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Empowering lawyers in a competitive environment: a reflection on alternative business structures and advertising

From the 1990s onwards the interest of the European Union in the world of legal professions has passed from a need to guarantee free circulation or the freedom of establishment to the application of the rules of competition, thus influencing the fundamental institutions of legal activity such as professional tariffs, the rules regarding advertising, associated forms of practice, reserved activities, ongoing professional training and access to the profession.

The intellectual nature of the service and the obligation to comply with the specific discipline of the subject have not been considered to such an extent as to exclude legal activities from the sphere of application of the rules on the subject of competition. This results from both the orientation of the Court of Justice as well as the initiatives undertaken by the European Commission.

The recent directive no. 2018/958 took a further step in the direction towards the need to comply with competition rules on this subject through the obligation of the carrying out of a proportionality test before adopting new professional regulations. This basically means that it is not possible to discipline the exercising of the professional activity without satisfying the following four specific conditions:

- compliance with the non-discrimination rule;
- justification on grounds of general interest;
- suitability for securing the attainment of the objective pursued;
- not exceeding what is necessary in order to attain that objective.

On the basis of the new directive, it will be necessary to tackle the controversial theme of Alternative Business Solutions (ABS) considering the absence of specific harmonization measures regarding the same meaning that member States cannot count on a common regulatory framework based on clearly defined concepts.

It is certainly true that the Alternative Business Solution models deriving from the English system, following the approval of the Legal Services Act in 2007, which came into force in 2011, were heavily opposed by the continental legal profession. With regard to this phenomenon there was very strong opposition from the

Bundesrechtsanwaltskammer, BRAK, the German federal order, as well as the Conseil National des Barreaux in France.

The Italian Legal Profession, through the Consiglio Nazionale Forense, expressed itself in a restrictive sense with respect to the position of partners who are not lawyers in legal companies. The result was that the entry of *non-professional partners* as well as the participation of *non-lawyer professionals* is permitted in new legal companies in Italy. The former should hold two thirds of the share capital and have voting rights. Moreover the majority of the members of the managerial body should be made up of lawyer partners who cannot be subjects that are extraneous to the company.

Basically, the lawyer partners should be the majority in order to avert as far as possible the risk that the management of the company could fall into the hands of subjects that do not carry out professional activities but are limited to coordinating and organizing the professional services carried out by the professional partners.

Therefore, there is no place for ABS in Italy considering that the measures introduced for the practicing of legal activities in a company form were deemed necessary in order to guarantee the autonomy and independence of the lawyer.

The idea that under the English regulatory regime even non lawyers can own legal firms, consequently giving the green light in this sense to banks, insurance companies, supermarket chains and such forth, is not part of the legal culture of most of the rest of Europe.

Today, therefore, Brexit should avert the danger of contagion. However, in the meantime, the phenomenon has become remarkably widespread also through the activation of ABS branches in other States, in Spain, for example in a well-known case. Problems have also arisen linked to specific aspects connected to ABS activities like:

- the investment of continental lawyers in ABS;
- the carrying out of work activities by continental lawyers for ABS in England;
- the supply and carrying out of non-reserved ABS activities in a State other than the one of origin;
- the provision of online legal services via ABS pursuant to the directive on electronic commerce;
- the temporary provision of services in a State other than the one of origin via ABS, with the application of the dictates of the Gebhard ruling of the Court of Justice that revealed the 4 points of the proportionality test in directive no.2018/958;
- the freedom of establishment of ABS in States other than the ones of origin.

The Solicitor Regulation Authority ("SRA") has registered nearly one thousand subjects with an ABS license. The SRA keeps a register of all licensed ABS on their Website. ABS consisting of the following have been authorized:

- accounting firms like come PWC, KPMG and EY;
- suppliers of consumer goods and services, such as, for example, Co-op Legal Services and WH Smith. Co-op offers fixed tariff consultancy and WH Smith offers DIY legal documentation kits;
- companies that simultaneously manage accidents and the relevant legal cases, such as, for example, BT, Direct line and Helpline;
- IPOs of connected legal firms – from traditional firms like Gateley, Gordon Dadds and Rosenblatts, to “dispersed” legal firms like Keystone Law that can gather enormous quantities of capital.

These are just some of the ways in which ABS structures can be used to offer different types of legal services, from the perspective that if the business models certified in the form of an ABS are successful there will be an interest in bringing those innovative models to other European States. Economic motives can create tensions within individual States between the supporters of the English model and those of the continental advocacy model. Naturally the Court of Justice will decide which of the two should prevail since it is clearly possible to hypothesize the certainty of litigation on the subject.

The proportionality test compulsorily introduced by the new directive will also influence the new regulations regarding the advertising of legal activities which constitute an important verification profile of the self-regulation tool.

Specific harmonizing measures on this subject are absent in the European sphere.

In the United States the prohibition of advertising was removed in 1977 following the famous pronouncement of the Supreme Court on the *Bates v. State Bar of Arizona* case which affirmed the unconstitutionality of the rule prohibiting lawyers from advertising their services since it was contrary to the First Amendment of the American Constitution protecting freedom of speech.

However, the contrast in European advocacy between the two different concepts of advertising the legal profession, reflecting different ways of understanding the role of the lawyer, is well-known.

This debate makes a comparison between the supporters of a vision of the professional activity prevalently oriented towards the market with that of the supporters of the constitutional importance of the right to a defense and the social responsibility of the profession, considering the protection of people's rights and duties. For the former, advertising should have no limits. For the latter there should be only space for "informative advertising" conditioned by the decorum and dignity of the profession, the aim of which is not "to grab clients", but to give the public elements that are useful for providing complete and truthful information.

Italy is one of the countries which, like France and Germany, considers informative advertising to be legitimate for the legal profession.

In Italy, in particular, the instrument used to discipline the subject of advertising is self-regulation where the need to adapt in order to comply with the rules of competition has determined a situation in which, while reiterating the limits of informative advertising, art. 35 of the current Legal Code of conduct, greatly expands the boundaries since it envisages that lawyers can give information about their own professional activity "using any means", in compliance with the limits of transparency, truth and propriety, as long as the said information is not comparative, misleading, disparaging or suggestive. Recently the Consiglio Nazionale Forense, with ruling no. 243/2017, modifying its previous orientation, deemed an advertising message highlighting the amount of the fee to be paid to the lawyer to be permissible, because where the said amount is expressed in a fair manner it constitutes a contractual element of primary interest to the client and is, therefore, essential for correct professional advertising information.

On the subject of advertising, the activity of self-regulation by the legal profession has permitted this category in Italy to align itself with the new requirements that have emerged with the passing of time regarding advertising, demonstrating the efficacy of this tool.

However, the future of self-regulation lies in the prompt compliance with the proportionality test introduced by the new directive, to be carried out with effective instruments so as to avoid introducing rules that could cause market distortion.

For Italy here it is worth mentioning the recent experience of the Consiglio Nazionale Forense which, on the occasion of the issuing of the regulations on legal specializations, through the Osservatorio Nazionale Permanente sull'Esercizio della Giurisdizione (ONPG)-Permanent National Observatory on the Exercising of Jurisdiction, preliminarily carried out, for the first time, a specific process of analysis of the impact of the regulation (AIR), as defined on an international level by the OECD,

with the aim of better identifying the factors and dimensions of the phenomenon or the problem for which the regulations were being proposed and possibly adopted. This necessarily also occurs through the involvement of public and private stakeholders.

This working method may bring some important contributions for the purpose of carrying out the proportionality test imposed by the new directive, boosting the importance of self-regulation within the sphere of the discipline pertaining to the practicing of the legal profession.

Naturally it will be the task of the legal profession to valorize the principles of autonomy and independence of the advocacy that the EU Court of Justice has also highlighted in its pronouncements, affirming, in particular, beginning with the *Wouters* ruling, the specific nature of the role of the lawyer even with respect to other professional figures, to the point of establishing that restrictive effects on competition should be deemed to be justified in order to guarantee the correct and “good practice of the profession of lawyer”.