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Panagiotis Delimatsis

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The Future of Transnational Self-Regulation – Enforcement and Compliance in Professional Services

BY PANAGIOTIS DELIMATIS*

Abstract

The increased expansion of economic activity beyond national borders leads to a shift of regulatory power. Public authorities concede power, explicitly or tacitly, to private bodies, whereas the multilayered ecology of global governance inevitably increases the role of transnational institutional structures. This article examines such developments in the area of professional services. It starts by analyzing the self-regulation phenomenon in professional services and points to examples where professional associations accentuate their unique nature to justify the importance of nonintervention in their internal affairs. Powerful professional associations have been thereby created, which, depending on the services subsector (e.g. legal, engineering or advertising services), are the final masters of access to and practice of a given profession. After a critical review of the most important professional associations at the global level, the article focuses on instances of private enforcement and goes on to examine the role of courts in reviewing such enforcement. In this regard, constitutionality of private enforcement is also examined. Finally, the article refers to the role of antitrust rules in harnessing distortive business practices that professional associations may adopt. The article focuses in particular on instances of private, decentralized enforcement. Whereas no truly transnational private regulation in professional services has yet

* Professor of Law and Director, Tilburg Law and Economics Center (TILEC), Tilburg University, the Netherlands; Fellow, Program on International Financial Systems, Harvard Law School. Earlier versions of this article were presented at the University College Dublin, the European University Institute in Florence, the Hague Institute for the Internationalization of Law (HiiL) and the TILEC seminars. The author is grateful to Fabrizio Cafaggi, Angelos Dimopoulos, Gillian Hadfield, Jens Prüfer, Colin Scott and Linda Senden for insightful comments and valuable discussions. Remaining errors are of the author's alone. Contact: p.delimatsis@uvt.nl.

emerged, it is submitted that the foundations for such a development are being built progressively as a result of borderless activities in this sector and a relatively deferential stance on the side of the State.

I. Introduction

In a recent case, the United States Supreme Court had to decide on whether pretrial restraint of legitimate, untainted assets necessary to hire legal counsel of choice violated the Sixth Amendment.¹ The Supreme Court answered in the affirmative. This judgment is important for various reasons. For our purposes, it is significant because, after many decades of judicial interpretations about several aspects of legal services, it confirmed the hybrid nature of legal services pending between the private interests of economic actors, such as those of lawyers, on one side, and the public interest that lawyers are still called upon to defend today.

The public nature of the legal profession is exemplified more eloquently in the objective of the smooth administration of justice. Indeed, as confirmed by the Supreme Court in *Gideon*,² the respect of the right to be heard is inextricably associated with the right of choosing the 'guiding hand' of legal counsel. This fundamental right to counsel³ epitomizes the distinguished role of lawyers as facilitators of the need for respecting constitutional rights and due process in virtually all legal traditions.⁴

The hybrid nature of legal activity means that courts will acknowledge the economic character of lawyers' activities and will occasionally find that the public character of their functioning does not exempt them from the application of obligations that other trades, businesses, or professions must abide by. For instance, the Court of Justice of the European Union (CJEU) has recently found that the Directive on unfair terms in consumer contracts applies to legal services – in this case, a contract between a lawyer and a client-consumer relating to legal fees.⁵ Such obligations would apply in addition to the obligations of independence, confidentiality and ethical requirements. The fact that an asymmetry of information and technical

1. *See Luis v United States*, 578 U. S. __ (2016), judgment of March 30, 2016.

2. *See Gideon v Wainwright*, 372 U. S. 335 (1963).

3. *See Grosjean v American Press Co.*, 297 U. S. 233, 243, 244 (1936).

4. Recently, the Court accepted that under certain rare and exceptional circumstances, attorney fees may increase based on the so-called "lodestar approach", again recognizing the importance of adequately compensating attorneys who facilitate the administration of justice and sometimes substitute for the deficiencies of the public prosecution system. *See US Supreme Court, Perdue v Kenny A.*, 559 U. S. 542 (2010).

5. *See Case C-537/13, Birutė Šiba v Arūnas Devėnas*, 2015 E.C.R., [hereafter Birutė Šiba]

knowledge exists by nature in this bilateral relationship weighed heavily in the decision of the court.⁶

Similar judgments that attempt to draw a balance between the public and the private nature of professionals abound. Globalization of economic activity raises new questions and concerns, notably because the activity of professionals may not be subject to domestic regulations due to the lack of jurisdiction. As the issue of jurisdiction becomes blurred, private regulation developed by transnational professional bodies is growing in prominence. The legal profession has only been part of a more general trend that clearly surfaces in professional services.⁷

The objective of this article is to map the landscape of transnational self-regulation in professional services and critically review instances (and potential problems) of enforcement, be it private, public or hybrid. Transnational self-regulation in professional services examines the emerging body of rules created by private actors that are active beyond national borders and attempts to manage ex ante potential challenges that the global nature of economic activity brings about. Increased globalization of economic activity leads to a shift of regulatory power from public to private and from national to global. Driven by the forces of globalization of business, these private actors aim to offer handy solutions to global professionals through rule-making activities that take place “in the shadow of the law” and the traditional forms of State regulatory making.⁸

Inevitably, the issue of legitimacy of such actors emerges.⁹ Domestic self-regulated professional associations typically draw their legitimacy by an act transferring powers from public bodies to such associations. However, transnational professional associations claim legitimacy through the participation of domestic private bodies in such associations. This “derived legitimacy” can be highly problematic, notably in regards to enforcement.

At the outset, it appears opportune to delineate the services sectors that we will focus on. According to the sectoral classification list (W/120) of the General Agreement on Trade in Services (GATS)¹⁰ of the World

6. See also, Case C-94/04, Cipolla, 2006 E.C.R. I-11421.

7. For an early account, see Detlev Vagts, *The International Legal Profession: A Need for More Governance?*, 90:2 AM. J. INT'L L. 250 (1996).

8. For an economic perspective on alternative modes of governance, see the treatise by AVINASH DIXIT, *LAWLESSNESS AND ECONOMICS – ALTERNATIVE MODES OF GOVERNANCE* (2004).

9. See Richard Stewart, *Enforcement of Transnational Public Regulation*, in ENFORCEMENT OF TRANSNATIONAL REGULATION – ENSURING COMPLIANCE IN A GLOBAL WORLD 41, 44 (Fabrizio Cafaggi, ed., 2012).

10. Marrakesh Agreement Establishing the World Trade Organization, General Agreement on Trade in Services (GATS), Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), as reported in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF

Trade Organization (WTO),¹¹ professional services do not form an independent services sector, but are classified as a subsector of business services.¹² This classification contains 11 broad services sectors and one residual category of “other services.” These sectors are further divided into sub-sectors and sub-subsectors. The W/120 follows the structure of the more detailed provisional Central Product Classification (CPC) system agreed upon within the United Nations.¹³ Professional services within the meaning of the GATS are considered to include a wide array of professions such as accounting, law, architecture, advertising, architecture, engineering, management consulting or market research.¹⁴

This article focuses on the regulation and enforcement of transnational private regulation in legal, architectural and engineering services. After a review of recent trends in business and professional services in Section II, Section III discusses the rationale behind the regulation of professional services as well as its peculiarities. An analysis of the transnational dimension of legal, engineering and architectural services, including the relevant actors and processes, follows in Section IV. The interaction between private enforcement and judicial review is discussed in Section V, whereas Section VI tackles the possibility of invoking constitutional claims that can be raised against restrictive self-regulatory practices. Section VII critically reviews the existing case law relating to the role of antitrust-related claims to trump private regulation and enforcement practices by professional associations. Section VIII concludes.

II. The Importance of Professional Services – Recent Trends

Global trade in services has grown in the last 20 years in a steadier manner than merchandise trade. Importantly, services have been more resilient than goods to the macroeconomic upheaval of recent times. Trade in services suffered significantly only in 2009, decreasing almost 10 percent. However, in

MULTILATERAL TRADE NEGOTIATIONS 284 (1999) [hereinafter GATS].

11. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), [hereinafter Marrakesh Agreement or WTO Agreement].

12. GATS, *supra* at note 10, “Services Sectoral Classification List,” MTN.GNS/W/120, 10 July 1991. The GATS is the first and only international agreement regulating trade in services, agreed on as an Annex to the World Trade Organization Agreement entered into force in 1995.

13. United Nations Statistical Papers, Provisional Central Product Classification, Series M No. 77, (1991). The United Nations Statistics Division currently uses the CPC Version 2.1.

14. *See* GATS, *supra* at note 10, “Trade in Professional Services,” Note by the Secretariat, MTN.GNS/W/67, (1989).

2010, it resumed its precrisis levels, whereas global services exports grew by five percent in 2014. On average, trade in services has still increased by eight percent annually in the last two decades. Exports of commercial services by WTO Members totalled US\$4.87 trillion in 2014, about a fifth of global trade. Having said this, such statistics routinely underestimate the value of services trade, as they fail to capture investment flows by foreign affiliates in an accurate way. For instance, in terms of value added, services are regarded as accounting for 40 percent of total trade.¹⁵

Services account for most of US and world economic output. An average of over 70 percent of GDP and jobs in the OECD countries are due to a service-related activity. The EU is the leading importer and exporter of services,¹⁶ followed by the US. Business services play a particularly important role in all modern economies and are regarded as essential drivers of economic growth. Many of the activities covered by this sector of the economy (legal, accounting and auditing, market research, advertising, and other business activities such as computer services, real estate, or R&D) have fully exploited the outsourcing phenomenon, which may explain their recent rapid growth. The rapid development of business process outsourcing (BPO) is the result of unprecedented advances in information and communication technologies (ICT) and their application to everyday business. Outsourcing of legal services typically occurs through subcontracting certain services to an independent supplier. However, large law firms may decide to establish their own premises abroad and thus control recruitment and training. This is the case with Clifford Chance in India, for instance. Outsourcing parts of a project has also increased in architecture.

More specifically, the global market for legal process outsourcing (LPO) accounted for over US \$1 billion in 2012, growing exponentially since the burst of the financial crisis in 2008. Estimates suggest that LPO could grow as much as US \$8.5 billion by 2020, leading to the blossoming of a new sub-sector of legal services, that is legal *support* services.¹⁷ With an average rate of 30 percent annually, LPO is the fastest growing segment in India.¹⁸ Revenue from LPO is expected to exceed US\$1 billion in 2016

15. See Rainer Lanz & Andreas Maurer, *Services and Global Value Chains – Some Evidence on Servicification of Manufacturing and Services Networks*, WTO Working Paper ERSD-2015-03, (2015).

16. Being a customs union, the 28 member States of the European Union (EU) are trivially taken as one entity (customs territory) in global statistics.

17. See Grand View Research, *Legal Process Outsourcing (LPO) Market Analysis by location, by services and segment forecasts to 2020*, April 2014. See also Integreon, 'Submission on Legal Process Outsourcing to ABA Commission on Ethics 20 /20,' June 2010.

18. ValueNotes, *LPO fastest growing segment in India*, March 12, 2014, <http://www.sourcinqotes.com/content/view/913/1>.

and to employ 32,000 professionals in India. In addition, it transforms outsourcing, as Indian IT companies active in BPO also offer LPO to their global clients. Outsourcing-related work has more recently evolved to satisfy demands for higher quality, giving rise to a new phenomenon, called 'knowledge process outsourcing' (KPO). In India only, KPO employed more than 250,000 professionals in 2014.¹⁹

The increasing willingness of companies located in developed countries, mainly in Europe and the United States, to outsource noncore business functions also reinforces this trend. This trend was affected by the recent financial crisis only momentarily. From call centers to legal research and text editing, manifold operations of developed-country companies are supplied by companies established in India, Philippines or elsewhere nowadays.²⁰ This phenomenon explains the fact that almost half of the cross-border exports of services worldwide is in business services. Bar associations acknowledged the paradigm shift and revised their rules to accommodate contemporary concerns relating to professional liability, integrity and independence. For instance, the American Bar Association (ABA) recently revised its model rules on professional conduct to tackle, *inter alia*, the growing phenomenon of outsourcing.²¹

Business services are typically provided to other enterprises (but also to public administration), whereby they often become part of complex production processes. Nonetheless, several business services, such as legal, engineering or architectural services, are also supplied to households. Business services exert an enabling role in bettering competitiveness and overall performance of any economy. For instance, in terms of value added, business services was the largest sector within the EU-28's nonfinancial business economy. In the EU, business services account for over half of the non-financial business economy and for about 30 percent of total trade in services.

In the EU only, about 21 million people and over 4 million enterprises provide services in business services, many of them being small and medium enterprises (SMEs).²² Legal, accounting, management consultancy, engineering and architectural services hold the lion's share in this area of services.²³ While hit by the financial crisis, these services recorded double-digit growth between their mid-crisis lows in 2009 and the second quarter

19. *Id.*

20. For a study on BPO, see UNCTAD, *E- Commerce and Development Report 2003* (United Nations Publication, 2003), Chapter 5. <http://www.sourcinquotes.com/content/view/913/1>.

21. See Model Rules of Prof'L Conduct R.5.3 (2012).

22. See European Commission, High-Level Group on Business Services – Final Report, 63 (2014).

23. "Business services: recent economic developments," statistics in focus, EUROSTAT, Issue 35 (2011).

of 2015.²⁴ Export of such services in the EU and the U.S. have also grown quite substantially, recording an increase of eight percent and seven percent, respectively, in the years 2010-2013. They both account for around 40 percent of global trade in business services.²⁵

The importance of several business services lies in their added value, that is, the overall impact they have on the economy. Subsectors of business services, such as legal services or advertising, have value-added traits leading to higher labour productivity and positive spillovers. For instance, advertising is essentially a distributive activity with a high level of turnover and high sales relative to personnel costs. The same goes for professional services.

The growth of the sector globally is driven by strong export demand, whereas innovations in ICT increase opportunities for further development of the sector trespassing geographical borders and downplaying previously insurmountable barriers. Business, professional and technical services are among the most flourishing services sectors in the developed world.²⁶ Developing countries keep pace closely. Other than India, where those sectors are among the main export sectors, in Brazil, those sectors accounted for 45 percent of Brazil's total commercial services exports in 2007, with a value of over US\$10 billion. Architectural, engineering and other technical consultancy services are the largest subsectors, followed by legal services. In certain sectors like engineering, offshoring is the first stage sometimes leading to bigger shifts of production *loci* in emerging countries.²⁷

The phenomenon of outsourcing has also contributed greatly to the rapid growth of the business sector, as businesses increasingly realize the benefits that they can seize by buying business services through specialized enterprises instead of producing them in-house. Having said this, certain service activities are more readily exportable than others. This is due to the fact that they are transferable more easily through electronic means, they do not require commercial presence (or require only a limited one) nor thorough knowledge of the export market, its laws or preferences. This is, for instance, the case with computer services and increasingly with some professional services, education or health care services. The same goes for

24. See, "Services statistics – short-term indicators," EUROSTAT, September 2015, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Services_statistics_-_short-term_indicators.

25. See WTO, *International Trade Statistics 2015*, pp. 143, 144.

26. *Id.* at 144.

27. See Leonard Lynn and Hal Salzman, *Engineers, Firms and Nations: Ethical Dilemmas in the New Global Environment*, in *ENGINEERING ETHICS FOR A GLOBALIZED WORLD* 15, 20 (Colleen Murphy et al., eds., 2015).

various back office support and so-called knowledge services such as research and development.

III. Regulating Professional Services

A. The Challenges of Regulating Professionals

Services are typically nontangible, nonstorable, and above all heterogeneous with limited possibilities of mass production. Thus, many of the most “effective” barriers to free movement of services relate to pre- or post-establishment of juridical and natural persons.²⁸ Such barriers are typically enshrined in domestic regulations promulgated by public, but also private bodies. Quality, the “holy grail” of every law or regulation governing services, is closely intertwined with the characteristics, qualifications, experience, and so forth of each individual service provider. This trait of services regulations increases the transaction costs and undermines the pursuit of efficiency when regulating this highly heterogeneous sector of the economy.

Regulations on services are designed by a well-intentioned government which, driven by public interest considerations, seeks to contend with perceived market failures such as those typically associated with externalities, information inadequacies, or imperfect competition and misuse of market power.²⁹ In the case of professional services, information asymmetries and competition concerns appear to be the most important market failures. Information inadequacies mostly appear in a wide range of intermediation and knowledge-based services. The nature of the services supply and the direct contact involved between suppliers and consumers generate significant risks. The consequences of asymmetric information may not be easily reversible for consumers who lack information about the skills that a given service supplier has.³⁰ While the quality of some products, such as milk or sugar, can be ascertained on inspection prior to sale (*search* goods), others, including almost all types of services, cannot be evaluated until received, used or consumed (*experience* goods).³¹ In

28. Cf. Panagiotis Delimatsis, *Due Process and “Good” Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services Through Article VI of the GATS*, 10:1 J. INT’L ECON. L. 13, 16 (2007).

29. Carlo Gamberale & Aaditya Mattoo, *Domestic Regulations and Liberalization of Trade in Services*, in DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 290 (Bernard Hoekman et al., eds., 2002); also STEPHEN BREYER, REGULATION AND ITS REFORM 15- 35 (1982).

30. Cf. *Birutė Šiba*, supra note 5, at ¶23.

31. Phillip Nelson, *Information and Consumer Behavior*, 78:2 J. POLIT. ECON. 311 (1970); also George Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84:3 Q. J. ECON. 488 (1970).

extreme cases (e.g., construction of a house ostensibly complying with anti-seismic regulations), the effects of use or consumption are made known only years later (*credence goods*).³²

Since markets may not provide appropriate incentives for the acquisition and dissemination of information, appropriate legislation that requires disclosure of certain information could in theory remedy the problem. Nevertheless, it may be too expensive to communicate the necessary information to individual consumers. In such cases, instead of educating the consumers, it is more cost-effective to regulate suppliers. In particular, the governmental intervention will prescribe the type of information that needs to be provided and will thereby help potential buyers evaluate the information that is being supplied.

An interference with the market may be motivated by the need for accomplishing noneconomic, social goals, such as redistribution of income, consumer protection, universal service, etc., in order to assure equity, or may even take place because of clearly paternalistic motivations.³³ These regulatory goals are rather horizontal in nature; hence, they are applicable across the board to all services sectors. This fact can be decisive when determining the nature of the instruments (e.g., whether they should be specific to a certain sector or of general application). In other words, the fact that similar public policy objectives are sought across sectors may be indicative of the need to use similar instruments. This, however, may be way too simplistic an approach, as an objective can be served in various *degrees*; and this already within a given services sector such as professional services. For instance, the higher stakes for the consumer and the public good in the area of engineering rather than advertising services will lead to heavier regulation of access to the former profession. In this case, *ex ante* regulatory intervention acts preventively.

Professional services are regarded as labour-intensive services. Their central trait is the supply of human capital acquired through high standards of education and training. In addition, access to professional services is typically subject to certain licensing and qualification requirements, which determine issues relating to entry and practice of a given profession.³⁴ Such requirements are imposed either by the State or through self-regulation by professional bodies – or both. In the latter case, access restrictions imposed by professional bodies dominated by active market participants are not based on quality-related considerations but aim

32. Michael Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16:1 J. LAW ECON. 67 (1973). The authors demonstrate that in the case of goods that have credence qualities, a governmental intervention would not lead to an efficient allocation of resources and thus would be preferable to leave the market unregulated.

33. ANTHONY OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 51 (1994).

34. See, Duc Nguyen-Hong, “*Restrictions on Trade in Professional Services*,” Productivity Commission Staff Research Paper, (2000).

many times at restricting supply of newcomers artificially, thereby keeping prices at a high level to the benefit of incumbents.³⁵ For instance, studies showed that State licensing requirements and ABA regulations lead to excessive earnings premiums for lawyers.³⁶

Typically, in this case the regulating bodies of the professional associations are the fora whereby like-minded incumbents harmonize their practice and essentially act as yet another cartel.³⁷ As noted recently by the United States Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*, dual allegiances are not always apparent to a professional who also acts as a regulator.³⁸ The resulting monopoly outcome reallocates income from lower income consumers to higher income professionals.³⁹

Harmonization and mutual recognition efforts in the area of business services and notably professional services already *within* the EU, which is a fairly integrated example of transnational legal order, have met with limited overall success to date.⁴⁰ Even for professional services, where automatic recognition of professional qualifications was agreed on within the EU, such as architecture, one should not lose sight of the fact that this was the result of lengthy negotiations and discussions that lasted more than fifteen years.⁴¹

This is not to say that harmonization and mutual recognition in the area of professions is a walkover. On the contrary, professional peculiarities abound and complicate any effort to draw common standards even within federal or quasi-federal, decentralized systems. To name but one example, because of the heterogeneous country-specific characteristics and requirements of practice in the engineering profession, automatic recognition may not be the wisest option.

All these professional peculiarities highlight the difficulties that any horizontal, i.e., across-services sectors, regulatory intervention may face.

35. See MORRIS KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 65 – 96 (2006).

36. Such premiums amounted to \$64 billion in 2004, or \$71,000 per lawyer. See CLIFFORD WINSTON ET. AL, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS (2011).

37. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, U.PA.L. REV. 1093, 1102 (2014).

38. The Court noted that for this reason antitrust accountability is necessary to ensure the undistorted functioning of markets. See, *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. __ (2015); also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U. S. 492, 500 (1988).

39. Maury Gittleman et al., *Analyzing the Labor Market Outcomes of Occupational Licensing*, National Bureau of Economic Research Working Paper 20961, (2015).

40. See TINNE HEREMANS, PROFESSIONAL SERVICES IN EU INTERNAL MARKET – QUALITY REGULATION AND SELF-REGULATION (2012).

41. EEC Directive 85/384/EEC [1985] OJ L 223/15 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services.

Within the EU, two major achievements in the wake of the new millennium gave a new impetus to the liberalization of regulated professions.⁴² The first is the adoption of the directive on professional qualifications (PQD) providing for the mutual recognition of professional qualifications for such professions.⁴³ Contrary to previous practice, the directive also called for the recognition of qualifications of those professionals who offer their services in another EU Member State (MS) only temporarily. In addition, the directive confirmed the automatic recognition for certain professions, such as doctors, architects or midwives,⁴⁴ and in essence requires the mutual recognition of practical experience for professionals. The most recent directive amending the PQD introduced the European professional card, a mechanism that will further lead to the erosion of protectionist biases by host MS, but also facilitate mobility of professionals within the EU.⁴⁵ For instance, in several EU MS the use of the engineering card, a professional card for engineers, which documents educational and professional qualifications and other information with a view to simplifying recognition, is a reality for the sector.⁴⁶

The other achievement in the realm of liberal professions in the EU was the adoption of the Services Directive.⁴⁷ To be sure, its timing was unfortunate, as it was associated with the fear of several MS against uncontrolled flows of migrants from the new Eastern European MS to the “old” EU15 MS. Thus, the major tool to achieve full integration in the area of services, i.e., the country of origin principle, did not find its way to the final text of the Directive. Having said that, this principle was replaced by the principle of free movement in services set out in Article 16 of the Services Directive.⁴⁸ In addition, the Services Directive is an important legislative development in that it confirmed the importance of home country control⁴⁹ and that the host country can only take measures in exceptional

42. See Panagiotis Delimatsis, *Standardization in Services – European Ambitions and Sectoral Realities*, 3 EUR. L. REV. 513 (2016). See also Erik Canton et al., *The Economic Impact of Professional Services Liberalization*, European Commission Economic Papers No 533, (2014).

43. Directive 2005/36/EC on professional qualifications [2005] OJ L 255/22.

44. Automatic recognition means that no discretion is left to the host country. See Case C-365/13, *Ordre des architectes*, E.C.R. 280.

45. See Council Directive 2013/55, 2013 O.J. (L. 354/132) (EU). See also European Commission, “*Action Lines for Liberal Professions – Final Report of the Working Group*,” 7 (2015).

46. See High-Level Group on Business Services, note 22, at 120.

47. Council Directive 2006/123, 2006 O.J. (L376/36) [hereinafter *Services Directive*].

48. See European Commission, *Handbook on the implementation of the Services Directive 36* (2007).

49. See also Case C-458/08, *Commission v Portugal*, 2010 E.C.R. I-11599. This is also in line with the expression of the principle of mutual recognition in the area of services in cases like C-76/90, *Säger*, 1991 E.C.R. I-4221; *Cipolla*, *supra* note 6.

circumstances relating to the safety of a given service.⁵⁰

There are 4,600 regulated professions in the EU nowadays. In the case of professional services, an important subsector of business services, regulatory diversity already at a subnational level creates challenges for service suppliers who are interested in exploring market access opportunities beyond their region. Professional services regulations may differ substantially among the various professions based on manifold public policy considerations, but also long-standing traditions protected faithfully by professional associations. This sector displays restrictive regulatory measures spanning from burdensome entry requirements (e.g., licensing restrictions or onerous procedures) to sometimes prohibitive post-entry requirements, such as restrictions (or even outright prohibitions) on advertising; fixed or recommended minimum or maximum prices; reserved tasks and exclusive rights; or mandatory business structure and multidisciplinary practices.⁵¹ This indicates that, even within highly integrated markets, such as the U.S. or the EU, services maintain their trait of being very vulnerable to regulations impeding their supply.⁵²

B. Delegation, Self-Regulation, Co-Regulation

As noted earlier, the potentially chilling effect of regulations is in part due to the peculiar nature of services relating to the intangibility, nonstorability and heterogeneity. It is all the more so in professional services where serving the interests of each client necessitates a different treatment by the professional service supplier. In addition, the quality of the service is closely intertwined with the characteristics, education, qualifications, or experience of each individual service provider, as well as the domestic preferences and traditions of each EU MS.

It is in part this peculiar nature of services that had led several countries to abandon “command-and-control” regulation in professional services and essentially outsource the establishment of rules relating to the access and pursuit of a profession to the respective professional associations. The fact that professionals in the three professions covered in this article have grown in prominence is also a factor that made self-regulation be regarded as an appealing alternative to state regulation. Crucially, private ordering in the field of professional services has been diachronic; such rules existed before the adoption of public regulation; once the latter emerged, private ordering has coexisted with – and many times de facto superseded – public forms of regulation.

50. See Art. 18 in conjunction with Art. 35 of the Services Directive, *supra* note 47.

51. Cf. Report on Competition in Professional Services, COM(2004) 83 (EC).

52. See also PANAGIOTIS DELIMATIS, INTERNATIONAL TRADE IN SERVICES AND DOMESTIC REGULATIONS – NECESSITY, TRANSPARENCY AND REGULATORY DIVERSITY 62 (2007).

Self-regulation entails an explicit or tacit transfer of authority to private bodies, which allows them to delineate a sphere of expertise, establish conditions for membership, limit competition for nonmembers (either because they objectively do not qualify or because the incumbents want to maximise their rents), and impose deontological rules of conduct on professionals which would protect the integrity of the profession and ensure the quality of the service provided.⁵³ Self-regulation further entails monitoring of compliance with such rules and instituting enforcement mechanisms.⁵⁴ Compliance in particular with private enforcement mechanisms would be a function of the importance of the membership. If exit is costly, then compliance will most likely occur to avoid negative effects on the possibility for trading in the future.

Professional associations regulate access and pursuit of a given profession ostensibly with a view to ensuring high levels of consumer protection. However, they also represent the professionals. Therefore, their role is to promote the interests of their members. More often than not, the two functions (regulatory *and* representative) cannot be easily reconciled. Thus, conflicts of interest may and do actually arise, notably because of the exercise of this dual function performed by private regulators.

In establishing rules relating to the regulation of professions, the private sector is called upon to fulfill a decisive regulatory role and serve the objective of managing access to the profession with a view to improving efficiency, quality, and competitiveness. Surveillance and enforcement of these rules is typically guaranteed by the fact that registration with the relevant professional body is a precondition for the taking up and pursuit of the particular profession at issue. Compulsory registration allows for more effective supervision of professional conduct and, accordingly, sanctions against those professionals who do not adhere to the rules established by the professional body, including deontological rules usually contained in the respective sectoral code of conduct (CoC). Disciplinary cases can be treated more efficiently due to the Damoclean sword of exclusion from the club in case of noncompliance.⁵⁵

According to Dixit, such relation-based governance systems can work only provided that, (i) the norms of good conduct are clearly understood;

53. STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* (1994).

54. See also Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-regulating World*, 54 in *CURRENT LEGAL PROBLEMS* 103 (2001).

55. See also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 11 *J. LEGAL STUD.* 115 (1992).

and (ii) information about adherence or rather violations of these norms must be diffused to all members of the association accurately and quickly.⁵⁶ However, in practice, the accuracy of communication and adherence to the norms and collective sanctions which is necessary for the success of such associations can be challenged by the number and heterogeneity of transactors and the increased size and complexity of transactions.⁵⁷ Indeed, self-regulation seems to work better in small, relatively homogeneous and interconnected industries where the threat of outside regulation adequately incentivizes the industry to regulate itself.⁵⁸ More generally, good regulation nowadays implies that a regulator is able to adopt different responsive enforcement strategies depending on whether the regulatee is a leader, reluctant complier, the recalcitrant or the incompetent.⁵⁹

To retain self-regulatory powers, professional associations emphasize the central role of specialized expertise and the existing institutional arrangements to maintain the benefits of such expertise. This would allow them to create their own “living space,” shielded from the market and the state.⁶⁰ This may be necessary in order to protect their alleged uniqueness and independence. For instance, the preamble of the Model Rules of Professional Conduct of the American Bar Association (ABA) provides:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority

56. Avinash Dixit, “Relation-based Governance and Competition” (on file with the author).

57. Others have argued that the a coordinating function ensuring a common logic, i.e., a system of reasoning that generates unique common knowledge classifications of conduct, provided by a third-party (private) institution supplying a system of neutral reasoning could ensure the sustainability of a decentralized enforcement system. See Gillian Hadfield & Barry Weingast, *What is Law? A Coordination Model of the Characteristics of Legal Order*, 4:2 J. LEGAL ANALYSIS 471 (2012).

58. Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, THE OXFORD HANDBOOK OF REGULATION 146, 154 (Richard Baldwin et al., eds., 2010).

59. Neil Gunningham, *Enforcement and Compliance Strategies*, THE OXFORD HANDBOOK OF REGULATION 121, 126 (Richard Baldwin et al., eds., 2010).

60. See Tanina Rostain, *Self-Regulatory Authority, Markets, and the Ideology of Professionalism*, THE OXFORD HANDBOOK OF REGULATION 169, 170 (Richard Baldwin et al. eds., 2010), noting that “[a]s professions obtained self-regulatory powers, they instituted measures – including educational and accreditation standards, ethics codes, and workplace structures – to demarcate spaces of discretionary expertise insulated from penetration by either market logic or state control.”

over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

By the same token, the Council of Bars and Law Societies of Europe (CCBE), which is the ABA counterpart in Europe, has also taken issue with public regulation in the field of legal services by emphasizing that:⁶¹

[A]n independent legal profession is the cornerstone of a free and democratic society. Self-regulation, conceptually, must be seen as a corollary to the core value of independence. Self-regulation addresses the collective independence of the members of the legal profession. Exclusive direct state regulation, without a leading role for the profession in the setting and enforcing of standards of conduct and of service, is incompatible with an independent legal profession.

The CCBE went on to underscore the benefits of self-regulation such as voluntary availability of expertise to regulate the subject matters relating to the legal profession, high level of acceptance of standards set and enforced by professional colleagues, flexibility and cost-effectiveness.

The importance of the independence of the legal profession has also been hailed by the judiciary. The Supreme Court of Canada in *Canada (Attorney General) v. Law Society of British Columbia* ruled:⁶²

61. See CCBE Position on Regulatory and Representative Functions of Bars (June 2005), http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg_1_1182254709.pdf (last visited on Jan. 15, 2016).

62. *Canada (Attorney General) v. Law Society of British Columbia* (1982) 2 S.C.R. 307, 336-7 (Can.). See also Judgment of the High Court of Judicature at Bombay, *Lawyers Collective v. Bar Council of India and others*, W.P. 1526/1995, at ¶56 (2009). See, along these lines, the statement by the CJEU in *Jakubowska*: “The absence of conflicts of interest is essential to the practice of the profession of lawyer and requires, in particular, that lawyers should be in a situation of independence vis-à-vis the public authorities and other operators, by whom they must never be influenced.” C-225/09, 729, ¶61 (2010).

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

In India, the Apex Court noted in *Indian Council of Legal Aid and Advice v. Bar Council of India* that:⁶³

The bar Councils are enjoined with the duty to act as sentinels of professional conduct and must ensure that the dignity and purity of the profession are in no way undermined. Its job is to uphold the standards of professional conduct and etiquette. Thus, every State Bar Council and the Bar Council of India has a public duty to perform, namely, to ensure that the monopoly of practice granted under the Act is not misused or abused by a person who is enrolled as an advocate. The Bar Councils have been created at the State level as well as the Central level not only to protect the rights, interests and privileges of its members but also to protect the litigating public by ensuring that high and noble traditions are maintained so that the purity and dignity of the profession are not jeopardized. It is generally believed that members of the legal profession have certain social obligations, e.g., to render “pro bono

63. *Indian Council of Legal Aid and Advice v. Bar Council of India* [1995] 1 SCC 732 (India).

publico” service to the poor and the underprivileged. Since the duty of a lawyer is to assist the court in the administration of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct behoving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society. That is why the functions of the Bar Council include the laying down of standards of professional conduct and etiquette which advocates must follow to maintain the dignity and purity of the profession.

In a similar vein, the US Supreme Court stated in *Goldfarb*:⁶⁴

The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the courts.”

However, the more such associations control the market for the supply of a given service, the more frequent complaints of their excessive power and abuse become. Furthermore, regulatory capture can occur not only when governments regulate, but also in the case of self-regulation by professional associations.⁶⁵ In addition, existing barriers relating, for instance, to lack of recognition of professional qualifications or to licensing conditions generate deadweight losses. These characteristics of services regulations increase transaction costs and can undermine the pursuit of efficiency when regulating this highly heterogeneous sector of the economy. This regularly leads governmental authorities to scrutinize complaints about anticompetitive practices, market foreclosure, excessive prices and monopolies, and to balance the interest of maintaining the delegation of power to such private bodies against the public interest. Some go as far as to advocate deregulation of certain professional services.⁶⁶

A central issue in professional services is what form of regulation can

64. *Lewis Goldfarb v. Virginia State Bar*, 421 US 773 (1975).

65. George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971); Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 335 (1974); & John Kay, *The Forms of Regulation*, FINANCIAL REGULATION – OR OVER-REGULATION 33 (Arthur Seldon, ed., 1998).

66. See, with respect to the legal sector, James Moliterno, *The Trouble with Lawyer Regulation*, 62 EMORY LAW J. 101 (2013).

better achieve the legitimate objectives that are relevant for each profession, such as the integrity of the profession, professional competence, consumer protection and the like. Typically, state intervention is premised on the need to address market failures, most notably created by information asymmetries between service providers and their clients regarding the quality of services rendered. Indeed, where information costs are high, ex ante regulation of the industry and setting of quality standards may be an adequate form of regulation. Opponents of self-regulation would argue that it can only be justified by a self-interest maximiser viewpoint,⁶⁷ as the protection of public interest can only be ensured by state intervention. This paternalistic view is premised on the belief that professional associations cannot adequately protect the interests of their members and those of consumers at the same time. Consumer lobbies may actually also subscribe to this paternalistic view, notably on price competition grounds.

On the other side of the spectrum, proponents of self-regulation would argue that a bottom-up approach would be more apposite due to expertise and insider knowledge that only the professionals themselves may have. Especially when the private group entrusted with self-regulatory powers is sufficiently cohesive or solidary and pursues State-like objectives, thereby acting as another agent of the State, transfer of resources to such groups appears to be the most efficient solution for the State.⁶⁸ Professional associations can draft and review rules more quickly and flexibly than any State authority to better serve consumers without unduly hampering the supply of the services at issue. Norm-making groups may also adapt more quickly in the aftermath of exogenous shocks, thereby showing their mutability forces that partly explain their dominance in norm-making.⁶⁹ In that case, any state interference would be counter-productive, whereas any legal rules designed to regulate intra-group relations would negatively affect the group's ability to regulate its members. In fact, with the exception of rules that deter extreme bad faith conduct, even rules that merely duplicate the group's own norms will generally undermine self-regulation.⁷⁰

Self-regulation cannot be regarded as an absolute prerogative, as

67. See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBOURS SETTLE DISPUTES* (1991), using several case-studies to show that members of a close-knit group develop and abide by norms whose content serves to maximize the aggregate welfare that members obtain in their work-a-day affairs with one another.

68. See Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 CHICAGO L. REV. 133, 136 (1996).

69. See, generally, RESILIENT LIBERALISM IN EUROPE'S POLITICAL ECONOMY, (Vivien Schmidt & Mark Thatcher, eds., 2015); Robert Ellickson, *The Market for Social Norms*, 3: 1 AM. L. & ECON. REV. 1, 22 (2001).

70. *Id.*

private groups exercise power that can be reclaimed by the state or constrained by the public judicial system. More generally, experiments with regulation and regulatory approaches are a frequent phenomenon nowadays.⁷¹ Co-regulation or cooperative regulation in several sectors of the economy is, for instance, a form of regulation that goes beyond the coercion that State authority can exert.⁷² Co-regulatory approaches allow self-regulation and state regulation to meet with a view to optimizing regulatory performance and more efficiently addressing market failures and certain malfunctions.

In the case of important unforeseen negative externalities, governments can reclaim authority anytime, notably taking advantage of the elusive nature of the concept of “public interest.”⁷³ For instance, the recent Legal Services Act in England challenges the earlier unfettered power of the Law Society of England and Wales to regulate the legal profession. A new oversight regulator, the Legal Services Board (LSB), is created to serve as a single, independent, and publicly accountable regulator with the power to enforce high standards in the legal sector and oversee the approved regulators such as the Law Society. Approved regulators are now obliged to distinguish among representative and regulatory functions. The Act also creates an Office of Legal Complaints (OLC), which removes handling of complaints by the legal profession in order to restore consumer confidence that complaints are handled independently and without self-interest; that they are handled efficiently, fairly and quickly.⁷⁴ In 2010, the OLC established the Legal Ombudsman, who is in charge of complaints against lawyers in England and Wales. The dispute resolution services offered are free of charge, in principle. In 2014-15 alone, the Ombudsman services helped resolve about 7,500 complaints.⁷⁵

71. Cf. Grainne de Búrca, Robert Keohane & Charles Sabel, *Global Experimentalist Governance*, 44(3) BRIT. J. POLIT. SCI. 477 (2014).

72. One of the OECD best practices in regulating professional services suggests that professional associations should not be granted exclusive jurisdiction and rather be subject to independent (probably state-centered) scrutiny in making decisions about entrance requirements, mutual recognition, or the boundary of their exclusive rights. See OECD Summary Report of the Study on Globalisation and Innovation in the Business Services Sector, at 16 (2007), available at <http://www.oecd.org/dataoecd/18/55/38619867.pdf>.

73. See Mike Feintuck, *Regulatory Rationales beyond the Economic: In Search of the Public Interest*, in THE OXFORD HANDBOOK OF REGULATION 39, 45 (Richard Baldwin et al., eds., 2010).

74. UK Ministry of Justice, *Legal Services Bill – Regulatory Impact Assessment*, 10 (2006), <http://www.justice.gov.uk/publications/legalservicesbill.htm>.

75. Over one fifth of these complaints relates to residential conveyancing. See The Office for Legal Complaints/Legal Ombudsman, *Annual Report and Accounts for the Year Ending 31 March 2015* (2016), <http://www.legalombudsman.org.uk/wp-content/uploads/2014/09/Annual-Report-2014-15.pdf>.

Similar concerns in Australia led the government to step in to essentially end self-regulation in the legal profession. This was, for instance, the case through the Queensland Legal Profession Act of 2007. More recently, it appears that Australia has moved towards co-regulation that distinguishes between regulatory and representative functions of the Bar, while relying on the integrated involvement of government, the legal profession and the courts.⁷⁶ Although these changes were initially backed up by all territories, in the end, only two Australian jurisdictions decided to move forward with sweeping reforms in the legal sector. In July 2015, New South Wales and Victoria (accounting for approximately 80 percent of practising lawyers in Australia) started applying the Legal Profession Uniform Law,⁷⁷ which creates a Legal Services Council as the overseeing body, but resolutely moves towards principles-based regulation of the legal profession with clearly established regulatory objectives, a first for the Australian legal sector. Day-to-day regulation remains with the relevant regulatory bodies such as the Law Council of Australia (for solicitors) and the Australian Bar Association (for barristers). The Office of the Legal Services Commissioner is in charge of complaints against lawyers based on the Uniform Law Application Act of 2014. Divergences in regulatory approaches affect the degree of influence of professional associations on the making of rules that affect them.

The situation, including the issue of enforcing professional obligations against wrongdoers, becomes more complex once self-regulation of a given profession becomes borderless at the transnational level. Issues of jurisdiction and conflict surface and, quite astonishingly, their complexity nourishes the evolution of transnational regulation and private ordering. As a rule, professions dislike public rules and governmental intervention. This should not be taken to mean that the rules created by private bodies have a different starting point than that of public rules: They both aim to create “social order by focusing or channelling the diverse, arbitrary, even chaotic motives or actions of individuals into a few socially privileged alleys by making compliance a normative demand.”⁷⁸ To be sure, compliance may be ensured through different avenues and at a varying degree.

76. Paul Paton, *Cooperation, Co-option or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession*, JOURNAL OF THE PROFESSIONAL LAWYER 165, 166 (2010).

77. The Uniform Law Framework consists of various sets of rules. See Legal Services Council, *Uniform Law*, <http://www.legalservicescouncil.org.au/Pages/uniform-rules/uniform-rules.aspx>.

78. See Marietta Auer, *The Anti-Network. A Comment on Annelise Riles*, 56 AM. J. COMP. LAW 631, 636-7 (2008).

C. Trade in Professional Services – The WTO and the Manifold Preferential Trade Agreements

One notable exception where the interests of professionals meet those of their governments seems to be the work undertaken by the WTO regarding progressive liberalization of market access in professional services. Professional services were among the first sectors that the WTO negotiators identified as a priority in the 1990s. Professional services had already been tackled in a working group that was established on May 11, 1990, during the Uruguay Round negotiations, along with working groups on financial, transport, and tourism services.⁷⁹ At the end of the Uruguay Round in 1995, a Working Party on Professional Services (WPPS) was created whose mandate was twofold: First, it was instructed to examine and recommend any possible disciplines, which would ensure that measures regarding qualifications, licensing, and technical standards do not unduly distort trade in professional services. Second, as a matter of priority, the WPPS had to concentrate on the elaboration of multilateral disciplines on the accountancy sector to give operational effect to specific commitments under the GATS.

Work on accountancy sector was completed on December 14, 1998, with the adoption by the Council for Trade in Services (CTS) of the *Disciplines on Domestic Regulation in the Accountancy Sector* (“the accountancy disciplines”).⁸⁰ The accountancy disciplines do not tackle the substantive content of qualifications or standards in accountancy. Setting the level of qualifications or the content of technical standards of any kind to be required of suppliers of accountancy services essentially remains a prerogative for each Member or the delegated national authority. Nevertheless, these disciplines do envisage, for the most part, the need to ensure procedural transparency in matters of licensing and qualification. The disciplines are not yet binding and the current Doha Round stalemate renders their entry into force uncertain.

Within the broad range of professional services, the decision to start with accountancy services was intentional. Two factors are regarded as determinative in this choice: First, the relevant industry had a great interest in the development of a sector that was expanding rapidly worldwide and was deemed a crucial infrastructural element of financial services. Already

79. J.V. Reyna, *Services* in VOL II: COMMENTARY, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) at 2373, (Terence Stewart ed., 1993).

80. Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, WTO Doc. S/L/64 (1998).

during the Uruguay Round, the United States had proposed the endorsement of an Annex on Professional Accountancy Services.⁸¹ The second factor relates to the level of integration that the accountancy services demonstrated at that point of time, which was considerable if compared to other professional services.⁸² In preparing those rules on accountancy, the WTO had to consult with several international organizations such as the International Federation of Accountants (IFAC), the International Accounting Standards Committee (IASC), and the International Organization of Securities Commissions (IOSCO). This was also very helpful for the WPPS work relating to the preparation of the voluntary Guidelines for Mutual Recognition Agreements (MRAs) in the Accountancy Sector,⁸³ which matched work that is also done in the relevant international organizations. On the other side, the WPPS preferred not to intermingle with standardization issues in this field, which are dealt with elsewhere.⁸⁴

The successor of the WPPS, the Working Party on Domestic Regulation (WPDR) has also been tasked with building bridges with international professional associations to examine the possibility of applying the accountancy disciplines to other professions as well.⁸⁵ Several professional associations reacted positively or critically.⁸⁶ Their reaction, however, shows that they believe in the multilateral process and the necessity of this type of public rules that couple their efforts towards further integration within their profession in a globalized world.⁸⁷ For

81. Working Group on Professional Services, *Note on the Meeting of 3-4 October 1990*, GATT MTN.GNS.PROF/W/2 (1990).

82. Cf. Working Party on Professional Services, *Functions of the Working Party on Professional Services in Relation to Accountancy*, Note by the Secretariat, ¶ 4, WTO Doc. S/WPPS/W/1 (1995).

83. Working Party on Professional Services, *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, WTO Doc. S/WPPS/W/12/Rev.1 (1997). See also Council for Trade in Services, *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, WTO Doc. S/L/38 (1997).

84. Singapore WTO Ministerial, *Singapore Ministerial Declaration*, WTO Doc. WT/MIN(96)/DEC (1996). According to Trachtman, this statement “signals the WTO’s deference and, in effect, delegation (at least in part), to these organizations. Thus, the WTO has ‘delegated’ to specific functional organizations the task of establishing standards to facilitate the free movement of accountancy services.” Joel Trachtman, *Accounting Standards and Trade Disciplines – Irreconcilable Differences?*, 31:6 J. WORLD TRADE 70 (1997).

85. Members were also asked to consult with domestic professional associations on the same matter.

86. See Working Party on Domestic Regulation – *Results of Secretariat Consultations with International Professional Services Associations* JOB(03)/126, (June 25, 2003) (Informal Note by the Secretariat).

87. The fact that the GATS also applies to rules promulgated by self-regulating bodies may

instance, in 2003, the Council of the International Bar Association (IBA) adopted a resolution in support of a system of terminology for legal services for the purposes of international trade negotiations, but also general principles for the establishment and regulation of foreign lawyers.⁸⁸

At the regional level, professional services were part of the trade agenda from early on. For instance, already in the U.S. - Canada Free Trade Agreement of 1988, and subsequently in NAFTA in 1994,⁸⁹ there were provisions regulating trade in professional services. An Annex on Professional Services incorporates provisions relating to transparency, the development of international standards, temporary licensing and review procedures. Nowadays, virtually all regional trade agreements are aimed at advancing trade in professional services, as they play a very important role as inputs of other services and generate important value added. Negotiation of MRAs can be a particularly useful tool in this regard. In NAFTA, for instance, MRAs were approved for engineers and architects. In both cases, professional regulatory bodies came together to liberalize practice across borders in USA, Canada and Mexico within the spirit of NAFTA Chapter 16. According to the tripartite MRA:⁹⁰

Architects registered in a jurisdiction are required to follow the laws and codes in force in each jurisdiction in which they have been authorized to practice. Architects practicing outside their own country under this agreement are limited to providing those services that local architects are permitted to provide and will only provide those services they customarily provide in their own country if less than those services permitted in the host jurisdiction.

By the same token, in ASEAN an MRA allows engineers to move freely in the territories of the ASEAN signatories provided that they satisfy the requirements for acquiring the title of the ASEAN Chartered Professional Engineer (ACPE). There are also agreements that are based on the concept that a person recognized in one country as attaining the

also be a factor that calls for the proactive involvement of professional associations.

88. Council for Trade in Service, *Legal Services*, WTO Doc. S/C/W/318 (2010).

89. Professional services were ostensibly included in the agenda because of the architectural profession. This resulted in an annex proposing that the architectural professions in Canada and the U.S.A. work towards the establishment of similar standards vis-à-vis accreditation, internships, examinations and ethics. See OECD International Trade in Professional and Educational Services: Implications for the Professions and Higher Education, at 4 (2001).

90. Tri-National Mutual Recognition Agreement for International Practice, art. 3.3, Oct. 7, 2005.

agreed international standard of competence should only be minimally assessed (mainly for local knowledge) before obtaining registration in another country party to the agreement. Such agreements are the APEC Engineer Agreement and the Engineers Mobility Forum Agreement. Both agreements are largely administered by engineering bodies. This underlines time and again the role of private actors in the regulation of professions at a supranational level.

More recently, the chapter relating to trade in services within the Trans-Pacific Partnership (TPP) included an Annex on Professional Services.⁹¹ Interestingly, the TPP parties have included only two Annexes in the chapter of the agreement relating to services, the other one being in the area of express delivery services.

TPP Parties have agreed to the creation of a Professional Services Working Group.⁹² With respect to architectural and engineering services, the agreement refers to the APEC Engineer and Architect frameworks, respectively, and calls for the creation of MRAs. Interestingly, following the NAFTA model, the TPP encourages the implementation of temporary or project-specific licensing and registration procedures based on the home country titles and licenses. With respect to legal services, the TPP recognizes the importance of transnational legal services for trade and investment and in promoting economic growth and business confidence. According to TPP, foreign lawyers should be able to practice the law of their home jurisdiction abroad and participate in commercial arbitration, conciliation or mediation proceedings. The open-ended list of possibilities for transnational supply of legal services and the scope of cooperation with domestic lawyers appears quite broad. Thus, cooperation of the regulating bodies will be of dire need. The role of the Working Group is indeed to support the professional bodies in liaising with one another. Progress should be discussed annually. Similar mechanisms are to be expected in the Transatlantic Trade and Investment Partnership (TTIP). The EU has proposed, for instance, the creation of a Committee on the Recognition of Professional Qualification, but again, no tangible results will be yielded without the active participation of professional bodies.

91. See Trans-Pacific Partnership, Annex 10-A Agreed on Jan. 26, 2016, https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/10.-Cross-Border-Trade-in-Services-Chapter.pdf? [hereinafter TPP Final Text].

92. See TPP Final Text, *supra* note 91, at art. 10.9.

IV. The Transnational Dimension of Regulating Professional Services

A. Two-Dimensional Transnational Private Regulation of Professional Services

Transnational law of professional services is a dynamic process with strong normative characteristics led by predominantly private actors.⁹³ The transnational dimension in professional services should be examined at two different levels. The first refers to the level of firm; more specifically, large professional service firms that are active in supplying accountancy and auditing, legal, management consulting, and advertising services worldwide. Foreign earnings of those firms sometimes surpass domestic revenues. International operations of such large firms are typically organized as loose collections of rather autonomous, locally owned partnerships. These partnerships are linked to an international organism that may have coordinating responsibilities, among others. As business strategies become more intertwined and companies strive for higher returns through diversification, market boundaries faint. For instance, large accounting firms regularly provide management advisory services, whereas internationally active law firms equally are active in areas of tax and trust and estates, very much like accounting firms. This is not an exclusively developed-country phenomenon; rather, the quest for new markets leads firms to seek market shares in the developing world as well, where concentration of power to few may be easier due to the weaknesses of domestic market structures and antitrust law.

In other cases, professional services have been traditionally interconnected (or in certain cases, vertically integrated), sometimes displaying characteristics of complementarity. This is the case of architectural and engineering services, along with construction services. Architectural firms prepare blueprints and designs for buildings, whereas engineering firms provide services relating to planning, design, construction and management for buildings, installations, civil engineering works and industrial processes. Consulting engineers, on the other hand, may work hand in hand with architects from the very early stage of a project.⁹⁴ Research is still at its infancy when it comes to deciphering the interrelations among various professional services and the function of so-

93. Cf. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

94. Cf. Council for Trade in Services, *Background Note by the Secretariat: Architectural Services*, WTO Doc.S/C.W303, at 3 (Sept. 17, 2009).

called “professional service supply chains.”⁹⁵

The second level relates to professional associations. Internationalization of business gave rise to the creation of international professional bodies that promote the adoption of business-friendly rules transcending national frontiers to the benefit of professionals. Individual professionals are only indirectly represented in these attempts, as their voices are heard exclusively at the level of each national professional association. In turn, international professional associations consist predominantly of a group of national associations. In this sense, rule-making of international professional associations raises questions of good governance similar to rule-making of international organizations. However, there may also be associations that follow a more representative or mixed form of organization. For instance, the legal profession at the global level is represented not only by the IBA, which is closer to the Anglo-Saxon legal tradition, but also by the International Union of Lawyers (*Union Internationale des Avocats* – UIA). The UIA claims to be the most representative international association of lawyers in Europe, South America and Africa. Thus, already in this area of professional services, elements of fragmentation alluding to possible conflicts and overlaps are present. For our purposes here, it bears noting that both bodies have international coverage and their membership includes national professional associations and individual lawyers.⁹⁶

B. The International Professional Associations

Although the creation of professional associations at the international level has traditionally improved cooperation and exchange of information in various professions, notably on issues such as education, professional qualifications and international standards, this phenomenon has intensified due to the globalization of business. As business expands beyond national borders, professional service suppliers equally expand their spectrum of activity. However, supply of professional services at a transnational level can be hampered by various impediments notably of regulatory nature. The need to facilitate access and enhance convergence with respect to applicable rules, but also to capture activities national laws cannot, led to the creation of sectoral non-governmental organizations at the international level. Furthermore, as the locus of legal services supply shifts at the global

95. These are defined as systematic sequences of professional, clerical, and technical services explicitly set up to provide specific services, such as producing a financial product, designing a house, or replacing a hip. See Jean Harvey, *Professional Service Supply Chains*, 42-43 J. OPER. MANAG. 52 (2016).

96. Council for Trade in Services, *Background Note by the Secretariat: Legal Services*, WTO Doc. S/C/W/43, at 18 (1998).

level, the public interest dimension of the practice of law faints, leading benevolent professionals in efforts to ensure the quality of the legal services even at the global level.⁹⁷ We discuss the main features of these organizations in the areas of law, engineering, and architecture in turn.

As a prelude, a common characteristic of these regimes is their fragmented way of functioning with high levels of overlap and low levels of active coordination. Most of these organizations have adopted rules relating to professional competence, consumer protection, and the protection of public interest; thereby, showing awareness of professional services having characteristics similar to experience goods, i.e., significant information asymmetries. Such rules are typically incorporated in a model code of ethics, which is intended to inspire domestic professional associations when they prepare or revise their code of conduct. Accreditation and (continued) education is an emerging area of significant interaction among international associations of a given profession and other international organizations or entities. Such initiatives can potentially lead to mutual recognition, recognition of equivalent qualifications, and ultimately increased mobility. Thus, significant legal material is produced and epitomizes a range of degrees of legal formality; both “soft” and “harder” law seems to be generated. In that sense, international professional associations constitute embryonic transnational legal orders.⁹⁸

i. Legal Services

The legal sector plays an enabling role in the economy. It is no coincidence that every new Member that joined the WTO in the aftermath of the Uruguay Round, including China, inscribed commitments in legal services in its schedule of services commitments. The legal sector has experienced steady growth in recent years, following the growth of international trade and the development of new fields of practice, notably in the area of business and commercial law. Legal firms around the globe are internationalizing their activities to serve better clients engaged in activities of a transnational nature. The profession has become global and lawyers are increasingly required to conduct transactions that cross national borders and involve several jurisdictions. It is the demand for legal services that can go beyond national borders that drives the increasing interest of the legal professionals in the expansion of their possibilities for unhindered

97. See also Cristopher Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27(2) PENN STATE INT'L L. REV. 465 (2008).

98. See generally, TRANSNATIONAL LEGAL ORDERS (Terence Halliday & Gregory Shaffer, eds., 2015).

international mobility. Multi-jurisdictional advice and fully integrated services covering all aspects of a business transaction are increasingly sought after by multinationals. Such phenomena lead to important structural shifts in the legal market at the national and global levels.⁹⁹

Having said this, the regulation of the legal profession is still carried out predominantly at the level of political subdivisions rather than at the national level. Thus, authority for admission to the profession and professional discipline often is in the hands of local, state or provincial organs, be it governmental or professional (in the latter case, through delegation, as noted earlier). Such fragmentation of regulating the legal profession is often the result of rent-seeking.¹⁰⁰ The superiority of self-regulation in the legal profession has been questioned based on competition law grounds at least in the OECD countries, whereby a transition towards separate independent “umbrella regulators” who focus on the market at the macrolevel (rather than the individual service supplier) seems to be taking place.¹⁰¹

Important initiatives have been taken at the transnational level to reduce fragmentation of rules relating, for instance, to corporate structure or double deontology (referring to the obligation of foreign lawyers to comply with both the home and host country code of conduct). One of the most interesting issues on this score relates to restrictions regarding advertising. For instance, in the host country, contrary to the home country, advertising of legal services may be prohibited. Such rules may be applying in a discriminatory manner. For instance, in Denmark, foreign lawyers face restrictions on advertising that do not apply to local lawyers.

Significant progress has been made under the auspices of the International Bar Association (IBA) with respect to better transnational regulation of the legal profession worldwide. The IBA is a federation of national bar associations and law societies based in New York. It is a truly international organization with about 200 national professional organizations and 40,000 individual lawyers as registered members. The IBA Council, where representatives from Bar Associations sit, is IBA’s governing body.

According to the constitution of the IBA, the IBA aims, inter alia, to (i) establish and maintain relations and exchanges between Bar Associations and their members worldwide; (ii) assist in the development

99. See also Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, MICH. STATE L. REV. 1043 (2015).

100. See Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 64, 291 (1974).

101. See also Alison Hook, *Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services*, 13 (2007), (OECD/World Bank Sixth Services Experts Meeting on Domestic Regulation and Trade in Professional Services).

and improvement of the profession's organization and status worldwide; (iii) promote uniformity and definition in appropriate fields of law; and (iv) promote the administration of justice under the rule of law globally.¹⁰² To achieve these objectives, the IBA undertook significant work adopting resolutions and producing guidelines related to such diverse areas as ethical standards, conflicts of interest, taking of evidence and party representation in international arbitration; the recognition and enforcement of foreign judgments for collective redress; multidisciplinary practices; money laundering; standards and criteria for recognition of lawyers' qualifications; or the regulation of foreign lawyers.¹⁰³ Notably, two resolutions of the IBA on General Principles for the Establishment and Regulation of Foreign Lawyers (adopted in June 1998) and the resolution in Support of a System of Terminology for Legal Services for the Purposes of International Trade Negotiations (adopted in September 2003) provide reference points on the regulation of foreign lawyers advocating the adoption of either a full licensing approach or a limited licensing approach or an appropriate combination of both with a view to facilitating legal practice around the world.

The IBA International Code of Ethics was first adopted in 1956. The latest edition dates back to 1988. The code is not binding on the members of the IBA and applies to any lawyer of one jurisdiction in relation to his contracts with a lawyer of another jurisdiction or to his activities in another jurisdiction. The code includes rules on ethical standards that are common to most countries on matters such as honour and dignity, independence, courtesy and fairness to colleagues, financial diligence, conflicts of interest, contingency fees, unauthorised practice of law, professional liability, disclosure of confidential information, confidentiality of lawyer-client communications, respect towards the courts, advertisement and solicitation, handling, refusal and withdrawal from cases and out of court settlements. It also includes a rule that binds lawyers who undertake work in a jurisdiction where they are not full members of the local profession to the ethical rules of the host country, as well as to those of their home country. The IBA may bring incidents of alleged violation of the code to the attention of relevant organizations.

In addition, the IBA adopted a 'Guide for Establishing and Maintaining Complaints and Discipline Procedures' to assist national associations in the creation or revision of their complaints and discipline procedures. The Guide makes a logical link with the Code of Conduct in

102. See International Bar Association Constitution, art. 1 (May 28, 2011), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=D1E3CF28-BE59-4FC6-96EB-4E40156C19CE>.

103. For a list of the IBA resolutions, see *IBA guides, rules and other free materials*, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

that the implementation of complaints procedures depends on the clarity of the rules enshrined in the Code of Conduct. The Guide emphasizes the need for adequately informing the consumers of the possibility of lodging a complaint; allowing easy, public access to information relating to complaints; setting specific timelines for handling complaints; and giving the opportunity to respond to the lawyer concerned. The Guide envisages a disciplinary framework, whereby the complainant has access to a complaint handling body, which, if the complaint is well-substantiated, refers the matter to a disciplinary tribunal. Decisions of the latter shall be appealed before an appeal tribunal. All three bodies are to be fair, impartial and independent and may, but need not necessarily, contain nonlawyers.

Thus, the Guide promotes an extra-judicial mechanism that is to run in parallel with public courts, but crucially does not require the participation of non-lawyers. For instance, participation of judges or notaries (at least, in those jurisdictions where notaries are deemed agents of the public interest) could be a more valuable guarantee of independence.¹⁰⁴ According to the Guide, the following penalties could be imposed to the lawyer: (a) reprimand; (b) fine and/or restitution order; (c) suspension or revocation of license to practice; (d) additional courses or further education of the respondent; (e) restricting the lawyer's licence to practice.

With over 200 Bar Associations and several thousand individual members, the International Union of Lawyers (UIA) has similar objectives and membership. UIA equally adopted resolutions relating to issues of professional conduct, foreign legal practice, professional secrecy and multidisciplinary practices.¹⁰⁵ The UIA's 'Turin Principles of Professional Conduct for the Legal Profession on the 21st Century' of 2002 provide:

C. Role of and Representation by the Bar

Depending on the country, a Lawyer has the duty or the right to be a member of a Bar or Law Society and to ensure that the profession is governed by rules laid down by the representative bodies of which he or she is a member, and that they are observed.

Provided that the Bar observes the principles set out

104. Cf. Case C-506/04, *Wilson v. Ordre des avocats du barreau de Luxembourg*, ¶43-62, 2006 E.C.R. I-8613, (the Court cast doubts as to the impartiality of a disciplinary body which is composed exclusively by lawyers).

105. See International Association for Lawyers, Resolutions and Charters, <http://www.uanet.org/en/documentation/resolutions> (last accessed on Apr. 15, 2016).

in the Basic Principles on the Role of Lawyers endorsed by the UN,¹⁰⁶ Lawyers have the duty to recognise the Bar's right to establish such rules and to ensure compliance by conforming their conduct to the rules laid down by their own Bar and those of the other jurisdictions in which they practise.

The UIA has further adopted in 2002 a set of 'Standards for Lawyers Establishing a Legal Practice Outside Their Home Country' which provides, *inter alia*, for compliance of foreign lawyers with host country rules of ethics and implies that the host country regulatory authority should, through the registration of the foreign lawyer, have all available information to determine and enforce compliance with applicable standards.

i. Engineering Services

Contrary to the legal sector, engineering has been less bothered with securing complete regulatory authority. This is because engineers typically work as employees of private companies, notably due to the need for significant capital investment.¹⁰⁷ However, the emergence of other non-governmental international professional organizations has influenced developments in this profession as well. The World Federation of Engineering Organizations (WFEO) consists of over 90 national and 10 regional members representing some 20 million engineers. It has ten standing committees hosted in various countries worldwide. In 2001, the WFEO adopted a model code of ethics to define and support the creation of similar codes in member institutions. Interestingly, the Code comes with an interpretation of the Code of Ethics. The Code's introductory text provided:

[These governing principles of the Code of Ethics] are usually presented either as broad guiding principles of an idealistic or inspirational nature, or, alternatively, as a detailed and specific set of rules couched in legalistic or imperative terms to make them more enforceable. Professions that have been given the privilege and

106. The text refers here to the Basic Principles on the Role of Lawyers, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27, September 7, 1990.

107. Rostain, *supra* note 60, at 173.

responsibility of self regulation, including the engineering profession, have tended to opt for the first alternative, espousing sets of underlying principles as codes of professional ethics which form the basis and framework for responsible professional practice. Arising from this context, professional codes of ethics *have sometimes been incorrectly interpreted as a set of “rules” of conduct intended for passive observance. A more appropriate use by practicing professionals is to interpret the essence of the underlying principles within their daily decision-making situations in a dynamic manner, responsive to the need of the situation. As a consequence, a code of professional ethics is more than a minimum standard of conduct; rather, it is a set of principles which should guide professionals in their daily work.* (Emphasis added).

The most recent WFEO Model Code of Ethics confirms the twofold objective of a model code of ethics, that is, protect the public, but also the engineering practitioners from provisions that may restrain commercial activity. In addition, it identifies four objectives for any code of ethics in engineering: integrity, competence, leadership, and sustainability.¹⁰⁸ More generally, sustainability has become an increasingly important issue for WFEO to the extent that a Model Code of Practice for sustainable development and environmental stewardship was adopted in September 2013. On the occasion of the Paris conference on climate change, WFEO reflected on the role of engineers in a low-carbon economy. At this juncture, it adopted a Model Code of Practice on Principles of Climate Change Adaptation for Engineers during the WFEO General Assembly in December 2015 in Paris. This Code complements the previous two and evolves around principles relating to professional judgment, integration of climate information, and guidance on practice.

Sustainability-related global rules in engineering are growing in prominence, notably due to the globalization of supply chains.¹⁰⁹ As

108. For the latest version of the Model Code of the World Federation of Engineering Organizations, see http://www.wfeo.org/wp-content/uploads/WFEO_MODEL_CODE_OF_ETHICS_Final.pdf (last accessed on Apr. 22, 2016).

109. See also Meredith Miller, *Corporate Codes of Conduct and Working Conditions in the Global Supply Chain – Accountability through Transparency in Private Ordering*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE – MOVING FORWARD, LOOKING BACK* 432 (Jena Martin & Karen Bravo eds., 2016).

production is outsourced, leveling the playing field in supplying engineering services is necessary, as the recent collapse of the eight-story Rana Plaza building dramatically demonstrates.¹¹⁰ Such tragic events also emphasize the need for more regular checks by Western investors of facilities, buildings and infrastructure that is used for their production, perhaps through commissioning engineers from their home countries. In addition, growing internationalization calls for more convergence regarding educational standards and professional qualifications.

Since the 1980s, national institutions and other associations have attempted to establish systems for accrediting engineering courses and assessing the professional competence of engineers for independent practice. The most well-known examples of this cooperation include the Washington Accord, which is a constitutive part of the International Engineering Alliance (IEA). The Washington Accord is an early example of a reciprocal agreement that was reached by engineering organisations representing Australia, Canada, Ireland, Hong Kong, Japan, New Zealand, Singapore, South Africa, South Korea, Taiwan, Turkey, Malaysia, the United Kingdom and the United States. In 2014, Sri Lanka and India joined the Accord. The Accord recognises the equivalency of the national accreditation mechanisms in these countries and thus graduates in these countries are considered as having met the academic requirements for entry to the practice of engineering.¹¹¹ Other parts of the education of engineers are covered by the Sydney Accord (engineering technologists or incorporated engineers), signed in 2001, and the Dublin Accord (engineering technician), signed in 2002.

Other examples of cooperation include the European Federation of National Engineering Organizations (FEANI), the Engineers Mobility Forum and the APEC Engineer Monitoring Committee. These constitute a global network working on standards for engineering degrees and professional engineering practice.¹¹² For instance, FEANI adopted standards and rules relating to the assessment of competence of professional engineers with a view to increase mobility of engineers in Europe. Notably the Engineers Mobility Forum agreement created the framework for the establishment of an international standard of competence for professional engineering. This

110. Jim Yardley, *Justice Still Elusive in Factory Disasters in Bangladesh*, N.Y. TIMES, June 29, 2013.

111. See Washington Accord, IEA, <http://www.ieaagreements.org/Washington-Accord/> (last accessed on May 15, 2016); also John Mallea, "International Trade in Professional and Educational Services: Implications for the Professions and Higher Education," at 4-5, (1998).

112. Cf. Peter Greenwood, WFEO, *Mobility of Engineering Professionals, Information Paper on Mobility Prepared for the WFEO Standing Committee on Education and Training (CET)* (Oct. 20, 2008).

Forum was repealed by the International Professional Engineers Agreement (IPEA), a multinational, open agreement with the same critical objective as the previous Forum.¹¹³ The standard applied is the same as the APEC Engineer Agreement. However, non-APEC members, such as the United Kingdom or Ireland, are parties to the IPEA. WFEO, in turn, has been working on the preparation of a policy on accreditation of courses and mobility of engineering professionals, which would complement the above-mentioned initiatives.

There are other international organizations that are concurrently active in promoting the engineering profession. Most notably, the Institute of Electrical and Electronics Engineers (IEEE), which has over 400,000 members in 160 countries and covers electrical and electronics engineers, or the International Federation of Consulting Engineers (FIDIC), which focuses entirely on consulting firms. The World Council of Civil Engineers focuses on civil engineers who represent around 50 percent of all engineering organizations worldwide. The Institution of Civil Engineers (ICE), although established in the UK, represents about 90,000 members from more than 160 countries worldwide.

One interesting aspect of the above-mentioned international initiatives is that they have adopted codes of conduct, which, other than making reference to education, competence and integrity of the engineers, underscore the importance of combating corruption in the profession, particularly in the materialization of construction projects. For instance, FIDIC has prepared and encourages the implementation of an 'Integrity Management System', focusing on preventive action to fight corruption. Guidelines in this regard were first adopted in 2001. In 2006, FIDIC adopted similar guidelines specific to government procurement. In 2011, the first edition of policies and principles regarding the FIDIC Integrity Management System (FIMS) was published.¹¹⁴

ICE also adopted a Code of Professional Conduct, violation of which may lead to disciplinary action against a given member. The ICE disciplinary mechanism includes the Professional Conduct Panel and the Disciplinary Board. The former is in charge of investigating all allegations against ICE Members that are accused of inappropriate conduct. Serious cases are to be forwarded to the Disciplinary Board for formal adjudication. According to By-law 40, the Disciplinary Board can impose the following sanctions: compliance with certain requirements regarding the member's future professional or business

113. IEA CONST., *available* at <http://www.ieagreements.org/Agreement-Constitutions-Version-1.pdf>.

114. *See also* INT'L FED'N OF CONSULTING ENG'RS, <http://fidic.org/node/777> (last visited May 4, 2016).

conduct; fines up to a maximum of £2,000; admonition; severe reprimand; suspension; and expulsion. According to By-law 41, appeal to an independent tribunal is possible in theory under certain circumstances.

ii. Architectural Services

The International Union of Architects (UIA) consists of national associations from 130 countries and territories. It is a federation of national professional organizations called Member Sections. The UIA maintains an open electronic database with information about the industry in each Member Section and in order to assist those architects who practice their profession at the international level. In this respect, the UIA has been quite active in the field of facilitating movement of architects at the international level. In 1999, the UIA General Assembly unanimously agreed on an Accord on Recommended International Standards of Professionalism in Architectural Practice and a set of Recommended Guidelines, which offer a basis for mutual recognition of architectural competences at the international level.¹¹⁵ In addition, the UIA has developed, jointly with UNESCO, a Charter for Architectural Education, which sets out broad minimum standards.¹¹⁶ According to UIA, the latter should be regarded as the minimum criteria for architectural education.

Previously, the UIA had adopted an International Code of Ethics on Consulting Services, which should ostensibly constitute “the common standard of conduct for all professionals performing consulting services in all nations.” Member Sections are encouraged to introduce into their own codes of ethics the recommended Accord Guidelines mentioned earlier and a requirement that their members adhere to the codes of ethics in force in the host country, provided that they are not prohibited by international law or the home country laws. Indeed, Article 9 of the Code provides that the architect delivering professional services abroad shall abide by the host country’s professional regulation laws and adhere to the code of ethics that *domestic* professionals apply. Interestingly, in its Article 10, the Code provides:

- (1) The common objectives of all professional organizations are to establish and promote the highest

115. Most recently revised in 2014, the Accord is available at: <http://www.uia.archi/sites/default/files/AIAS075164.pdf> (last accessed on May 2, 2016).

116. The most recent revised version can be found at: <http://www.uia.archi/sites/default/files/charte-en.pdf> (last accessed on May 2, 2016).

standards of ethical conduct and excellence in the practice of the professions, to regulate the professional conduct of the members of the professions and to cooperate with their allied professional organizations.

(2) In line with the foregoing objectives, *it shall be mandatory upon a professional organization to take appropriate action on any formal complaint for unethical conduct filed against any member of its profession by a co-professional, a client, a professional organization or a government regardless of the residence of the complainant.* (Emphasis added).

At the national level, the Accord encourages the creation of professional bodies if they do not exist. It further underlines the importance for these bodies to adhere to the UIA international standards, the UNESCO-UIA requirements, and the UIA Code of Ethics. Such bodies should be governed in an open and transparent manner and are expected to promote the interests of consumers, architects, and the general public.

The Accord and Recommended Guidelines are deemed nonbinding documents for the consideration of the individual national Member Sections, and the UIA cannot enforce those documents. However, their influence is apparent. For instance, Korea expanded the required architectural education from four to five years; the Architects' Council of Europe revised their recommended Code of Ethics based on the UIA mode; and the MRA relating to architects under NAFTA uses the definition of architect included in the UIA Accord.¹¹⁷ In addition, UIA was one of the few international professional associations to submit a proposal for a WTO GATS Annex on Domestic Regulation to allow for the dismantlement of unnecessarily excessive barriers to trade in professional/architectural services.¹¹⁸

V. Private Enforcement and Judicial Review

Private enforcement has been a pervasive feature of the existing social and economic system for several decades. Whereas the State assists by establishing and maintaining a court system, the most important part of

117. See Russell Keune, "Architectural Services in Global Trade in Professional Services," paper presented at the OECD/World Bank Sixth Services Experts Meeting on Domestic Regulation and Trade in Professional Services, at 24, (Feb. 2007).

118. See the proposal of 2006 at: http://www.ace-cae.eu/uploads/tx_jidocumentsview/A_G207UIADomreg.pdf (last accessed on May 2, 2016).

enforcement is informal, also driven by the “latent threat of withdrawing future business from the violator.”¹¹⁹ Enforcement of private rules in professional services reveals an interaction of bodies, be it public, private or hybrid. In professional services in which self-regulation has traditionally prevailed, such as the legal profession, the creation of disciplinary bodies consisting mainly of fellow professionals is common.

It is in a second step and in more significant cases of professional misconduct that the participation of a “public authority” representative, such as a judge, occurs. In other cases, referral of the entire case to a public court may be stipulated in the statute of a given professional organization. For instance, the rules of a given professional association may offer the possibility of appeal to ordinary courts against certain decisions made by disciplinary bodies of the association. In other cases, notably claims raised by consumers, it is public courts that will be deciding on issues of fault and liability. Finally, once the remedy of having recourse to the disciplinary bodies of a given professional association is exhausted, recourse to the ordinary judicial system is always open for the person negatively affected. As mentioned earlier in the case of the UK, the State in certain cases may prefer to delegate the most insignificant cases to special agencies that oversee the work and activities of the professional bodies.

Initially regarded as an intervention in the matters of professional associations, judicial review of decisions by private professional associations became a standard procedure in case of continued complaints. This can happen even after the exhaustion of disciplinary processes within a given professional association, notably with regard to the imposition of sanctions and the admission to the profession. In both cases, the notion of public interest and antitrust-related considerations are important issues for the State to keep an eye on. Judicial review in this case would entail a balance between incommensurables whereby judges ultimately make implicit value judgments.

When a given situation is treated by the disciplinary body of a given professional association, it seems that the enforcement pyramid becomes relevant.¹²⁰ Regulatory approaches would begin at the bottom of the pyramid for low-profile cases necessitating a warning or soft forms of notice, and escalate towards the imposition of fines and/or incapacitation in response to compliance failures. According to Ayres and Braithwaite,¹²¹ governments should allow self-regulation to industries in the first instance, but the State should move on through enforced self-regulation to command regulation with (discretionary and

119. William Landes & Richard Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

120. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION – TRANSCENDING THE DEREGULATION DEBATE* 38 (Oxford University Press 1995).

121. *Id.*

subsequently with nondiscretionary) punishment if the goals are not met. Thus, the regulator shall be able to move up and down the pyramid or even recover the regulatory power that had been delegated to a professional association depending on the gravity of the situation. This last element can also be part of a meta-regulation approach, whereby governmental authorities deliberately seek to induce private bodies to develop their internal self-regulatory responses to challenges.¹²² However, an overemphasis on punitive strategies can render voluntary compliance at the bottom of the pyramid impossible.¹²³

A. Legal Services

Private enforcement in the legal profession entails, for the most part, the implementation of legal ethics rules against misconduct or fraudulent and deceptive practices of lawyers. Typically, codes of ethics would entail a series of sanctions, which, depending on the type of behaviour and severity of the offense, would escalate up to the level of indefinite expulsion from the Bar. Sanctions more often than not include: admonition, reprimand, censure, suspension from practice, or disbarment. Admonition is usually a private discipline, whereas reprimand can be private or public. Censure, suspension and disbarment are public disciplinary sanctions.

In the United States, self-regulation in the legal profession co-exists with state regulation. Codes of ethics are typically enforced by the respective state's supreme courts, which have acted as the ultimate gatekeepers. Thus, rules of professional conduct in the legal profession are in the end considered as rules of the supreme court of a given state, and thus applied under the aegis of the state judiciary.¹²⁴ However, in practice, such rules have been prepared by the state bar and are typically based on the Model Rules of Professional Conduct set out by the American Bar Association (ABA). In several states, disbarment, which is the most severe sanction, can be decided only by the state's supreme court.¹²⁵

Nonetheless, the rest of the sanctions have been traditionally enforced by disciplinary agencies that either operate within the judicial branch or are part of the state bars. Thus, for some time, state bars were in charge of

122. Coglianesi & Mendelson, *supra* note 58, at 147.

123. Richard Baldwin & Julia Black, *Really Responsive Regulation*, 71 MODERN L. REV. 59 (2008).

124. In general, Supreme Courts have ultimate jurisdiction for admission to the practice of law, the discipline of persons so admitted, and all other matters relating to legal practice. *See* for instance, OH Const. art. §4.02(B)(1)(g).

125. It bears noting that disbarment is not necessarily permanent, as reinstatement is possible in some states.

conducting investigations, holding hearings and imposing a range of disciplines. This led to the proceedings becoming confidential, somehow implying that there was no public interest involved in cases brought against misbehaving lawyers.

However, over the years it became clear that the bars largely failed to run effective disciplinary mechanisms, with more than 90 percent of complaints against lawyers being dismissed – sometimes without any investigation.¹²⁶ In addition, corporate lawyers became so intertwined with business that they became subject to federal regulation in important areas such as securities or taxation. In the case of corporate practice, ethics regulation is federalized.¹²⁷ In such areas of significant federal interest, federal regulation treats corporate lawyers as one of a class of similar service providers.¹²⁸

Thus, more open mechanisms have emerged in which, nonetheless, lawyers, and less the organized state bars, continued to play an essential role. For instance, in New Jersey, legal ethics issues will first be raised with one of the seventeen district ethics committees around that state.¹²⁹ Such committees are composed of three members, two of whom are lawyers. Decisions of the committees and the Office of Attorney Ethics can be reviewed before the Disciplinary Review Board (DRB) of the supreme court of New Jersey, which conducts a *de novo* review. The DRB consists of nine members appointed by the supreme court.¹³⁰ Five of them are attorneys, one member is a retired judge and the remaining three members are nonlawyer, public members. The Board's decision must be reviewed by the state's supreme court only in the case of a decision recommending disbarment.

According to Rule 1:20-16(b) of the New Jersey Court Rules Governing Attorney Discipline, in all forms of discipline other than disbarment, the recommendation of the Board becomes final on entry of an order by the supreme court, unless the latter grants one of the parties leave to appeal. The state's supreme court decision can be appealed before the

126. See Rostain, *supra* note 60, at 180.

127. This is, for instance, the case with the Sarbanes-Oxley Act: 15 U.S.C. § 7245 (Supp. III 2003). For a critical review of lawyers' objections against such pieces of legislation, see William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75(3) FORDHAM L. REV. 1453 (2006).

128. see also Laurel Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers."* JOURNAL OF THE PROFESSIONAL LAWYER 189 (2008).

129. Complaints relating to advertising shall be raised with the Attorney Advertising Committee.

130. Cf ABA Model Rules for Lawyer Disciplinary Enforcement, more recently amended in 2002.

United States Supreme Court. Disciplinary proceedings are public, but all fee arbitration proceedings are confidential.¹³¹ A Random Audit Compliance Programme is also pursued, which allows the identification of otherwise unknown attorney misconduct.

The state's supreme court is free to follow its own argumentation, whereas the views of the bodies previously dealing with a given case merely constitute recommendations. For instance, in *Zauderer*, the United States Supreme Court rejected the appellant's claimant that his due process rights were violated because the Ohio Supreme Court relied on a theory that was different from the one brought forward by the Board of Commissioners on Grievances and Discipline or the Office of Disciplinary Counsel. The United States Supreme Court emphasized that, under the law of Ohio, the Board has no authority to impose discipline, but simply recommend discipline to the state's supreme court, which is the ultimate authority responsible for bar discipline according to the Ohio state constitution (and, obviously under all state constitutions).¹³²

As an alternative to civil litigation, in the state of New Jersey, the possibility of fee arbitration is offered when there is disagreement with respect to fees. This programme handled more than 1,795 cases involving more than \$13 million in legal fees in 2014.¹³³ If parties choose this option instead of civil litigation, they are presumed as bound by the decision of the arbitrators. Just as with the DRB, most members in this institution are still attorneys. Typically, the fee arbitrator committee will consist of three lawyers or two lawyers and one public member.

Although important steps were made to improve the openness of disciplinary mechanisms, the situation is still regarded as unsatisfactory in several States.¹³⁴ Lawyer discipline mechanisms have been criticized for their lack of transparency at least since the 1970s and this has led to an increased involvement of the judicial branch as a guarantee of independence. The ABA McKay Commission, when examining the lawyer discipline mechanisms, found that "[t]he Commission is convinced that secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems."¹³⁵ In addition, in several

131. Information on all disciplinary cases since 1984 is to be found at: <http://www.judiciary.state.nj.us/dae/discipline.htm> (last accessed on May 10, 2016).

132. *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 655 (1985).

133. See Stuart Rabner & Charles Centinaro, *State of the Attorney Disciplinary System Report 2014*, 45.

134. Leslie Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEORGETOWN J. OF LEGAL ETHICS 1 (2007).

135. ABA Commission on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a*

cases, consumers are not adequately informed of recidivists, who may actually have been sanctioned several times before they are disbarred, if at all. Indeed, in New Jersey, several lawyers have received public discipline in more than one instance.¹³⁶ In Louisiana, a study suggested that between 1975 and 2000, 85 percent of the disbarred lawyers who applied for reinstatement succeeded and 44 percent of those lawyers were subsequently disciplined.¹³⁷ Furthermore, it appears that sanctions are imposed in an unbalanced manner in that solo or small-firm lawyers are disproportionately prosecuted.

Nowadays, important steps towards increased transparency were made, with an enhanced involvement of the state judiciary. In California, for instance, the State Bar investigates complaints of attorney misconduct and, if necessary, files formal charges with the State Bar Court. This court consists of independent professional judges and no attorneys are involved. The State Bar Court has the power to discipline lawyers for lesser offenses and recommend to the State's Supreme Court suspension or disbarment for more serious crimes. Again, the extent to which the disciplinary system is public varies among states. Complaints against lawyers in Florida, New Hampshire, Oregon and West Virginia are treated as a matter of public record.

In 2009, over 88,000 complaints were received by the state disciplinary agencies. However, the majority of the complaints filed were dismissed after investigation during the same period.¹³⁸ More than 2,000 lawyers were privately sanctioned, whereas the number of lawyers who were publicly sanctioned was slightly below 5,000. Thus, sanctions have become increasingly public, thereby serving an important function of transparency, openness, and consumer protection from laggards. However, downsides are also present in that reputation costs can be high, notably for lawyers who in the end were not disciplined.¹³⁹

Many times, disciplinary proceedings run in parallel with civil litigation or criminal proceedings. For instance, *In the Matter of Marc F. Desidario*, the New Jersey Supreme Court disbarred Mr. Desiderio as a result of his criminal conviction by the United States District Court for the Southern District of California. Mr. Desiderio was accused of money laundering, aiming to conceal the operations of a substantial marijuana

New Century: Report of the Commission on Evaluation of Disciplinary Enforcement, 33 (1992).

136. See Stuart & Rabner, *supra* note 133, at 18ff.

137. Levin, *supra* note 134, p. 3 (citing Terry Carter, 'Bounced from the Bar: Lawyers Who Lose Their Licenses for Fraud or Other Misconduct Can Win Reinstatement, If They Practice in the Right State,' ABA Journal, October 2003, p. 56).

138. ABA Survey on Lawyer Discipline Systems 2014, Charts I and II.

139. In the United States, there is also a website which allows ratings of lawyers. See for instance: www.lawyerratingz.com.

distribution organization. The New Jersey Supreme Court temporarily suspended the attorney, but only after he pleaded guilty to conspiracy to commit money laundering before the United States District Court for the Southern District of Florida.¹⁴⁰

In *Ohralik*, a case that was subsequently handled by the United States Supreme Court,¹⁴¹ at stake was the behaviour of an Ohio lawyer, who managed, through face-to-face solicitation of two car accident victims, to sign contingent-fee arrangements with them. Eventually, both victims discharged the attorney, but he succeeded in obtaining a share of the driver's insurance recovery in settlement of his lawsuit against them for breach of contract. Later, both victims filed grievances with the Ohio State Bar Association for violation of the rules prohibiting unsolicited recommendation or acceptance of employment for members of the Bar.¹⁴² The Bar's grievance committee recommended a public reprimand, which was later endorsed by the Disciplinary Board of the Ohio Supreme Court. On appeal, the Ohio Supreme Court adopted the Board's findings, but increased the Board's recommended sanction of a public reprimand to an indefinite suspension.

In Europe, the structure of disciplinary mechanisms varies. The CCBE recommends that any disciplinary proceedings in the legal profession be independent vis-à-vis state authorities. Rather, the primary responsibility of the conduct of disciplinary proceedings should preferably lie with the Bar or the Law Society. Having said this, the State may set the framework within which disciplinary proceedings should function.¹⁴³

In England and Wales, the Legal Services Act of 2007 constitutes a major overhaul of the regulation of the legal profession and a dramatic transformation of the self-regulatory model. The Act permits, inter alia, nonlawyers to invest in law firms. Thus, UK-based firms can seek outside capital. In addition, the Act allows the creation of Alternative Business Structures (ABS),¹⁴⁴ alias multidisciplinary practices, whereby lawyers can join forces with nonlawyers such as accountants or tax consultants.¹⁴⁵ By

140. See *In the Matter of Desiderio*, 927 A.2d 560 (2007) and *In the Matter of Desiderio*, 963 A.2d 810 (2009).

141. See *infra* Section III.

142. Rules DR 2-103(A) & DR 2-104(A) of the Ohio Code of Professional Responsibility (1970).

143. See CCBE Recommendations on Disciplinary Process for Legal Professions, http://www.ccbe.org/fileadmin/user_upload/NTCdocument/CCBE_Recommendations1_1190034926.pf (last visited Mar. 15, 2016).

144. The Solicitors Regulation Authority licensed the first ABS in March 2012.

145. This is prohibited in the US and in several EU MS. For an early assessment of the effects on competition that this discrepancy may have, see Anthony Davis, *Regulation of the*

2014, over 250 ABSs were licensed in the UK, accounting for a significant share in the legal market.¹⁴⁶

In this new regulatory framework, the Solicitors Regulation Authority (SRA), established in 2007, is the independent regulatory body of the Law Society of England and Wales. The new SRA Code of Conduct, adopting an outcomes-focused regulatory approach, came into force in 2011. According to the new framework, all authorized legal firms in the UK will need to appoint compliance officers for legal practice (COLPs, must be qualified lawyers) and for finance and administration (COFAs, not necessarily lawyers), who will be responsible for risk management and proper governance.

In principle, the SRA is the first body that will take up a complaint of misconduct against a solicitor.¹⁴⁷ The SRA has vague standards as to whether decisions against solicitors will be published or not, depending on whether publication promotes the public interest (which the SRA decides unilaterally upon). Published decisions include: decisions to fine or rebuke, decisions to prosecute at the Solicitors Disciplinary Tribunal (SDT), decisions to control how a firm or an individual practices, decisions to close a practice, and agreed outcomes with firms or individuals.

The SDT is constituted as a Statutory Tribunal under the UK Solicitors Act 1974. Prosecution to the SDT is done by the SRA and is necessary in severe cases such as striking a solicitor from the roll of solicitors. The SDT also decides for reinstatements, i.e. restorations to the roll of solicitors. It has 53 members, 34 of which are solicitors. These solicitors should have no connection with the SRA. Publication of outcomes comes late in the procedure. Decisions of the SRA to prosecute will be published only when the SDT has certified that there is a case to answer. Orders delivered by the SDT can be appealed before the High Court. The SRA can also appeal against a decision by the SDT.

For instance, *In the Matter of Pawan Vikram Sharma*,¹⁴⁸ at stake was the misconduct of Mr. Sharma who, *inter alia*, forged signatures on five occasions during a transaction and sent on his firm's letterheaded paper to facilitate a personal transaction. Despite admitting that the allegations were

Legal Profession in the United States and the Future of Global Law Practice, 19:2 PROFESSIONAL LAWYER 1 (2009).

146. See Solicitors Regulation Authority, Research on alternative business structures (ABSs) – Findings from surveys with ABSs and applicants that withdrew from the licensing process, (May 2014).

147. The UK regulatory framework also includes a Legal Ombudsman and an Office of Legal Complaints.

148. See Solicitors Disciplinary Tribunal, *In the Matter of Pawan Vikram Sharma*, No 10079-2008.

true, Mr. Sharma denied that he had acted fraudulently or dishonestly. The SDT initially found that, despite Mr. Sharma's dishonesty, the fact that no public harm occurred and Mr. Sharma was the beneficial owner of 100 percent of the shares in the company on behalf of which he wrote on the firm's letterhead made this case exceptional. For these reasons, the SDT disciplined Mr. Sharma with a three-year suspension from practice as a solicitor.

The SRA believed this sanction to be excessively lenient and therefore appealed before the High Court arguing that the appropriate sanction in this case would be disbarment.¹⁴⁹ The High Court considered the *Salsbury v. Law Society*¹⁵⁰ test to find that it was not applicable in the end. Under the circumstances of the case at issue, dishonesty from a solicitor could not be permissible, as Mr. Sharma had repeatedly acted dishonestly and no exceptional circumstances could justify such behaviour. Thus, the High Court concluded that a striking-off order from the roll was appropriate.

The CJEU has also reviewed manifold decisions by professional bodies to protect the fundamental freedoms in accordance with the treaties, notably the freedom of establishment set out in Article 49 of the Treaty on the Functioning of the European Union (TFEU) and the freedom to provide services enshrined in Article 56 TFEU. Recognizing that the private bodies can hamper market access and that the rules of free movement can have horizontal effect, that is, they can be invoked against nongovernmental bodies and individuals,¹⁵¹ the CJEU revolutionized the interpretation of the EU Treaties.

In *Wilson*, for instance, at issue was the Luxembourg *Conseil d'Ordre* (Bar Council) refusal to register Mr. Wilson in the Bar Register, as the Bar Council was unable to determine Mr. Wilson's language knowledge. Mr. Wilson decided not to appeal before the Bar's Disciplinary and Administrative Committee, but to the Administrative Court. The latter, however, found that it had no jurisdiction. Subsequently, Mr. Wilson appealed to the Higher Administrative Court, which decided to seek a preliminary ruling by the CJEU. Mr. Wilson challenged the independence of the disciplinary bodies of the Bar to substantiate his claim that the disciplinary proceedings violated the Directive 98/5 requiring that refusals of registration to the Bar be reviewed by a court of tribunal as defined by EU law. The CJEU found that the condition of independence was not met. According to the CJEU:¹⁵²

149. Solicitors Regulation Authority v Parwan Vikram Sharma (2010) QBD (Admin).

150. EWCA Civ 1285, (2008) 1 WLR 1286 (2009).

151. See, for instance, Case 41/74, Van Duyn (1974) E.C.R. 1337, ¶4-8; and C-281/98, Angonese (2000) E.C.R. I-4139.

152. C-506/04, Wilson (2006) E.C.R. I-8613, ¶53-55.

[The] guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it . . .

In this case, the composition of the Disciplinary and Administrative Committee . . . is characterised by the exclusive presence of lawyers of Luxembourg nationality. . .

As regards the Disciplinary and Administrative Appeals Committee, the amendment made . . . confers overriding influence on the assessors, who must be registered on the same list and presented by the Bar Councils of each of the Bar Associations referred to in the preceding paragraph of this judgment, as compared with the professional magistrates.

..the Bar Council, whose members . . . are lawyers registered in List I of the Bar Register, thus has its decisions refusing registration of a European lawyer reviewed at first instance by a body composed exclusively of lawyers registered on the same list and on appeal by a body composed for the most part of such lawyers.

In those circumstances, a European lawyer whose registration on List IV of the Bar Register has been refused by the Bar Council has legitimate grounds for concern that either all or the majority, as the case may be, of the members of those bodies have a common interest contrary to his own, that is, to confirm a decision to remove from the market a competitor who has obtained his professional qualification in another Member State, and for suspecting that the balance of interests concerned would be upset. . .

Thus, the Court was concerned about the impartiality of such private enforcement bodies. Another element weighing against the Luxembourg Bar was that subsequent judicial review by the domestic Supreme Court was limited to issues of law according to the relevant legislation. However, in such cases,

courts should have full jurisdiction to make an independent, *de novo* review.¹⁵³

As private enforcement bodies de facto exercise judicial functions, the CJEU has accepted early on that they can have recourse to the preliminary reference mechanism in case of doubt as to the interpretation of EU law. In *Broekmeulen*, the CJEU had to examine a refusal of the General Practitioners Registration Committee, a body established by the Royal Netherlands Society for the Promotion of Medicine, to register as general practitioner a doctor who obtained his diploma in Belgium.

In that case, interestingly, the Appeals Committee of the private body sought a preliminary ruling by the CJEU. As a preliminary issue touching upon the admissibility of the application, the CJEU had to decide whether the Committee could come under the definition of a tribunal or court. The CJEU acknowledged that, in the case at issue, the private body was fairly powerful and access to ordinary courts was in fact nonexistent. The CJEU held that the Appeals Committee must be regarded as a court or tribunal and therefore have access to the preliminary ruling proceedings of the CJEU relating to the interpretation of EU law. Two elements weighed heavily in the minds of the judges: first, that this body operates with the consent and cooperation of the public authorities; and second, that it delivers decisions that are in fact recognized as final after an adversarial procedure.¹⁵⁴

B. Engineering

Codes of ethics for the engineering profession in the US existed since the beginning of the twentieth century and initially aimed to regulate the professional ethos. Few years later, European engineering associations, notably in Germany (e.g. DIN, VDI), have started becoming powerful and produced legally binding rules for technological design. In the United States, regulation and a fortiori enforcement against misconduct of engineers is rather state-centered. This implies that mobility already at the federal level can be challenging, notably as in some States generic licenses are issued, while in others, licenses for specific disciplines of engineering (for instance, civil engineering or mechanical engineering) are delivered. Exams are typically organized by the National Council of Examiners for Engineering and Surveying (NCEES) to which each state's engineering board is represented.

In some states, a board may be responsible for identifying misconduct in engineering and related professions, such as architecture. Thus, in Missouri, the Missouri Board for Architects, Professional Engineers, and

153. Cf. *Capital Bank AD v. Bulgaria*, 2005, E.C. H.R., no. 49429/99, ¶98-104.

154. Case 246/80, *Broekmeulen v Huisarts Registratie Commissie*, [1981] E.C.R. 2311.

Professional Land Surveyors and Landscape Architects are in charge of ensuring the adherence to the relevant code of conduct. In a recent case, the issue was whether a licensed professional engineer, Mr. Bird, should be disciplined because he affixed his seal to building plans that were prepared in large part by a licensed architect whose work was not done under the engineer's immediate personal supervision as the relevant Board regulations required.¹⁵⁵ Mr. Bird agreed to complete plans and drawings for a commercial building project for Landmark Builders of Blue Springs after the architect's refusal to complete them. Landmark had previously refused to pay an additional fee to the architect for the completion of the drawings. The revision of the drawings was necessary because the Planning Commission rejected them. The Administrative Hearing Committee (AHC), before which the Board filed a complaint, found that Mr. Bird's behaviour was faulty and subject to discipline because he did not supervise the prior work of the architect. The Board subsequently suspended Mr. Bird for three years to be followed by a year of probation. Mr. Bird asked for a review before the Cole County Circuit Court which, after finding serious errors in the AHC's decision, remanded rehearing.

On appeal, the Court of Appeals dismissed Mr. Bird's appeal. Ultimately, the matter was brought before the Missouri Supreme Court.¹⁵⁶ The Court started by underscoring the breadth of its judicial review: "the Court's inquiry may extend to a determination of whether the action of the agency is in violation of constitutional provisions, is in excess of the statutory authority or jurisdiction of the agency, is unsupported by competent and substantial evidence upon the whole record, is, for any other reason, unauthorized by law, is made upon unlawful procedure or without a fair trial, is arbitrary, capricious or unreasonable, or involves an abuse of discretion."

The Court went on to hold that the purpose of professional regulation is the protection of the public and not of the licensees. Therefore, any financial losses or nullification of property interest of the architect are irrelevant. Rather, the regulations at issue do nothing more than impose an affirmative duty on licensees to ensure the quality of the work they complete and to accept personal responsibility for documents they seal, a duty that Mr. Bird actually fulfilled, just as he assumed full responsibility for the entire project. Indeed, the ultimate purpose of the regulations was to assign personal liability upon professionals in the case of defect. For these reasons, the Court reversed the AHC decision and cleared Mr. Bird.

155. Regulations 4 CSR 30-3.030(7) and 4 CSR 30-13.010, which subject Mr. Bird to discipline under section 327.441.2(6).

156. *Bird v. Missouri Board of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects*, 259 S.W. 3d 516 (2008).

Thus, judicial review against decisions by professional disciplinary bodies can be scrutinized thoroughly when the matter at issue pertains to the legal interpretation of professional regulations. As the Missouri Supreme Court put it in *Bird*: “Occupational licensing boards deserve deference [only] in cases that require technical expertise in their respective fields.” Under this spectrum, the role of judicial review shall be regarded as a complementary one, providing guidance on legal questions, where the professional bodies lack expertise.

Few years earlier, in *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*, at issue was a failure by a certified engineer to review and check plans and drawings for which the engineer was legally responsible. The Missouri Court of Appeals was called upon to decide on a case whereby the license of a supervising engineer was revoked because he affixed his seal to structural drawings that were the basis for the fabricator’s shop drawings that provided for a defective design.¹⁵⁷ More specifically, because of the defective design, the second and fourth floor walkways of Hyatt Regency Hotel in Kansas City collapsed in 1981, leading to the death of 114 people and injuring at least another 186 people.¹⁵⁸ In the aftermath of this tragedy, the Board sought to discipline the professionals responsible for this project, including Mr. Duncan.

The AHC found several instances of gross negligence and held that the licenses of the professionals accused had to be suspended or revoked. The Board ultimately ordered the revocation of all licenses; this decision was affirmed by the trial court and the Missouri Court of Appeals. The Court confirmed that the thrust of the regulations at issue was professional accountability by a specific individual certified engineer to protect the public. The rules relating to seal suggest that the responsibility imposed on engineers for the entire project and all documents connected herewith is full and non-delegable, unless a disclaimer is explicitly used. This is what the engineer assumes responsibility for in exchange for the right to practice the engineering profession.¹⁵⁹ It bears mentioning that in this case none of the engineers involved were convicted of criminal negligence.

The National Society of Professional Engineers (NSPE) has also adopted a code of ethics for engineers.¹⁶⁰ The Board of Ethical Review is

157. *Duncan v. Mo. Bd. For Architects*, 744 S.W.2d 524 (Mo. Ct. App. 1988).

158. See also Sarah Pfatteicher, “*The Hyatt Horror*”: *Failure and responsibility in American Engineering*, 14:2 ASCE JOURNAL OF PERFORMANCE OF CONSTRUCTED FACILITIES 62 (2000).

159. See also Norbert Delatte, *International Ethics and Failures. Case Studies, in ENGINEERING ETHICS FOR A GLOBALIZED WORLD* 39 (Colleen Murphy et al., eds., 2015).

160. NAT’L SOC’Y OF PROF. ENGINEERS, *Code of Ethics for Engineers*, 2016, Publication # 1102.

composed of seven licensed engineers. Its mission is, inter alia, to render opinions as to the interpretation of the Code of Ethics. However, the Code does not establish a disciplinary mechanism and thus the decisions have an advisory nature.

In Ireland, the Institution of Engineers of Ireland (Engineers Ireland) adopted a Code of Ethics that was last revised in 2009. An Ethics and Disciplinary Board is the standing committee in charge of the enforcement of the code. In substantiated cases, an Investigative and Disciplinary Panel deals with a specific complaint. The Ethics Board is composed of sixteen members where up to four persons are not members of the engineering profession. Proceedings of the Board, Panel, Council and Appeal Board are private. Reprimand, suspension, or exclusion from membership are the most important sanctions that the Panel can impose. Any suspension or erasure from Engineers Ireland is to be published in the Engineers Journal. Appeals can be lodged with the three-member Appeal Board, where one barrister of the Supreme Court also participates.

Self-regulation in engineering can vary depending on the jurisdiction. In certain cases, a private regime exists in parallel with a public (not necessarily competing) one, but members of the private regime are only bound by the former. More interestingly, courts may be asked to establish a hierarchy among potentially applicable and thus conflicting norms. In Ontario, a question was raised as to the effects of the new Building Code Act (BCA) on the otherwise qualified architects and engineers. In *Association of Professional Engineers (Ontario) v Ontario (Minister of Municipal Affairs and Housing)*, the Ontario Superior Court of Justice (Divisional Court) found that professional architects and engineers were not subject to the BCA and Building Code. Only through legislation could one envisage parallel regulation of competence and professional integrity. According to the Court, the BCA's objective was not to advance public safety, but rather to intrude on the exclusive mandate of the Association of Professional Engineers (Ontario) and the Ontario Association of Architects to qualify, govern, and discipline their members.

When it comes to the professions of architect and engineer, the CJEU has notably been solicited in cases relating to the recognition of professional qualifications (or, rather, the absence thereof). This has been the case for various professions over the years, including lawyers. Thus, settled case law suggests that domestic competent authorities are required to take into account the knowledge, diplomas, certificates, qualifications and experience already recognized or acquired in another EU MS, and give adequate reasons in case of nonrecognition, as well as allow for access to

an effective remedy.¹⁶¹ Of course, contrary to the profession of engineer, architects in the European Union benefit from an automatic recognition regime, along with a limited number of other professionals such as midwives, doctors, or pharmacists.¹⁶²

Thus, in professions where no automatic recognition can take place, professionals that are negatively affected by the discretionary powers of the relevant regulatory body in the host country have to be able to have access to independent review of the decision of that body. Many times, only public courts can ensure such review as a last resort.

C. Architecture

In the US, the American Institute of Architects (AIA) agreed on a Code of Ethics and Professional Conduct already at the beginning of the 20th century. It was most recently amended in 2012. The Code contains rules of conduct that are mandatory, as well as canons (or ethical standards), which are nonbinding rules. Failure to comply with the Code's rules of conduct constitutes grounds for disciplinary action by the National Ethics Council (NEC).¹⁶³ The NEC is composed of seven members appointed by the AIA Board of Directors and can impose the following sanctions: (a) admonition; (b) censure; (c) suspension of membership for a period of time; and (d) termination of membership. In addition to decision, NEC also delivers advisory opinions. Proceedings are confidential, as is the discipline of admonition. All other sanctions are public. Decisions to terminate membership in particular, are to be considered by the Executive Committee, which, if approved, shall be reviewed by the Board, which is the supreme body deciding about this sanction. Common ethics violations include: attribution of credit (that is, stating or giving proper credit for project involvement); accurate representation of qualifications; attainment and provision of examples of work; and basic honesty.¹⁶⁴

In its 90-12 decision of June 22, 1992, the NEC had to deal with a claim against an architect who made false statements about the size and composition of his firm and the experience and professional qualifications of the employees of the firm, thereby violating certain rules of the AIA

161. See Joined Cases C-422/09; 425/09 and 426/09, *Vandorou* (2010) E.C.R. I-12411, ¶ 65-71; C-345/08, *Pešla* (2009) E.C.R. I-11677.

162. Council Directive 2005/36/EC O.J. (L 255), at art. 21 (Professional Qualifications).

163. NAT'L ETHICS COUNCIL, *Rules of Procedure*, THE AM. INST. OF ARCHITECTS 3. (2016).

164. THE AM. INST. OF ARCHITECTS, *The Architect's Handbook of Professional Practice*, 6 (2008).

Code of Ethics. Architect A's objective was to receive a rather specialized commission by submitting information that would give him a comparative advantage vis-à-vis other firms. Interestingly, architect A claimed that the preparation of the firm brochure was the responsibility of the other principal of the firm, who was not an AIA member, and thus was not bound by the Code. The NEC was not convinced and instead submitted that architect A should have been aware of the untruthfulness of the information presented to the interview committee and underscored Members' responsibility for "what goes on in their firms." Because misrepresentations were intentional and due to the lack of professionalism from the side of architect A, the NEC imposed the penalty of censure. The decision was appealed to the AIA Executive Committee, which considered the sanction appropriate. In the aftermath of the decision, architect A resigned his AIA membership.

More recently, in October 2009, the NEC had to deal with a complaint brought against an architect who was accused of ignoring the effects that her proposed design would have on adjoining property owned by the complainants and of not disclosing information that would enable the complainants to consent or to act to protect their interests. In addition, the architect failed to notify the authorities of the unsafe and improper activity of her clients. In its decision 2006-21,¹⁶⁵ the NEC found that the architect violated the rule prohibiting wanton disregard of the rights of others. According to NEC case law, wanton disregard entails an action taken in disregard of a "high degree of risk that the Complainant would be adversely affected" and that risk "is apparent or would be apparent to a reasonable person." The NEC further found that, in effect, the architect failed to resolve the matter or notify the competent authorities although she was aware of unsafe and improper activity. Because of this and other violations of the AIA Code, the NEC imposed the penalty of suspension of AIA membership for three years.

In Australia, Members of the Royal Australian Institute of Architects (RAIA) can be subject to the disciplinary mechanism of the association if they fail to abide by the RAIA's rules of conduct. The Memorandum of Association of the RAIA provides that a Professional Conduct Tribunal shall examine any complaint for misconduct against an Australian architect. The Tribunal is comprised of fellows of the RAIA of at least 10 years standing, but it can also include a lawyer. The Tribunal can impose the following sanctions: (private) reprimand, specific professional training for a period determined by the RAIA Council, suspension of membership

165. Wanton Disregard of the Right of others; et. al Findings, 2006, Decision 21, National Ethics Council of the American Institute of Architecture, available at: <http://www.aia.org/aiaucmp/groups/aia/documents/document/aia082037.pdf> (last visited Oct. 15, 2016).

not exceeding two years, and expulsion of membership. Arbitration is also offered as a substitute to appeal mechanisms. Reinstatement is always possible, but, in the case of expulsion, at least three years after the decision by the RAIA Council.

In the United Kingdom, the Professional Conduct Committee (PCC) is the disciplinary tribunal that hears claims of inappropriate professional conduct and incompetence against architects. The PCC is chaired by a solicitor nominated by the Law Society; an architect and one lay member will typically complete the three-member PCC whose hearings are public. The PCC can issue reprimands, impose fines, suspend or expel an architect of the Register. The Architects Act 1997 requires the publication of the name and offense of those architects who have been found guilty.

In the Matter of Derrick Arthur Matthews, the PCC decided to erase from its Register an architect who failed to properly manage his finances, gave misleading information to be readmitted to the Register, and had inadequate professional indemnity insurance coverage. Sanctions can also be imposed when the complaint is not directly based on the architect's professional competence. For instance, *In the Matter of Clive Wille*, the PCC decided that expulsion was the appropriate sanction for an architect who had several personal problems (e.g., properly dealing with stress; controlling violent tendencies) that affected his fitness to practice. The PCC left the possibility for reinstatement open after two years.¹⁶⁶

According to the relevant rules of procedure,¹⁶⁷ individuals negatively affected by a decision of the Investigations Panel not willing to refer a matter to the PCC can request a third-party independent review. Alternatively, recourse to ordinary judicial proceedings is possible.

Judicial review of decisions of private enforcement mechanisms by the ordinary courts appears to be fairly deferential and marginal, thereby accepting at least implicitly the expertise of the disciplinary mechanisms of the professional associations, but also the importance of legal certainty when egregious errors are absent. For instance, in *Nye v. Ohio Board Of Examiners of Architects*, the Court of Appeals of the Ohio Tenth Appellate District had to examine an appeal against a judgment by the Franklin County Court of Common Pleas to affirm an order by the Ohio Board of Examiners of Architects to revoke the certificate of qualification of an

166. *Professional Conduct Community*, ARCHITECTS REGISTRATION BD., http://www.arb.org.uk/professional_standards/regulating_architects/pcc_decisions/wille.php (last visited May 2, 2016).

167. *See Investigation Rules and Professional Conduct Committee Rules*, ARCHITECTS REGISTRATION BD., <http://www.arb.org.uk/files/files/PCC%20rules%202015%20with%20Form%20A.pdf> (last visited Apr. 20, 2016).

architect to practice architecture.¹⁶⁸ In proceedings unrelated to this case, the architect had admitted to fraud, fraudulent transfers and conduct preventing the discharge of debt under the bankruptcy code through a settlement agreement that he concluded with the complainant, the Redeemer Lutheran Church (RLC). Based on these circumstances, the Board considered erasure from the Register to be an adequate sanction. In doing so, the Board found that the sanction of suspension for at least one year that the Hearing Officer previously recommended was too lenient. The Court of Appeals used the *res judicata* doctrine and the terms of the settlement agreement to ultimately affirm the decision of the County Court.

Nevertheless, ordinary courts will still apply basic principles of law, especially in cases of manifest legal errors such as *ultra vires* claims. In *Chandler v. Alberta Association of Architects*,¹⁶⁹ the Supreme Court of Canada upheld the decision of the Court of Appeal, which in turn had agreed with the findings of the Court of Queen's Bench. The latter had quashed the disciplinary sanctions imposed by the Practice Review Board of the Alberta Association of Architects against a firm of architects. In that case, according to the Architects Act, the Board was only allowed to report to the Council of the Alberta Association of Architects and make appropriate recommendations and not assume functions that are entrusted to the Complaint Review Committee of the Association.

VI. Private Enforcement and Constitutional Matters

When examining the constitutional dimension of private enforcement, one important area that is worth examining is the interaction between certain restrictions enclosed in professional codes of ethics, such as restrictions relating to communications and advertising on one side, and the protection of human rights on the other.

In particular, professional advertising is considered an essential component of the freedom of commercial speech. In *Bates v. State Bar of Arizona*,¹⁷⁰ the United States Supreme Court allowed attorney advertising for the first time by relying on the First Amendment. More specifically, it condemned blanket bans on price advertising and fees charged by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice. According to the Court, "such speech serves individual and societal interests in assuring informed and reliable

168. *Nye v. Ohio Bd. Of Examiners of Architects*, 165 Ohio App.3d 502 (2006).

169. *Chandler v. Alta. Ass'n of Architects*, [1989] 2 S.C.R. 848 (Can.).

170. *Bates v. State Bar of Az.*, 433 US 350 (1977).

decisionmaking” from consumers.¹⁷¹ In that case, the Supreme Court found that the postulated connection between advertising and the erosion of true professionalism to be severely strained.¹⁷² It went on to hold that “[s]ince the belief that lawyers are somehow ‘above’ trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.”¹⁷³

In *Shapiro v. Kentucky Bar Association*,¹⁷⁴ the US Supreme Court clarified that,

Commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.¹⁷⁵ Since state regulation of commercial speech may extend only as far as the interest it serves, state rules that are designed to prevent the potential for deception and confusion may be no broader than reasonably necessary to prevent perceived evil.

Therefore, restrictions relating to commercial speech that is not itself deceptive is to be narrowly crafted. Having said this, the Supreme Court confirmed that states have a substantial margin for manoeuvre, as they have a substantial interest to prevent the dissemination of commercial speech that is false, deceptive, misleading, or which proposes an illegal transaction.¹⁷⁶ Hence, state rules prohibiting in-person solicitation of clients by lawyers can be permissible under certain circumstances, as the states bear “a special responsibility for maintaining standards among members of the licensed professions and notably lawyers who are essential to the

171. *Id.* at 365. See also *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 770 (1976).

172. *Bates*, 433 U.S. at 368.

173. *Id.* at 372.

174. *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 472 (1988).

175. This is the so-called Central Hudson test which includes four prongs: (a) is the regulated speech misleading or involves unlawful activity; (b) the state’s interest in limiting speech is substantial; (c) the regulation advances this interest in a direct and material way; and (d) the extent of the restriction on protected speech is narrowly crafted toward the interest served. The burden of proof lies with the state authorities. See *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 566 (1980). For the demanding burden of proof under this test, see the (concurring in part) opinion of Justice Brennan and Marshall in *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 659.

176. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 US 748, at 771-2 (1976); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Pittsburgh Press Co v. Human Relations Comm’n*, 413 U.S. 376 (1973).

primary governmental function of administering justice and have historically been ‘officers of the Courts.’”¹⁷⁷ Even if lawyers are self-employed businessmen who are interested in pursuing their self-interest, they are also expected to act as trusted agents of their clients and as assistants to the court in search of a just solution to disputes.¹⁷⁸

Thus, in *Ohralik v. Ohio State Bar Ass’n*,¹⁷⁹ the Supreme Court found that face-to-face solicitation by a lawyer for profit is a practice rife with possibilities of overreaching, invasion of privacy, the exercise of undue influence and outright fraud. Whenever state rules and ethical standards of lawyers are linked to the service and protection of clients notably by protecting their privacy, they further the goals of true professionalism and thus are admissible.¹⁸⁰ Such measures, including outright bans of in-person solicitation can be prophylactic ones, aiming to prevent harm before it occurs, and therefore, proof of actual harm is not required. Such measures are necessary, because in-person solicitation is not visible or otherwise subject to effective oversight either by the state or the legal profession.

In *Zauderer v. Office of Disciplinary Counsel*,¹⁸¹ the Supreme Court dealt with three more precise questions: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees. Examining the three issues in turn, the Supreme Court found that lawyers’ newspaper advertisements containing truthful and non-deceptive information and advice regarding the legal rights of potential clients as well as accurate and nondeceptive illustrations are permissible. Thus, attorneys are allowed to go beyond passive advertising and use a more aggressive, but still truthful printed solicitation to attract clients. However, it found that, even if freedom of commercial speech invalidates any *compulsion* to speak, a State should be allowed to seek the maximum information to prevent deception of consumers. Advertisers’ rights are protected as long as the disclosure requirements regarding the client’s liability for costs are reasonably related to the state objective.

Later on, the Supreme Court relaxed its *Ohralik* jurisprudence. Thus, it ruled in *Shapiro* that, contrary to in-person solicitation, targeted, direct-mail solicitation is protected by the First Amendment. Although the Court accepted that personalized targeted mailing poses

177. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

178. *Cohen v. Hurley*, 366 U.S. 117, 124 (1961).

179. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).

180. *Id.* at 458-9, 462.

181. *Sauderer*, 471 U.S. 626 (1985).

several risks, it found that a written solicitation is different from in-person solicitation, and therefore a total ban against the former would be unnecessary, as a less restrictive alternative would be to simply require that the lawyers file any solicitation letter with a state agency, “giving the State ample opportunity to supervise mailings and penalize actual abuses.”¹⁸² In more recent cases, the Supreme Court accepted that:

- specializations of lawyers can under certain circumstances be advertised;¹⁸³
- a 30-day ban on direct mail solicitation in accident or disaster cases to protect the privacy of potential recipients is permissible.¹⁸⁴

It remains open whether and how to regulate unverifiable claims made by lawyers in advertisements seeking to convey the quality of their legal services. For instance, the New York Code of Professional Responsibility adopted in 2006 included rules prohibiting the use of nicknames, trade names, and marketing slogans that may imply an unproved ability to win cases. In addition, the use of marketing gimmicks and other attention-getting techniques not containing objective information about legal services was equally prohibited. In *Alexander v. Cahill*, the United States Court of Appeals for the Second Circuit found in 2010 that such regulations do not materially advance the state’s interest in prohibiting the dissemination of misleading information.¹⁸⁵ The United States Supreme Court denied hearing the case. Few years earlier, nevertheless, the Florida Supreme Court upheld restrictions prohibiting a law firm from using an image of a pit bull in its advertisements.¹⁸⁶

In *re R.M.J.*, the US Supreme Court condemned absolute prohibitions on certain types of potentially misleading advertisements.¹⁸⁷

182. Shapero, 486 U.S. 466, 476 (1988). Previously, in *Primus*, the United States Supreme Court had found that communications that can be regarded as a mode of *political* speech would be protected more generously than the other cases relating to *commercial* speech and therefore state regulation would be scrutinized more broadly. Obviously the absence of pecuniary gain plays a decisive role here: *Ohralik*, 436 U.S. 412.

183. *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990); *Ibanez v. Florida Dep’t of Bus. and Prof’l Regulation*, 512 U.S. 136 (1994).

184. *The Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

185. *Alexander v Cahill*, 589 F.3d, 79 (2d Cir. 2010).

186. *Florida Bar v. Pape*, 918 So. 2d 240 (Fla. 2005).

187. *In re R.M.J.* 455 U.S. 191, 203 (1982).

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

The Court also reaffirmed the notion that a state might require a warning or disclaimer to minimize the likelihood of consumer confusion or deception.¹⁸⁸ However, disclaimers should not be unduly burdensome and thus rule out the ability of lawyers to employ short advertisements. The US Court of Appeals for the Fifth Circuit argued as much in *Public Citizen Inc. v. Louisiana Attorney Disciplinary Board*.¹⁸⁹ In that case, the Fifth Circuit also outlawed rules prohibiting lawyers from advertising previous litigation successes and testimonials and banning advertising that depicts a jury or a judge. Thus, regulation of attorney advertising will continue to be a topical matter, as states attempt to cope with the emergence of new media and the limits of content that can be advertised by lawyers.

In *De Moor v. Belgium*,¹⁹⁰ the European Court of Human Rights (ECTHR) had to examine a complaint by a retired army officer whose application to be entered in the list of trainee advocates of the Hasselt was rejected by the Bar Council. Mr. De Moor challenged the decision before the *Conseil d'Etat*. Almost eight years later, the *Conseil d'Etat* decided to dismiss the appeal, considering that it lacked jurisdiction to review decisions of the Bar Council. The Court underscored that once Mr. De Moor fulfilled the conditions for admission, his right of access to the Bar could not be hampered. On the contrary, the disputed decision gave no reasons as to the objective conditions that the candidate failed to fulfill. The Court found that no public hearing was held to scrutinize the application and the decision was not delivered in public, thereby violating Mr. Moor's right to a fair trial within the meaning of Article 6 of ECTHR.

188. *Id.* at 201.

189. *Public Citizen Inc v. Couisimm Attorney Disciplinary Board*, 632 F3d 212 (5th Cir. 2011).

190. *De Moor v. Belgium*, 1994 E.C.H.R No. 09-30925.

VII. Private Enforcement and Competition Law

Enforcing antitrust rules in professional services to harness abuse of monopoly power and cartel-like behavior by self-regulating professional bodies has been an important task of the judicial branch. Close surveillance and control of the activities of largely self-regulating professional bodies is necessary, as the number of labor forces dependent on licensing procedures giving access to a given occupation grows.¹⁹¹ A peculiarity of law-related competition analysis regarding self-regulating bodies endowed with regulatory power by the state is that no per se (or as such) abuse is created by the mere fact of assigning exclusive rights or a dominant position in a given market.¹⁹² Indeed, as the US Supreme Court noted in *Goldfarb*, the public service aspect of certain professional services and other features of the professions at stake may call for a more nuanced approach.¹⁹³ What is rather key in such an inquiry is whether an abuse of such rights took place that led to an unreasonable market distortion that cannot be outweighed by any procompetitive justification.¹⁹⁴ For instance, the US Supreme Court found a prohibition to engage in fraudulent practices or untruthful and deceptive advertising reasonable.¹⁹⁵

Professional rules of private bodies that may have anti-competitive effects include rules relating to price fixing; recommended prices and minimum fees; restrictions relating to commercial communications and advertising; quantitative restrictions to the number of licenses emitted;¹⁹⁶ entry requirements and reserved rights; and regulations relating to legal form, ownership and multidisciplinary practices.¹⁹⁷ In several instances, professional bodies worldwide have included these types of restrictions in

191. See Morris Kleiner & Alan Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S198 (2013).

192. Cf. *NCAA v. Board of Regents*, 468 U.S. 85, 98-104 (1984); Case C-351/12, *OSA*, 2014, C.J.E.U., 110, ¶83-84.

193. See, *Lewis Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-789 (1975); “may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.”

194. The corresponding four-prong test that the CJEU applies is set out in TFEU art. 101:3. See Case C-238/05, *Asnef-Equifax and Administración del Estado*, (2006) E.C.R. I-11125, ¶65. In that case, the CJEU clarified that in assessing the application of Article 101 of the TFEU, account must be had on the actual context in which a given decision by the professional body is situated, notably the economic and legal context; the nature of the goods or services affected, and the real conditions of the functioning and the structure of the market at stake. *Id.* ¶49.

195. *California Dental Association v FTC*, 526 U.S. 756 (1999).

196. For instance, a decision of the regulating private body to issue only a small number of new licenses to practice each year. See *Hoover v Ronwin*, 466 U.S. 558 (1984).

197. Cf. *Communication from the Commission – Report on Competition in Professional Services*, COM (2004) 83 final, at 3 (2004).

their codes of ethics and linked them to the proper conduct of the profession or even consumer protection.¹⁹⁸

In *Goldfarb*,¹⁹⁹ the United States Supreme Court was called upon to examine the consistency of a minimum-fee schedule and its enforcement mechanism with the Sherman Act, as applied to fees for legal services performed by attorneys in examining titles in connection with financing the purchase of real estate. Previously, the Court of Appeals expressed the traditional view at the time that occupational regulation increases quality and reduces information asymmetries without any negative spillovers. Thus, it found that the State Bar's action was immune from liability as state action. The practice of law does not constitute trade or commerce within the meaning of the Sherman Act, according to the Court of Appeals.

The Supreme Court, however, found that the Virginia State Bar practice constituted price-fixing and thus violated § 1 of the Sherman Act. The schedule was a rigid price floor enforced through the threat of professional discipline by the State Bar, and by tacitly ensuring that other lawyers would not compete by underbidding. It created a price system that consumers were bound to use, as title examination is a necessary step in financing a real estate purchase. The Supreme Court went on to examine the alleged immunity of the 'learned professions' under the Sherman Act. The Court took issue with the Court of Appeals and reminded that the nature of an occupation, standing alone, cannot exclude the application of the Sherman Act, especially when one considers its comprehensive language, whereas the public-service aspect of professional practice is not controlling in determining whether § 1 of the Sherman Act includes professions.²⁰⁰ The Court observed:²⁰¹

[t]he examination of a land title is a service; the exchange of such a service for money is "commerce" in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect. . . (Footnote omitted).

198. *Commission Decision of 24 June 2004 relating to a proceeding pursuant to Article 81 of the EC Treaty concerning case COMP/A.38549 – Belgian Architects' Association* (June 24, 2004).

199. *Lewis Goldfarb*, 421 U.S. 773, 773.

200. *Id.* Here, the Court referred to a previous case, *United States v. Nat'l Assoc. of Real Estate Boards*, 339 US at 485, 489 (1950).

201. *Lewis Goldfarb*, 421 U.S. 773, 787. However, the Supreme Court clarified that, in certain circumstances, in view of the public interest aspect and the features of certain professions, it may be possible that certain restraints, which would otherwise be considered as violating the Sherman Act, would be treated differently. *Id.* at 789.

The Supreme Court went on to add:²⁰²

In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.

Thus, the United States Supreme Court confirmed that professional licensing activities affect interstate commerce and cannot escape the application of antitrust rules under the Sherman Act. A few years later, the United States Supreme Court had to decide on the compatibility of the Sherman Act with a rule of ethics adopted by the NSPE prohibiting its members from submitting competitive bids for engineering services.²⁰³ Thus, engineers were guided to refuse to negotiate or even discuss the question of fees until the client has selected the engineer for a particular project. The Supreme Court held that the rule at stake amounted to collusion among competitors who refused to discuss prices with potential clients until negotiations result in the initial selection of an engineer. This practice operates as an absolute ban on competitive bidding.

The Court ruled that unfettered competition was essential to the health of a free market economy and the only lawful way competition could be restrained was through state or federal legislation. Having said this, ethical norms in professional services may serve to regulate and promote competition in such services. In its judgment, the Court dismissed arguments stressing the possible negative effects of fee competition on the health, safety, and welfare of the public. The Court also emphasized that enforcement of antitrust rules does not impinge on the First Amendment.²⁰⁴

Similarly, the United States Justice Department in the same period of time determined that the Sherman Act of 1890 demanded that architects be allowed to compete on the basis of fees and that not doing so constituted an unreasonable trade restriction.

In *North Carolina State Board of Dental Examiners v. FTC*, the United States Supreme Court was called upon to decide whether a decision by the professional selfregulating body to exclude nondentists from the market for teeth whitening services in North Carolina can be subject to the Sherman Act. The Court first recalled that certain activities of states in

202. *Id.* at 788.

203. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 679 (1978).

204. *Id.* at 697, citing to *Giboney v Empire Storage & Ice Co.*, 336 US 490, 502 (1949).

their sovereign capacity which are anticompetitive can escape the purview of the Sherman Act. For this, the challenged anticompetitive restraint must be clearly articulated and affirmatively expressed as state policy, and such policy must be actively supervised by the state.²⁰⁵ According to the Court, active supervision means that the state has review mechanisms in place that offer a realistic assurance that the private regulator promotes state policy when acting in a noncompetitive manner. This would mean that the state should be able to review the substance of the anticompetitive decision and if needed, veto or modify that decision to ensure its alignment with state policy. In addition, to ensure impartiality and objectivity, the State cannot itself be an active market participant in that same market.

In the case at hand, the Supreme Court found that, absent any active supervision by the state (which in most professional associations is missing), the Board cannot invoke state-action antitrust immunity as established in *Parker v. Brown*²⁰⁶ if a controlling number of the Board's decision-makers are in fact active market participants in the same profession that the Board regulates.²⁰⁷ Thus, the Supreme Court interpreted narrowly the concept of the "exercise of the State's sovereign power" and confirmed that private regulators lack immunity for anticompetitive behaviour unless the State accepts political accountability for such behavior that permits and controls.²⁰⁸ This is so even if such bodies exercise public functions.²⁰⁹ Implicitly, the Supreme Court also re-opened the discussion regarding job allocation in the case of overlapping scope of practice for

205. This two-tier test was first established by the Supreme Court in *California Retail Liquor Dealers Assn. v. Medcal Aluminium, Inc.*, 445 U.S. 97, 105. For a discussion, see EDLIN AND HAW, *supra* note 37.

206. The state-action exemption was recognized by the US Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943).

207. *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct.1101, 1112 (2015).

208. In the aftermath of this decision, the FTC produced a document offering nonbinding clarifications as to the concept of active supervision. See *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* (October 2015). A similarly narrow hermeneutic approach was adopted by the CJEU in *Wouters* where the Court found that competition rules cannot apply to an activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity, or which is connected with the exercise of the powers of a public authority: Case C-309/99, *Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, (2002) E.C.R. I-1577, ¶57 [hereinafter *Wouters*]. For an application of this test in the profession of chartered accountants, see Case C-1/12, *Ordem dos Técnicos Oficiais de Contas*, 2013, E.C.R (EU).

209. Cf. *R. v. Panel on Take-overs and Mergers ex parte Datafin Pic*, (1987) Q.B. 815 (U.K.) (finding that the City's self-regulating mechanism for mergers and acquisitions is amenable to judicial review).

possibly competing professions.²¹⁰

As noted earlier, anticompetitive behavior may be part and parcel of a professional code of ethics. Just like the US Supreme Court's, settled CJEU case law suggest that rules of professional ethics come within the scope of EU competition law, as they organize and influence the exercise of a given profession.²¹¹ The compatibility of rules contained in CoC with EU law may be contentious when examined through the lens of competition law. Such an examination is, however, necessary to ensure that equally competitive conditions are offered to the economic operators active in the EU market, and that rules enshrined in codes of professional conduct do not impose anti-competitive behaviour.²¹²

On the other side of the Atlantic, the CJEU adopted a sweeping view as to the applicability of competition rules to professional services. In *Wouters*, the CJEU held that lawyers are undertakings within the meaning of Article 101 TFEU.²¹³ The Court justified this finding by noting that they offer services against remuneration and bear the financial risks that failures may entail.²¹⁴ By the same token, the Bar should be regarded as an association of undertakings that adopts a collusive behaviour in contravention of Article 101 in that it influences the conduct of its members on the market in the relevant services sector and directs them to act in a particular manner when they carry their economic activity.²¹⁵ These findings apply to every professional association and its members, as long as they have some regulatory powers.²¹⁶ Thus, rules created in the exercise of a professional body's regulatory autonomy and discretion, such as the adoption of codes of professional conduct (or of certain rules therein, such as those relating to advertising or minimum/maximum fees), are decisions adopted by an association of undertakings within the meaning of Article 101:1 TFEU.²¹⁷

The CJEU also ruled that a violation of Articles 10 and 81 EC (now 4:3 on

210. Morris Kleiner, *Battling over Jobs: Occupational Licensing in Health Care*, 106(5) AM. ECON. R: PAPERS & PROCEEDINGS 165 (2016).

211. Case T-144/99, *Institut des mandataires agréés* (2001) E.C.R. II-1087, ¶64.

212. Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio* (2008) E.C.R. I-4863, ¶51.

213. Art. 101 TFEU prohibits as incompatible with the internal market all decisions by associations of undertakings which may affect trade between MS and which have as their object of effect the prevention, restriction or distortion of competition within the EU internal market.

214. *Wouters*, *supra* note 208 at ¶49.

215. *Id.* ¶ 63-4.

216. For the importance of this trait, see the Judgment of the General Court in Case T-90/11, *Ordre national des pharmaciens (ONP)*, 2014, E.C.R., 1049, ¶347.

217. *Wouters*, *supra* note 206, ¶71. *See also* T-144/99, *Institut des mandataires agréés*, ¶62. Interestingly, in this ruling, the General Court found that an outright prohibition of comparative advertising incorporated in a CoC can violate Article 101 TFEU. *Id.* at ¶79.

the Treaty on European Union-TEU²¹⁸ and 101 TFEU, respectively) occurs when (a) a MS divests its rules of legislative character through delegation to private economic actors of the responsibility to take decisions affecting the economic sphere, or (b) a MS requires or even encourages collusive behaviour contrary to Article 101 or reinforces its effects.²¹⁹ Under this latter option, the behaviour of all self-regulatory bodies can be examined against the EU competition rules. Furthermore, under certain circumstances, the activity of professional associations can also constitute an abuse of dominant position.²²⁰

In *Mauri*,²²¹ the issue was whether a violation of EU competition rules occurs in case when access to the legal profession is determined by a state examination committee, which consists of five members and two of them – or potentially three – are already members of the Bar. The CJEU found that this is outweighed by the presence of two judges who must be regarded as an emanation of that state. Other outweighing factors also are that the Ministry of Justice can potentially intervene at every state of the process, whereas negative decisions can be appealed before the administrative court, which will conduct a *de novo* review. Thus, sufficient state involvement coalesced to the inapplicability of competition rules.

The result in *Mauri* was in line with the CJEU's finding in *Wouters* that rules adopted by a professional association are, for all practical purposes, state measures. Therefore, they fall outside the scope of the EU competition rules when an EU MS grants regulatory powers to that professional association. This is so even if the state defines the public interest criteria and the essential principles with which the rules of the professional association must comply and retains its power to adopt decisions in the last resort.²²² In addition, the Court clarified that the fact that a given activity by the professional body does not aim to make a profit cannot alone prevent the application of Article 101 TFEU where the offer of services by this body coexists in competition with that of other, for-profit operators.²²³

In *Wouters*, the CJEU also found that outright prohibitions of multidisciplinary practices in the legal profession enclosed in legislative acts or

218. Art. 4.3 TEU incorporates the so-called duty of loyalty for EU MS vis-a-vis the EU and other EU MS. Treaty of Lisbon, Dec. 13, 2007 [2009, later known as Treaty of the European Union, consolidated in 2016 C-2-2/16, O.J Thereafter TEU].

219. Case C-35/99, *Arduino*, (2002) E.C.R. I-1529, ¶35; Case 267/86, *Van Eycke v. ASPA NV*, (1988) E.C.R. 4769, ¶16.

220. See Panagiotis Delimatsis, "Thou Shall Not... (Dis)Trust": Codes of Conduct and Harmonization of Professional Standards in the EU, 47 COMMON MKT L. REV. 1049, 1084 (2010).

221. Case C-250/03, *Mauri* (2005) E.C.R. I-1267, ¶29-37.

222. *Wouters*, *supra* note 208 at ¶54.

223. See *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, *supra* Note 208, at ¶57.

codes of conduct violate Article 101:1(b). This is because they are liable to limit production and technical development,²²⁴ as they do not allow the exploitation of the one-stop-shop advantage, the supply of 'full service' and the possible diminution of costs. However, the CJEU submitted that the rules at issue were designed to ensure the proper conduct of the profession and the sound administration of justice. Therefore, they were justified and proportionate, thereby striking a balance between the anti-competitive behaviour and the pursuit of non-economic legitimate objectives, which may, however, have pro-competitive effects.²²⁵

Enforcement of competition rules is achieved through the judicial route but also through the DG Competition of the European Commission. For instance, in 2004, the Commission struck down the recommended fee scale operated by the Belgian Architects' Association.²²⁶ Although the scale was described as a guideline with which not all architects had complied, the Commission found that the fee scale was an independent act of prescriptive character for which the Association, acting as an association of undertakings according to Article 101 TFEU, was wholly responsible.

Regional competition authorities also attempt to strike down anti-competitive practices of professionals. For instance, the Finnish Competition Authority challenged the practice of the Association of Finnish Architects (SAFA) that prevented its members from entering architectural competitions only after consulting with or receiving approval by SAFA. According to the Finnish Competition Authority, this behaviour constitutes an impermissible output limitation.²²⁷

224. Wouters, *supra* note 208, at ¶90.

225. See Pietro Manzini, *The European Rule of Reason: Crossing the Sea of Doubt*, 23 ECL REV. 392 (2002). Such an interpretation also exemplifies a tendency to apply Art. 101 based on the methodology of jurisprudence relating to free movement. See R. O'Loughlin, *EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ Wouters Decision*, 24 ECL REV. 62 (2003). In *Métropole*, the General Court contended that a balancing of anti- and pro-competitive effects can only be accepted under the narrow confines of Art. 101:3 TFEU. Case T-112/99, *Métropole télévision (M6)*, (2001) E.C.R. II-2459, ¶74. Arguably, the CJEU was convinced that the rules at issue in *Wouters* were welfare-enhancing and thus pro-competitive. See also Communication from the Commission: Notice of Guidelines on the application of Article 81 (3) of the Treaty, [2004] OJ C 101/98, ¶11, 85, 91-93. It is worth noting that the U.S. Supreme Court found that ethical rules can promote competition and thus fall within the rule of reason: See *National Society of Professional Engineers v. US*, 435 U.S. 679, 696 (1978). See also the Opinion of the AG Léger in *Wouters*, *supra* note 208++ at ¶112.

226. Decision of 26.06.2004, COMP/38.549 - PO / L'Ordre des Architectes belges, available at : http://ec.europa.eu/competition/antitrust/cases/dec_docs/38549/38549_72_1.pdf(last accessed September 15, 2016).

227. FINNISH COMPETITION AUTHORITY, *Output limitation in application of architectural competition conditions*. Dnro 669/61/02, (October 11, 2004).

Pro-competition provisions that lead to better access to professions in certain markets can also be part of legislative instruments aiming at the liberalization of the service sector in general. For instance, in the EU, a long-lasting discussion as to the anti-competitive effects of total bans on advertising culminated to the adoption of a provision in the EU Services Directive outlawing total bans on commercial communications. This per se prohibition has been applied strictly by the CJEU in a recent case regarding a total prohibition of canvassing in the profession of qualified accountant in France.²²⁸ After defining ‘canvassing’ as an unsolicited personal offer of goods or services to a certain natural or legal person, the Court found that the concept of commercial communication set out in Article 24:1 of the Services Directive is sufficiently broad to cover canvassing that is yet another form of direct marketing. Therefore, a total prohibition of this form of commercial communication is inconsistent with the EU Services Directive and cannot be justified based on a legitimate public interest nor is it proportionate to the objective it wants to achieve. Crucially, the CJEU took a pro-liberalization/pro-competition stance adhering to the view that such prohibitions of advertising deprive EU service suppliers of an effective means of penetrating a given EU market.²²⁹ Arguably, the most interesting element of this judgment by the CJEU is the fact that the Court dismissed in two sentences the possibility for justifying such a restriction, alluding to the narrow test that it is willing to apply in similar cases in the future.

VIII. Conclusion

The objective of this article has been to map rules, instances, and institutions of enforcement in transnational private regulation regimes. Such regimes shape the new landscape for global practice of various professions; they keep the tradition of domestic self-regulation in the shadow of the law and the State but dramatically expand its territorial scope through the globalization of guidelines, recommendations and codes of conduct and ethics. At the same time, self-contained disciplinary regimes for global professionals are virtually non-existent. Rather, the creation of disciplinary rules in international professional associations is left for the future. Nevertheless, the future will soon become the present, as over half of global exports in services are in the business services sector.

To date, there are noteworthy variations in private, non-judicial disciplinary proceedings, which are fairly interesting when ordinary

228. See Case C-119/09, *Société fiduciaire nationale d’expertise comptable*, 2011, E.C.R., 208

229. See, by analogy, Case C-384/93, *Alpine Investments*, 1995 E.C.R. I-1141, ¶28, 38.

judicial proceedings are also involved, typically at the appeal stage. In the latter case, fair trial considerations and clemency when judged by a professional body are more often than not reasons for striking down or amending rulings made by the disciplinary bodies of professional associations. Participation of state representatives and/or non-professionals can under certain circumstances, ensure independence and impartiality, as well as satisfy due process.

Having said this, the turn to informality²³⁰ at the global level seems to be irreversible and permeates virtually all types of economic activity. Our analysis, while explorative, demonstrates that the State (in its various forms) endows professional associations with self-regulatory authority, but is still omnipresent in the regulation of professional services.²³¹ In addition, professional associations may be regarded as decentralized state agencies, as American courts found for the State Bars. However, principal-agent issues will most likely arise, as amply demonstrated by the case law discussed above.

Private enforcement is essential when technical expertise is needed to adequately decide on a complaint against a given professional. On the other hand, private disciplinary bodies (other than in the legal profession) may lack legal expertise. In that case, it is quintessential to have envisaged a disciplinary system that is open to an appeal in ordinary courts or else ensure that essential due process rights and the rule of law find expression in the statutes, rules, and by-laws of the professional association at stake.

Self-regulation has been regarded as an excellent way for the State to remedy information asymmetries and diminish monitoring and enforcement costs. Enforcement before private bodies that are composed in accordance with the statutes of a professional association or its code of professional conduct can indeed be more expedient and somehow alleviate the workload of courts. In this sense, private non-judicial enforcement and public judicial mechanisms are functionally mutually reinforcing.²³² However, allegations against the impartiality, objectivity and proper constitution of their disciplinary mechanisms undermine any sincere efforts by

230. Cf. Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733 (2014) (discussing the increased cooperation and cross-border agreements made outside traditional legal institutions, such as the UN and WTO).

231. Cf. Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 L. & CONTEMP. PROBS. 263, at 281-282 (2005) (arguing that commitment by States still matters even when private bodies in fact finalize and operate a transnational agreement).

232. See also FABRIZIO CAFAGGI, *Enforcing transnational private regulation: models and patterns*, in ENFORCEMENT OF TRANSNATIONAL REGULATION – ENSURING COMPLIANCE IN A GLOBAL WORLD 75, 81 (Fabrizio Cafaggi, ed., 2012).

professional bodies to take full advantage of the opportunities that self-regulation provides. Governmental authorities and public courts may be called upon to scrutinize complaints about anticompetitive practices, market foreclosure, excessive prices, and monopolies, and to balance between incommensurables. However, the more powerful transnational private regimes as meta-regulators become, the more official judicial mechanisms will see the need for more transnational cooperation and perhaps collective review of claims.²³³

Transnational professional associations have to intensify their work on levelling the playing field with regard to canons of ethics for a given profession. This includes, *inter alia*, increasing the level of transparency internally. Possibilities for drawing inspiration from the legal and judicial systems around the world abound. As mobility of professionals increases in a globalized business environment, demands for more streamlined rules will be emerging more often, leading to more concerted efforts for mutual recognition or equivalence.

In addition, new technologies should be expected to further transform the way professional expertise is sought, found, supplied and diffused.²³⁴ Technological advances will render necessary a reconceptualization of all issues relating to professions, from the initiation of mandates to the conundrum of efficient remedies. This will lead to disruptive innovations that will transform extant market structures in all backbone professions, including the three analyzed in this article.²³⁵ To avoid the danger of becoming irrelevant soon, professional associations should intensify their work at the national and transnational level to factor in these important developments and use them to positively modernize the supply of professional services. Researchers will have to critically review such transformations at regular intervals with a view to ensuring that economic opportunities are distributed evenly and in a pro-competitive manner. At the more abstract level, future research will need to more closely assess the extent transnationalism affects the future and fate of self-regulation in professional services.

233. *See also*, EYAL BENVENISTI AND GEORGE DOWNS, *National courts and transnational private regulation*, in ENFORCEMENT OF TRANSNATIONAL REGULATION – ENSURING COMPLIANCE IN A GLOBAL WORLD 131, 140 (Fabrizio Cafaggi, ed., 2012).

234. *See also*, RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* (Oxford Univ. Press, 2015).

235. *See also* Ray Worthy Campbell, *Rethinking Regulation and Innovation in the US Legal Services Market*, 9 NYU J. OF L. & BUS. 1 (2012).