

Competition Law and Lawyers – New EU trends applied to Spanish and Portuguese lawyers¹ –

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I – Introduction.-

Liberal professions, in general, and law practice in particular, are known for a strict traditionalism and a “hierarchization” in their contact with clients, which has allowed them to stay above the market and free competence defence rules. The lawyer, natural collaborator in the legal system, is a professional highly qualified in her/his field of knowledge, who holds an independence in the practice of her/his role and is bound, in most of the western legal systems, to three basic, concomitant or alternative, conditions: the obtaining of a professional title, the joining a professional organisation and the submitting to a set of specific rules applicable to practice, limiting or excluding certain activities in legal practice³.

The question of independence is one of the most discussed and less clear in practice, as these professionals can act as private service providers, or as employees for another lawyer or working for the Public Administration. More and more, lawyers are grouping into commercial firms, or even organising their activity with other professionals (psychologists, doctors, technical experts, documentalists, accountants, detectives, translators...). However, we must point out that the independence of the

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³ For the characteristic of liberal professions in general see, among others, SOUVIRON MORENILLA, J.M.: “La configuración jurídica de las profesiones tituladas en España y la CEE”. Consejo General de Universidades Secretaría General. Madrid 1988. For the concept of profession see ALBERTO LUIS, A profissão de Advogado e a Deontologia, lições policopiadas do Centro de Estágio de Conselho Distrital do Porto da Ordem dos Advogados, pp. 9 y 10., who defines it as “uma actividade exercida com base em conhecimentos teóricos adquiridos a través de um método científico e generadora da confiança proporcionada por quem tem autoridade para exercer, com acesso e exercício regulamentados em função do seu interesse público ou utilidade social e com subordinação a um código deontológico, imposto por uma associação que promove a cultura própria da actividade considerada”.

professional persists where the practice of her/his activity, in other words s/he keeps her/his freedom of judgement concerning the application of knowledge, proposal of evidence and the personal organisation of her/his work, which is intimately linked to her/his own responsibility towards the client⁴.

Their exclusion from the Trade Laws and Laws of Competition has been unsustainable for a long time. From the Law courts, Institutions and Doctrine, a voice of alarm has been raised. All professionals are included in the service sector and are a significant part of the market economy; recently one of those acquiring most force, specially due to the volume of business involved. Therefore they should be bound by the market rules, especially regarding competition. The lawyer, however, like medical professionals and some other liberal professionals, works with constitutional values, mainly the principle of Justice, which gives him/her a less economic, more liberal and human character, and affects her/his consideration in the market. Her/his role as collaborator with Justice is the lawyer's shield to confront the will of these institutions, specially the European Commission, to place her/him in the same "basket" as the rest of the services providers.

II - The lawyer as subject to law of competition.-

The classic paradigm of a lawyer is changing and with it her/his privileges. Traditionally, the liberal professions have been excluded from the sphere of trade law. They were seen more as a social phenomenon than an economic one, therefore they would neither benefit from "the market rules" nor be bound to its rules of competition⁵. The argument was solid: the personality of the professional is what guarantees the confidentiality with the client, something essential in all service provision. The legal activity is based on that personal character (*intuitu personae*), intellectual and independent, therefore professional practice should always be excluded from the trade

⁴ See also OLESTI RAYO, A.: *La libre circulación de profesionales liberales en la CEE*. Barcelona 1992, p.42. y ABELLAN HONRUBIA, V: "La libre circulación de profesionales liberales en la Comunidad Europea", *Gaceta Jurídica* 1988 D-9, pp. 189 and ff. The CJEC, in its Wouters sentence, of 19 February 2002, has also reinforced the character of the independence of the lawyer, faced with the external pressures, in interest of the client, and the obligation to professional secrecy.

⁵ SERRANO CAÑAS, J.M.: "Los profesionales liberales ante el Derecho de la competencia", *Rev. Derecho de los Negocios*, July-August 2001, pp. 17 a 28.

market⁶, reserved to companies and businessmen, not understanding this activity as commercial. Whoever offers professional services in the market, it was understood, is not offering commercial or industrial services, and is therefore, only bound by civil law; in consequence, escapes the rules of defence of competition. The VIII Conference of the Spanish Law Practitioners established that "it is difficult to admit, that European Lawyers are deemed economic agents (traders); and to include this trading concept and what it involves within the frame of the obligations derived from free legal assistance, as a practical effect of the constitutional right every citizen has to a free and independent defence"⁷.

However, the new forms of organization of the law practitioner, especially when s/he practises within a group, as well as consumers and users protection rules, have forced a reconsideration of this argument. The client, facing the lawyer, finds him/herself in a situation of inferiority, sometimes of weakness. Economists point out the reason for this situation in the so called **market failures** of professional services, i.e. the information asymmetries and externalities.

The first concept refers to the conflict of interests arising between client and professional when the former must evaluate the quality of the service provided by the latter, a matter that not only arises when the contractual relation begins, but even when this has already ended. In the choice of one or another lawyer, many factors might become involved (price, data given by other clients about the quality of the service, personal contact, even the gender of the professional), but all can be resumed in one: the confidence or credit (*credence goods*) inspired in the client by the professional⁸. If they are unable to evaluate *a priori* the quality of the service, they can neither compare the service nor price with that of other lawyers. This failure can reduce the quality of the service, only permitting law practitioners to be distinguished

⁶ Contributing to maintain this concept, the Codes of Commerce in Spain and Portugal which, focusing on the notion of act of commerce and tradesman, excluded the professional services from their sphere.

⁷ Speech III in the VI Conference of Spanish Advocacy, held in Salamanca in October 2003, p. 33.

⁸ For the importance of professional ethics and trust see GUEDES DA COSTA, O.: *Direito Profissional do advogado. Noções elementares*. Coimbra 2003, pp. 5 to 13, who reminds us that art. 2.2 of the EU Ethic Code for Lawyers states that the relations based on trust are not possible if there are doubts about the honesty, probity, straightfulness or sincerity of the lawyer, for whom these traditional virtues are professional obligations.

according to their pricing⁹. Remuneration would turn out to be the competition factor *per excellence* among professionals¹⁰.

¿How can these errors be overcome? There are different mechanisms. Some normative, such as qualifications, which guarantee a minimum quality, and adscription to professional associations, which binds the professional to a set of ethic and deontological rules, and to a disciplinary control; and other non-regulatory, such as: the obligation of providing guarantees or warrants; the profusion of legal links of the client with other lawyers (which would prove more expensive and would only be possible for "big clients"); a good professional reputation, or the production and distribution of information about service quality in reviews or periodicals aimed at consumers and users and, the enforcement of tort act against the negligent advocate¹¹.

On the other hand, the so called externalities include the effects providing a service can have on third parties not participating in the contractual relation between lawyer and client, such as the consequences of the notarial or registral activities over other parties or the guarantee of Justice as a public value and protected good. This factor, specific to legal professions justifies a special regulation of the legal practice.

These market failures will force us to seek a balance between the double condition of the lawyer as an independent professional and as businessperson, whether s/he acts individually or as a firm¹². Spanish law, following economic criteria, maintains a wide concept of enterprise, therefore the dividing line between a professional and

⁹ Long gone are the times when legal services were offered freely or in exchange for other goods. Today, the retribution of a lawyer is totally comparable to a price in the market economy and, therefore, it holds no special characteristics which exclude it from the application of rules of competition.

¹⁰ Some authors point out the danger of lowering the quality of the services offered, which could take us to a "market for lemons" situation, where competition, based on prices, excludes the best professionals. Vid AKERLOF, G.A.: "The market for "lemons": quality uncertainty and the market mechanism" en *Quarterly J. Econ.*, 84, 1970, p. 488; LELAND, H.E.: "Quacks, Lemons, and Licensing: a theory of Minimum quality Standards", *J. Pol. Econ.*, 87, 1979, pp. 1328-1345. As regards solicitors see., PAZ-ARES, El Sistema Notarial. Una aproximación económica, Madrid 1995, pp. 67 and ff.; and lawyers ALFARO J.: "Competencia desleal por infracción de normas", in *RDM* 1991, pp. 718-719.

¹¹ See the explanations given by CAMPING VARGAS, A.: *La Sociedad Profesional*, Madrid 2000, pp. 148 and ff. and VAZQUEZ ALBERT, D. *Derecho de la Competencia y Ejercicio de las Profesiones*, Navarra 2002, pp. 307 and ff..

¹² Vazquez Albert calls our attention to the double phenomenon experienced by legal professions in recent years: on the one hand, the *proletarianisation* of lawyers who practise under a working contract or as civil servants, and, on the other hand, the *societarisation*, with an ever increasing number of big law firms established under different legal company forms, *Derecho de la op cit.* pp. 53-54.

a businessperson is less clearly drawn, almost unperceivable¹³. In fact, Trade law contemplates the professional as a subject within its sphere¹⁴ and the Community law also holds a very ample concept of the enterprise in which the liberal profession can be included. In this sense it was interpreted by the Court of Justice of the European Communities in its Sentence of 23 April 1991¹⁵.

We understand that there is not only one concept of a professional, neither from a sociologic nor legal point of view. The institutions in charge of regulating law of competition do not usually consider the professional as subject to their rules until they confront the economic importance of the services they offer. In a recent report, published in February 2004, about competition in professional services, the European Commission estimates its relevance, even though they lack exact data on this sector, in a third of the employment included in the category "other services for companies", a category which every year increases its turnover figures¹⁶. An up to date example: the increase in the number of large law firms in Spain has been 8.68% in 2003, 3.32% less than in 2002, with a total turnover of 987,36 M¹⁷. Professional services play an important role in the development of competitiveness at a European level and they also have a direct influence on the consumers. Thus the insistence in liberalising and deregulating the professional services. The trend towards the inclusion of professionals in the sphere of the Law of competition was already supported by the

¹³ Spanish Tax laws include liberal professions in the Income tax and VAT sphere. (L 40/1998 Income tax regulation and L 37/92 VAT regulation) and labour law defines a businessperson as any individual or legal entity, or community of goods which receives the services of employees (arts 1 and 2 of the Workers' Statute, Reglament 1/1995, of 24 March). Commerce law doctrine describes it as that individual or legal entity who, on her/his own behalf acts as intermediary in the market, an entrepreneurial activity, usually aiming a profit. See JIMÉNEZ SÁNCHEZ, G.J.: *Lecciones de Derecho Mercantil*, Madrid 1999, p. 78.

¹⁴ See Law of Defence of Competition 1989, Law of Unfair Competition 1991, Law of General Contracting Conditions 1998 and General Law of Publicity 1988. For these norms it is indifferent who carries out the illegal act, as they are binding for any person acting in the market.

¹⁵ CJEC 23 April 1991, C-41/1990 Höfner / Macroton case, status that "the notion of business includes any entity which exercises an economic activity, without taking into account legal status or its financial sources".

¹⁶ We refer to the Communication of the Commission "Report on Competition in Professional Services", COM (2004) 83 to end, Brussels 9 February 2004 pp. 7 & 8. EUROSTAT (2002): *European businesses: facts and figures*.

¹⁷ See newspaper article "Los bufetes se estancan y crecen sólo un 8,68%", CGAE, General Summary, Publisher by Expansión 4 May 2004. The information offers the turnover ranking of the most important Spanish law firms in 2003.

national authorities in the European Union.¹⁸, but it is the European Union who is taking a stronger position in the regulation and adaptation of this sector to rules of competition. In addition, the Commission has proved that the Directives related to recognition of professional qualifications, in our case those which facilitate the free circulation of lawyers, is not having the success expected because lawyers still have to overcome market obstacles not only to establish themselves in a different country from the one where they have qualified but also when offering temporary or sporadic services. The aim is to attempt to create a single market without internal restrictions¹⁹.

Regulation 1/2003²⁰ relating to the application of rules on competition anticipated in articles 81 and 82 EUT which decentralize the application of the E.U. anti monopoly laws, concedes a more prominent role in the evaluation of the rules and regulations related to the professions to the national authorities on competition and the courts, permitting them to decide on the compatibility of an agreement, decision or practice within article 81 EUT. Since 1st May 2004, the date when this regulation came into force, these authorities work in coordination within the so called European Competition Network in such a way that the abovementioned precepts and their exceptions are established in a homogeneous way, harmonized in all the Member States. The Commission will continue to supervise and handle matters which transcend national limits.

¹⁸ In Spain, the Report of the Court of Defence of Competition on the free exercise of professions (proposal on adjust the rules on professional associations to the legal competition framework existent in Spain) June 1992, was the trigger to focus the policy to anti trust practices. VAZQUEZ ALBERT, offers a statistic note about the decisions which specifically punish the professional associations, describing the attitude of the Court has "harassment" of certain professions, in *Derecho de la...*, op cit, p. 151-152. Referring to lawyers, the CDC has ruled ten decisions on different restrictions on publicity, on reservation of activity, on activity beyond the geographical limits of Prof Assoc., or the *cuota litis* prohibition. The authorities of Denmark, Ireland, Netherlands, Finland and UK have also established, or are about to do so, a general programme of action to reform the sector. Most of the MS have treated protests and demands. See the EC press note IP/04/185 9 February 2004. In Portugal, however, the question has not even been planted before the authority for competition.

¹⁹ See Directive 98/5 16th February 1998, intended to facilitate the permanent exercise of the profession of lawyer in a Member State distinct from the one where the degree was obtained. EUOJ L 77 14th March 1998; Directive 89/48 21st December 1988 EUOJ L 19 24th January 1989 on recognition of higher education degrees which include a training period of at least three years; Directive 77/249 22d, March 1977 which regulates the free provision of services of lawyers EUOJ L 78 26th March 1977.

²⁰ Regulation (CE) n° 1/2003 of the Council 16th December 2002 relating to the application of the rules of competition provided for in articles 81 and 82 of the Treaty. DO 11 4th January 2002 p.1.

III. Restrictions to open competition in the Legal Profession.

In many countries preoccupation had already been expressed for the fact that professional rules had the direct or indirect effect of restricting competition in the service market, increasing prices and limiting variety and innovation in professional services²¹. What are these limitations? This section includes an analysis of possible restrictions to open competition laid down by the Lawyers Professional Association or put into effect individually by lawyers.

A. As regards prices.

1. - Price fixing and recommended prices.

Restrictions where professional fees are concerned, given the importance of price, is one of the measures which can most affect the market economy and which has greater repercussion on the users of legal services. The fixing of a range of professional fees, maximum and minimum, according to the legal activity was a habitual practice in the Lawyers Professional Associations which they justified as guaranteeing a better quality in the service provided, arguing that their elimination would produce a lowering of professionalism of lawyers. In Spain, as article 1.255 of the Civil Code establishes as regards contracts, the parties can agree on prices, so that the intervention of professional organizations in private relations, such as those lawyers establish with their clients, is, to say the least, an intromission. In addition, price freedom and open competition are aspects which force lawyers into a continual modernization and innovation of their activity, which undoubtedly leads to an increase in quality in favour of the client. The prohibition of the free establishing of professional fees was shown to be a mere plan to favour the interests of those already established in the market, and at the same time impeded the possible offers which new lawyers might wish to make, thereby limiting competition.

²¹ See Journal of Competition Law and Policy of the OECD n° 4 February 2002 "Competition in Professional Services" p.56-57

Article 44 of the General Charter of the Spanish Legal Profession²² has had to admit that "the amount for professional fees will be freely agreed between the client and the lawyer with respect to the deontological limits in rules of unfair competition". Nevertheless, as a supplementary measure and for want of an express agreement the associations agree price guide lines which can be applied equally in cases where costs are awarded to the opposite party. The Spanish legal system therefore, although not obliging or imposing, quantifies the price even if only to orientate the lawyer and support the judge or magistrate who awards costs. The lawyer is free to charge the amount suggested or any other considered appropriate, but s/he will always be subjected to the deontological rules on undue and excessive professional fees and to the regulations on unfair competition (acts of confusion or deceit about the services or prices of other lawyers, attentions which oblige the user to contract services, comparisons and denigration of colleagues...). The governing body of the Association where the lawyer is registered, as guarantor of professional rules, will be competent to adopt the disciplinary measures it considers opportune, and the courts will be responsible for resolving actions for breaking the rules of competition set before them.

The Charter once again provides orientation on the way to charge in the second part of Article 44: *"Said economic compensation can take the form of retribution, fixed, periodical or by the hour"*.

In the same way, Article 65 of the Charter of Rules for Portuguese Lawyers²³ outlines a system for establishing the cost of services but without fixing an exact amount. In other words, it orientates the way to establish the price without marking a *quantum* not even as a means of orientation. *"When establishing professional fees the lawyer ought to proceed with moderation, attending to the time spent, the difficulty of the process, the importance of the service, the possessions of the interested parties, the results obtained and the particularities of common practice and style in the area and forum"*. The price for arranging a divorce for example could vary considerably according to these variables. Contemplating as it does a free price, with only a call for

²² Approved by Decree 658/2001, 22nd June, BOE 10th July. Before the Law 7/1997 14th. April, on liberalizing measures in areas of land and professional associations, professional fees were fixed by the Associations and had an obligatory character. Once this law came into force the power of the Prof. Assoc. to fix minimum fees was eliminated, although they could establish them by way of orientation. The legislators thus erased from the rules of the Prof. Assoc. some restrictions, including the collective fixing of professional fees, the requirement of multiple inscription in Prof. Assoc. according to the court where they were to practice and the exclusion of the collegiate professions of law of competition.

²³ Approved by Law n° 80/2001 20th July which modified the earlier Decree n°84/1984 16th March.

moderation, the compatibility of this precept with the rules of competition is much more exact.

What is specified is that professional fees ought to be paid in cash (Art.65.2). Are payment in kind, permutation of services, shares in a company, or any kind of property or real estate, therefore, not permitted? Was the price not freely agreed between lawyer and client? There is no deontological rule which considers unworthy payment by means other than money, in fact this was what in the past professionals agreed especially doctors and lawyers. For this reason we understand that if a lawyer considers s/he has been paid with whatever the client has handed over (be this money or any goods or services) no inappropriateness, contempt or insult is shown towards the legal activity, and therefore agreement is being restricted, even though it is impossible to illustrate what effects this method of payment could have over competition. Given the present social culture it does not seem likely that returning to the primitive system of permutation of services or payment in kind is going to have a high repercussion on the profession, but to forbid it emphatically, obliging payment in money, does not seem very correct nor in line with the freedom of agreements proclaimed.

The Report of the European Commission of February 2004 on competition and professional services notes that Italy is the only country in the European Union which fixes maximum and minimum professional fees for its lawyers by ministerial decree. In practice, lawyers' tariffs are proposed by the Consiglio Nazionale Forense (CNF) and approved by the Ministry of Justice. This rule was taken before the ECCJ for its interpretation.²⁴ As results of a penal case related to the breaking of the Italian driving code, Mr. Arduino was ordered to pay costs of the opposing party's lawyer. The Judge who tried the case did not apply the tariff corresponding to the range of professional fees established in Italy for the lawyers' fees. Given that in Italy there exists two

²⁴ S. ECCJ 19th February 2002, Arduino, as. 35/99.

opposing tendencies in jurisprudence where the nature of said list is concerned²⁵, the Judge of Pinerolo placed before the Tribunal of Justice of the European Union the prior judicial question as to whether such list of fees is compatible with Community Law on competition. The chief lawyer Mr. Léger considered that the Decree by which the proposals of the Italian Council of Lawyers (CNF), as regards the list of fees, ought to comply with certain requisites given that it restricts competition in the market for legal services. Lawyers carry out their activities in a market of legal services for profit, and that consequently, they carry out in said Member State an economic activity as regards the Treaty. Thus is his opinion, they ought to be considered as businesses subject to the Community Laws of competition and the CNF should be comparable with an association of businesses. However, the ECCJ notes that the CNF limits itself to elaborating the range of fees and as such, lacks obligatory power. If the Minister does not approve the project it does not become valid and the previous approved list is applied. The liquidation of professional fees is decided at court and based on the criteria included in article 57 of the Decree, taking into account the importance and number of issues discussed. In addition, under exceptional circumstances, the court can, with a duly motivated decision, depart from the maximum and minimum amounts fixed in article 58 of the Decree, therefore it could not be accepted that the Italian State delegated in private operators the responsibility of taking decisions for intervention in economic matters, which would have the effect of depriving this rule of its official nature. It can neither be accused of the imposition of favouring acts against article 85 of the Treaty, nor reinforcing their effects. The ECCJ ends by stating that the Community Law is not contrary to " *a Member State adopting a legislative or reglamentary measure approved on the basis of a project elaborated by a council of professional associations of lawyers, fixing a maximum and minimum range of fees for the members*

²⁵ The Prefect of Pinerolo observes that in the Italian Judicial Organization there exist two opposing tendencies in jurisprudence as to whether the list of professional fees for lawyers approved by the Ministerial Decree n. 585/94, constitutes or not a restrictive agreement of competition with respect to article 85 of the Treaty (today 81 TCE). According to the first view, the characteristics of this national rule are analogous to the regulation of the tariff systems of Customs agents which was the subject of a sentence by the Court of Justice 18th June 1998, Commission/Italy (C-35/96, Rec. p. I-3851). The CNF is, from this point of view, an association of businesses in the sense of Article 85 part 1 of the Treaty and no legal disposition demands that criteria of general interest be taken into account when fixing the list of professional fees of lawyers. Consequently the judge is obliged to apply said list. According to the second view of jurisprudence, the list is not the result of a discretionary decision of the professional organization involved. The intervention of the public authority plays a decisive role in the phase of elaboration as well as in that of approval, thus the public authority does not delegate its power in private operators so that they can establish the list of fees themselves, which constitutes an infringement of article 85 of the Treaty.

of this profession, when this measure is adopted in the framework of a procedure as that foreseen in the Italian legislation".

The Report by the Commission goes a little further: "the recommended prices, as well as the fixed prices, can have an important negative effect on competition. Firstly, they can favour the pricing agreements between service providers. Secondly, they can confuse the consumer as to reasonable price levels"²⁶. The professional organisations, who offered their point of view at the Commission's request²⁷, consider that this guidelines as to prices has the aim to inform the consumer about the average costs of the services, serve as a negotiation criteria between the parties and as a guide for the lawyers who begin their professional career; arguments not accepted by the Commission, who alleged that consumers have other ways, less restrictive of competition, such as the publications offered by other independent organizations (e.g. consumers' associations) or the enquiries carried out on usual prices. With practice, professionals usually acquire the necessary experience to be able to quantify their services, drafting their fees table according to different factors.

Portugal, Austria and Spain are the Member States of the EU which fix the prices as recommended by their lawyers. Austria, in addition, establishes minimum prices, while Germany establishes maximum prices. Italy is the only State which regulates maximum and minimum prices. No Member State in the EU fixes concrete prices for these professionals.

What would happen if the prices were completely free? According to the lawyers, "the bad times suffered by some law firms during 2003 have given place to ridiculous situations when trying to gain a contract. The law firms admit there is an obvious price war". And they alert to the danger of the fact that: "clients know they can pressure, easily, in the price, to attain these services. However, they are not usually aware of the negative effect pressing for a lower price can have on the quality of the service received, as the work will not probably be carried out by expert partners"²⁸. This by applying market rules to pricing, as in any other enterprise.

2. - Ban on "*cuota litis*".-

A completely different question to the setting of a range of fees, is the restriction which, established by the Lawyers Charter, bans the fixing of fees according to results: the absolute *cuota litis* ban. (Art. 44 EGAE and 66 EOA).

²⁶ February Report 2004, apud cit, p. 13.

²⁷ See Working Papers of the Commission Services 27 March 2003. "Regulación de las profesiones liberales y sus efectos. Invitación a presentar comentarios".

²⁸ Vid "Los bufetes se estancan..." Expansión, 4 May 2004.

This subject has had a special repercussion in Spain, where the Constitutional Court fixed a 180,000• fine on the General Council of Lawyers, understanding that the article 16 of the Deontological Code of Law Practice, passed 30 June 2000, when forbidding, in any case, the *cuota litis* in the strict sense of the expression, was adopting a general decision which limits the autonomy of lawyers to establish their fees, with a view to and the effect of restricting competition among them²⁹.

The General Council had alleged that this ban intends to guarantee the independence of the lawyer, and avoid her/his "association" with the client, as well as avoiding sales at a loss, forbidden by the Law of Unfair Competition. Nevertheless, the Court responds that if the fees are agreed upon freely by the parties, the imposition of this banning hinders contractual freedom and the sale at a loss is only deemed unfair when it pursues the elimination of competitors in the market. And, in addition, the Court adds, "*when a lawyer takes charge of a case, i.e. in the moment of contracting the professional services, the results are uncertain and the costs unknown*". The independence of the lawyer, on the other hand, is not discussed by the Constitutional Court. What is argued is that the deontological code admits that the lawyer, if s/he has so agreed with her/his client and, in the event of winning a cause, might be paid according to the results (*cuota litis*), but it forbids such an agreement if the cause is lost. Therefore, the Court esteems it a mere restriction to the fees fixing, which damages the competition in the market, especially in the case of young lawyers who are starting in their professional career and could be open to charging fees which do not cover their costs when they do not win the causes they defend. This court decision was voted against by one of the magistrates and has been taken in appeal to the Audiencia Nacional, who has not yet decided on the sanction imposed.

In the meantime, the Spanish Supreme Appeal Court (Tribunal Supremo, TS) has given a sentence in the opposite sense³⁰. In the face of an appeal submitted by a group of lawyers from Elche (Valencia) who requested the nullity of the General Charter for Spanish Advocacy for different reasons, the Supreme Court decided, in those areas covered by this study, on publicity rules and the *cuota litis*. We will talk about later on

²⁹ Vid Constitucional Court sanctioning files, Decision File. 528/01, General Council of Advocacy. Article 16 of the Deontologic Code defines *cuota litis*, strictu sensu, as "*the agreement between the lawyer and her/his client, formal before the end of the larger case, according to which the client agrees to pay the lawyer only a percentage of the resulting gains in the resolution of the case, might it consist in an amount of money or any other profit, good or asset the client might obtain from the case*".

³⁰ See S SCA 3 March 2003, sala contencioso-administrativo, appeal n° 496/2001 (RJ 2003/2643).

about this. As regards the fees fixing, the Supreme Court understands that the limit established in the Charter should be deemed "lawful behaviour", as the Professional Associations Law authorises these to regulate their respective professions "watching over the ethics and respect to the rights of individuals". The lawyer establishes with her/his client a contract for the providing of a service, not for an activity or result, nor a entrepreneurial contract; therefore should not be charged with the risk any judicial procedure implies. If the agreement "if I do not win, I do not charge" were admitted, the lawyer would be acting in the frame of a contractual figure different from that of a service contract. And, concerning the rules of competition, it underlines that "...the least restriction on free competition involved in the *cuota litis* pact ban in its strictest terms, is sufficiently justified in Law due to the Fact that its admission would not only act against the dignity of the Legal Profession, but furthermore, it would blur the mere concept of this professional activity; and would not duly respect the rights of individuals, who, under certain circumstances, could see themselves drawn to act as mere instruments of the commercial behaviour of law practitioners". Therefore, it declares the validity of the prohibition in the Charter, contrary to the view of the Constitutional Court. The Supreme Court ruling, as that of the Constitucional Court, was voted against by one of the magistrates, who considered not valid the prohibition of one of the forms of payment of professional services which is commonly admitted and does not affect the independence of the lawyer "*but favours the effectiveness of the right to a defence and guarantees free competition*"³¹. The magistrate argues that nobody initiates a trial to claim an amount inferior to the fees which, in order to avoid the *cuota litis* ban, s/he should pay her/his lawyer; which is, in itself, a limitation of the access to Justice, and that the Charter of Legal Practice does not stop the lawyer from associating with her/his client, but only that such association should be in such a form as that the client would only be obliged to pay a percentage of the gains in the trial; on the other hand allowing it if there is a minimum payment. This is to say, an agreement of *cuota litis* is allowed, but not to its ultimate consequences.

We will have to wait for the ruling by the Audiencia Nacional, but, in the face of the Supreme Appeal Court ruling, it is foreseeable that the *cuota litis* ban may continue in a strict sense. Nevertheless, article 16 of the deontological Code of Spanish Legal Profession has been suspended following a decision of the General Council of Spanish Legal Profession on 10 December 2002.

³¹ The vote against the ruling was held by Magistrate Mr. Jesús Ernesto Peces Morate.

3. - The need of request or authorisation.-

The obligation of having to make requests or authorisations in order to substitute a professional, only possible after the payment of the fees to the lawyer contracted in the first place³², can also mean, in the view of the Commission, a restriction of free competition not only among lawyers, but also for the clients who, facing the obligation to pay someone who has not solved their problem, may think twice about trusting the lawyer they first contracted. Furthermore, the Charter imposes a duty of collaboration between law practitioners, obliging the substitute to "collaborate with diligence in the matter" of fees payment to the first lawyer.

The contract signed by the parties is a typical mandate and, in principle, is freely revocable by the parties involved. This, with a condition for one of the parties: the lawyer is free to accept or reject the defence of the case in any moment of the legal process, as long as it does not give place to defencelessness of the client. The change of lawyer requires a previous and written application to the lawyer who started the procedure, who cannot deny it and must provide the new lawyer with all the information needed to continue with the client's defence. The professional who leaves the case has in that moment a right to claim from the client the fees related to her/his service.

The application, though it cannot be denied, is a formal step which implies an authorisation by the first lawyer to the second, which includes an obligation to request or ask for permission to act among lawyers, which has no justification when who is ending the contract is the client. It has been the latter who has ended the mandate and, therefore, who can recover or claim all the documents, information and a report of the activity carried out by the lawyer who started the case, without the need for the second lawyer to request permission, authorisation or previous acceptance of the second mandate s/he is in charge of³³.

The Portuguese Charter of Legal Profession contemplates as one of the duties of a lawyer towards her/his client "*não abandonar o patrocínio do constituinte ou o acompanhamento das questões que lhe estão cometidas sem motivo justificado*"³⁴, but does not impose the communication between both lawyers. If it is the lawyer who ends the mandate and did not do so in due anticipation, it is s/he who should compensate the client for the prejudice s/he might suffer. This revocation can only be exercised with a justified motive, this is to say, for any reason or under any circumstance that

³² Art. 26 EGAE

³³ Art. 1.733 Spanish Civil Code: "El mandante puede revocar a su voluntad, y compeler al mandatario a la devolución del documento en que conste el mandato".

³⁴ Art. 83.1 j) EOA and 1.170 Civil Code.

might rend the relation client-lawyer unacceptable for both parties. The good faith criteria in an atmosphere of courtesy among lawyers would be applicable to the ending of the mandate.

A) Access to the legal practice and reserved rights.-

Except in Spain, in all other Member States there are established mechanisms of widening legal knowledge after the obtention of the title of Bachelor in Law and previous to the beginning of the legal practice, both as an independent lawyer or under a working contract. Sometimes it consists of a period of practice, and others in a test or exam. But, furthermore, almost all the Member States of the EU demand prior entrance into the professional associations or joining a professional organisation. These differences in access, together with the differences between the legal systems themselves, are what have hindered the process of recognition of lawyers' qualifications and the delay in the Directive about the establishment of European lawyers³⁵. Competition between European lawyers is practically non existent, focused only in large law firms with offices in several Member States.

In many cases, the restrictions to legal practice include reserved rights to render certain services, according to which only duly qualified lawyers can carry out certain tasks. The argument of guaranteeing quality of services on which this situation is based, is starting to be questioned. Law Courts and competition authorities are, generally, in favour of demanding a minimum qualification in order to practise the professional activity and offer services with a minimum quality, but they are more demanding regarding the restrictions of activity set for the legal practice.

³⁵ The Commission, on the basis of the principle of mutual trust has been passing Directives on the rights of establishing and service providing of different liberal professions. When dealing with the legal profession, it met with the problem of the different qualifications demanded in the different MS in order to use the professional title; therefore, it only regulated temporary legal practice, the offering of services (Directive 77/249). Later, in 1989, it decided to establish a general system for the recognition of qualifications (Directive 89/48) in which the right of establishment of lawyers was included. Nevertheless, this Directive, in practice, did not contribute to the development of a Single Market in legal services, given that it imposed compensation mechanisms which will reduce differences in qualifications among European lawyers, often real obstacles. Therefore, a specific regulation for the establishment of lawyers in a MS distinct from the one where they had obtained their qualifications, was necessary. (Directive 98/5). On the freedom of establishment and the free provision of services by lawyers, there exists a large bibliography. See for example: ADAMSON, H: Free movement of lawyers, 2^a ed. Butterworths, London 1998; BAENA DEL ALCÁZAR: La libre circulación de profesionales y su incidencia en España, Ministerio de Educación y Ciencia, Madrid 1987; MARTÍN BERNALD, J.M.: Abogados y Jueces ante la Comunidad Europea, Colex, Madrid 1990; VIÑUELAS ZAHINOS, M.T.: Libre circulación del abogado en la U.E.: trabajador por cuenta propia, trabajador por cuenta ajena, Tesis inédita, Universidad de Extremadura 2003.

This is to say, there is a minimum established for the access to practice, but once active, quality is taken for granted. A 1990 report by the USA Federal Commission for Trade, has shown that these restrictions have had an effect of increasing prices without increasing quality of the service³⁶. On the contrary, in some countries, the softening of the restrictions has taken to lower prices without a decrease in quality³⁷. The European Commission proposes in its Report a reduction of the conditions to access the legal practice when they are disproportionate in relation with the complexity of the activity and also a reduction of the tasks reserved to the different professions. This proposal finds the direct opposition of lawyers of all Member States, who jointly defend a highly qualified and controlled profession.

In Spain, due to the strong demand of a Law which could regulate the access to practice in a more qualified manner (remember that it is the only country in which one can access legal practice directly from University), a draft of a Law of access to Advocacy and Procurator is being prepared; which will include the creation of an accreditation system of professional skills, guaranteeing the qualification needed for correct professional practice. It will consist in an annual exam held by the Ministry of Justice with two parts: The first will be an exercise which might allow the candidate to show, in an objective way, sufficient practical training for the practice of her/his profession as a lawyer. The second will aim at guaranteeing the knowledge of ethics and professional rules. Nevertheless, this rule is still waiting to be passed. The only restriction concerning access could come from the obligation to pass the two courses of the Legal Practice School, which permits access to free Legal Assistance Office.

In Portugal, after obtaining the title of Bachelor in Law, a period of practice is obligatory, *estágio* (art. 159 and ss. EOA), with a duration of 18 months divided into two different periods: one of 3 months and another of 15. During the first stage the BLL gains deeper knowledge in matters already studied at University, and in the second, s/he starts her/his contact with legal firms, courts and other legal services. While s/he is in the first period s/he cannot practise law, except in her/his own cases, for ascendants

³⁶ Cox C. y S. Foster, "The Costs and Benefits of Occupational Regulation". Report by the Bureau of Economics of the Federal Commission of Commerce, 1990, pp. 26-27.

³⁷ See the Report of the Commission on competition and professional services p. 16, which analyzes 3 concrete examples: a) the suppression of rights reserved to Austrian lawyers for services related to the transmission of property and the monopoly of lawyers to act before the courts has lowered the global costs of legal services in 12%; b) the drafting of documents for transferring property by professionals who are not lawyers caused a reduction in prices in the '80s and c) in the Netherlands, the abolition of restriction of access to professional activity by estate agents meant an increase in new professionals, a reduction of prices for services, and a more flexible professional activity.

or descendents, and during the second period s/he can only practise with restrictions. In all this time, s/he must clearly indicate that s/he is acting as "*estagiário*" (art. 164 EOA). After this training period, the lawyer must pass a final test before a court. Only professors or former professors in Laws Faculties and Doctors in Laws are dispensed of undergoing the *estágio*³⁸.

Another practice seen as restrictive of competition is that which divides the market between lawyers acting in different geographical divisions. Territorial restrictions abolished in Spain after the Law 7/1997 of 14 April, of liberalisation measures concerning land use and Professional Associations, by which joining one territorial Association (in Spain there is one per province), which will be that of the main and legal working address, the lawyer can provide legal service in any part of the National Territory. Movements in order to act before courts in another province was until this hindered by the obligation to inform the Lawyers' Association in that province and to pay a fee, known as *habilitación*, so as to submit the lawyer's acts to the disciplinary and deontological control of the hosting Association. This fee, without any sense at all and which affected the fees paid by the client was abolished by the Decree 6/2000, of 23 June.

Instead of marking limits to the access of lawyers to practise, and in order to assure the quality of the legal service, it might be better to make the lawyer aware of the need to undergo a continuous evaluation of her/his skills. Law, as is the Society itself, is in constant evolution. The changes experienced by the different laws make it necessary to keep a constant updating process by the lawyer, and also drive him/her to a specialisation. Recognition of this specialisation can be guaranteed by the Legal Associations through the organisation of annual quality exams, which can show skills and qualification in concrete areas of knowledge. The lawyer, on a voluntary basis, could offer her/his specialisation in an official way and it would be an adequate form of assuring users the quality of their legal services.

Where reserved rights are concerned, the Spanish Supreme Court of Appeal, in its sentence of 2 June 2001, points out that article 436 of the Judicial Power Law does not give the lawyer "exclusiveness in legal assessment", "but it limits the use of the name and function of *lawyer* to Bachelors in law in charge of the guidance and defence of the parties in all kind of trials, or legal assessment or counselling, without giving them the monopoly of these services". Therefore, State Lawyers, Solicitors and

³⁸ See also the Regulamento dos Advogados Portugueses, approved in the Conselho Geral session of 7 July 2000.

Registrars advising Administration bodies, constitutional organs or the users of public services for the guarantee of legal trade of goods and services, as well as state agents and other professionals who council, as long as they make it clear that they are not Bachelors in Laws, can lawfully render this service without committing professional intrusion.

B) Restrictions on publicity.-

According to Economic Theory, publicity can boost competition. It serves not only to find clients, but also to inform the consumers about the services offered and allows them to take decisions with a stronger basis. Therefore, the restrictions on publicity can reduce competition, affecting in a negative way the consumer in her/his search for more competitive services (s/he cannot compare easily) and in her/his logical intention to overcome unbalanced information. Several Member States have eased the restrictions they used to impose on their professionals, either by mere adaptation to the new ways of making business, or following a court ruling. Publicity, in itself, if it respects the general rules concerning false and deceitful publicity, and it respects the principle of lawyer-client confidentiality, can contribute to develop legal services in a more modern and innovative way, even avoiding many trials in court. We must not forget that the lawyer is an important link in the chain of Justice, as her/his advice or counselling avoids, in many occasions, the presence of the parties in a trial. Her/his collaboration can accelerate the pace of Justice, or, at least, not hamper it³⁹.

In the EU, only Greece, Ireland and Portugal (art. 80 EOA) ban publicity for lawyers, while Austria, Belgium, France, Ireland (for legal advisers), Luxembourg and Spain (art. 25 General Charter of Spanish Legal Profession) keep important restrictions on theirs. The rest of Member States abolished these restrictions⁴⁰.

In Spain, as a starting point, the Defence of Competition Court admitted publicity restrictions for the legal services⁴¹, but in the new century it changed completely its view, fining with 180,000• the General Council of Spanish Legal Profession for the

³⁹ The GCSA itself launched an institutional campaign in the national media, to promote the services of lawyers in the income tax campaign, and another campaign launched with the slogan: "Have you considered that a lawyer can avoid you having to go to court?" in February and October 2002, respectively.

⁴⁰ Vid the table elaborated by the Commission in its Report about competition in the professional services sectors, loc. cit. p. 15.

⁴¹ Vid Ruling of 2 November 1994 stating that the rules by the Legal Association restricting publicity for lawyers was based on a regulatory norm, and was, therefore, lawful.

approval of the, today abolished, Publicity Regulation, which included restrictions and limitations as regards the information the lawyer could give, and the media or instrument in which s/he could give it⁴². This administrative Court understood that, although the Law of Professional Associations gave them powers to regulate the practice of their legal services, it also establishes that the Law of Defence of Competition should be binding in the agreements "with an economic effect", as is the case of the aforementioned Publicity Regulation. It points out that it cannot be considered a market economy without publicity, which is key a part of it. It considers lawyers as *"economic operators who, like all the rest, must have full independence in their activity with economic effect, logically, within the current legal framework"*. In addition, it underlined the effects this restriction or prohibition might have on the consumers and the barrier to access it can be for the new lawyers.

Later on, it fined the Legal Association in Madrid for approving a regulation limiting the publicity of their lawyers, especially concerning the publicity of fees⁴³.

The same evolution has been undergone by the Supreme Court of Appeal in Spain, who, in its first sentences supported the Associations' rules regarding publicity, but later gives priority to other more solid principles. In this sense we find a decision from 1988 stating that the services rendered by lawyers *"are not, due to their aim, comparable to an industrial or commercial product, therefore, when talking about publicity the constitutional rule applicable (freedom of speech) must be restricted on behalf of the principles involved in the legal practice"*⁴⁴. Two years later, in 1990, it was already giving priority to the freedom of enterprise principle over the obligation of Professional Associations' rules, considering that the restrictions should be an exception⁴⁵, and comes to the same subject again in its sentence of 29 May 2001. This time, judging the lawfulness of a fine imposed on a lawyer from the Legal Association in Barcelona, who had offered his services as specialist in expropriations, including names and addresses of former clients in this subject, and information about the results obtained in successful cases. The Supreme Court of Appeal deemed

⁴² Vid Decision of 18 January 2000.

⁴³ The fine of over 120,000*. Ruling by the Court for Defence of Competition 11 October 2001

⁴⁴ Supreme Court of Appeal sentence of 23 September 1988, the Casado Coca case. This suit was initiated by a lawyer member of the Legal Association in Barcelona, fined for the publicity he was making against the rules of Association. The lawyer even appealed to the ETHR, who also denied the vulneration of the freedom of speech, though it did admit a trend towards a more flexible position in this question, therefore the same case could be ruled in a different sense in the future. S. ETHR 24 February 1994.

⁴⁵ S. Supreme Court of Appeal 17 October 1990.

the behaviour of this lawyer unlawful as it was focused directly in finding new clients in a unfair way, according to article 6 of the General Law of Publicity⁴⁶.

It is certain that, with the generalization of new technologies control of the publicity which lawyers offer will be every day more difficult.⁴⁷ If the Charter is interpreted in a literal sense, the infringements could be so numerous that it would be possible that there was no lawyer without a corresponding sanction. A broader interpretation of the rules on publicity would come to temper the question.

This fact is recognized by the European Tribunal of Human Rights itself in its Ruling of 24th February and the SCA in its Ruling of 3rd March 2003, already cited in section on *cuota litis*. The first manifests that regulation of publicity in the legal profession varies from one country to another depending on their cultural traditions although there is in the major part of the European countries, a tendency to flexibility, promoted principally by the social changes and the important role of the mass media. For this reason I would suggest that it is the national legal authorities who know their social reality and are in a better position to value *"the right balance between the different interests at play: the imperative need for a good administration of justice, the dignity of the profession, the right to receive information about legal assistance and the possibility for a lawyer to publicize his practice"*. For its part, the SCA departs from the basis that, as the State Lawyer argued in the proceedings, publicize with direct or indirect reference to the lawyer's own clients, that is, identify the consumer of the product, does not necessarily qualify the services from the professional point of view. Nevertheless, he recognizes the social reality that *"the permanence of determined and qualified clients receiving the legal services of a lawyer provides a powerful index of accreditation of professional solvency"*. It should not be forgotten that 'Word of mouth' publicity also exists and given that the relationship lawyer – client is based on the principal of confidence, to know that the lawyer chosen has carried cases of people we know, whether near to us or not, contributes to increase the grade of trust on the part of the user of the legal service. For this reason the Court prefers to stress the duty of discretion and professional secrecy to justify this restriction. The professional secret is not in fact the lawyer's right but of the citizen.

In Portugal very little publicity is permitted, understanding publicity as any disclosure about the lawyer or her/his work as a way of attracting clients. Article 80.1 of the EOA considers publicity all advertisement carried out by means of circulars,

⁴⁶ Law 34/1988, 11 November, BOE 15 November 1988.

⁴⁷ On publicity in Internet See LOBATO DE PAIVA, M.A.: "Publicidade do advogado na Internet", October 2002, in his website.

advert, means of social communication or any other form, direct or indirect, of professional publicity, especially disclosing names of clients. In its second section it also forbids lawyers the promotion without authorization of the Ordem dos Advogados, of information referring to lawsuits or other professional questions confided in them⁴⁸. The charter aims to avoid lawyers recruiting clients like traders or industrialists, announcing that they do not charge fees unless they win the case (something, anyway, which is forbidden by article 66 EOA, which regulates the *cuota litis*), or the distribution of visiting cards in hospitals among traffic victims, or on the doors of the Courthouses, offering their services, sending out circulars, unless the aim is to inform about change of address of the practice or to announce "*talent and honesty as one who announces a good coffee*"⁴⁹. It would not be forbidden for a lawyer to mention the position he/she exercises in the Ordem dos Advogados or to refer to a civil society of which he/she is a member, or to erect nameplates outside the law practice, or to use visiting cards or paper with name, address and consulting hours. Nor would the insertion in specialized publications of her/his academic and professional *curriculum vitae* which include her/his specialty. The Charter contemplates in detail very concrete situations, which should not even be considered as publicity, rather as mere organization of work. This ruling of the EOA has recently been modified by the Charter on Publicity approved by the Ordem dos Advogados. Conclusion 133 of the V Congresso dos Advogados Portugueses already contemplates that "*O Estatuto da Ordem dos Advogados, deve permitir a publicidade informativa do advogado, a qual deverá conter informação objectiva, verdadeira e digna, no rigoroso respeito dos deveres deontológicos,*

⁴⁸ The Congress of Portuguese Lawyers held in the year 2000 refers to the public discussion of professional questions specifying that a) the relations between lawyers and the Media should be regulated, b) any press conference or interview about pending trials would need the prior authorization of the chairman of the District Council., c) lawyers should not influence or try to influence through the Media, court decisions or other pending questions, d) lawyers should not discuss in public or through the Media pending or non initiated questions

⁴⁹ The example comes from GUEDES DA COSTA, *Direito Profissional...*, op cit, p. 180. El mismo autor destaca el problema a que dio lugar la recomendación del II Congreso de los abogados portugueses de que fuera creado el título de "abogado especialista". Dado que el art. 80. 5 reconoce la posibilidad, previa autorización de la Ordem, de hacer mención, a través de su currículo, de la especialidad en publicaciones jurídicas, la creación de tal título se enlazaba directamente con la publicidad. Fueron tales los obstáculos a la creación de especialidades que el Conselho Geral de la Ordem dos Advogados emitió un parecer el 28 de octubre de 1988 (BOA nº 4/89, p. 27) con el que se aparcaba la cuestión. Todavía hoy nada se ha regulado.

do segredo profissional e das normas legais sobre publicidade e concorrência desleal."⁵⁰ The new Charter of Publicity for Lawyers foresees the possibility of publishing the names of clients when they authorise it. In any case, even after the advance in the new Charter, commercial publicity, with the aim of finding new clients, and comparative publicity, due to the risk of falling into deceitful publicity, are still prohibited.

In Great Britain, Denmark and the Netherlands, on the contrary, publicity is considered as a form of promotion of activity and image of the lawyer, and as a way of competing with other professionals who also offer legal services. This attitude has also extended to other Northern Europe countries, such as Austria, Germany, Belgium, Ireland, Norway, Sweden and Finland⁵¹.

The country most open to lawyers' publicity is, without doubt, United States of America, where, since 1977 to find clients using any kind of publicity, including the television, which is the strongest publicity media is allowed.

The differences between the national legislations cause discrimination between the lawyers from different Member States and with those from third countries. We must forget hypocrisy and, without going into broad marketing in this subject, look for the right balance between publicity and professional ethics; always taking into account that Law practice in the 21 C. renders a service to an advanced society, included in a so called Society of knowledge, where information is a basic right which should prevail over any traditional rule. This balance can only be attained through the consensus of all General Councils of Advocacy. The CCBE would play a good role as intermediary between the States more open to publicity and those more opposed to it. Although the Commission Report on Competition and Professional Services is not a binding document, it does allow to see the trends which will be followed by the European

⁵⁰ See the comment of Dr. Luís Silveira Rodrigues 10-5-2002 and the Parecer of Dr. António de Magalhães Cardoso 9-5-2002 en www.oa.pt, and different opinions of lawyers in the article "Marcas e publicidade dividem advogados" and "Advogacia com publicidade avança, mais com regras", *Diário Económico*, Política nacional, 11 May 2004. The Ordem dos Advogados is clear as to the limits imposed on lawyers where publicity is concerned, appearing the new Charter for Publicity passed by the OA. Professional publicity by groups of lawyers should have a strictly informative character and be objective, true and dignified. In the OA website we can read that «a divulgação da identidade e currículo dos sócios, associados e colaboradores de trabalhos anteriores, da organização interna, da existência de áreas preferenciais de actividade não pode implicar, em caso algum, quebra do sigilo profissional ou revelação da identidade de clientes sem o consentimento destes». The diffusion, in the cases where it is allowed, can be through any media

⁵¹ In this sense, see the Communication on Lawyers' Publicity of Bastonário COELHO RIBEIRO in the III Congresso dos Advogados Portugueses.

Competition Network. The national authorities can punish anti-competition behavior in liberal professions. In order to avoid economic prejudice, it is necessary to adapt the regulation in a harmonised way.

If the Community view is the one finally adopted, a completely new version of article 80 of the EOA will be necessary, as well as a modification of article 25.

C) Restrictions on the company structure of the law firm.-

Legal practice and Law have experienced such development, such expansion, in the last ten years, that the organization of work has had to be adapted to the new realities and to a professional practice in working groups. We are not referring only to lawyers working within a firm or company, but also to multidisciplinary teams, where professionals complement each others' work. It is not uncommon to find law firms where lawyers are working together with medical professionals, detectives, technical experts, economists, translators, psychologists, documentalists,... who collaborate in solving the lawsuits⁵².

But the company structure of law firms is still restricted, especially in Portugal.

Chapter IV in Title II of the EOA only talks about the law companies to direct us towards future law regulation of their management⁵³. Ordinance n. 513/Q-79 is the regulation describing their legal regime. In this decree we find a strong restriction to the professional practice and its evolution: it is only allowed to create civil societies. The object of the society can only be the common practice of their profession as lawyers, with a view to distribute among the partners the turnover from their activity. We are talking, therefore, of a society to participate in the results of the common activity and not a professional firm, highlighting that, both the personal character of the society and its object is the organization of work. Furthermore, a new restriction, the constitutional act of the society can only be carried out after the approval of the social pact project by the Ordem dos Advogados, who guarantees its coherence with the professional ethics principles and makes sure there is no other reason for the setting up of the society, which might lead to errors (article 2 Decree). Portugal, however,

⁵² On the precedents and the business organization of law practice, see MORENO LISO, L. and VIÑUELAS ZAHINOS, M.T.: "El Abogado del siglo XXI", *Diario La Ley* n° 5618, 24 September 2002, p. 4-5. On the differences between professional societies *strictu sensu*, in which the object the activity of the group, and the professional societies or societies of means, where partners only share costs, see CAMPING VARGAS, A.: *La Sociedad Profesional*, Madrid 2000 p. 34-35.

⁵³ Art. 173-E *Sociedades de Advogados*. Portugal transposed the Directive on free service providing of 1977 in the Charter itself.

bound by European Directives, admits the legal practice of multinational law firms from EU in its territory, but would not admit registering them, as is done with the Portuguese firms⁵⁴. The General Council of the OA is responsible for deciding on the incompatibilities of lawyers, and must, therefore, case by case, decide with whom can a lawyer work, following articles 68 and 69 EOA⁵⁵.

The restriction on the company structure of the law firm can also limit the property of the professional services, the sphere of collaboration with other kind of professionals, and in some cases, like the current case, the opening of new branches, franchises or delegations. Furthermore, the prohibition to create commercial companies may reduce the access to the legal services market, hindering new entrances and their growth⁵⁶.

Regarding multidisciplinary societies, Portuguese Law, although it obviously allows the collaboration of lawyers with other professionals, it understands it is not necessary to merge both in a society, which would hinder the ethical control, and it bans them (art. 2.2). However, almost all countries allow them⁵⁷. A possible way of avoiding the ban on pluridisciplinary societies could be the creation of an EEIG, under Council Regulation (CEE) 2137/85, of 25 July, binding for all Member States in the EU. This Group, in any case, would have to have a cross border character⁵⁸.

In Spain, the question of group practice seems to be solved by art. 28 EGAE, which allows legal practice collectively, under any lawful form, including a commercial society. The social object must be, exclusively, the legal practice, and the legal form of the group must allow the identification of its partners, which is very useful when

⁵⁴ GUEDES DA COSTA, op. cit, pp. 129 y 132, remember that art. 11 of the Directive 98/5 permits the practice in group of the professional activity and the creation of branches or agencies of the group in another Member State, as long as the rules regulating practice in the State of origin are not incompatible with those of the State of destination. See also the working document 10/3/1997 by the Vice-president of CCBE Denis de Ricci during its plenary session in London.

⁵⁵ See Parecer nº E-36/03 15 January 2004, where it declares incompatible the practice of advocacy with the position as Provedor Municipal and Parecer nº E-29/03, 16 March 2003 about the incompatibility with the activity as football agent, but not with the attendance to any courses qualifying for this activity.

⁵⁶ Commission Report, loc cit, p.17.

⁵⁷ See comparative study CAMPING VARGAS, A., op cit, p. 86, note 116.

⁵⁸ In its Parecer in January 1990, the Conselho Geral de la Ordem dos Advogados proposed that the Portuguese government inform the EC, that, among the categories of people excluded from the participation in a EEIG should be lawyers and law firms, however, the Regulation did not include this exception. GUEDES DA COSTA, op. cit, p. 137, admits that "*teremos que rever este ponto talvez no sentido de uma previsão legislativa de direito interno português que consagre aquela possibilidade, sob pena de Portugal vir a ficar isolado a este respeito no contexto europeu*".

clarifying responsibilities is concerned⁵⁹. Nevertheless certain details which should be regulated remain pending.

The prohibition on not sharing premises or services with incompatible professions, without specifying which, is a clear reference to auditors. At the moment of endorsing the Charter, the ECCJ has still not pronounced on the Wouters or Nova case⁶⁰, but there already existed certain controversy between the professional secrecy which lawyers must respect and the transparency of auditors' reports. The ECCJ considers in its sentence that the association between lawyers and auditors in the Netherlands does not infringe the rules of competition or those of community orders, although it recognizes that a certain incompatibility could exist between the advisory activity which the lawyer exercises and the control developed by the auditor. In addition the latter is not subject to professional secrecy. Thus there could exist reasons of public order, as guarantee of the most important deontological rules of a profession, which make necessary a limit to the exercise of the profession in association with other professions.

IV. - Brief reference to the newly adherent States

The EU has just suffered a new enlargement, the most numerous with regard to the incorporation of the number of countries and we do not want to lose sight of the event. It must be kept in mind that the 10 new States of the EU, members since the 1st May, tend, generally, to regulate jointly all practices relative to the market,

⁵⁹ The professional behavior of its members is submitted to collegiate discipline by the College in whose field they act, and the lawyer concerned is personally responsible. The civil responsibility which a collective practice could have will depend on the general legal system applicable to the social type or group constituted, although all the lawyers who have intervened in the case are civilly responsible before the client in a personal, mutually binding and unlimited way (evidence of the remains of individualism which society continues to maintain). See also the proposal for the draft version of the project of the Law of Professional Associations on which the Spanish Ministry of Justice is working, General Commission for Codification: section two of Mercantile Law; ALBIEZ DORMÁN, K.J.: "La sociedad de abogados stricto sensu en el Estatuto General de la Abogacía", *Diario La Ley* n° 5665, 28th November 2002, p. 1; TRIGO GARCÍA, B.: "Regulación del ejercicio societario de la abogacía mediante normas reglamentarias?" *Diario La Ley* n° 5527, 2002, pp. 1 y ss.; LECIÑENA IBARRA: "Competencia estatutaria en la regulación de los despachos colectivos: el art. 28 del Estatuto General de la Abogacía", *R. Actualidad Civil*, n° 26 2002, pp. 855 y ss.

⁶⁰ Sentence TJCE 19th February 2002, as. 309/99, Wouters, Rec. 2002, p. I-1577. For a deeper study of the topic see VAZQUEZ ALBERT, D.: *Abogados y Auditores: régimen jurídico del ejercicio multidisciplinar*, Ed. Marcial Pons Madrid 2003.

including unfair competition and publicity.⁶¹ They will adapt gradually to the European rules of competition, from which can be presumed that with regard to the market for legal services, they will board the train of change at the same time as the rest of the MS. Anyway it is an area where there is still much to be done, although we think that it is worthwhile to leave it pointed. The Commission has just published a bid to contract a study to analyze the rules of jurisprudence existent in the recently incorporated countries in matters of unfair commercial practices between businesses and consumers and the obstacles to the Single Market which could result.⁶² A study of the Global Economic Forum has concluded that Estonia, Latvia and Slovenia have a more competitive economy than Greece and Portugal and that Estonia also does better than Italy if the so called process of Lisbon is applied⁶³, but in general the rest of the new European states do not enjoy strong economies.

The reception or welcome of the professionals from the East by the European professionals has been somewhat lacking in confidence. On 29th April 2004 a Euro-Mediterranean Meeting of Professional Organizations was held where sensitivity was demanded from European governments and the Commissioner for Competition, Mario Monti, was asked to control the qualifications of the ten new countries to be integrated in the EU⁶⁴.

Lawyers from the East are now full members and participate in the Single Market in equality of conditions. They are going to begin to circulate and to have their professional qualifications recognized. We must get used to a wider Europe which offers new opportunities and from which will emerge new legal conflicts. The globalization will increase the signature of agreements of collaboration among offices of different States of the world. From mutual knowledge of the legal systems confidence will emerge.

⁶¹ See MARCOS FERNÁNDEZ, F.: "El Derecho de defensa de la competencia en los nuevos Estados miembros de la Unión Europea", in *Gaceta Jurídica y de la Competencia*, January-February 2004, p. 86.

⁶² Ref. DO 2004/S 83-070339. Advertisement to Contract Services. And in its February 2004 report on competition in professional services announced that in 2004 it would extend its study to the ten new adherent member states.

⁶³ The Council of Europe of Lisbon in March 2000 adopted a programme of economic reform with the aim of converting the EU in the first economy based on more competitive and dynamic knowledge of the world, highlighting the importance services have in the economy for reaching this objective, especially for their capacity to create employment and contribute to growth. See: "The Global Competitiveness Report 2003-2004 presented in April 2004 by the World Economic Forum. This is an independent international organization. www.weforum.org.

⁶⁴ Press CGAE 29th April 2004. www.cgae.es

V. - How does open competition affect the regulations of the professions?

The conclusions of the study "Economic impact of regulations in the sector of professions in different Member States" of the Institute for Advanced Studies of Vienna⁶⁵ showed the general tendencies in these services.

- In countries with a high degree of regulation relatively high figures for volume of work per income (professional fees) are registered in comparison to the number of professional practitioners.

- In countries with low levels of regulations lower figures for volume of work per income are registered in proportional relation to the number of professional practitioners.

It can be deduced therefore that low levels of regulation are not an obstacle; rather they are a stimulus for the creation and distribution of wealth. The study adds, in a somewhat ambiguous way, given that it does not establish a direct relationship between regulations and economic results, that the existence of certain types of restrictive regulations contrary to competition, make one think that they could be used by professionals to obtain economic results which benefit them but are contrary to the needs and interests of consumers. And, nevertheless it points out that the impact of regulations on the services offered to consumers is non existent, in other words, that *"there is no motive to doubt the high quality and the essential values of professional services independently of the fact that levels of regulation are high or low"*.

The economic studies have already demonstrated that the biggest effectiveness of the laws of defense of the competition have positive effects on the managerial efficiency. The Law 16/89 of Defense of the Competition of July 17, the Law 34/88 General of Publicity of November 11, and the Law 3/91 of Disloyal Competition, in Spain, as well as the Lei nº 18/03, of June 11 that approves the juridical régime of the competition in Portugal⁶⁶, have the necessary generality to include in them the juridical activities maintaining the protection of the users and consumers.

Economic studies have shown that greater efficiency and effectiveness of the laws in defense of competition have positive effects on business efficiency.

Lawyers must update their deontological schemas, which is where a large part of the restrictions to competition lie. Only those who have already done so, the large law

⁶⁵ Presented in January 2003 and available in the official languages en the web page of the DG Competition.

⁶⁶ On the recent approval of this law see ADALBERTO COSTA: Regimen Legal da Concorrência, Ed. Libreria Almedina, Coimbra 2004.

firms, are growing. Their adaptation to the rules in defense of competition does not need to alter the essential characteristics of the profession.

The Presidency of the CCBE has already commissioned the elaboration of a new European deontological code for general application to the co-president of the Deontological Committee D. Ramón Mullerat. The new code, inspired by the wording of the Directive's proposal in matters of Services in the Single Market⁶⁷ (art.39 y 40), will comprise principles common to the deontology existent in the European Union and will probably have national application. The Code, once passed, will replace the one currently in existence which is applicable only in questions of a cross border nature.

Internal Market and freedom of circulation are not possible without a harmonized regulation of the competition norms, and this statement doesn't exclude to the liberal professions.

⁶⁷ COM (2004) 2 final, 13 January 2004, pp. 78 y 79.