7; art. 5.1 of L.O. 7/1997 of Apr. 14.

124. Art. 5.1 of L.O. 7/1997 of Apr. 14.

reform procedures and that, to a great extent, is the product of pressures from professional organizations.

In spite of this, it should be mentioned that, after Act 7/1997, other liberalizing content reforms have been approved. In this respect, it is worth emphasizing the package of liberalizing measures approved by the Government on June 23, 2000, in which are incorporated, among other measures, the potential of single professional association eliminating the territorial barriers such as economic consideration, the admission of applying discounts to notary tariffs and the explicit declaration of real estate intermediation as a free activity not reserved exclusively to any profession.¹²⁵

An eloquent example of the trend to project competition regulation on professional activity is constituted by the new General Statute of the Spanish Legal Profession that the Government has approved recently by means of Royal Decree of June 22, 2001, published in the State's Official Journal, number 164, of July 10.¹²⁶

The new Statute expressly recognizes that the legal profession is exercised "in a system of free and fair competition" (article 1) and, consistently with that, eliminates some of the principal competition restrictions contained in the Statute of 1982, especially on fees (article 44), advertising (article 25), professional corporations (articles 28 and 29) and single joining of a professional association (article 17).¹²⁷

The second manifestation of the TDC's leading role in professional liberalization resides, as has been advanced, in this body's adoption of a favorable interpretation of the subordination of professionals to competition freedom. This interpretation is what has made possible that the Court's doctrine on the subject experience a tremendous evolution that has come marked by four stages distinguished by the following features: the first by the Court's stagnation, the second by adopting a broad interpretation of legal exemption, the third by accepting a strict interpretation of said exemption and the fourth by activism favorable to the application of antitrust rules.

125. R.D.L. 6/2000, of June 23 (B.O.E. 1996, 151) (Spain). See Consejo General de la Abogacía Española [General Council of Spanish Law], *Código Deontológico* [Deontological Code], Aprobado por el Pleno del Consejo General de la Abogacía Española de 30 de junio de 2000 [Approved by the Plenary session of the General Council of the Spanish Law of June 30, 2000], available at http://www.cgae.es/textos_leg/estatuto/cod_deont.htm; see also Teresa Saintgermain, *La Clasificación Urbanística del Suelo tras las Medidas Liberalizadoras Adoptadas por el Gobierno Español* [The Urbanistic Classification of Grounding after the Liberalizing Measures Adopted by the Spanish Government], INFORMACIÓN JURÍDICA, ECONÓMICA Y FISCAL [INJEF] [JURID., ECON. & FISCAL INFO.], July 21, 2000, available at http://www.injef.com/revista/urbanismo/c_000721.htm.

126. R.D. 658/2001, of June 22 (B.O.E. 2001, 164) (Spain).

127. *Id.*; Arts. 17, 25, 28, 29, 44 of the R.D. 2090/1982, of July 24 (B.O.E. 1982, 210) (Spain).

Thus, the first stage, which covered the period when the Act of repression of restrictive competition practices of 1963 was in force, is characterized by the scarce number of Resolutions the Court examined on this subject and the fact that in all of them it rejected the existence restrictive competition acts.

The second stage, which lasted during the first years the Ley de Defensa de la Competencia (LDC, Competition Defense Act) of 1989 was in force, is also characterized by the scarce cases submitted to the TDC, but is distinguished by the fact that the Court considered the restrictive conducts to be protected by the legal exemption contained in article 2.1 of the LDC in all the cases.¹²⁸

The third stage, which would begin from the 1992 publication of the Report on the Freedom of Professional Practice, involved a drastic change of direction with regard to the previous stage, because the Court accepted a strict interpretation of the mentioned exemption, which allowed the emission of the first Resolutions sanctioning the execution of anticompetitive conducts by Professional Associations.¹²⁹

Finally, the fourth stage, which would when Law-decree 5/1996 and Act 7/1997 came into force, is characterized by definitively consolidating the TDC's position and motivating control policy of the anticompetitive legality of professional association's performances, which has translated into a high number of Resolutions on the subject and the frequent imposition of sanctions on Professional Associations.¹³⁰

The analysis of more than sixty Resolutions emitted by the TDC regarding professional practice allows us to make numerous conclusions not only legal, but also sociological. Here I will limit myself to commenting on a few of the most outstanding. From a sociological perspective, it is worth emphasizing the following ones:

First, the Resolutions affect a wide span of professions, which encompasses legal professions (attorneys, barristers, administrative solicitors, notaries and commercial notaries); technical professions (architects, riggers and engineers); medical professions (doctors, dentists, stomach specialists, opticians, qualified nurses and veterinarians); as well as professions related to the real estate area (real estate agents, administrators and experts).

Second, certain professions exist that have especially suffered harassment from the TDC. Principally, and without a doubt, the architects, who have been the object of more than twenty Resolutions, relating in most

128. Art. 2.1 of the Ley de Defensa de la Competencia [LDC] [Competition Defense Act] 16/1989, of July 17 (B.O.E. 1989, 170) (Spain).

129. See PROFESSIONAL PRACTICE FREEDOM REPORT, *supra* note 121.

130. R.D.L. 5/1996 of June 7; L.O. 7/1997 of Apr. 14.

cases to diverse categories of restriction to freedom of fee fixation. In continuation, in a prominent place, we find the real estate agents, who along with real estate experts and administrators, have been the object of more than ten Resolutions relating in most cases to restrictions in terms exclusive activity reservation. Finally, attorneys must also be mentioned, who have six Resolutions, relating to diverse restrictions on advertising, performance outside the territorial area of association and activity reservation matters.

Third, and in relation to the type of restriction, it is worth emphasizing that the most frequent restrictions have been, with differences, those related, directly or indirectly, to the freedom of fee fixation. In this matter, approximately thirty-five Resolutions have been detected, more than half of the total enacted Resolutions. The affected restrictions vary significantly: collective fixing of fees, conditioning project visas to the satisfaction of professional associations' fee rules, mandatory collection of fees through Professional Associations, conditioning project permits or authorizations to the pre-payment of fees, etc. The remaining Resolutions are uniformly distributed among different restrictions, which stand out those relative to activity reservation, advertising, associate practice or to performance outside the field of association.

IV. CRITICAL REVIEW OF PROFESSIONAL REGULATION

Once analyzed the trend, in the national and international arena, toward subordination of professional activity to the free competition norm, in the following pages I develop a critical review proposal of professional regulation directed at eliminating all those competition restrictions that lack justification. With this purpose, I examine the economic rationality that justifies the existence of the mentioned regulation, to later propose a series of general criteria on which to review the legitimacy of competition restrictions contained in the regulation, in order to deactivate all those restrictions that do not adequately answer the mentioned general criteria.

This review proposal has as addressees, on one side, the regulators, be they public powers (state or autonomic), professional associations, in their function to establish, modify or eliminate generic categories of competition restrictions; and, on the other side, the authorities that apply the regulations to the professions, referring specifically to the authorities that control the competition regulation, in their function to supervise the adequacy of certain competition restrictions.

A. Economic Rationality of Professional Regulation

1. Market Failures of Professional Services

Traditionally, the exclusion of professional activity from the application area of competition rules has justified itself through fundamentally spiritual arguments, based on the intellectual and personal character of the furnishing of professional services, in the altruistic and disinterested character of such furnishing, in that the services cannot be estimated, in the confidential relationship that originates between client and professional or in the profession's deontological values, among which dignity and honor stand out.

Nevertheless, the regulation of professional activity, and especially, the establishment of competition restrictions in the regulation, possesses an economic justification.¹³¹ The purpose of this regulation is to correct the risks that market failures be produced that reduce the quality of professional services. These failures can be grouped in two categories: the existence of informative asymmetries and the generation of externalities.

131. Regarding this approach exposed here on, inspired in the Legal economic analysis, in American literature, see George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970); Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & ECON. 67 (1973); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 THE J. POL. ECON. 1328 (1979); R. C. O. Matthews, *The Economics of Professional Ethics: Should the Professions be More Like Business?*, 101 THE ECON. J. 737 (1991); Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579 (1992); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105 (1995); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965 (1997); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L. J. 375 (1997); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998).

See also the following Reports on professions and competition in the international arena: REGULATORY REFORM REPORT, *supra* note 10; COMPETITION IN PROFESSIONAL SERVICES, *supra* note 10; LECG LTD., *supra* note 93; COMPETITION IN PROFESSIONS, *supra* note 101; AGCM COGNITIVE INVESTIGATION No. 5400, *supra* note 110.

Between us, see CÁNDIDO PAZ-ARES, EL SISTEMA NOTARIAL: UNA APROXIMACIÓN ECONÓMICA [THE NOTARY SYSTEM: AN ECONOMIC APPROXIMATION] 67 et seq. (Colegios Notariales de España [Notary Colleges of Spain] 1995); CAMPINS VARGAS, *supra* note 1, at 148–65; Francisco Marcos, *La Lucha Contra las Restricciones a la Libre Competencia en el Mercado de Servicios Profesionales* [The Struggle Against the Restrictions to Competition Freedom in the Professional Services' Market], GJ, May–June 2002, No. 219, at 22–35, *passim*.

a. Information Asymmetries

The informative asymmetries have their origin in the conflict of interests that arises in the relationships between the professional and the client. In the economic theory terminology, these relationships constitute a typical agency relationship, in which the client (principal) entrusts to the professional (agent) the management of his interests. In this type of relationships transaction costs are generated named agency costs, which are those the principal must incur to avoid the agent's opportunist conduct acting in self-interest and to the detriment of the principal. In this context, the relationship between professional and client is characterized by generating some high agency costs as consequence of the informative asymmetries that arise in this relationship. Certainly, these asymmetries are not exclusive of the professional services sector, but in this sector, they are manifested in a particularly intense form.

In effect, in the professional relationship the client generally has an enormous difficulty to assess the quality of the professional services offered to him, even after having acquired the services. Professional services consist in the application of certain knowledge to a concrete case making it very difficult to measure the result, bearing in mind the individuality of the professional and specificity of the case, which does not allow a standardized assessment of the results. Said differently, the existing relationship between the activity developed by the professional and the result obtained by him often cannot be predetermined. Thus, for example, in spite of making the best effort, the best doctors cannot cure all the patients, nor can the best attorneys win all the litigations. In principle, the only way to calibrate such services would be to submit them to the evaluation of another professional requesting a second opinion, but it is obvious that this mechanism would increase enormously the cost of services. For this reason, professional services tend to be included within the category of the denominated credence goods.

This informative disparity places the client in a weak and dependent position with respect to the professional, which may end up provoking market failures consisting in a reduction of the quality of professional services. First, the difficulty of the clients to assess the quality of services drives the selection of the professional, not based on quality, but rather on price, since the latter turns into the only element simple to value for the client. This circumstance is a disincentive to professionals to differentiate themselves from the rest based on quality and leads them to center only on price as the competitive factor, forcing them to reduce the quality to stay in the market, which leads to a situation where the average quality of professional services is reduced, turning into what is called "market for lemons," that is, a destructive competition situation consisting in a

reduction of prices that generates a reduction in the quality of services. Second, the client's inability to measure the quality of services can entice the professional to provide more services than those truly necessary with the sole purpose of increasing their income. Finally, everything discussed above leads consumers to reduce their consumption of professional services.

b. Externalities

On the other hand, the second category of market failures that may arise in the professional services sector are external, that is, the effects that providing these services can generate over third parties not directly involved in the relationship between the professional and the client. This risk is based on the fact that the professional bilateral relationship tends to be, in reality, more complex and conflicting, because it infringes its effects on third parties, which can turn it into a multilateral relationship.

These externalities arise specially when providing professional services not only constitutes a private activity, but also constitutes subsequently of simultaneously a total or partial public activity, or possesses a great public transcendence.

The first case is of those mentioned above where private practices with a public function or civil servants and, essentially, notaries and registrars, were denominated. All those professions narrowly linked to essential public values such as justice or health, particularly, constitute the second case attorneys and doctors.

A significant example of this second category of professional activity is the furnishing of auditing services: the audited company may be tempted to reduce costs by soliciting from the auditor a service of lower quality, which may have a negative impact on the company's creditors or investors, which will lack a trustworthy information source about the company's economic situation.

2. Corrective Mechanisms for the Market Failures

a. Regulatory Mechanisms

As has been advanced, professional regulation fulfills the function of avoiding the risks that market failures will take place in the shape of informative asymmetries or externalities, thus guaranteeing a minimal level of quality of professional services. Hence, first, the requirement of title documents guarantees the professional possesses the necessary knowledge and skills in order to engage in the professional activity. Secondly, the delegation of control powers to Professional Associations, specifically regulatory and disciplinary powers, constitutes subsequent mechanisms to

guarantee the quality of professional services. This way, the Associations have among their functions, on the one hand, to structure the profession by establishing access systems to the same and approving deontological codes of conduct and, on the other hand, sanctioning eventual breaches of the specific structure rules, sanctions that may inclusively consist of the temporary or definitive expulsion from the market. The power to structure the professions allows imposing minimal standards of quality on the professionals in defense of the clients, whereas the disciplinary power allows sanctioning those who fail to fulfill such standards.

An this point it should be recalled that the adopted regulation model could be based on a partially alternative formula consisting of the assumption by the proper Administration of the mentioned regulatory and disciplinary powers presently assumed by the Professional Associations. The Professional Associations' formula, contrary to the Administration's, presents as advantages greater sensibility of the professionals to the peculiarities of every specific sector and minor control cost, which is assumed by the professionals. Nevertheless, the disadvantages of this formula center on the risk that a protectionist attitude could turn the protection of general interests into sufficient pretext to allow the defense of particular interests of professionals.

b. Non-regulatory Mechanisms

Professional regulation does not constitute the only mechanism with which to confront the risk of failures that take place in the professional services market. Therefore, non-regulatory mechanisms must also be considered, among which stand out the acquisition or perpetuation of a good reputation in the service market, the client's interposition of a civil liability lawsuit for damages caused by the professional, the professional's guarantee proffers, the public dispersal of information about the quality of the professional services via consumer publications of these services and assignment distributions among diverse professionals in order to confirm their quality.

Nonetheless, these mechanisms present certain disadvantages that make them less effective than the regulatory method, disadvantages that are especially serious in the cases of complex professional services, whose quality results difficult or impossible to evaluate before their acquisition, and with regard to consumers who lack information and do not possess resources to control the quality of services.

This way, first, it is true that the professionals' reputation poses an enormous incentive to provide quality services, because the consequence they face otherwise is not limited to the loss of the client they are dealing with, but the eventual future clients who will cease to be attracted by the

reputation. Regardless, this mechanism does not effectively guarantee that the professionals will always provide their services with a quality standard marked by their reputation, which may cause irreparable harms to the clients who suffer this circumstance.

Secondly, though the civil liability lawsuit certainly offers compensation to clients who suffer harms because the services provided were of low quality, this mechanism presents diverse limitations. On the one hand, it operates a posteriori (subsequent), which in principle only projects its effects on the supposed points where the harm effectively occurred. And, on the other hand, it possesses a high cost, which is a disincentive for its use in cases, certainly numerous, where the generated damages are lower than such cost. Definitively, lawsuit liability, based on a compensation that operates a posteriori, results less effective at the time of adequately enticing professionals to maintain the quality of their services than professional regulation, based essentially on the use of preventive mechanisms that act a priori (before).

Thirdly, guarantee proffers by professionals, as well as the disclosure of information about the quality of the professional services also present some limitations and, especially, the aforementioned difficulty of valuing professional services in view that generally they do not constitute services that are provided in standardized or uniform manner, but rather will depend on the concrete circumstances of each case. Besides, these mechanisms can represent an extraordinarily high cost for small-scale professionals.

B. Review Criteria of Competition Restrictions

1. Pro Libertate (pro liberty) Principle.

Professional regulation should come inspired in the pro libertate principle. As mentioned above, this principle is based on the constitutional regulation of professions and, concretely, on a joint interpretation of the rules that contemplate professional freedom (article 35 Spanish Constitution, SC), enterprise freedom (article 38 SC), as well as Professional Associations and qualified professional practice (article 36 SC).¹³² The pro liberate principle is reinforced, further, by the constitutional recognition of freedom as supreme value of the legal system (article 1 SC).¹³³

The principal consequence of the vitality of the pro libertate principle in professional activity resides in the fact that freedom, as governing principle of the mentioned activity, constitutes the general rule and, therefore, should be interpreted broadly; whereas freedom limitations constitute

132. In this respect, see Olavarria & Viciano, *supra* note 16, at 208–16.

133. CONSTITUCIÓN [C.E.] [Constitution] arts. 1 (Spain).

exceptions to said general rule and, in consequence, should be subject to a strict interpretation. Specifically, regarding competition restrictions in professional practice, the pro libertate principle implies that, in general, professional activity must progress in a system of broad and complete competition freedom, and that any restriction to it must be considered as an exception subject to a strict interpretation.

As constitutional jurisprudence has expressly recognized, the exceptions to the freedom principle contained in the professional regulation and, especially, the restrictions to competition freedom in professional practice, are essentially subject to two limits that are analyzed next: a formal limit, the legislative reserve, and the public interest satisfaction.

2. Limits on the Exceptions to the Pro Libertate Principle

a. *Formal Limit: Legislative Reserve*

As has been mentioned above, the constitutional rules that deal with the professions expressly demand that their regulation be embodied in norms that have a legislative status (articles 35, 36 and 38, in connection with article 53.1 SC).¹³⁴ Such as has been recognized by the Spanish Constitutional Court, this legislative reserve does not exclude the legislator from referring to regulatory rules, although it prevents that such a reference make possible "an independent regulation, and not clearly subordinated to the law."¹³⁵ For this motive, the legal references or qualifications to regulatory authority must limit this authority's practice to a mere "legal regulation complement."¹³⁶

The projection of these ideas on competition restrictions in professional practice unavoidably leads to the conclusion that these restrictions must be established, whether in a legal norm, or in a regulatory norm (for example, professional), which possesses what the constitutional jurisprudence calls "sufficient legal qualification."

In this respect, the fact that the legislator explicitly attributes to the Professional Associations the function of organizing the profession (article 3 LCP) does not legitimize the establishment of competition restrictions by these organizations, because it refers to a legal qualification of generic character, which in some way can be sufficiently understood, by virtue of the above-mentioned strict interpretation to which the exceptions to the

134. C.E. arts. 35, 36 & 38, in connection with C.E., art. 53.1 (Spain).

135. STC, July 24, 1984 (B.O.E., No. 83/1984), sec. II, para. 4 (Spain).

136. *Id.*

freedom principle must be submitted regarding professional regulation.¹³⁷ Thus, the Professional Associations must possess a specific legal qualification to be able to legitimately limit competition freedom in professional practice. By virtue of the strict interpretation mentioned, in case of doubt whether a specific restriction is protected or not by a sufficient legal qualification, it must opt to consider such qualification does not exist.

This strict interpretation has been expressly received by the TDC in the prosecution of restrictions contained in association rules, by negating the existence of sufficient legal qualification when such restrictions were not protected by a legal norm. Going farther still, the legislator has recently taken this interpretation to its maximum severity. In effect, the *Ley sobre Colegios Profesionales* (LDC, Act on Professional Associations) 1999 reform has limited the field of restrictive competition conducts exempt from prohibition solely to those that ensue “from the application of a Law,” eliminating the clause that allowed restrictive conducts carried out in virtue of “regulatory dispositions dictated in application of a Law” (article 2.1 LDC) to be consider exempt.¹³⁸

b. Material Limit: Public Interest

As has been established by the constitutional jurisprudence, the professional regulation, whether it is contained in a legal or a regulatory norm, must be based on criteria of public interest. Nonetheless, neither the Constitutional Court, nor the jurisdictional bodies have accurately outlined the content of this material limit referring generically to the public interest.

In relation to the competition restrictions contained in the professional regulation, and as the TDC has expressly recognized in its 1992 Report, the mentioned public interest is essentially manifested in the idea of guaranteeing the quality of professional services, with the goal to protect consumers from said services against the risks that the aforementioned market failures arise.¹³⁹ Nevertheless, to determine if a specific competition restriction is justified or not by the mentioned public interest requires a complex valuation that could be named quality test and is described in the following paragraphs.

First, however, it suits to mention that the public interest requirement flatly excludes professional regulation directed at introducing competition restrictions with the purpose to protect the professionals private interest and, particularly, those which consists in limiting competition with the aim

137. Art. 3 of the *Ley sobre Colegios Profesionales* [LCP] [Act on Professional Associations] 2/1974, of Feb. 13 (Directorship), (B.O.E. 1974, 40) (Spain).

138. LDC of July 17.

139. PROFESSIONAL PRACTICE FREEDOM REPORT, *supra* note 121.

to grant professionals a monopolizing privilege that allows them to appropriate benefits derived from the exploitation of this privilege, the so called monopolistic revenues, thus transferring the consumers' wealth to the professionals. Despite the fact that Professional Associations are legitimized to defend their members' private interests, this circumstance does not authorize them to use their normative power to restrict competition to the benefit of the professionals and to the detriment of the consumers.

V. CONCLUSIONS

Professional activity subordination to competition regulation today is an irreversible phenomenon. This phenomenon has caused the strong regulation to which traditionally the said activity is subjected to being the object of a liberalization process, aimed at eliminating competition restrictions that lack a justification based on public interest criteria.

Even so, this liberalization process is encountering serious obstacles because of the radical opposition from some professional associations, which intend to preserve the competition limitations in professional practice. In a good part of the cases, these limitations have as the only justification the safeguard of private interests consisting of conserving traditional privileges, without there actually existing public interest reasons that allow justifying their preservation.

International experience demonstrates precisely the enormous evolution this theme has experienced, especially in the last decade, and, at the same time, the numerous advances that are yet to be achieved. The most palpable evidence of this situation is constituted by the fact that, even in the countries most advanced on this theme, in which the liberalization process has been in effect for more than thirty years, there are still numerous restrictions on competition freedom that continue to exist and lack any justification.

In consequence, the tension between the regulatory tradition and the liberal trend cause this theme to be a complex and polemic issue in which there is still a long path to cover.

In Spain, the liberalizing trend is very recent. Though, at first, the regulatory framework favored such trend, it has been implemented gradually, motivated to a great extent by the progressive interpretation accepted by the majority of the competent jurisdictions, beginning with the Constitutional Court, and continuing with the courts of civil and litigious-administrative jurisdiction.

At this point, it is worth emphasizing the importance of the TDC, which at all time has developed an aggressive policy in favor of professional activity liberalization. The symbol of this policy is, undoubtedly, the Report on this subject elaborated in 1992 by the TDC. Immediately after

this Report, the TDC, on one side, motivated the reform that finally ended in the promulgation of Act 7/1997, Professional Associations' liberalization; and, conversely, it drastically modified its doctrine, accepting a broad interpretation that has allowed it to supervise with maximum energy the fulfillment of the competition rules in the professional arena.

Nevertheless, the liberalization motivated by the TDC possesses significant limits. On one hand, the ambitious reform proposals formulated by this Court were accepted by the legislator, but only after submitting them to a dilution process of its liberalizing contents, at the request of some of the professional organizations. On the other hand, the TDC's supervision is exceedingly limited by the legal protection that some of the most significant competition restrictions still preserve.

In this context, the present study proposes to carry out a critical review of professional regulation, with the goal of eliminating all those competition restrictions in the professional sector that are not based on the public interest. This critical review is structured, essentially, around a general evaluation criterion denominated quality test. By virtue of this criterion, the competition restrictions constitute exceptions to the general principle of competition freedom and, as such, can only be admitted if they possess a justification, of which necessity and proportionality must be evaluated in strict terms and argued on the base of a casuistically and empirical analysis. In particular, the reasons that allow justification of the competition restrictions consists, fundamentally, of the need to guarantee the quality of the professional services in benefit of the consumers and society in general, correcting thus the failures produced in the market for these services caused by the peculiarities of the same.

This review proposal has as principal addressees the regulators of professional activity, whether they are public powers or professional organizations, though especially to the latter, since they have in their hands the responsibility of exercising their functions in agreement with public interest criteria. Putting this review in practice would permit implementation of a second generation of reforms that would lead to deactivation of numerous competition restrictions that today are still in force, in spite of lacking any justification.

This review proposal is based on an irrefutable discovery: in the countries in which professional activity regulation has been characterized by greater flexibility, the growth of this activity has been superior to that of those countries characterized by greater inflexibility. This circumstance has turned the countries with flexible regulations into exporters of professional services and those with rigorous regulations into importers of such services.

The most eloquent example of this discovery is provided by the enormous success of the Anglo-Saxon attorneys' offices in the international

market. The greater flexibility of the regulation of professional corporations in the United States and the United Kingdom has favored the creation of large attorney firms characterized by their extensive competitiveness, which in turn has been one of the principal factors that explain why these two countries are the major exporters of legal services. On the other hand, the greater inflexibility of the regulation in continental European countries has enormously impeded the creation of large attorney firms and, hence, has favored the disembarkation of North American and British firms.

Unquestionably, time has demonstrated that the liberalizing policies, and not the protectionist ones, are the ones that truly favor the competitiveness of the professional sector, allowing with it that this sector grow and increase the quality of its services, all this in benefit of the consumers, of the professionals and, therefore, of the society in general.