

**SELF-REGULATION OF THE MEDICAL AND LEGAL PROFESSIONS: REMAINING
BARRIERS TO COMPETITION AND EC-LAW**

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1. Introduction

Traditionally, medicine and law have not been subjected to the competitive forces that operate in commercial sectors. This policy of distinguishing professional practice from commercial trade reflects a traditional concept that due to the specialised, personal and important nature of the professional services and the need to uphold and preserve the quality and integrity of the professions, competition would not guarantee a socially optimal outcome. Medicine and law can be seen as the prototypes of the ideal of a profession¹. Ideally, advice of the lawyer and the doctor is impartial, of the highest quality and always in the best interests of the client. Much of this ideal has been developed by the professional societies in an effort to gain the public trust.

Regulation of the medical and legal professions has, by tradition, been achieved through a combination of direct government regulation and, to a large extent, through rules adopted by professional associations. These associations enjoy public law status; they are called „Orders“ (France, Italy, Belgium, Netherlands) or „Chambers“ (Germany). Their self-regulatory powers enable them to establish both entry requirements and rules regarding professional conduct. The professional bodies are composed of practising professionals only; there are no lay members representing consumers' interests. In the legal and medical professions the self-regulatory powers have been used to promulgate „ethical rules“ which aim at protecting professional integrity and dignity. Instead of benefiting the consumers of medical and legal services, professional ethics may substantially hinder competition by imposing restrictions on advertising, establishing fee schedules and regulating business structures of professionals. Since Milton Friedman's seminal early work on the professions², it has widely been recognised that a policy of giving professions powers of self-regulation carries with it the danger that the professions will thereby be enabled to pursue the interests of their members to the detriment of the public interest.

In recent years policy makers have become increasingly aware of the danger that self-regulation may excessively restrain competition and promote the interests of the professions, without yielding

¹ There is currently no existing agreed-upon definition of the term profession, either generally or under law. Therefore, in some countries the list of professions may be restricted to less than five occupations and in other countries businesses may be considered as professional activities, even though they are seen as purely commercial in the first group of countries.

² Friedman and Kuznets (1945).

corresponding benefits to the public. The broader deregulation movement has also led to efforts seeking to liberalise markets for professional services. First, rules of competition law (prohibition of cartel agreements and abuse of a dominant position) have been applied to the professions. For example, regulation of fees by self-regulatory professional bodies has been held to violate competition laws of the EC-Member States. Second, alternatives for the current self-regulatory frameworks have received particular attention from policy makers. In some countries, the preference of the legislator is shifting towards other instruments of control. For example, in the Netherlands proposals have been made to replace the current self-regulatory system of licensing in the medical profession by certification, a procedure which reserves only the exclusive right to use the title to members of the profession, but does not exclude others from offering similar services. Third, the scope of the professional monopoly is inclined to decrease. Very radical reforms took place in the United Kingdom³. In order to develop a wider range of legal services and to improve consumer choices, several monopoly rights of the traditional legal professions (barristers and solicitors) have been abolished. Also in other countries, efforts are undertaken to broaden the supply of legal services. For example, in the Netherlands professional bodies of attorneys may soon be forced to admit also employed lawyers (legal counsellors of enterprises, lawyers working with insurance companies) as members. Although the deregulation movement may be seen as a response to the growing criticism that self-regulation may be abused, the term „deregulation“ is still somewhat misleading. In spite of the recent efforts at liberalisation, regulation largely remains in place: the move towards less interventionist measures does not necessarily imply that the new degree of regulation will be optimal. Rules relaxing entry conditions may have also adverse effects if they simultaneously increase the control powers of the self-regulatory bodies.

In this paper it is investigated how EC law copes with the abuse of self-regulation. It could be expected that the competent EC-authorities have assumed actions to set aside or modify restrictive practices, similar to the measures which have been undertaken at the member States' level. However, liberalisation of entry conditions in the sector of the professions has been very slow. The implementation of the freedom of establishment (Article 52 EC-Treaty) and the freedom to provide services (Article 59 EC-Treaty) has posed serious difficulties. Additionally, recent case-law of the European Court of Justice shows a remarkable (and somewhat unexpected) change of direction. In a recent judgement⁴ ethical rules restricting advertising were not considered to be against the principle

³ Courts and Legal Services Act 1990.

⁴ Case C-292/92, *Hünermund et al. v. Landesapothekerkammer Baden-Württemberg* [1993] ECR I- 6787. See the discussion in section 1.2.2. of this paper.

of free movement of goods (Article 30 EC-Treaty). Given the current state of EC-law, liberalisation thus largely remains the responsibility of Member States. Therefore, a global assessment of the anti-competitive effects of self-regulation in the EC requires an extensive overview of the relevant provisions and their enforcement in the 15 EC Member States. Such a survey cannot be offered within the scope of this paper. To allow the reader to appreciate some remarkable differences across countries, in Appendix I information is given about both the rules governing access to the legal and medical professions and rules relating to professional conduct in four Member States (Germany, Belgium, The Netherlands and The United Kingdom). As far as the application of competition rules is concerned, the case law of six Member States (all of the above, as well as France and Italy) will be briefly discussed in the first section of this paper (see 1.2.).

The paper is structured as follows. In the legal part of the paper an overview is given of the current state of market integration in the legal and medical professions. Both the EC-rules and case-law on the right of establishment and the freedom to provide services (section 1.1) and the EC competition rules (section 1.2) are examined. Reference to the legal rules of the Member States is made, where such seems to be appropriate in order to get a better insight in the real-life effects of the self-regulatory measures. After the legal analysis, an attempt is made to explain the current state of the law, using economic theories of regulation. Can the current degree of self-regulation be understood, from a „public interest“ perspective, as a set of rules needed to correct market failures (asymmetric information, principal-agent problems, externalities)? Or does the „private interest“ approach, stressing the role of pressure groups in decision making, offer a more powerful explanation? Both approaches are dealt with in the second section of the paper. Section 3 will then combine the legal and economic approaches. It will be shown how economic insights may be made useful for the assessment of controversial legal issues in the domain of self-regulation. In particular, economic criteria will prove to be helpful in interpreting the proportionality requirement, which is crucial under EC-law. Finally, some concluding remarks will be presented.

2. Legal analysis

2.1. Rules regarding access to the medical and legal professions

European law distinguishes between the right of establishment and the freedom to provide services. This difference is economically arbitrary and fluid in practice. Because the freedom to provide services does not entirely rest on the same principles as those governing establishment, the distinction will be kept in the legal part of the paper (but be abandoned in the other parts). When professionals invoke the right of establishment they seek a permanent right to exercise an economic activity. In contrast, the freedom to provide services involves the exercise of an economic activity on a temporary basis in another EC-Member State while remaining established in a home country⁵.

Full market integration requires the removal of several obstacles to the free flow of professional services. Self-regulation may undermine some key principles of the EC-Treaty in various ways. Rules which are discriminatory on grounds of nationality are blatant effort to restrict entry. The argument that the removal of such discriminations suffices to guarantee a free flow of professional services, because nationals of other Member States are free to obtain the requisite qualifications, would hardly be to the point. On the assumption that consumers' needs (and therefore appropriate minimum standards) do not vary significantly across Member States, lawyers and doctors licensed in one state should be free to practise in another⁶. Therefore, provisions stipulating that the pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications must equally be scrutinised. Besides from nationality requirements and the diplomas' barrier, market integration demands the removal of still another obstacle. National rules may lay down the conditions for the use of professional titles, such as „Rechtsanwalt“ (Germany), „avvocato“ (Italy) or the indication of a medical speciality (e.g. „surgeon“, „dermatologist“ or „gynaecologist“). In EC-countries differences in scope of the protection of professional titles exist and the definition of the activities pursued by professions holding the title is not common to all Member States⁷. In addition to the protection of the title, the pursuit of the regulated activity will usually be restricted to persons belonging to a professional body. Entry into the profession may thus be controlled by the professions

⁵ One may notice the arbitrariness of the distinction by comparing on the one hand, the attorney established in a border area, who has a large clientele from another country but maintains a single office in his „home country“, and on the other hand, the attorney who decides to open a second office a few kilometres across the border.

⁶ Ogus (1994), 222.

⁷ A well-known example is the distinction, in the British legal profession, between barristers and solicitors. See Ogus (1993).

themselves by establishing particular rules and/or supervision. For example, establishment may be contrary to „ethical rules“, prohibiting the opening of a second office.

The question arises whether the above measures are in conformity with EC-law. First we will deal with the issue of discrimination on grounds of nationality. Second, the restriction of access to the profession benefiting holders of a diploma will be examined. Third, the conditions for the use of professional titles and compulsory membership of professional bodies will be simultaneously examined. In both cases the same legal principles apply. Finally, ethical rules prohibiting the keeping of more than one office will be addressed.

2.1.1. Discrimination on grounds of nationality

Discrimination on grounds of nationality is an obvious and very serious impediment to market integration. Already in 1974 the European Court of Justice held the prohibition of discrimination contained in Article 52 EC-Treaty „directly applicable“. A national of a Member State can directly invoke Article 52 when he wishes to establish himself in another Member State. This freedom applies even in the absence of implementing directives⁸. In the same year the direct effect of Article 59 EC-Treaty, which guarantees freedom to provide services, has been confirmed as well⁹.

In several judgements the European Court of Justice made clear that the prohibition of discrimination on grounds of nationality is also to be respected by the self-regulatory bodies of the professions. With regard to the medical profession the European Court of Justice held in the *Broekmeulen* case that a national of a Member State who has obtained a diploma of medical doctor in another Member State and who, therefore, may practise general medicine in that other Member State is entitled to establish himself in his own country, even if the latter makes entry into the profession subject to additional requirements. In this case the Dutch General Practitioners Registration Committee refused to register a Dutch doctor, having obtained his professional qualifications in Belgium, on the ground that he did not undergo a year's training in general medicine as required of any doctor holding a diploma of doctor in medicine awarded by a Dutch university. This refusal was considered contrary to Article 52 EC-Treaty and Directive 75/362 concerning the mutual recognition of medical

⁸ The leading case for the direct applicability of Article 52 concerned the legal profession. A Belgian regulation had laid down discriminatory conditions for foreigners to practise law as an attorney in Belgium. The Court of Justice ruled that the prohibition of discrimination has direct effect (Case 2/74, *Reyners v. Belgian State* [1974] ECR 631.

⁹ Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

qualifications¹⁰. Another important judgement has dealt with the right of establishment for lawyers. In the *Thieffry* case the European Court of Justice held that when a national of one Member State has obtained a diploma of doctor of law in his country of origin, which has been recognised as an equivalent qualification by the competent authority under the legislation of the country of establishment, the Bar cannot refuse permission to register for practical training. In these circumstances the act of demanding the prescribed national diploma constitutes a restriction incompatible with the freedom of establishment¹¹. This judgement also shows the possibility of relying on the directly effective Article 52 EC-Treaty without prior co-ordination of national professional requirements.

2.1.2. Diplomas

Freedom of establishment cannot be achieved only by eliminating discriminatory rules with respect to entry into the profession. Non-discriminatory rules may form an even greater obstacle for foreigners than for the nationals of the Member State of establishment. Rules regarding access to the professions often contain requirements which foreigners have great difficulty in meeting. The diplomas required for the exercise of medical and legal professions are a clear example. Where the taking-up or pursuit of a profession is subject to conditions regarding diplomas, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 EEC Treaty stated that the Council had to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications, in order to facilitate the exercise of the freedom of establishment. Mobility of professions may be enhanced also by a concomitant harmonisation of education and training requirements. To achieve this goal, directives had to be adopted and implemented in the EC-Member States by the end of the transitional period (that was 31 December 1969). At the beginning of the seventies there were still a lot of draft directives on the Council's table. During the seventies the great backlog in the sector of the professions was partly removed by the adoption of the 1975 Directives with respect to the medical professions. However, as far as the legal profession is concerned, a specific Directive has never been issued.

a. Medicine

¹⁰ Case 246/80, *Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311.

¹¹ Case 71/76, *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

In the sector of the medical professions freedom of establishment has been realised through mutual recognition of medical qualifications and measures co-ordinating the training requirements¹². The Directive on mutual recognition (75/362) applies to both self-employed and employed doctors. Directive 75/362 does, however, not affect national provisions which prohibit companies or firms from practising medicine or impose on them conditions for such practice.

Each Member State is required to recognise the diplomas (listed in the Directive) awarded to nationals of Member States by another Member State, by giving these diplomas the same effect as those which the Member State itself awards (Art. 2 Directive 75/362). Where a speciality exists in the host Member State, but diplomas leading up to such speciality are not awarded in the Member State of origin, the host Member State may require such person to fulfil the conditions of training as laid down in respect of that speciality by its domestic law, but must take into account the training periods completed by that person in the Member State of origin as far as such training periods correspond to those required in domestic law (Art. 8 Directive 75/362). Apart from training, other requirements for the taking up and the practice of a medical profession may consist of proof of good character, health certificate, membership of a professional body and (for the purpose of health insurance schemes) registration with a public social security body.

In order to ensure that the training of doctors is of equal standard in all Member States, Directive 75/363 provides for a co-ordination of training requirements. This Directive imposes on the Member States the obligation to require persons wishing to practice a medical profession to hold a diploma (as listed in Directive 75/362) awarded after a training which meets the requirements as set out in the Directive. Diplomas must be required from doctors and medical specialists where the speciality is listed in at least two member states. From 1995 on also the activity of a general practitioner requires specialised training.

b. Law

In the field of the legal profession the harmonisation went not that far. In 1977 a directive concerning the freedom to provide services was adopted. A directive with respect to establishment in the legal profession never came into being. The legal profession, however, falls within the scope of the 1989

¹² Directive 75/362 of June 16, 1975 deals with the *mutual recognition of medical qualifications*, *Official Journal* (hereinafter abbreviated as *OJ*), 1975, L 167/1 modified by Directive 81/1057 of December 14, 1981, *OJ*, 1981, L 385/25 and Directive 82/76 of January 26, 1982, *OJ*, 1982, L 43/21. *Measures co-ordinating the training requirements* have been laid down in Directive 75/363 of June 16, 1975, *OJ*, 1975, L 167/14, modified by Directive 82/76 of January 26, 1982, *OJ*, 1982, L 43/21.

Directive on the mutual recognition of higher education diplomas by Member States¹³. This Directive fits into the „new approach“ towards harmonisation, which the Commission adopted in the mid-eighties. According to the principles of the new approach full harmonisation is no longer aimed at.

Due to the allegedly national character of most legal problems, in a first period only measures facilitating the provision of legal services have been taken. Directive 77/249 applies to the activities of lawyers pursued by way of provision of services. It states that a lawyer providing services is to adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages of that State, with an indication of the professional organisation by which he is authorised to practice or the court of law before which he is entitled to practice pursuant to the laws of that State. Services include both non-contentious (giving advice to clients and/or representation) and contentious activities (representation of clients in court proceedings). The Directive provides that „activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence or registration with a professional organisation, in that State“. Registration requirements would hinder the free flow of services. The temporary nature of the activities does not mean that the provider of services may not equip himself with an office, chambers or consulting rooms in the host Member State in so far as such forms of infrastructure are necessary for the purposes of performing the services in question. If representation of clients in courts is mandatory¹⁴, foreign attorneys must act in conjunction with national attorneys entitled to provide the service. According to Article 4(2) of Directive 77/2489, in pursuing activities relating to representation, the attorney must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes. As far as the pursuit of all other activities is concerned, the rules of professional conduct of the Member State of origin apply, without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially incompatibilities and professional secrecy (Article 4(4) Directive 77/249). This rule of „double ethics“ imposes several behavioural controls whose cumulative effect may restrict competition substantially.

¹³ Directive 89/48 of December 21, 1988, *OJ*, 1989, L 19/16.

¹⁴ The number of cases in which representation by professional attorneys is mandatory varies across European countries. For more information, see Appendix I.

To implement the freedom of establishment no specific directives for the legal profession have been taken. As mentioned above, the legal profession falls within the scope of the Directive on the mutual recognition of higher education diplomas by Member States. By virtue of article 3 of this directive all professional education qualifications acquired in the course of obtaining higher education diplomas are regarded as equivalent throughout the Community and the host Member State may not require national diplomas. However, according to the same directive the host Member State is free to require an additional period of practice or an aptitude test, where the field covered by the higher education in the Member State of origin differs substantially from the field covered by the higher education in the host Member State. It is not easy to judge whether such „substantial differences“ exist and there is thus a risk that differences in education may continue to serve as a general excuse not to allow free establishment. As far as the legal profession is concerned, legal systems are often grouped into two main families, depending upon whether they fit in the „civil law“ - tradition or rather in the „common law“ tradition. Although there are indeed differences between both legal families, it may be asked whether these differences are substantial enough to abandon the principle of free establishment in the legal profession. The latter question has become particularly significant since the emergence of a common law of Europe (a new *ius commune*) has been documented in recent legal literature. Exceptions to the right of establishment will even be harder to justify in cases where attorneys may wish to move to another country whose legal system belongs to the same legal family as the system of his(her) home country. It seems hard to justify additional training and/or examinations if the law of the host country is largely similar to the law of the country of origin (e.g. German and Austrian law), or if the migrant attorney is willing to handle cases involving only the law of his (her) home country and European law. In spite of the increasing similarities between legal families, the ongoing harmonisation of legal rules (either by EC-Directives or spontaneously) and the presumably limited scope of the intended professional practice, the Directive excludes case-by-case adjudication by explicitly stating that additional requirements may be set for professions for which knowledge of the national legal system is required. Therefore it can not be questioned that legal education covers „substantially different“ rules. Moreover - in contrast with the holders of other higher education diplomas, where the applicant who wishes to establish himself (herself) has the right to choose between having to pass examinations or to undergo additional practical training - in the case of the legal profession the host Member State, eventually after consulting with the professional bodies of attorneys, will decide how the substantial differences in education must be overcome. The overall preference goes to the aptitude test. An additional training period is very cumbersome for the

attorneys' profession: the number of trainee posts is limited and older practitioners („patrons“) may not wish to teach experienced attorneys coming from another EC- Member State.

It is clear that the ease with which attorneys can move between Member States will depend upon the contents of the law examinations in the host countries. Even though there is a need to ensure that attorneys are familiar with laws and regulations of the host Member States, too rigorous examinations may significantly limit freedom of establishment. In the USA, law examinations have been criticised as creating the potential for unreasonable exclusion of qualified attorneys, since the Bar examiners may possibly have an economic interest in limiting the number of successful applicants¹⁵. It follows from the American experience that the drafting and grading of exams should not be assigned to practising attorneys and that excessive failure rates may indicate a wish to limit entry. European legislators do not seem to have learned the lessons from their American counterparts. In some EC-countries attorneys willing to establish themselves in another Member State will have to undergo an aptitude test, which is organised by the professional body of attorneys of the host Member State¹⁶. In some German states, diplomas acquired in another EC-Member State are not regarded as equivalent to the first German state examination¹⁷. Lawyers willing to establish themselves as an attorney in Germany may thus be required to pass two state examinations, including an aptitude test (Eignungsprüfung). It may be doubted whether these requirements are in conformity with EC-law. Life is easier for lawyers who are already registered as an attorney in another EC Member State. These attorneys may establish themselves in Germany if they confine themselves to conducting litigation in fields of foreign and international law (including European law) and if they are registered with the competent public professional body (Rechtsanwaltskammer). This distinction relating to the areas of law covered by the attorney's practice overcomes some of the criticisms which have been formulated above with respect to the lack of differentiation in EC Directive 89/48. For the sake of completeness, it may be added that attempts to limit entry are not only directed against attorneys coming from other Member States but also against own nationals¹⁸.

¹⁵ OECD (1985) 35.

¹⁶ This is the case in Belgium ; see Royal Decree 02.06.1996, *Belgisch Staatsblad*, 15 May 1996. The Examination Commission is composed of two attorneys, a judge and a university professor. Both judges and university professors tend to have strong connections with the Bar.

¹⁷ Bayerischer Verwaltungsgerichtshof München, 23.11.1994 (Az: 3 B 94.227).

¹⁸ Public professional bodies may abuse their power by organising examinations aiming at a general reduction of the number of young professionals (not only migrant professionals). For example, in Belgium young attorneys must take courses during their training period and pass a bar examination. These courses are largely a rehearsal of what they learned at the university and would, therefore, be more useful for older attorneys. The augmenting number of duties during the training period is clearly a response to the increasing number of young attorneys (see Faure (1993), 92-93 and 110-111). In Great-Britain, the failure rate of the (relatively low) number of solicitors taking the advocacy tests to obtain rights of audience in higher courts is high and steadily increases. These experiences seem to indicate that the

In the legal literature the question has been raised whether attorneys willing to establish themselves in a host Member State are free to do so under their home title. Strictly speaking, these attorneys do not invoke their rights of establishment, but use a similar title without being affiliated to the Bar of the host Member State¹⁹. An example may clarify the problem: can an Italian lawyer practice in other European countries as long as he uses his home title „avvocato“ and not titles protected by legislation of the home Member State, such as „Rechtsanwalt“ (Germany) or „advocaat“ (the Netherlands)? Clearly lawyers practising under their home title cannot offer services which are subject of monopoly rights granted to licensed professionals, who bear a protected title. Nevertheless the question remains important since in some Member States the scope of the monopoly rights is rather small (see Appendix I). There are no clear-cut answers to the questions raised by the use of home titles in the legal profession²⁰. The Directive 89/48 concerning mutual recognition of higher education degrees does not regulate the competition between attorneys who stayed in their home country and foreign attorneys who decide to establish themselves there and continue to use the title acquired in their country of origin. Upon the basis of article 7 of Directive 89/48 one may argue that the use of the home title underlies approval by the competent authorities. In any case, the practitioner who is not affiliated to the competent professional body will not be allowed to use the professional title of the host Member State and must see to it that no confusion arises between the latter title and the eventually homonymous home title by adding additional information (e.g. „avocat au barreau de Paris“). Even though the Directive itself certainly does not require registration with the local Bar, the question arises whether such a requirement could be laid down by Member States without infringing Article 52 EC Treaty. This problem will be addressed in the next subsection.

2.1.3. Professional Titles and Compulsory Membership of Professional Bodies

In spite of the extensive case law of the European Court of Justice dealing with non discriminatory measures hindering the free movement of goods and services, it took until 1995 before the key principles concerning non-discriminatory measures were laid down. Prior to the *Gebhard* judgement, the case-law of the European Court of Justice was not conclusive. In some cases

incumbent professionals try to keep control over entry by newcomers and that they may remain able to limit market entry.

¹⁹ Lawyers who are not affiliated to the Bar do not have to obey the ethical rules enacted by the Bar. Since these rules contain many restrictions on competition (see Appendix I), attorneys practising under their home title would be able to stimulate competition substantially if they were not subjected to these rules.

²⁰ For a discussion of divergent interpretations, see: Stuyck and Geens (1993) 85-86.

freedom of establishment seemed to be restricted to a prohibition of discriminatory measures²¹, including cases of indirect or covert discrimination²². In other cases the Court went beyond a mere prohibition to discriminate²³. The latter judgements seemed to bring the case law on the right of establishment in line with the key principles governing free movement of goods, which the Court developed in several well-known judgements (*Dassonville*, *Cassis de Dijon*). According to the „rule of reason“ developed in the latter case-law limitations on the free movement of goods and services and restrictions of the right of establishment may be justified for reasons of public interest if they go not beyond what is necessary for attaining the public interest goal. (Readers unfamiliar with this case-law may consult appendix II, containing a check list of relevant questions, which must be answered to find out whether regulatory measures of the Member States are in conformity with the principle of free movement of goods.) An important, but not yet complete, step towards the convergence of both freedoms was taken in the *Kraus* case. For the first time, a clear reference to a „rule of reason“ appeared, but its formulation seemed to be restricted to the particular facts of the case. In the *Gebhard* case the Court has formulated a general rule:

„ It follows, however, from the Court’s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it“.

This sweeping statement lays down criteria without distinguishing the four freedoms (free movement of goods, persons, services and capital). The „rule of reason“ is formulated as a general test for all four freedoms : imperative requirements of public interest may justify restrictions on the key principles of free movement of goods, persons, services and capital if they are suitable for attaining goals of public interest and pass the proportionality test. Consequently non-discriminatory rules restricting the right to bear a professional title and compulsory membership of public professional bodies must be justified by „imperative requirements“ in the general interest. In *Gebhard* the court does not provide any indication about what may be considered such legitimate purposes. Assuming that the protection of consumers (and the public at large) from the harmful consequences of legal advice given by unqualified professionals is the goal of public interest to be aimed at, the analysis will then have to

²¹ Case 221/85, *Commission v. Belgium* [1987] 719; Case C-61/89, *Bouchoucha* [1990] I- 3551.

²² Case C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.

²³ Case 107/83, *Ordre des Avocats au Barreau de Paris v. Klopp* [1984] ECR 2971; Case 96/85, *Commission v. France* [1986] ECR 1475; Case 81/87, *The Queen v. H.M. Treasury and Commissioner of Inland Revenue, ex parte Daily Mail*

proceed with an investigation of both the suitability and proportionality of the contested measures. Older judgements, to which the Court referred in *Gebhard* provide some guidance on this point.

Do provisions laying down the conditions for the use of professional titles violate the right of establishment? In *Gebhard* the question arose whether a German Rechtsanwalt who practised law in Italy (essentially by giving legal advice to German-speakers) could carry the title „avvocato“. In its judgement the Court offered no clear indications as to how the proportionality test should be carried out. In the older *Kraus* case, by contrast, criteria were given to assess whether a procedure by which permission for the use of a foreign diploma is granted stand up to the principle of proportionality. The procedure must be restricted to the question whether the academic diploma has been correctly issued by the competent institution; moreover, it has to be easily accessible, may not be made dependent on excessive administration fees, and must be subject to judicial review. Criminal sanctions for neglecting the permission requirement may be imposed, but may not be disproportionately grave²⁴.

After *Gebhard* there can be no doubt that the „rule of reason“ equally applies with respect to the compulsory membership of public professional bodies. To underline the importance of the *Gebhard* judgement, a comparison with earlier case-law seems appropriate. In the case *Vlassopoulou*, the Court held that the competent authorities who grant the right to practise the profession of attorney have to take into account both the diploma obtained in the Member State of which the applicant is a national²⁵ and the practical experience acquired in the host Member State. After having obtained her diploma in Greece and having practised as an attorney in her home country Mrs Vlassopoulou practised law in Germany. After five years of practice in a lawyer’s office she was refused the right to establish herself as „Rechtsanwalt“. The Court ruled that the national authorities may require that the applicant proves to have acquired the necessary additional knowledge and qualifications in case the diploma has been awarded after an education which differs from the education and training in the host Member State, but that they should take into account the practical experience already acquired. If necessary, the licensing bodies must proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned. The explicit reference to the *Vlassopoulou*-judgement in *Gebhard* seems to indicate that these principles remain relevant even

and *General Trust PLC* [1988] ECR 5483. The first two cases dealt with the right to set up a secondary establishment in another Member State; the last case extends the freedom of establishment to a right to move away.

²⁴ Case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] I-1663.

²⁵ Twelve years earlier, in *Thieffry* the Court already held that the Order of Attorneys must take account of the equivalence of diplomas (Case 71/76, *Thieffry v. Conseil de l’Ordre des Avocats à la Cour de Paris* [1977] ECR 765).

after the implementation of the EC Directive on higher education degrees. However, according to Article 4 (2) of Directive 89/48 the host Member State may not at the same time organise an aptitude test and require proof of practical experience.

In *Gullung*²⁶ the Court considered the case of a person who wished to practise as an avocat without being registered at a French Bar and held such a registration requirement not incompatible with Art. 52 EC-Treaty. Gullung was a member of the Bar in Germany and wanted to exercise his profession in France, where he was denied access to the Bar because of lack of proof of good character. The Court decided that a lawyer who had been denied access to the Bar in a Member State because of failure to fulfil the necessary conditions of good character could not rely on Community law (being a member of the Bar in another Member State) to exercise his profession in the entire Community. This older judgement gave clear support to the survival of registration requirements existing in most Member States and acknowledged the role of the Bar as the final supervisor of entry into the profession. The *Gebhard* judgement, however, makes membership of a professional body subject to the four conditions governing restrictions of the fundamental freedom of the right of establishment. This raises the question whether membership of the Bar is suitable for securing the quality of professional services and, more importantly, whether membership does not go beyond what is necessary. If membership can be denied to applicants who are not of „good conduct“, subjective decisions as to who will be permitted to practice can hardly be avoided. Hence the licensing process may operate to limit the numbers of new entrants and harm competition. To prevent abuse of the prerequisite of „good character“ as a condition of entry into regulated professions, an economic analysis of the proportionality requirement may be particularly helpful (see Section 3).

2.1.4. Second Office

Professionals may wish to practice in more than one Member State. Regarding the establishment of a second professional base, the Court of Justice had to decide upon the validity of ethical rules prohibiting the opening of a second office. Restraints on the opening of a second office are usually justified by the need to ensure that clients can easily reach their attorneys. Attorneys who keep more than one office, so it is said, would not be sufficiently available to their clients. In the *Klopp* case the single chambers rule of the Paris Bar, even though non-discriminatory, was held incompatible with Article 52 EC-Treaty. The Court of Justice held that the right to enter the attorneys' profession may

²⁶ Case C-292/86, *Gullung v. Conseil de l'Ordre des Avocats au Barreau de Colmar et al*[1988] ECR 111.

not be denied to a German „Rechtsanwalt“ wishing to establish himself as an attorney in Paris, on the ground that this registration would contravene the relevant French law as well as the internal rules of the Paris Bar, providing that an „avocat“ may not keep chambers in more than one place and that such place must be within the territorial jurisdiction of the court with which he is registered. With respect to the medical profession the same principle has been confirmed in the case *Commission v. France*. The rule of French professional ethics prohibiting medical doctors and dentists from keeping more than one practice was held incompatible with the freedom of establishment. In this judgement the Court stressed that restrictions on this freedom must, to be acceptable, satisfy the requirement of proportionality. If professional ethics for the medical profession are defended for reasons of public health, it must be shown that the challenged rules really serve this purpose and that public health cannot be safeguarded by less restrictive means²⁷.

It follows from the above judgements that non-discriminatory ethical rules prohibiting the keeping of more than one office or the entering into partnerships at more than one Bar are incompatible with article 52 EC-Treaty. The freedom of establishment implies that a national of another Member State may not be denied entry into a profession solely on the ground that he already maintains an office in another Member State.

2.2. Rules regarding conduct

The medical and legal professions have used their self-regulatory powers to restrict many types of conduct, which allegedly may endanger professional integrity and dignity. Rules requiring adherence to fee scales - so it is said, in order to guarantee the quality of the services offered - are overt restrictions of competition. Besides from fee schedules, restrictions on advertising and rules concerning business structure, which restrict multi-disciplinary practices, may equally harm the public interest. The question arises whether these restrictions are subject to challenge by the antitrust authorities of the EC- Member States and/or the European Commission. The applicability of rules of competition law to professional ethics will be examined below. Additionally, the rules regarding free movement of services (art. 59 EC-Treaty) will be investigated. It seems evident that restrictions on advertising and fixed fee scales may hinder the free flow of professional services. Therefore, one could expect that the European Court of Justice would complement the control exercised by the European Commission. Unfortunately, the current state of the law does not provide for a simple

²⁷ Case 96/85, *Commission v. France*[1986] ECR 1475.

answer to the question whether the ethical rules are in conformity with the principle of free movement of services. The latter problem will be addressed in the second part of this section.

2.2.1. Competition law

The great degree of regulation covering the professions, both through government actions and self-regulation, also has an impact on the application of rules of competition law to the professions. The competition laws of the EC-Member States discussed below have not specifically addressed the question of the relationship between the professions and the national competition laws. None of the competition laws, however, has granted an exemption for cartel-like behaviour and monopolistic conduct in the sector of the professions. While the professions are not generally exempted from the provisions of competition law, in some Member States (Germany, the Netherlands, Italy) restrictive practices may escape from antitrust scrutiny as long as they are mandated by government or are promulgated by a public or private professional association under the supervision or direction of the government.

Even though professions are thus generally subject to antitrust scrutiny, professional regulations will not be controlled by the competition authorities if, according to national competition law, they can be understood as the consequence of state action or as government-authorised conduct. Under US antitrust law this favourable treatment of restrictive practices directly arising from state or government action is known as the „state action“ doctrine. In the European Community the applicability of competition laws to the professions will depend upon two factors. First, it must be investigated whether the national competition laws provide for a „state action“-like exemption and, if this is the case, how such exemption is construed. A narrow interpretation of the requirement that professional ethics must be based on statutory authority may bring most of the restrictions on competition within the scope of national cartel prohibitions. Second, even if the law of the Member States allows restrictive practices, these rules must be analysed as far as their conformity with the EC-Treaty is concerned. The Treaty provides for the possibility of attacking Member States' laws which adversely affect the full applicability of the prohibitions contained in the articles 85 and 86 of the EC-Treaty. Professional ethics may be challenged on the basis of the combined use of the articles 3(g), 5 (2) and 85-86 EC-Treaty. Given the primacy of European law, the Member States

have to reconcile their national regulations with the competition rules of the EC²⁸. Let us now examine the competition law of six Member States „state action“-like exemptions for liberal professions and the problem of their conformity with EC-law in more detail.

a. Germany

In Germany competition is regulated by the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, abbreviated GWB). Professions are not generally exempted from the prohibition of cartels and monopolistic practices; they fall within the scope of the GWB if the general requirements are met. The German competition law applies to agreements entered into by „undertakings“. The definition of „undertaking“ is broad enough to include liberal professions. According to German competition law the term includes any entity, regardless of size, which is engaged in trade with goods or services. Also professions come within this definition²⁹. German case-law shows some examples of practices which were held contrary to the principle of free competition. Price agreements between professionals and price recommendations issued by professional bodies were held to violate the prohibition of cartel agreements. For example, the Federal Supreme Court held that a Chamber of Architects violated the cartel prohibition by encouraging its members not to charge lower prices than the maximum indicated in the statutory scale of fees³⁰. Another practice, which was prohibited by the German cartel authorities, related to attempts at excluding outsiders by means of a boycott. For example, the Berlin Court of Appeal confirmed fines imposed on certain medical societies for inciting members to boycott two drug manufacturers who offered laboratory services in competition with independent laboratory specialists³¹.

Although the German competition law thus applies to liberal professions and there is no general exemption from the said law, at the same time, however, rules governing entry into the professions

²⁸ According to settled case law, Member States are required not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see e.g. Case C-379/82 *Peralta* [1994] ECR I- 3453). Such is the case, according to that case law : (1) if a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects, or (2) deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere. An example of the first indent could be the approval by government of prices fixed by professional bodies. An example of the second might be the extensive delegation of powers to professional bodies by allowing them to set performance standards.

²⁹ Immenga in: Immenga/ Mestmäcker (1992), § 1, Nr. 84-85.

³⁰ WuW/E BGH 1474 (Architektenkammer Niedersachsen). See also : WuW/E BKartA 50 (Vereidigte Buchprüfer), KG WuW/E OLG 322 (Vereidigte Buchprüfer II), OLG Stuttgart WuW/E OLG 545 (Rabattverbot der Apothekerkammer) and OLG Bremen WuW/E OLG 4367 (Proben apothekenüblicher Waren).

³¹ KG WuW/E OLG 1687 (Laboruntersuchungen). See also : WuW/E BKartA 357 (Berufsboxer) and with respect to veterinary surgeons: WuW/E BGH 647, 650 (Rinderbesamung).

and performance of the professional services will not be controlled to the extent that these practices are authorised by other legislation or are conducted pursuant to statutory directive. State regulations controlling entry or training in the professions are clear examples of rules which - in spite of their potential harmful effects on competition - escape from antitrust scrutiny³². This leaves us with the question whether rules of conduct, issued by professional bodies, may be attacked on the basis of the German competition law. In principle, restrictive practices do not violate the German competition law if they are authorised by other legislation. However, this exception in the German competition law is interpreted narrowly; rules restricting types of conduct will be challenged if they are not clearly based on statutory authority or exceed such authority. For example, price-fixing will be challenged if professional bodies have been empowered to generally safeguard professional duties, without giving them explicit power to establish fee schedules³³. Even though the case-law shows a clear tendency to interpret the exemption narrowly, some anti-competitive practices remain outside the scope of the German competition law because they are directly compelled by the state. With respect to attorneys the state imposes a fixed fees schedule (see Appendix I). Fixed fees for attorneys' services are thus clearly based on statutory authority and do not exceed such authority. For this reason it does not seem possible to challenge these anti-competitive practices on the basis of the German competition rules only; the EC-rules will have to fill this gap in the German control system.

b. France

In France the scope of the competition law is very broad: it does not make any reference to agreements between „undertakings“; moreover it applies to economic activities, irrespective of criteria relating to the size of the parties involved, such as market share. Both factors explain the great number of cases concerning professionals³⁴. Several practices were considered contrary to the French competition rules. Recommendations issued by the Paris Bar Council concerning fees were held to violate the French competition law because both professionals and clients could understand these recommendations as minimum fees to be respected. By fixing average and minimum fees in its Bulletins the Bar Council was restricting potential competition among lawyers. Recommended fee

³² Immenga in Immenga/Mestmäcker (1992), § 1, Nr. 90 with further references to the relevant case-law.

³³ WuW/E BGH 1474, 1476.

³⁴ See e.g. Decisions of the Competition Council (Conseil de la Concurrence) in the cases 82-4/DC, BOCC, 1982, 268-269 (legal counselors), 86-2/DC, BOCC, 1986, 5-8 and 87-D 15, BOCCRF, 1987, 177-179 (pharmacists); 87-D-53, BOCCRF, 1987, 360-363 (architects); 88-D-23, BOCCRF, 1988, 143-145 and 91-D-04, BOCCRF, 1991, 59-64 (opticians), 89-D-36, BOCCRF, 1989, 295-301 (dentists); 91-D-43, BOCCRF, 1991, 27-32 (medical specialists); 91-D-55, BOCCRF, 1992, 27-32 (geometrical experts); 92-D-39, BOCCRF, 1992, 281-283 (private investigators) and Advice in the case 92-A-04, BOCCRF, 1992, 298-301 (veterinaries).

schedules were also condemned in other liberal professions. The Order of Pharmacists tried to prevent price competition in the market for pharmaceutical products by encouraging the use of recommended prices, to be set by producers, and threatening pharmacists with disciplinary sanctions, if they would lower retail prices. The Order of Architects distributed standard form contracts containing clauses concerning remuneration; the wording of the contracts gave the impression that it was not possible to alter the terms of the contract with respect to fees. Another decision concerned the Order of Dentists, which organised a survey among its members to acquire information about fees. The results of the survey could be claimed by the members, so that it became easier for them to engage in illegal price-fixing. In each of the above cases the professional bodies were instructed to desist from these various fee fixing practices.

c. United Kingdom

In the United Kingdom there is a long tradition in applying competition rules to the professions. Restrictions on competition by the professions may be capable of investigation by the Monopolies and Mergers Commission (MMC) on a reference by the Director General or a Minister, under the „complex monopoly“ provisions of the Fair Trading Act. A complex monopoly under the Fair Trading Act exists if two or more persons who together account for 25% or more of the supply in the United Kingdom of a designated service so conduct their respective affairs that competition is prevented, restricted or distorted. The Commission must report to the Minister on the effects upon the public interest, and may make recommendations. If its conclusions are accepted, remedial action may be taken either by negotiation with the parties or by statutory order. Already in 1970 the Monopolies Commission (after 1973 the Commission was renamed the Monopolies and Mergers Commission) published a general report on restrictive practices in the supply of professional services³⁵. Following this report, many references of particular restrictions were made to the Commission. They concerned advertising restrictions (e.g. for barristers, solicitors, veterinary surgeons and accountants), collective fixing of fee scales (architects and surveyors) and the „two counsel rule“³⁶ in the legal profession. In every case, with the exception of the restrictions on advertising applying to barristers, the Commission found that the restrictions operated against the public interest. In some professions implementation of the recommendations of the Monopolies and Mergers Commission has been achieved (e.g. solicitors, opticians, veterinary surgeons). In other cases, where the restrictions were enshrined in rules issued under the authority of statute,

³⁵ Monopolies Commission, A Report on the General Effect on the Public Interest of Certain Restrictive Practices so far as they prevail in the Supply of Professional Services, October 1970 Cmnd 4463.

³⁶ This is the rule whereby a Senior Counsel or Queens Counsel may not appear in a case without a junior counsel.

implementation proved to be more difficult. With respect to advertising restrictions, the Office of Fair Trading (OFT) published a report in 1986. The OFT reported that a great majority of the 83 professions, examined by the MMC in 1970, had abolished advertising restrictions. Some professional associations (22 in total, of which 13 in the health sector) still imposed rules concerning the content, „style“ and „dignity“ of the advertisements, as well as on the advertising media used. The OFT argued that loss of reputation would hinder professionals of engaging in incredulous advertising and that the general rules on advertising (British Code of Advertising Practice), which apply to all economic activities, are sufficient to protect the integrity of the professions. This report has certainly contributed to a very marked softening of attitudes towards advertising by professionals, even in the medical profession. The General Medical Council now believes that information about services offered by general practitioners should be widely publicised (see Appendix I) .

d. Other countries: Italy, Belgium, Netherlands

Finally, also in countries which do not have a long standing tradition as far as competition policy is concerned, fixing of fees has been held contrary to the (recently enacted) competition laws. Both the Italian and Belgian competition law apply to agreements between undertakings. For interpreting the rules guidance is sought in the case-law of the European Commission and the European Court of Justice. Since European law also uses broad definitions, in both countries professions come within the scope of the cartel prohibition and the rules banning abuse of dominant position³⁷. Professions are considered to be „undertakings“ and the Orders of attorneys and doctors are qualified as associations of undertakings. In *Italy* the antitrust authority (Autorità garante della concorrenza e del mercato) considers collective fixing of fees as a serious impediment to competition in the market for professional services and is not willing to accept the argument that price fixing is a means of guaranteeing quality. However, in the legal and medical professions the criteria for calculating fees are fixed by the public professional bodies and approved by the competent Minister³⁸. In cases of restrictions of competition caused by state action, the Autorità cannot directly prohibit the restrictive agreements and may only signal the anti-competitive self-regulatory rules to Parliament and propose

³⁷ Italy: legge 10.10.1990, n. 287; Belgium: Wet 05.08.1991 tot bescherming van de economische mededinging (entered into force on 01.04.1993).

³⁸ The criteria for fixing attorneys' fees are determined by the Consiglio Nazionale Forense and approved by the Minister of Justice (art. 57 R.D.L., 27.11. 1933, n. 1578; legge 07.11.1957, n. 1051; D.M. n. 392/1990). The tariffs are binding; no derogation is possible (art. 24 legge 13.06.1942, n. 794). Minimum fees for medical services are set by decree of the President of the Republic, following a proposal made by the Ministers of Health and Finances, after having obtained opinions from the State Council, the Superior Council for Health and the National Federation of the Orders of Doctors. The minimum prices are obligatory (legge 21.02.1963, n. 244).

changes (art. 21 legge n. 287/90). If anti-competitive behaviour is not explicitly supported by legislative provisions, the Italian antitrust authority may directly apply the prohibition of cartel agreements. The Autorità decided that the fee schedules of the national association of companies of chartered accountants, which contained both minimum and maximum tariffs constituted infringements of the Italian competition law. The Autorità rejected the argument that price fixing was needed to guarantee a proper remuneration, the necessity of which was argued by reference to the protection of the independence and the quality of the services. Consequently, the Autorità refused to grant an exemption³⁹. In *Belgium* the first steps have been taken to apply the recent competition law to the liberal professions. The Belgian competition authority „Raad voor de Mededinging“ (Competition Council) issued a preliminary ruling, holding minimum fee scales for architectural services contrary to the prohibition of cartels⁴⁰. It is significant to add that, according to the Council, a posterior approval of fee scales by a public authority does not affect the applicability of the Belgian competition law and thus ruled out the possibility of a „state action“-defence. Finally, in the *Netherlands* liberal professions also come within the scope of the competition law⁴¹, with the exception of restrictions resulting from legislative provisions. There is, however, a clear tendency to deregulate the sector of the liberal professions. For example, with respect to notaries a new law has been proposed, which would allow free fixing of tariffs, together with a lowering of entry barriers and a (partial) abrogation of the notaries' monopoly position in view of real estate transactions⁴².

e. EC-law

In a limited number of cases (see above) restrictions on competition contained in codes of professional ethics may survive at the national level. However, those restrictions may still be subjected to antitrust control by the European Commission. If Member States maintain regulations which adversely affect the full applicability of the prohibition of cartel agreements, they violate the Treaty on the basis of the combined use of the articles 3(g), 5(2) and 85-86. Even if one takes a very narrow view and requires that the anti-competitive activities must be compelled by direction of the State acting as a sovereign⁴³ national rules satisfying this requirement may continue to constitute a

³⁹ Provvedimento *Assirevi*. For a comment, see Cornetta (1992).

⁴⁰ Raad voor de Mededinging, 31 oktober 1995, 95- VMP-3

⁴¹ In 1987 the original antitrust law (Wet Economische Mededinging) was amended to include liberal professions. Regulations restricting competition, such as the codes of conduct, must be reported and registered. When they are not in the public interest they may be declared invalid. A new competition law, based upon the EC competition rules, has been proposed to the Dutch Parliament and will probably enter into force from 1997 on.

⁴² Bos (1995), 82-83.

⁴³ *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (Decision of the U.S. Supreme Court, 16 June 1975). The American Supreme Court explicitly stated that attorneys play an important role in economic markets and that restrictions on competition agreed upon by attorneys may be prohibited upon the basis of §1 Sherman Act.

major hindrance for competition. Therefore it is of utmost importance to contest national rules hindering full market integration. National rules which upheld restrictions of competition in the medical and legal professions may successfully be challenged, but only if the conditions for applying article 85 EC-Treaty are satisfied. In this respect the requirement that interstate trade must be affected may form a major obstacle, since markets for professional services have largely remained local⁴⁴.

The applicability of the prohibition of cartel agreements (art. 85 EC-Treaty) in the sector of the liberal professions has been confirmed by the recent Decisions of the European Commission in the cases *Consiglio nazionale degli spedizionieri doganali*⁴⁵ and *Colegio Oficial de Agentes de la Propriedad Industrial*⁴⁶. In the latter decision, the Commission stated that article 85 EC-Treaty fully applies if a Member State gives authority to a professional association to fix prices, thereby violating articles 3(g), 5 (2) and 85 EC-Treaty. When professional associations promulgate fee schedules on the basis of such authority they will not be immune from antitrust scrutiny. In both decisions price fixing was held illegal.

It may be asked whether these principles can be extended without difficulties to the medical professions. In the legal professions, increased price competition may have a positive impact on efficiency and innovation while exercising a downward influence on costs. In the medical profession, by contrast, fee schedules may be useful because they facilitate insurance reimbursements under government programs. Even though collective price-fixing may be considered a very serious infringement of the EC competition rules, especially when membership is a condition to practice the profession and may lead to market segmentation, the features of the medical profession in particular with respect to remuneration schemes agreed upon in the framework of public health systems seem to warrant a somewhat different treatment. The large share of medical services provided under public reimbursement suggests that price competition is less likely to occur in this profession. Therefore, distributive justice considerations (provision of medical services at low prices for poor people) may conflict with efficiency considerations.

2.2.2. Freedom to provide services

⁴⁴ Ehlermann (1993), 143.

⁴⁵ Decision 30.06.1993 [1993] OJL 203.

⁴⁶ Decision 30.01.1995 [1995] OJL 122.

Ethical rules regarding conduct may affect the free movement of goods and services. Therefore, articles 30 EC-Treaty, which prohibits quantitative restrictions on import and measures having equivalent effect, and 59 EC-Treaty, which protects the free movement of services, must briefly be discussed. Unfortunately, the case law of the European Court of Justice is very complex on this point and there is no clear-cut answer to the question whether ethical rules hindering the free flow of goods and services are contrary to the fundamental principles of the EC-Treaty. The case law on goods and the case law on services seem to evolve in a different way. In the *Hünermund* judgement ethical rules of a German Chamber of Pharmacists restricting advertising for non-medical products sold in pharmacies were not considered to be against Article 30 EC Treaty⁴⁷. This judgement followed the famous distinction made in the *Keck* decision⁴⁸ between measures regulating production and rules which restrict or prohibit certain „selling arrangements“. Whereas rules of the first category remain within the reach of the prohibition contained in Article 30 EC-Treaty (and the „rule of reason“), rules of the latter category are, according to the new learning, no longer considered as measures having equivalent effect. Recent case law of the European Court of Justice shows many examples of what - besides from a prohibition of sales at loss prices, which was the contested measure in *Keck* - may be considered regulations of „selling modalities“ : rules concerning the location where products may be sold⁴⁹, opening hours of shops⁵⁰ and also the prohibition of televised advertising in respect of certain sectors of economic activity⁵¹. It is still uncertain whether the Court of Justice would also qualify a *total* ban on advertising (e.g. a prohibition to advertise specialities) as a regulation of selling modalities.

In the *Alpine Investment* case an attempt was made at transposing the *Keck*-rule to the field of services. The measure contested was the general prohibition, which applied to all financial intermediaries established in the Netherlands and operating within and/or outside that territory, of contacting individuals by telephone without their prior written consent. The Court of Justice stated that the contested measure was not analogous to the legislation concerning selling arrangements in *Keck*. The prohibition of „cold calling“ covered not only the provision of services in the Netherlands

⁴⁷ Case C-292/92, *Hünermund et al. v. Landesapothekerkammer Baden-Württemberg* [1993] ECR I- 6787.

⁴⁸ Cases C-267 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097. To remain outside the scope of the prohibition the rules must apply to all affected traders operating within the national territory and they may not, in law or in fact, affect the marketing of imported and of domestic products in a different manner (paragraph 16 of the Court's judgement).

⁴⁹ Case C-391/92, *Commission v. Greece* [1995] ECR I-1621 (sale of milk for babies in pharmacies only); Case C-387/93 *Banchero*, not yet published (sale of cigarettes in tobacco shops).

⁵⁰ Cases C-69/93 and C-258/93 *Punto Casa and Boermans* [1994] ECR I- 2355; Cases C-401/92 and C-402/92 *Tankstation t Heukske and PPI* [1994] ECR I- 2199.

⁵¹ Case C-412/93, *Leclerc-Siplec v. TF 1 Publicité and M6 Publicité* [1995] ECR I-179.

but also in other Member States. The Netherlands thus required compliance with its own rules of marketing not only for the provision of services in its territory but also in the territory of other Member States. This „export of national restrictions concerning the manner in which services are to be provided“ was seen as a measure of equivalent effect, but justified under the „rule of reason“ as necessary to protect the good reputation of the financial sector and proportionate to this aim⁵².

As long as the European Court of Justice has not explicitly extended its *Keck*-rule to the supply of services, national regulatory measures restricting the free movement of goods may be dealt with in a more lenient way than restrictions on the free provision of services. Regulations restricting selling modalities, such as prohibitions of certain forms of advertising, are not considered contrary to the goal of market integration if they relate to goods, but may be held to violate the EC- Treaty if they relate to services. However, in the latter case the restrictions may be justified if they are suitable to reach a goal of public interest (e.g. consumer protection) and proportionate to the objective pursued. Professionals willing to offer their services outside the Member State where they are established may have to cope with ethical rules set by the public professional bodies of the host country holding the envisaged cross-border advertising contrary to the „dignity“ of the profession. If one adopts a fairly restrictive reading of the *Alpine Investments* decision, it may be argued that the professional public bodies are not exporting restrictions concerning the manner in which services are to be provided, as the Dutch government did, so that there remains scope for a *Keck*-like limitation of the prohibition of measures hindering the free movement of services. If one accepts this interpretation, ethical rules prohibiting the „marketing“ of professional services will not violate the EC-Treaty. In the other case, they will have to be justified under the „rule of reason“. The legal distinctions made by the European Court of Justice will strike non-lawyers as difficult and obscure. To simplify EC-law one could argue in favour of a similar treatment of goods and services, so that non-discriminatory rules concerning marketing would generally be in conformity with the EC-Treaty. The price to be paid for this simplification is high, however. Restrictions on competition in the markets for professional services would no longer have to be justified on public interest grounds and substantial inefficiencies may ensue.

3. Economic Analysis

⁵² Case C-384/93, *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141.

3.1. Self-regulation and the Public Interest

Both in the medical and legal professions public professional bodies control entry through registration requirements and conduct through „ethical rules“. It follows from the legal analysis that, under current EC-law, these remaining barriers to market integration can be upheld if it can be shown that free movement of professionals must make place for imperative reasons of „public interest“. The rationale for the policy of some EC-Member States that restrictive practices cannot be challenged upon the basis of the competition rules if they are mandated by government or promulgated by professional associations under the supervision of the government is the same. The underlying belief is that governments act in the best interests of their citizens and that therefore any anti-competitive effects of government regulations are outweighed by their benefits to society. Since quality improvement is the crux of the matter, the acute question is whether self-regulatory measures of the professions concerning access and performance further the public interest. Which arguments may be advanced to „regulate“ the medical and legal professions and to distrust the market mechanism? An unregulated market, that is where the provision of services is governed solely by contracts freely made between suppliers and purchasers would, it is alleged, give rise to significant social welfare losses as a result of the following problems.

First, markets for professional services are characterised by asymmetric information and, as a result, there is a risk of adverse selection. Lack of information on the part of the consumers is likely to be most severe with services (experience goods), which are not regularly purchased (no learning through the repeat-purchase-mechanism) and services whose properties can be assessed only with the help of highly technical standards (credence goods). If consumers cannot reliably judge the quality, neither *ex ante* nor *ex post*, trust in the professional becomes the only factor in economising on information costs. Such goods create the conditions for the emergence of a „market for lemons“. In his well-known study on quality uncertainty, Akerlof argues that asymmetric information, which cannot be eliminated by credible disclosure, attracts sellers of low quality⁵³. As a result of the asymmetric information producers are unable to signal differences in their relative quality to consumers. The result is that professionals who depress quality are not punished by the market mechanism. The market price will reflect only the average quality level and thus attract average quality sellers. In turn, this will lead to a reduction in the average level of quality perceived by

⁵³ Akerlof (1970).

consumers, a further reduction of the market price and another dilution of quality. This process of adverse selection is cumulative and may in the limit destroy the market altogether.

Second, informational asymmetries lead to conflicting agency relationships between the professionals and the consumers. The principal-agent-problem increases the magnitude of the welfare losses. Given the superior expertise of the supplier, discretion must be conferred on the professionals to determine to a large degree what services are needed. This may lead to demand generation, that is the provision of services which the clients, if fully informed, would not have wanted⁵⁴.

Third, externalities may result from poor quality of service. The quality of the service may affect third parties as well as the client. Considerable losses may be thrown upon society if poorly trained professionals were allowed to perform the services. An incompetently drafted will may impose losses on individuals far removed from the negligent lawyer; and a failure by a doctor in treating a contagious disease may give rise to an epidemic. Externalities are especially worrisome in the health sector, where injuries to the body represent significant and inherently unrecompensable losses.

Even though the above arguments do provide reasons for government intervention, they should be limited to their right proportions. The argument relating to lack of information about quality should not be overstated. Although costly, it is not impossible to get unbiased estimates of quality levels. Klein and Leffler demonstrate that the existence of any method to evaluate the validity of supplier claims is sufficient to allow the production of high quality services without regulation. Thus, a supplier wishing to produce high quality services will not be driven out of the market by quacks (lemons) as long as reputations for quality can be established on criteria other than prices⁵⁵. As far as legal services are concerned, a distinction is to be made between occasional clients who consult an attorney and corporate clients. Large corporations are undoubtedly better able to find competent providers of professional services than small businesses or individual consumers. For consumers who do not often require legal assistance, especially those in middle-income brackets, finding and selecting an attorney can be difficult, especially where little information is provided to the public. Large customers, who can invest more funds in obtaining the information and for whom the amount at stake is often larger, are able to overcome asymmetric information by investing money in searching for information. It has also been pointed out above that the problem of asymmetric information is particularly severe with services that are not regularly purchased. If, on the contrary,

⁵⁴ For empirical evidence on demand generation, see Trautwein and Rönnau (1993), 295-297 with further references.

services are purchased on a regular basis, quality control becomes possible through experience. For instance, a learning process will enable the patient to judge the quality of the treatment (the availability of the physician, his diligence and support); judgement on the appropriateness of the treatment to cure the disease may remain biased, however.

Additionally, it is not immediately clear that regulations are needed to reduce the agency problem. Supplier induced demand in the health sector, if evident, can also be reduced by demand-side reductions in insurance coverage. To justify the restriction of the number of practitioners in the health sector, the argument is made that without these limitations excess consumption of medical services would occur. This problem is connected with the regulation of fees. If patients have to pay only a small part of their expenses and the largest part is reimbursed by health insurance, a serious moral hazard problem emerges⁵⁶. The way to solve this problem is not necessarily by limiting entry; it could be considered also to introduce a deductible high enough to deter excess consumption. If demand for medical care is price-elastic⁵⁷, the moral hazard problem may better be solved by exposing the patient to risk than by quantity controls.

Finally, the externalities' problem does not compel self-regulation in its current form either. Regulations are not needed as long as there exist natural inducements or private law incentives (liability rules) to keep quality levels above some minimum. Quality may be regulated directly, through standards, or indirectly, through liability rules. In the literature quality regulation is advanced whenever the government has better information on optimal safety standards than parties in a market-setting and there is a risk that the defendants in a liability suit will not financially be able to compensate the harm („judgement-proof problem“)⁵⁸. Neither of both problems occur in malpractice cases given the information advantage of the professionals and their sheltered income situation. A case could thus be made for liability rules, but it remains unclear why self-regulation should be considered the only remedy.

Which arguments can be advanced to explain the existence of a self-regulatory framework to overcome the above mentioned problems? The leading advocate of self-regulation, Miller, presents

⁵⁵ Klein and Leffler (1981).

⁵⁶ Arrow (1963).

⁵⁷ Evidence that the demand for medical care in Belgium is price-elastic can be found in Carrin and De Graeve (1986) and Pacolet and Wouters (1986).

⁵⁸ See Shavell (1984) and Shavell (1986).

three advantages of self-regulation⁵⁹. First, a self-regulatory regime takes advantage of the fact that the members of the profession have better knowledge of the ways to guarantee quality and about the efficacy of various potential actions. A regulatory authority cannot acquire and maintain a specialised knowledge of each profession. Without this knowledge the performance of the professional services cannot be effectively regulated. Members of professions have access to information needed for effective regulation at lower costs than others. Therefore, the profession has the best capacity to control quality and recognise low standards. Second, self-regulation is more flexible and therefore less likely to stifle innovation or excessively limit consumer choice. Finally, self-regulation generally results in the costs of regulation being borne by the profession itself. Public regulation is costly to taxpayers, some of whom do not consume the product. Additionally, self-regulatory bodies have incentives to minimise costs of enforcement and compliance.

Miller's arguments are not entirely convincing. Against the advantages of self-regulation, one must point to a major disadvantage. Although the professions may indeed have better information, they may lack appropriate incentives to control and enforce quality standards. It may be assumed that professionals wish to exclude competition, so that they will aim at giving the consumers the impression that the services of all professionals are equally good. The advertisements for the profession as a group, which are made in spite of the strict ethical rules regarding advertising, confirm this goal. It is, of course, obvious that differences in quality do exist. Whereas competitive pressures could improve quality, professional ethics may restrict the information available to consumers and harm competition. There is thus a serious risk that market failures due to asymmetric information, principal-agent-problems and externalities will not be cured. In spite of the conceivable ineffectiveness of self-regulation as a remedy to market failures and the substantial costs associated with them, the advocates of self-regulation hold that the benefits in terms of cost-efficiency remain crucial. According to Miller, the government's role should be restricted to its function as referee. The job is to prevent self-regulation from discouraging competition within the industry. The overview of the substantive legal rules and their (lack of) enforcement in the first part of this paper warrants caution with respect to the ability of governments to eliminate restrictions on competition in the sector of the professions. If the damages to society caused by the self-regulatory restrictions on competition are higher than they are for government regulation, the arguments asserting the cost-efficiency of self-regulation may not hold.

⁵⁹ Miller (1985).

It should be added that the contentions about greater flexibility and the division of the costs of self-regulation are not compelling. First, as far as self-regulatory measures cause efficiency losses, they be may hard to change. If the professions can limit competition with the support of government officials, they may be better able to successfully resist the competition from associations of newcomers offering more efficient rules. The resistance to change may be more effective when the rules are promulgated by self-regulation than when by governmental regulation. Even if the rents⁶⁰ have been dissipated by competition between the privileged or by newcomers, the artificial restrictions on output give rise to what Tullock has called a „transitional gains trap“. There is no politically acceptable way to abolish a policy that is inefficient both from the standpoint of consumers, who pay artificially high prices, and from the standpoint of the privileged, who no longer make exceptional profits. The persons who loose will not willingly compensate the capital losses of the what they consider to be immoral gainers, even though these capital losses are smaller than the overall social welfare gains from removing the output restriction⁶¹. Many times only revolution will shake loose an economy’s inefficient regulations. Second, if Miller’s argument that all of the costs of regulation are borne in the market in which it is imposed holds, it remains hard to see why the distribution of the costs of the regulation would be split in an efficient fashion between the sellers and the buyers⁶². Professional bodies of doctors and attorneys, who consist only of members of the professions, may pass on the great bulk of the costs to the ultimate consumers. This leaves only the technological argument having to do with the costs of gathering information intact. On this point it should be noted that, under a tort system, judges may also hire experts (usually members of the regulated profession) to assist them in the assessment of negligence. The question is then whether the savings resulting by combining the judges’ and the experts’ roles into one are greater than the potential losses due to overinclusive self-regulation. Ultimately, the magnitude of the costs and benefits of self-regulation is an empirical issue. On a theoretical level the case for regulation in its strongest form (self-regulation of entry and conduct) is weak. However, before definitive conclusions may be reached, both advocates of self-regulation and their critics should produce empirical evidence to sustain their positions.

3.2. Self-regulation and the Pursuit of Private Interests

⁶⁰ The concept of rent-seeking is explained below (see 2.2).

⁶¹ Tullock (1975).

⁶² Curran (1993) 63

In contrast to the public interest theory of regulation, which sees self-regulation as a quality enhancing mechanism, in a private interest approach professions are seen as well-organised cartels with strong lobbies. The private interest theory of regulation predicts that professional groups will oppose all measures that may enhance competition between professionals. Market integration increases competitive pressures. The efforts of pressure groups to delay EC-programmes aiming at harmonisation of training and professional qualifications are understandable from this perspective. This may explain why progress on the programs to harmonise national systems for professional qualifications was painfully slow⁶³.

At the Member States' level, it may be expected that the professions will resist all changes in the institutional structures changing the scope of their monopoly rights. In the United Kingdom possibilities have been created to open the market for legal services to other practitioners than barristers and solicitors. Professional associations of other lawyers may apply for access, but the institutional structures are unlikely to generate full competition. As a result of pressure brought to bear on politicians during the legislative process, existing practitioners groups succeeded in gaining a significant influence over the newly established agencies. For example, rights of audience are to be determined by the Lord Chancellor and designated judges, all of whom were formerly barristers and retain strong connections with the Bar⁶⁴. Under the new regulation rights of audience can be sought by the Law Society (being the professional body of solicitors), by bodies representing employed lawyers or by bodies representing non-lawyers. The right to conduct litigation is granted to practitioners by the professional bodies to which they belong, if the bodies can demonstrate that they can set and maintain rules of conduct which are appropriate in the interests of the proper and efficient administration of justice. Consequently, competition for market access between self-regulatory bodies has become possible. As a result of the reforms the monopoly of barristers is no longer intact, since self-employed solicitors who passed an examination now have a right of audience in the higher courts. The question for the immediate future, however, is how many solicitors will qualify for rights of audience in the higher courts⁶⁵ and even more, how many will use them.

⁶³ See Section 1.1 of this paper. In the case of architects it took 17 years to produce a Directive (64/222).

⁶⁴ Ogus (1994), 110-111.

⁶⁵ The number of solicitors taking the advocacy tests is low: in the three first tests 74, 46 and 53 respectively. The failure rate is high: for example, only 29% of candidates passed the third evidence and procedure test, compared to 41% in the second test and 60% in the first test. In February 1996 there were no more than 375 solicitor advocates in the United Kingdom (*Law Society Gazette* 14 February 1996).

Private interest theory also criticises regulation serving producers' interests as „rent-seeking“. Professions seem to meet all requirements mentioned in the Public Choice literature to be effective interest groups, which may engage in rent-seeking. Rents earned in political and bureaucratic markets are defined as increases in net revenues that do not result from growth of output, but from redistribution of wealth through the coercive power of the state. Rent-seeking and profit seeking have much in common, but in competitive markets competition between producers eliminates profits (rents). In the absence of such competition, above-cost payments made available through the granting of exclusive rights by the government will be received by privileged groups, which will be able to retain the rents. To the extent that regulation protects the professions from competition they acquire rents and some wealth is transferred to them from consumers. The rents imply dead-weight losses beyond the standard losses of consumer surplus usually depicted by Harberger triangles. They cause additional social waste to the extent that lobbying for rents (and protecting them) binds resources which have an opportunity cost in terms of forgone production.

The rent-seeking hypotheses may be supported by three lines of reasoning. First, the professions fit the description of effective pressure groups. Second, the self-regulation extends beyond the scope of rules needed to correct market failures. Third, incomes of professionals are excessively high. Let us look at these arguments in more detail.

The most successful groups in obtaining wealth transfers are likely to be small, homogeneous and well organised. The suppliers of the rents are large groups in the general public, which are difficult to organise and which face information problems. Politicians can be seen as the brokers of the wealth transfers. In a seminal study Olson identified the factors which make a group more or less effective in influencing political decisions⁶⁶. Each interest group is subject to the classic public good problem of lobbying. Overcoming free-riding tends to be a decisive factor of a group's ability to organise itself as an effective pressure group. Therefore, the size of the coalition determines its potential as an effective interest group. Relatively small groups face lower costs of monitoring and controlling free-riding behaviour and will thus be more effective than larger groups. The size of the interest is another important determinant. Smaller coalitions with a strong community of interests will tend to have stronger political voices because each group member has a larger financial stake in the outcome, given that the potential gains will be divided among fewer hands. Therefore, a group will become an effective lobby if it is small enough in number and if the financial interests are sufficiently

⁶⁶ Olson (1965).

concentrated so that the potential benefits from organising and lobbying for governmental favours will exceed the associated costs. Small cohesive groups are often successful in obtaining wealth transfers at the expense of the general public. Consumer interests are more diffuse and the costs of organising consumers to avoid wealth transfers are relatively high and will exceed the expected gains from doing so.

The above observations help explain why the medical and legal professions are successful interest groups. To overcome free-riding, the professions have the strongest instrument at their disposal: coercion. Since they enjoy public law status, they do not only determine who may engage in the professional practice, but may also impose punishments on individuals not complying with professional ethics. The professional bodies require financial contributions, which may be quite substantial for newcomers, as a condition of membership. When membership is required to engage in potentially highly profitable undertakings, professional associations may become very effective interest groups. In addition, sanctions for not complying with ethical standards may be far-reaching and may even include prohibition from practice, either temporarily or permanently. Occupations which have no coercive power will try to overcome free-riding by positive selective incentives, that is private goods which an individual can only use as a member of the group. Examples are the provision of information, education programs and pension-schemes. Also the medical and legal professions are offering such services to their members, which may add to legitimising compulsory membership, being in itself a very effective way of overcoming free-riding problems. The varying degree of homogeneity of the different professional groups may also explain the relative success in rent-seeking. In the sector of the medical professions, pharmacists seem to be a more effective interest group than medical doctors. For example, in Belgium pharmacists enjoy territorial protection and their income is higher than the earnings of general practitioners⁶⁷. This can easily be explained using the above insights from Public Choice. The pharmacists' group is clearly smaller than the doctors' group. The homogeneity criterion applies to the former group (protection of the monopoly of selling medicines) but not to the latter group, which contains a lot of heterogeneous sub-groups. Finally, it is worth noting that the costs of lobbying for the medical and legal professions are reduced considerably because most of the organisational costs must be spent anyway. A significant portion of the costs of engaging in rent-seeking activity are start-up costs. Once they have been borne, the cost of supplying additional collective effort is relatively low. Professional societies are well situated to act on political issues that affect their wealth because the costs of identifying and organising a

⁶⁷ Van den Bergh and Faure (1991).

community of interests have already been incurred. For this reason they prove irrelevant when it comes to deciding whether to engage in lobbying activities or not. On the other side clients face high transaction costs in opposing wealth transfers. As far as the services of attorneys are concerned, there is no structured organisation of clients' interests. In the medical sector one would expect that health care insurers defend the interests of patients on a structured and continuous basis. However, experience indicates that health insurers have not been able to counter the bargaining strength of doctors effectively. For instance, in Belgium they have agreed not to inform their members about the quality of physicians in return for co-decision powers regarding fixing of fees⁶⁸. Policies whose benefits are narrowly focused on small, well-organised interest groups are favoured by politicians, especially when the prospective gains (votes, campaign contributions and the like) are high and the transfers are not recognised by the general public. In the health sector patients get medical bills reimbursed and are therefore less sensitive to the real amount of fees and the rents involved.

A second argument supporting the rent-seeking hypothesis follows from the scope of self-regulation itself. The comprehensive self-regulation of the medical and legal professions is not fully justified by market failures. First, professional ethics offers many examples of rules which go further than necessary to correct market failures. Restrictions on advertising, such as ethical rules prohibiting attorneys to solicit clients by informing them about their specialities, inhibit the free flow of information and competition. Instead of reducing the problem of informational asymmetry, these ethical rules create inefficiencies instead of eliminating them. Restrictions on advertising are blatant efforts to reduce price competition by constraining the flow of information. American and Canadian studies provide overwhelming evidence that advertising does not adversely affect quality. In at least one study restrictions on advertising are found to have actually reduced the quality of services provided⁶⁹. In many countries advertising restrictions are now being relaxed, either as a consequence of increasing interprofessional competition or judicial intervention (see Appendix I). Second, in some countries, there is evidence that ethical rules are mainly used (or abused) to discipline members for offences unrelated to quality of output. In Belgium sanctions are most often imposed for lack of dignity in private life or for improper behaviour towards the professional body, but rarely for professional malpractice. The Belgian public body seems not so much concerned with the supervision of the quality of the services performed, but rather with the public image of the attorney and its own privileges⁷⁰. The picture is somewhat different in the Netherlands, where a relatively greater number

⁶⁸ Swennen (1989).

⁶⁹ Muris and McChesney (1979).

⁷⁰ Van den Bergh and Faure (1991), 174-175; Faure (1993), 108-109.

of cases concern the duty of care towards clients, although sanctions are not only imposed for assuring minimum quality but also for violation of ethical rules restricting competition (fees, advertising)⁷¹.

High incomes on their own do not provide conclusive evidence of successful rent-seeking. At this point it should be recalled that asymmetric information on markets for professional services prevents competitive pricing. Given the experience goods (or credence goods) - character of professional services regulation of fees may be favoured in order to guarantee minimum quality. A sufficiently high „confidence premium“ must be paid to the professionals, in order to avoid strategic behaviour⁷². If the amount of the premium for opportunism exceeds the confidence premium, incompetent professionals may drive out good professionals (market for lemons). Although price regulation may overcome the problem of adverse selection, a major problem with the argument is that regulators are supposed to be sufficiently benevolent and omniscient to eliminate unproductive monopoly rents while still allowing quasi-rents (confidence premiums) as quality incentives. Under the current self-regulatory systems the professions may abuse fee regulation by accepting rewards for their monopoly without enforcing high standards. This danger is especially present given the existing entry barriers. Regulation of fees in combination with limitations on entry is dysfunctional in view of improving quality, since it is precisely the facilitation of market entry that raises the chances of a successful quality-enforcing policy⁷³. Moreover, insofar as clients cannot reliably evaluate service quality even after treatment (credence goods), there seems to be a case for more comprehensive quality-enforcing regulation. Regulation of fees seems to be an answer to strategic behaviour only if search costs exist and quality uncertainty can be reduced through the repeat purchase mechanism. It may be concluded that high incomes are partly justified insofar as they are able to guarantee minimum quality of experience goods. Although the protection of quality rents through professional self-regulation in its current form is dysfunctional, the analysis of income levels should take account of the desirability of quality rents to avoid adverse selection.

It is very difficult to prove empirically that doctors' or attorneys' incomes are the result of successful rent-seeking. Figures about income are available, but these data are seldom analysed in relation to the variables of professional regulation⁷⁴. The income situation of medical doctors may serve as an

⁷¹ Hellingman (1993), 193.

⁷² Schäfer and Ott (1995).

⁷³ Schulenburg (1986), 142-145.

⁷⁴ Canadian research has established a relationship between different variables of self-regulation in 20 professions (limitations on mobility, price restraints and advertising restrictions) and income. See Muzondo and Pazderka (1983).

example to illustrate the difficulties in proving rent-seeking⁷⁵. Clearly average doctors earn higher incomes than average self-employed workers. Salaries paid to UK doctors put them in the highest paid sector of the population⁷⁶. Empirical work done on physicians' income in Germany equally shows that incomes are 60% higher than the reference income of a civil servant⁷⁷ and that they have the highest relative incomes compared to their colleagues in the USA, UK and France⁷⁸. In Belgium and the Netherlands the picture is the same. In both countries medical specialists are on the top of the income scale⁷⁹. Generally, the empirical work seems to corroborate the excessive income hypothesis for doctors compared with the income of a control group of individuals. In spite of this evidence, efforts to identify rent-seeking remain rather controversial exercises. The trouble starts at the assessment of the incomes: different methods of cost accounting yield different outcomes. Next, to assess the excess return to human capital investment, figures are needed to estimate the costs involved in seeking rents. The long duration of the studies reduces the period in which income is earned. Finally, high incomes may just reflect appropriate quality rents. For all these reasons, it is hard to say to which extent high incomes are effects of the current self-regulation. Moreover, in recent years the relative income position of doctors is deteriorating while physician density increases⁸⁰. Strong cartelization would reflect a rather weak correlation of increasing physician density and decreasing incomes. And yet, the weak empirical evidence on rent-seeking should not let us forget that the other party in the controversy is likewise obliged to furnish proof that the current level of income just reflects an appropriate confidence premium.

Finally, although the empirical evidence is not conclusive, it is not difficult to find qualitative evidence for monopoly rent protection. Grandfather clauses, exempting the current members of the profession from having to satisfy new licensing standards, are the best known technique for generating rents for current members of an occupation. In the sector of the liberal professions rents are generated and protected through effective limitations on entry and competition. The most

Although the relationship between self-regulation and income has not clearly been established in European studies, there is some evidence about price-discrimination. In the UK conveyancing (a monopoly right of solicitors which has meanwhile been abolished) led to price discrimination, which was enhanced by the fixed scale of conveyancing fees set by the Law Society. See Bowles and Phillips (1977). With respect to minimum fee schedules and price discrimination in the American legal profession, compare Latham (1979).

⁷⁵ Income statistics show that the average income of attorneys is not very much higher than the average income of self-employed workers, so that the excessive income hypothesis seems to be falsified from the very beginning of the empirical analysis. See e.g. Van den Bergh and Faure (1991), 178-179.

⁷⁶ Bowles (1993) 335.

⁷⁷ Männer (1993).

⁷⁸ Reinhardt (1985). For other empirical studies, see Zohlhörer/Schmidt (1985) and Zweifel/Eichenberger (1988), whose research somewhat contradicts Reinhardt's conclusions.

⁷⁹ See for Belgium : Van den Bergh and Faure (1991), 178-179, and for the Netherlands : den Hertog (1993), 213.

⁸⁰ Trautwein and Rönnau (1993), 289 and 303.

prominent example for attempts at monopoly rent protection is the asymmetry in the quality checks of entrants and of established members of the medical and legal professions. Once entrants are licensed they will not -as a rule- lose their licenses even when they lost elementary parts of their qualification by lack of practice and/or by negligence of keeping track of innovations. Even if ethical rules require on-going education (and professional bodies offer education programmes to their members on a voluntary basis), the license to practise as an attorney or a doctor is valid for the entire professional life⁸¹. The intraprofessional transfers to a limited group of practitioners may be the most significant consequence of self-regulation. As the literature on rent-seeking has shown, the intra-industry distribution of rents may very well explain the struggle for regulations yielding these rents⁸²; self-regulation in the medical and legal professions seems to provide additional evidence for this hypothesis⁸³.

4. The Legal and the Economic Approaches Combined: The Proportionality Requirement Revisited

The prerequisite that professional rules must serve the general good and the requirement of proportionality are crucial in the evaluation of the compatibility of divergent national professional rules, which equally apply to national and foreign professionals, with the principles of free movement of goods and services and the right of establishment guaranteed by the EC-Treaty. To make a convincing case in favour of self-regulation in its current form, two things must be shown. First, it should be demonstrated that regulation is needed for imperative reasons of public interest. Rephrased in economic terms the first question relates to the necessity to cope with market failures. It should be shown that competition, due to the special characteristics of the professions, will not guarantee quality. Even if this first requirement is met, the question remains which form regulatory intervention should take. In legal terms this equals the analysis of the proportionality of the self-regulatory measures. To make a case in favour of an exemption for the medical and legal professions from the competition laws, similar evidence must be submitted. It needs to be shown that competition on the market for professional services is not able to generate outcomes improving social welfare and that

⁸¹ Finsinger (1993a), 371 and Finsinger (1993b), 389.

⁸² See e.g. Guttman (1978) and Maloney and McCormick (1982).

⁸³ Van den Bergh and Faure (1991), 180-181.

the restrictions imposed by self-regulation are indispensable to the attainment of the alleged benefits in terms of quality improvement⁸⁴.

It may be doubted that the current self-regulation in the medical and legal profession would survive the „rule of reason“ test if the European Court of Justice were willing to adopt an economic approach. First, some rules do not cure market imperfections but rather create them. A strict ban on advertising does not satisfy the criterion of necessity advanced by the European Court of Justice. It is hard to see why such a prohibition may be needed to cure a market imperfection. For example, rules preventing professionals from mentioning their specialities increase the search costs of consumers; instead of curing the informational asymmetry they protect less qualified professionals from competition. Economic analysis may help lawyers in deciding hard cases by unmasking the rhetoric supporting rules, which are allegedly serving the public interest. If it can be shown that self-regulatory rules serve to create inefficiencies rather than to cure market imperfections, the first question regarding the necessity of the contested measures may be answered negatively. Many ethical rules, such as advertising restrictions and the referral system⁸⁵, will not survive the reasonableness test at this first stage because they restrict the flow of information between clients and professionals. In these cases it will be possible to challenge the self-regulatory measures successfully and there will be no need to further investigate their proportionality.

The second question concerning the proportionality of the self-regulatory measures, which do serve the public interest, is much more difficult to answer. Some rules issued by self-regulatory bodies (e.g. control on entry and sanctions for malpractice) may be justified for imperative reasons of public interest, but it may be questioned whether they also satisfy the proportionality test. With respect to the requirement of proportionality, the crucial question is whether a less interventionist measure may cope with market failures as effectively as the current self-regulatory rules, without causing the same inefficiencies. Regulatory techniques differ in the extent to which they impede freedom of activity. Ogus has classified different regulatory techniques according to the degree of state intervention. He envisages a spectrum with information measures at one end and prior approval at the other end of

⁸⁴ See Article 85 (3) EC Treaty, which makes an exemption from the cartel prohibition dependent upon the fulfilment of four conditions. Production must be improved; consumers must get a fair share of the resulting benefits; the restrictions must be indispensable to the attainment of the benefits and competition may not be eliminated in respect of a substantial part of the products in question.

⁸⁵ In the medical profession the referral system prevents direct contacts between patients and specialists; general practitioners have to act as a clearing house for specialists. This kind of arrangement has been challenged successfully within the legal profession in the UK. See Ogus (1993).

the spectrum⁸⁶. Information measures require suppliers to disclose certain facts, but do not otherwise impose behavioural controls. Under a prior approval regime, by contrast, individuals or firms may be prevented from lawfully supplying a product or service without obtaining an authorisation from a public agency. Standards occupy a middle position between information remedies and prior approval; they allow the activity to take place without any *ex ante* control, but the supplier who fails to meet standards of quality commits an offence. Self-regulation, which enables professional bodies to control both entry (prior approval) and performance, represents high intervention, whereas other forms, such as information remedies and standards, represent low or middle-range intervention. Given the availability of these alternative regulatory techniques, the question arises whether self-regulation does not go beyond what is necessary to cope with market failures.

The proportionality problem is ultimately an empirical issue. On a theoretical level the case for self-regulation is not convincing, but empirical evidence to support the theory remains limited (see Section 2). As long as the regulation of the medical and legal professions in European countries is based upon the same principles, it will not be possible to collect sufficient evidence about the effects of an alternative less interventionist regime. The deregulation movement in some European countries may allow more empirical research in the near future. Cost-benefit analyses should be conducted to assess whether the benefits of self-regulation can be achieved at lower costs. If this is the case, the contested measures will not satisfy the proportionality criterion. Unfortunately, lawyers who have to decide hard cases cannot afford to wait for this information. Even in the absence of empirical evidence, the economic analysis remains useful because it will at least allow lawyers to ask the right questions. The answers to these questions will be helpful in assessing the proportionality requirement. Compulsory membership of professional bodies may be used as an example to illustrate how the proportionality requirement may be assessed from an economic perspective.

Compulsory membership of professional bodies may go beyond what is necessary to keep quality standards intact. It has been explained that information asymmetries and externalities may justify regulation. To cure the market failure of asymmetric information a less interventionist measure, such as registration and certification should be considered first. Under a registration programme those wishing to practice a profession would need only to inform the state of their intent. Registration does not address the issue of information asymmetry and may therefore be ignored as an alternative policy

⁸⁶ Ogus (1994), 150-151.

option⁸⁷. Under certification the professions would enjoy protection of their title only. Nobody would be allowed to call himself an attorney or a medical doctor, without being registered with the professional bodies. Protection of titles equals an information remedy: the member of an occupation may only use a title if he meets certain standards involving some combination of education, on-the-job-experience and successful completion of an examination. Certification possesses the advantage of preserving freedom of choice. Consumers can elect for a lower quality service at what will be a lower price. If the goal were to protect the individual preferring low quality who, in the opinion of the regulator is not acting in his own interest, then the justification for self-regulation would be paternalistic. The current self-regulatory licensing system would not conform to the proportionality requirement if certification was able to overcome the information deficit effectively and efficiently. As mentioned above, a comparison of the effectiveness and efficiency of both alternatives remains difficult because of lack of empirical evidence.

Also with respect to the externalities' problem it needs to be shown that less restrictive regulatory techniques are not adequate to cure the market imperfection. Tort liability suffers from important drawbacks. These include the limited capacity of the courts to deal with malpractice, the difficulties in establishing causation and quantifying harm when damages are sought. Moreover, before the quality levels are established through malpractice cases and the good professionals have driven out the bad professionals high unrecompensable losses may have occurred. This brings us to the question whether quality standards, set by a regulator (not necessarily self-regulation) may adequately cope with the externalities' problem. Quality standards are less interventionist than prior approval and should therefore, in the proportionality test, be considered first. Here the relevant question is whether input controls are to be preferred to output controls. Quality standards are imposed *ex post*, after the occurrence of the harm, whereas prior approval operates *ex ante*. It may be argued that input variables can more easily be measured and that they may be presumed to be closely correlated to quality. Prior approval may exclude *ex ante* manifest incompetence of a kind which can give rise to high social costs. The advantage of controlling entry through licensing is that this may ensure that professionals are properly trained and competent to practise in their fields. The alternative, *ex post* quality standards, may be a less effective response. Legislators will face a difficult task; to set quality levels they must decide how to measure quality, which is as difficult as it is for the courts to handle malpractice cases.

⁸⁷ Curran (1993), 52-53.

If certification is deemed insufficient to adequately cope with the externalities' problem (even though it may be an adequate response to the market failure of asymmetric information) prior approval in the form of licensing may be considered. At this point it should, however, be noted that there are remarkable differences between the current self-regulation in the medical and legal professions and licensing systems for other occupations. Under most licensing systems, the rules regarding entry are established by the government, after consulting with the professional associations. Licenses are issued by public authorities⁸⁸. Moreover, licensing laws do not contain specific rules regarding performance. Performance remains subject to less interventionist controls (tort liability, general standards concerning safety and health). The role of the occupations thus remains limited. Self-regulation, by contrast, transforms the professional association into a public body. Entry and performance are regulated by the profession itself. The control of the performance also covers the fees. According to sociologists this may be seen as the highest level of „professionalisation“⁸⁹. An occupation becomes only a real „profession“ if it has decisive power to fix prices. Professional autonomy is essentially autonomy with respect to remuneration: fees are, together with power and prestige, the most significant components of this autonomy.

Generally public interest arguments, involving the need to correct information asymmetries and the externalities' problem, raise a strong presumption for regulation but not necessarily self-regulation in its current form. Even though it may be difficult to assess the proportionality of self-regulatory rules, which may be justified as remedies to cure market imperfections, the economic analysis has made clear that several less interventionist measures are available. This raises some doubts with respect to the appropriateness of the current self-regulation in the medical and the legal professions. If one takes a closer look at self-regulation, as it exists in the medical and legal profession, a more striking conclusion may be reached. It is remarkable that the current self-regulatory systems make a combined use of all possible regulatory techniques. Registration is required since future professionals have to become a member of the public bodies of attorneys and doctors. Certification applies since the professions enjoy protection of titles. At the same time membership of the professional body implies the duty to comply with ethical rules. These rules, which prohibit certain modes of conduct are similar to performance standards. Finally, compulsory membership of the professional bodies

⁸⁸ For a critical analysis of the Belgian licensing system in the retailing trade, see Van den Bergh (1985).

⁸⁹ In sociology professionalisation is described as a process in different stages. As soon as practising the service becomes a daily duty (stage 1) an education can be organized, which gives access to the future profession (stage 2). Licensing institutionalises these first two stages of the professionalisation (stage 3). The highest level of professionalisation is reached when the professional association receives public law status (stage 4) and powers to control entry and performance. See Wilensky (1964).

equals prior approval. It adds to the protection of the title the protection of the profession itself (licensing). The right to perform protected services is reserved to persons who meet quality requirements to be proven by registration with the professional body (license). In the medical and legal occupations admittance to the profession is a right granted by the professional body. Not only

will it be impossible to carry the protected title; the supply of the professional services will be reserved for those who are members of the professional bodies. Moreover, control of performance is far-reaching: it covers fees and the sanctions include the prohibition to practice the profession, either temporarily or permanently.

Even if it can not be convincingly proven that a given regulatory measure taken on its own is disproportionate, it seems almost impossible to justify the current overregulation which makes a combined use of all possible remedies. Prior approval may be the most effective and efficient way to cope with the externalities' problem, but its combination with control of fees may turn it into a powerful anti-competitive weapon. Similarly, the combined use of prior approval and registration with a privileged professional body protects the position of an incumbent monopolist from erosion by new market entry. Adverse effects may occur if rules aiming at a relaxation of entry conditions force public professional bodies to accept individuals, who have been denied registration in the past, as new members. In the Netherlands it is suggested to compel the Order of Attorneys to admit employed lawyers⁹⁰. Such a reform would keep the monopoly intact and increase the control powers of the public professional body. To stimulate competition it would be better to have competing licensing bodies.

It may be required in the general interest that professionals are appropriately qualified and that they obey rules of conduct which are in the interests of the proper and efficient provision of the professional services. In this respect a far-reaching intervention, such as prior approval, may be needed. But the case for prior approval has its limits : it does not necessarily imply that entry control must be performed by self-regulatory professional bodies. The case law of the European Court of Justice and the national competition authorities (see Section 1) shows that Orders abuse their powers by imposing inappropriate criteria not ensuring competence nor response to consumer needs. For example, if membership can be denied to applicants who are not of good conduct ⁹¹ subjective decisions as to who will be permitted to practice can hardly be avoided and the licensing process may operate to limit the number of new entrants and harm competition. The proportionality requirement does not seem to be met if somebody, who is considered to be honest in one Member State is refused access to the same profession in another Member State for lack of good character. In these circumstances the principle of mutual recognition seems to imply that assessments of honesty are equally valid in all Member

⁹⁰ See Cohen (1996).

States. Even when control of the entry process is based on objective criteria, grading of licensing examinations by professional bodies can indirectly serve to limit the number of new professionals in the interests of the existing members of the profession. Entry requirements designed to ensure quality can serve to indirectly impose quantitative limits on the number of new entrants, depending on the level at which quality is set. It would, therefore, seem that control of the entry process by professionals should be limited to an advisory function. A far-reaching involvement in the grading of exams (as is currently the case in Italy) or the absence of a possibility of appeal against a decision rejecting registration with the professional body (as is currently the case in Belgium) open the door wide for unjustified entry limitations. Prior approval can only perform its function if the permission to enter the profession is granted upon the basis of objective criteria, which are applied in a non-discriminatory and non arbitrary manner. In this respect it may be questioned why licenses, which could be issued by public authorities, should be replaced by membership of professional bodies, enjoying public law status. Such membership requirements may go beyond what is necessary to guarantee quality.

5. Concluding Remarks

Self-regulation in the medical and legal professions is a highly complex problem and it is not easy to reach hard conclusions. However, the following remarks seem appropriate. The theoretical justification for self-regulation in its current form is weak. Legal analysis shows that current European law and national competition laws only provide a partial remedy to restrictions on entry and anti-competitive rules regarding conduct . Economic analysis may be helpful in interpreting the „rule of reason“ (in particular the proportionality requirement) and may thus contribute to pulling down regulations which harm the public interest. However, the question about the appropriateness of a more global reform remains. There are many alternatives to cope with existing market failures in the legal and medical professions, which would reduce the likelihood of regulations pursuing the interests of the professions to the detriment of the public interest. It is ultimately an empirical question how well these alternative devices will perform their task in curing market imperfections without causing severe restrictions on competition. In what follows the reader may find a few author’s suggestions with respect to possible future developments.

⁹¹ See the *Gullung* case, cited note 26.

To prevent abuses of self-regulation, a first step is to increase government involvement in the licensing process. The current system enables the professions to limit entry by determining the capacity for education and training. Free movement of lawyers across European countries may be hindered by the requirement to undergo aptitude tests controlled by the legal professions themselves. As has been pointed out above, licensing can be done by public bodies. This may avoid the erection of entry barriers and stimulate competition. Lawyers must not necessarily be required to join the Bar Association or Chamber in order to practise law; neither must there be a duty for physicians to become a member of the Order of Doctors. Since membership of the professional association of physicians is not required in the Netherlands (see Appendix I), it is hard to see why such membership should be required in other countries. Compulsory membership in privileged self-regulatory bodies should be abolished and replaced by optional membership in competing organisations. An independent governmental agency may exercise control over these professional associations by requiring them to impose quality standards upon their members. The ethical rules issued by these competing associations would be guidelines and not be binding on non-members. Such an approach generates competition between self-regulatory systems. In the Netherlands several alternative associations have already developed⁹². In the United Kingdom a first step has been taken into the direction of competition between competing professional associations in the legal profession, by making it possible for competing professional bodies and institutions to apply for rights of audience in the courts. The British experience, however, illustrates that full competition will not be achieved if existing practitioners groups succeed in gaining an significant influence over the agencies, which grant the right to perform professional services.

A further step is to increase consumer participation and to develop countervailing power. Again the Netherlands and the United Kingdom have taken the first steps. In the Netherlands there are more than 250 organisations of patients. In the United Kingdom a new body has been created, the Lord Chancellor's Advisory Committee on Legal Education, the majority of whose members are not practising lawyers. Professional bodies will have to submit regulations to the Advisory Committee for its endorsement⁹³.

At the level of performance controls, restrictions on advertising should be abolished. These restrictions impede the free flow of information and seriously hinder competition. Serious doubts arise with respect to collective fixing of fees. Minimum prices may be seen as a means to guarantee

⁹² den Hertog (1993), 209.

quality, but they are dysfunctional in combination with existing entry controls. Fee scales set by public professional bodies should be held contrary to the cartel prohibition as far as standardised fees cannot be justified to facilitate reimbursements under public health insurance plans. It is equally important to increase inter-professional competition. This competition may act as a powerful deterrent to the lowering of professional standards. Creative tension between the different professions may be helpful in discovering abuses and in improving efficiency by introducing a new division of labour. The current compartmentalisation prevents the creation of alternative markets, e.g. for the provision of simple or routine services. The proposed reforms may be able to cure the market imperfections in the sector of the legal and medical professions, without creating scope for self-regulatory rules harming the public interest.

⁹³ Ogus (1993), 309.

APPENDIX I

REGULATION OF ATTORNEYS IN GERMANY

Regulation of entry

Registration and Licensing

In Germany future attorneys must pass two state examinations: the first after having studied at a law faculty for at least 7 semesters and the second after an additional 2 years of practical training („Referendarzeit“). Licensing of attorneys is a responsibility of the State Justice Administrations. A license may only be granted after an opinion has been obtained from the competent Local Chamber of Attorneys. The Local Chambers of Attorneys are public bodies, which means that every attorney practising in the district has to become a member of the Chamber. For the admission to the Bar, the opinion of the competent Law Chamber is crucial. If in the Chamber's view there is any reason to deny the license (e.g. for reason of activities incompatible with a lawyer's profession or reputation), the decision must be suspended. In the latter case the applicant concerned can ask for a decision by a specialised court, which is composed of both attorneys and professional judges (Anwaltsgerichtshof). Every attorney must become a member of the Chamber of Attorneys before he can start practising. He must have his office in the district, where he has been admitted; exemptions are possible in specific cases of hardship.

Quotas and Territorial Restrictions

As a general rule there is a no numerus clausus at German universities, but universities may limit the number of student places in cases of excess demand.

The number of practising attorneys is not limited, but there are territorial restrictions. Every attorney must be admitted to a specific civil court, that is either a district court (Landgericht) or a regional court (Oberlandesgericht). In some states (Baden-Württemberg, Bayern, Berlin, Bremen, Hamburg, Saarland, Sachsen, Sachsen-Anhalt and Thüringen) attorneys can also obtain a license to practice both at a lower court and a higher regional court at the same time, provided they meet certain conditions. In civil disputes, attorneys are authorised to appear before the licensing court only. A simultaneous admission to another district court of the vicinity is only possible by exemption. Appearance before the Federal Court in civil disputes is reserved to attorneys, who have obtained a special permission. In all other legal matters any attorney is authorised to act in the name of his client before any court.

Protection of Titles

The title „Rechtsanwalt“ is protected.

Scope of the Monopoly

In contrast with other EC-Member States, not only the representation of clients in legal proceedings but also legal counselling is regulated. In principle only attorneys (Rechtsanwälte) may counsel clients and represent them in court. However, the attorneys' monopoly is subject to the following exceptions.

Any person may represent a process party in proceedings before the lower courts, except in cases of mandatory representation by attorneys (Amtsgerichte).

Legal advice may also be given by other professionals: legal counsellors, tax consultants, licensed accountants, notaries and some organisations. Legal counsellors may give advice in narrowly defined areas only. Unlike attorneys, their education is not regulated. Legal counsellors may plead in lower courts (Amtsgerichte) under certain conditions. They must have passed an examination and been admitted by the president of the district court (Landgericht).

Tax consultants may represent clients in tax disputes; it is controversial whether this includes legal matters related to tax disputes but not strictly limited to tax problems.

Licensed accountants verify balance-sheets and may represent clients in tax disputes, including the treatment of legal matters directly related to their tasks.

Public accountants may give legal advice in cases where there is a direct connection to their duties.

In most German states notaries can practice as an attorney and tax consultant.

Publicly funded Consumer Centres may take care of legal matters outside the court system within the framework of their responsibilities.

Employers' associations and trade unions may advise their members and defend them in the Labour Courts.

Finally, governmental bodies may give legal advice within the framework of their responsibilities.

Regulation of Conduct

Regulation of Fees

The German state imposes a fixed fee schedule; the relevant rules are to be found in the Bundesrechtsanwaltsgebührenordnung (BRAGO). The attorney's fee has to be calculated on the basis of fixed percentages of the litigation value. Higher salaries can be agreed upon in a written contract, but lower salaries are permitted only in exceptional circumstances (e.g. limited means of the client). The BRAGO allows lower salaries for the recovery of debts outside the court system.

Regulation of Advertising

The former Guidelines of the Federal Chamber of Attorneys, which outlawed advertising, were invalidated by decisions of the Federal Administrative Court (BVerfGE 76, 171; 76, 196). The current regulation (§ 43b Bundesrechtsanwaltsordnung) draws a difficult distinction between solicitation („Werbung um Praxis“) and information advertising („Informationswerbung“); only the latter type of advertising is deemed appropriate for the attorneys' profession. See for more information and criticisms : Herrmann (1993), 231-242.

German attorneys can advertise a limited number of specialities (Verwaltungsrecht, Steuerrecht, Arbeitsrecht, Sozialrecht) with the permission of Chamber of Attorneys. Other specialised services may be advertised if the announcements are appropriate and true (BVerfG, 05.12.1994, NJW 1995, 775).

REGULATION OF ATTORNEYS IN BELGIUM

Regulation of Entry

Registration and Licensing

In Belgium future attorneys must earn the degree of „licentiate in law“ from a university law school and perform an articling period of three years under the supervision of an older attorney („patron“). The Bar itself is the licensing body. The „Orders of Attorneys (Orde van Advocaten, Ordre des Avocats)“ at the different local Bars decide upon the admission to the attorneys’ profession. The Orders enjoy discretionary power to decide whether they accept a person as a member. Against a decision not to be admitted, no appeal before a court is possible (Art. 432 of the Belgian Code of Civil Procedure).

Quotas and Territorial Restrictions

There exists no numerus clausus, neither at the universities nor at the Bar. The number of notaries, by contrast, is regulated. However, also in the attorneys’ profession the public bodies („Orders of Attorneys“) may limit entry since they control admission to the Bar. Authority over the articling period with respect to both the contents of the practical (and theoretical) training and the remuneration paid to young attorneys during their training period creates the potential for unreasonable exclusion of qualified applicants (see Faure (1993), 92-93).

Protection of Titles

The title „advokaat“ (avocat) is protected (Art. 428 Belgian Code of Civil Procedure).

Scope of the Monopoly

The monopoly of attorneys does not cover legal consultations, but remains restricted to the representation of clients in courts. There are some exceptions to this monopoly. First, in most courts clients are allowed to defend their own cases. Second, before the Justices of the Peace, commercial courts and the labour courts clients may also be represented by their husband/wife or a family member. Third, attorneys lost their pleading monopoly before the labour courts, since lawyers working with the trade unions may also defend their members in court.

Regulation of Conduct

Regulation of Fees

Attorneys must charge fees „in accordance with the modesty of their profession“ (Art. 459 Code of Civil Procedure). Following this principle the Orders have fixed minimum amounts, since too small fees would be contrary to the dignity of the profession. Complaints about too high fees may be brought before the Bar Council, which can eventually decrease the amount of the fee. Agreements which make the amount of the fee dependent on the outcome of the case are prohibited.

Regulation of Advertising

Attorneys are not allowed to seek new clients by means of advertising. Special expertise can not be advertised. Future clients may consult registers, kept by the Bar, which mention the names of practising attorneys and their specialities.

REGULATION OF ATTORNEYS IN THE NETHERLANDS

Regulation of Entry

Certification and Licensing

In the Netherlands access to the profession is controlled by the Bar, which is also the licensing body. Persons having obtained a university degree in law („meester in de rechten“ - master of laws) may provisionally register as an attorney, unless the Board of Supervision objects because of reasonable fear that the applicant will violate norms of professional decency (Articles 2, 4, 62 and 64 Advocatenwet). During the first three years of registration an attorney can only practice as a trainee under the supervision of a „patron“. During the period of apprenticeship a supplementary education program must be followed. If the trainee passes the examinations, the provisional registration becomes definite.

Quotas and Territorial Restrictions

There are no quantitative restrictions for entry to the profession. The number of notary offices, by contrast, is regulated.

Dutch law (Advocatenwet) distinguishes „advokaten“ and „procureurs“, with regard to registration at the district courts. In practice the two functions are usually combined. „Procureurs“ must practice in the jurisdiction where they are registered. Territorial restrictions do not apply for „advokaten“, who may represent clients in all districts, irrespective of the district of registration.

In addition, non-competition clauses in trainee employment contracts may restrict the opportunities for independent establishment. These clauses are much debated (see Hellingman (1993), 162)

Protection of Titles

The Dutch Attorneys' Law (Advocatenwet) makes a distinction between „advokaten“ and „procureurs“. Both titles are protected. Both functions may be practised by a same lawyer.

The title of „procureur“ will most probably be abolished in the near future.

Scope of the Monopoly

Monopoly rights only exist with respect to representation of clients in courts. There are no restrictions on legal counselling.

The distinction between „advokaten“ and „procureurs“ is still relevant with respect to the process monopoly in civil law cases. In proceedings before the District Courts and the Courts of Appeal, representation must be done by a procureur, who is registered in the district concerned. „Advokaten“ may also represent clients, but only in conjunction with a procureur, who takes care of certain formal requirements. This results in a costly double representation (Hellingman, 155). However, as mentioned above, the distinction between „advokaten“ and „procureurs“ will not be upheld in the near future. In cases before the Supreme Court the process monopoly is granted to „advokaten“ of the Bar of the Hague only.

In proceedings before Cantonal Judges parties are free to act in person or through a representative. Although the representative must not be a „procureur“ or „advokaat“, the judge can refuse admittance to professional legal advisors for a certain case or certain period.

In administrative proceedings the situation is similar to that in proceedings before Cantonal Judges. In criminal cases a defendant need not be represented, but if representation is sought, it must be provided by an „advokaat“. Apart from this requirement, the defendant is free in his choice (Articles 28, 37 and 8 Wetboek van Strafvordering).

Currently, the process monopoly is heavily debated. It is envisaged to allow other lawyers than attorneys or procureurs to plead cases. These lawyers (e.g. legal advisors working with insurance companies or other enterprises) will have to be registered at the Bar.

Regulation of Conduct

Regulation of Fees

The Bar has issued several Guidelines for calculating fees. Relevant factors for the calculation include the number of hours worked, the financial interest involved in the case, the attorney's experience. Attorneys are not allowed to contract for a contingent fee. Clients must be informed about their right to have the bill reviewed by the Board of Supervision.

Regulation of Advertising

As a general rule advertising is permitted. Attorneys may advertise fees and their field of specialisation. Some restrictions still apply : to use methods of direct mailing, comparative advertising, rates of success, information on particular cases (without the client's consent), to mention names of clients and the fact that one holds an a position as a judge. In spite of the liberalisation, advertising remains sporadic and sober.

REGULATION OF ATTORNEYS IN THE UNITED KINGDOM (ENGLAND AND WALES)

Regulation of Entry

Registration and Licensing

In the United Kingdom legal functions are divided among barristers and solicitors.

Entrants into the barrister's profession must earn a degree in law from a university and successfully complete a second „vocational“ stage of education, which involves a one-year course, followed by examinations, and a one-year period of apprenticeship with an experienced barrister. To be admitted to one of the Inns of Court character references are also required.

All barristers must be affiliated to the Bar Council, which is a self-regulatory body. However, the recently established Lord Chancellor's Advisory Committee on Legal Education, the majority of whose members are not practising lawyers, is entrusted with the duty of assisting in the maintenance and development of standards in the education, training and conduct of those offering legal services. The Bar Council must submit regulations regarding entry to the Advisory Committee for its endorsement.

Future solicitors must equally earn a university degree and complete vocational training. A final examination must be passed after attending a one-year course and a period of two years as a „trainee solicitor“. With such qualifications the solicitor may obtain a practising certificate which is renewable annually. There is no duty to join the Law Society, the governing body of solicitors.

Scope of the Monopoly

Until the recent changes brought about by the Courts and Legal Services Act 1990 barristers enjoyed monopoly rights of audience in the higher courts. Solicitors in private practice who are not employed may now also have a right of audience in the higher courts, provided they pass an advocacy qualification test (for which the pass rate is low).

Besides from their monopoly rights to conducting litigation, solicitors had statutory monopolies in relation to the drawing up of documents for the administration of deceased persons' estates (the „probate monopoly“) and for the transfer of real property (the „conveyancing monopoly“). The two latter solicitors' monopolies have been abolished. Banks, building societies and insurance companies may now also arrange documents for the administration of deceased persons' estates. Similarly, the right to engage in conveyancing services is no longer restricted to solicitors, but determined by the Authorised Conveyancing Practitioners Board. Since the deregulation of the solicitors' monopoly licensed conveyancers have entered the market.

Since the 1990 reforms, professional associations may apply for access to the rights of audience and to conduct litigation. Decisions will be made by the Lord Chancellor and four leading „designated“ judges on the basis of advice both of the Lord Chancellor's Advisory Committee on Legal Education and of the Director General of Fair Trading. On this basis the Law Society received a permission enabling solicitors to plead cases in the higher courts. It is expected that the Institute of Legal Executives will soon retain the right for its members to plead cases in the lower courts.

Regulation of conduct

Regulation of Fees

Fees are freely negotiated between the solicitor and his client or between the barrister and the instructing solicitor. There are no minimum fees set by the self-regulatory bodies. Controls on fees are possible for services financed by Legal Aid. Clients may also require a solicitor to obtain a remuneration certificate from the Law Society, to show whether a fee is „fair and reasonable“; if the fee certified by the Law Society is lower than that charged, only the lower sum is recoverable from the client. Clients may also apply to the High Court for formal verification of the fairness and reasonableness of fees.

REGULATION OF MEDICAL DOCTORS IN GERMANY

Regulation of Entry

Registration and Licensing

Physicians who have passed the final examinations (after six years of study and 12 months of practical training) may submit an application for a license to the Bureau of Examinations (Landesprüfungsamt) of the state where they passed the third part of the examination. Membership of the Medical Councils (Ärzttekammern), which are instituted in each of the states (Bundesländer), is required for any practice that doctors are qualified for. The Landesärztekammern (LÄK) are bodies incorporated under public law. The LÄK are solely responsible for postgraduate training and conducting examinations in specialised medicine and granting speciality certificates.

The Federal Constitutional Court ruled that the conditions for specialisation in medicine are to be regulated by law⁹⁴. Moreover, details may be fixed by medical chambers. In addition to the acquisition of strictly defined professional experience with qualified physicians, an examination has to be taken.

Protection of the Title

The decrees of postgraduate education specify authorised specialist titles. There are more than 20 fields of specialisation.

Scope of the Monopoly

Physicians do not have a general monopoly of medical treatment. It is permissible -subject to certain restrictions- to practice medicine without being a licensed physician. However, such persons require authorisation by the state under the Act regulating the activities of non-licensed practitioners (Heilpraktikergesetz). A license may be withheld if the applicant intends to work also in any other occupation or if after examination the applicant's knowledge is found to be deficient and a threat to public health. In spite of the existence of non-physician practitioners, many areas of medical treatment nevertheless remain legally reserved for examined and licensed physicians : e.g. surgical operations, the treatment of epidemic and venereal diseases and the prescription of certain drugs. Moreover, a relatively strict separation of physician and non-physician health care markets is primarily enforced by the general exclusion of non-physician practitioners from direct contracting with statutory sickness funds.

The German statutory health care system (Gesetzliche Krankenversicherung, abbreviated GKV) obliges the sickness funds to contract with associations of physicians(Kassenärztliche Vereinigungen) who, in turn, guarantee service delivery through self-employed professionals on their panels. Medical treatment of GKV-members is confined to „panel doctors“. Other persons may assist only on a physician's orders and responsibility.

Quotas and Territorial Restrictions

The access to medical education at German universities is restricted and regulated in a very complex

⁹⁴ BVerfGE 33, 125.

way, in order to avoid conflicts with the constitutional guarantee of the free choice of occupation (Article 12(1) of the German Constitution). A numerus fixus must be limited to what is absolutely necessary and the allocation of university places must be subject to objective criteria⁹⁵ (for details, see Trautwein and Rönnau, 1993, 262). The admission process of doctors to the GKV-panels is a part of the joint self-regulation of panel doctors associations and statutory sickness funds. General restrictions of panel admission would violate the constitutional right to freely choose an occupation⁹⁶. Therefore, restrictions may only be imposed in cases of excess supply and may only limit access to specified fields for a maximum of three years (§§ 102-103 SGB V). Doctors are licensed by region, but the license is valid nation-wide.

Regulation of Conduct

Regulation of Fees

Physicians cannot freely determine the price for their services. Fees are fixed upon the basis of three different scales, applying to different schemes of health insurance. See for more information, Trautwein and Rönnau (1993), 267-270.

Regulation of Advertising

According to the rules of professional ethics all kinds of advertising are prohibited. The number of advertisements after the opening of a practice or a change of consulting hours is limited. The size and contents of the nameplate are regulated. Participation of physicians in discussions and interviews in the media are allowed.

⁹⁵ The Federal Constitutional Court has affirmed the basic right of every student to be admitted to a medical school. Consequently, a strict ban on the admission of beginners to any specific university schooling will be in conformity with the constitution only if the following conditions are met: (a) the bans must be limited to what is absolutely necessary for allowing the full utilisation of the existing training capacity and (b) if the allocation of university places is subject to objective criteria, a fair chance must be given to every qualified applicant and, to the fullest extent possible, account must be taken of the individual's choice of university. The legislative bodies carry the main responsibility for determining the conditions justifying admission bans and for the selection criteria to be adopted." (BVerfGE 33, 303).

⁹⁶ BVerfGE, 11, 30.

REGULATION OF MEDICAL DOCTORS IN BELGIUM

Regulation of entry

Registration and Licensing

Doctors must receive a diploma, awarded after training in conformity to the laws on academic degrees (and the European Directives). The diploma must be deposited for inspection by the competent Provincial Medical Commission. Doctors must become member of the public professional body, the Order of Physicians. In view of registration with the Order a certificate of good character and good repute is requested.

Quotas and Territorial restrictions

There is no general numerus fixus in respect of the medical profession or in respect of medical training. There is, however, a factual numerus fixus in respect of training leading up to a qualification as a specialist. To limit the number of university students, in Flandres an aptitude test will be introduced from 1997 on.

Protection of titles

The medical profession enjoys protection of its title.

Scope of the monopoly

Doctors enjoy the exclusive right to provide medical services. It is a violation of the law to engage in the unlicensed practice of medicine. In practice, the medical profession itself decides when services are „medical services“. There exists a list of medical acts (so-called nomenclature) which serves as a demarcation between the different medical professions and specialists and is also a price list. The government cannot act counter to the opinions of the representatives of the medical profession.

Regulation of conduct

Regulation of Fees

As far as the price of medical care is concerned, a distinction has to be made between the price paid by the patient and the fee received by the professional. The former price is the difference between the maximum price for medical care and the amount reimbursed by the health insurance. The latter price is regulated : its amount is fixed in agreements between the medical profession and the health insurance sector. The negotiations take place in Commissions, where both interests are represented in strict parity. The agreements reached in the Commissions has to be approved by the Minister. Physicians are not obliged to respect the prices fixed in the bilateral agreements, although the group of physicians who have joined the agreements (totally or partially) is large (approximately 85 %).

Regulation of Advertising

Advertising for physicians' services is governed both by the ethical rules of the medical profession and by the health insurance law. The professional ethics contain a general prohibition of „market oriented“ medicine and of advertising that emphasises the professional skills and reputation of individual physicians, a group of physicians or a school. Advertising that favours the medical profession as a whole is permitted. Specialities may be disclosed, but name plates may mention only the name of the physician, his or her speciality and hours of consultation. The same principles are laid down in health insurance legislation. Advertising that favours individual physicians is forbidden. The sanction for violating this prohibition is noteworthy: services rendered as a result of forbidden advertisements are not reimbursed by health insurance.

REGULATION OF MEDICAL DOCTORS IN THE UNITED KINGDOM

Regulation of Entry

Registration and Licensing

Entry into the medical profession requires admission to the Medical Register. This process is controlled by the General Medical Council (GMC). The GMC is composed of three groups: members elected by the medical profession, members nominated by the educational institutions and (a minority of) lay members. The GMC must ensure that those admitted to the Medical Register are competent and must remove from the register those practitioners unfit to practice.

Protection of the title

Even though the practice of medicine is not restricted to doctors (see below) it is an offence for a person to represent themselves falsely as qualified medical practitioner.

Scope of the monopoly

The 1983 Medical Act does not define medicine. Consequently the practice of medicine is not confined to those practitioners on the Medical Register.

Regulation of Conduct

Regulation of Advertising

The General Medical Council advises general practitioners to provide the public with practice leaflets giving factual information about their professional qualifications, services and practice arrangements and including, if they wish, a statement about their approach to medical practice. Specialists, by contrast, may provide information to professional colleagues but not to the public. The prohibition results from the referral system, under which general practitioners should filter cases where patients might wish to consult a specialist. See Bowles (1993), 346-347.

Regulation of Fees

In the UK public health care is provided to citizens at zero user cost. The costs of providing health care are met through taxation and not through an insurance system. A fee-paying private system runs alongside the state sector. The great majority of physicians (general practitioners and hospital doctors) are employed by or operate under contract with the National Health Service.

REGULATION OF MEDICAL DOCTORS (SPECIALISTS) IN THE NETHERLANDS

Regulation of Entry

Registration and Licensing

Registration and licensing is organised and performed by the profession itself (Koninklijke Nederlandse Maatschappij ter Bevordering der Geneeskunst, abbreviated KNMG). A Specialist Registration Committee keeps the medical register. Membership of the KNMG is not required to practice as a physician.

Protection of the Title

The title of doctor is legally reserved for those who have passed the examination in the study of medicine and taken the oath. Only the physician is entitled to perform all medical acts.

Scope of the Monopoly

An extensive definition of medical acts protects the profession against competition from other occupations. Medical specialists may only register in one speciality and must restrict their activities to certain specialised medical acts. Stepping across one's domain may lead to disciplinary sanctions. In contrast with Germany, it is the medical profession itself which has developed an extensive system of specialisation (see den Hertog (1993), 198) since state law grants the doctors the right to perform all medical services.

Quantitative and Territorial Restrictions

Since 1972 there has been a numerus fixus for the study of medicine. Each year approximately 1500 students are allowed to enter the study of medicine; about 80% pass the examinations.

The maximum and minimum numbers of general practitioners are determined through the granting of licenses. The number of licenses is not determined by members of the medical profession, but by the government.

As far as medical specialists are concerned, limitations on the number of practitioners follow from the need to have access to hospitals. The number of hospitals is legally determined by a planning system for the 27 health regions. The required number of specialists is measured in what are called function units: the annual production of specialist on a full-time basis. For the nine top specialist functions (e.g; heart surgery and organ transplants) hospitals need a license.

Setting up a practice in a given territorial area (without associating with fellow specialists) is not allowed within a two year period of standing in for a colleague in that same area. It is also forbidden to set up a practice after acquiring knowledge of the value of such practice in negotiations with local specialists in view of a possible take-over or association. Finally, a specialist is not allowed to set up practice in the area of his tutor.

Regulation of Conduct

Regulation of Fees

Prices in the health care sector result from negotiations between the suppliers of the care and the insurers. A public institution approves the prices which are agreed upon.

A special law empowers the Minister to determine so-called acceptable income levels after consultation with the profession.

The ethical rules of the medical profession oblige physicians to maintain the fees agreed upon.

Regulation of Advertising

Professional ethics contain a general prohibition on advertising of professional skills or specialised methods of treatment. When a new practice is set up, three advertisements may be made within a period of one month.

Ad 5.

Article 36 is concerned with the protection of important non-economic interests. Discriminatory prohibitions or restrictions on imports, exports or goods in transit may be justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historical or archaeological value, or the protection of industrial and commercial property. The prohibitions or restrictions may not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Ad 6.

In its *Keck*-judgement, the European Court of Justice distinguished between national regulations which lay down requirements as to production (composition, size, weight, designation, form) and regulations restricting or prohibiting certain selling arrangements. The latter measures do not violate Art. 30 if they apply to all affected traders operating within the national territory and, in law or in fact, do not differently affect the marketing of imported and domestic products.

Ad 7.

According to the „rule of reason“ developed in the *Cassis de Dijon*-case, non discriminatory measures can be maintained if they are justified for imperative reasons of public interest and proportionate to the objective pursued (so-called Cassis-formula). Reasons of public interest include e.g.: effectiveness of fiscal supervision, protection of public health, protection of consumers and protection of the environment and also the protection of the reputation of the national financial sector.

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SELF-REGULATION OF THE MEDICAL AND LEGAL PROFESSIONS: REMAINING BARRIERS TO COMPETITION AND EC-LAW

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Abstract

The medical and legal professions enjoy self-regulatory powers, which enable them to establish both entry requirements and rules regarding professional conduct. These measures may hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EC Treaty. Both the free movement of persons (art. 52 EC Treaty) and the free flow of professional services (art. 59 EC Treaty) are of particular significance in this respect. In the *Gebhard* judgment the European Court of Justice has formulated the requirements, which must be satisfied for restrictions to be compatible with the EC Treaty. Measures which are not discriminatory on grounds of nationality will survive the test if they may be justified by imperative reasons of public interest, if they are suitable for securing the attainment of the objective which they pursue and if they go not beyond what is necessary in order to attain it. This „rule of reason“ applies with respect to all entry restrictions in the medical and legal professions, such as the protection of professional titles and compulsory membership of public professional bodies. The criteria used by the European Court of Justice („general interest“, „not go beyond what is necessary“) are notoriously vague and the judgement provides little guidance as to how these criteria should be assessed in deciding hard cases. This paper examines whether the economic analysis of self-regulation may help European lawyers in reaching decisions about the conformity of self-regulatory measures in the medical and legal professions with the fundamental freedoms of the EC-Treaty.

In the Law and Economics literature there are two competing theories of (self-)regulation. The public interest theory argues that regulations are needed to cope with market failures (information asymmetries, externalities) and that self-regulation must be preferred to regulation by public authorities, because the regulated professions enjoy an information advantage. The private interest theory approaches professions as well organised cartels with strong lobbies. It criticises regulation serving producers' interests as rent-seeking. The rent-seeking hypotheses is supported by three lines of reasoning. First, the professions fit the description of effective pressure groups. Second, the self-regulation extends beyond the scope of rules needed to correct market failures. Third, incomes of professionals are excessively high. The co-existence of both approaches illustrates that the case for self-regulation is not entirely convincing from a theoretical point of view. However, the empirical evidence to support the private interest theory is so far limited.

The paper suggests how the legal criteria, formulated in the *Gebhard* case, may be clarified by economic insights to enable a better assessment of their conformity with the EC Treaty. To demonstrate that regulation is needed for imperative reasons of public interest, it should be shown that the self-regulatory measures are able to cope with market failures. To show that the measures go not beyond what is necessary to attain this goal (requirement of proportionality), it should be shown that there are no alternative rules which cope with the market failures as effectively as the current rules, without causing the same inefficiencies. The proportionality problem is ultimately an empirical issue. The current deregulation movement in some EC-Member States may allow to carry out more empirical research, the results of which are crucial for legal decision-makers.

