Pedro Petiz Viana **Online legal platforms, the beginning of the 4.0 law practice?**

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**Universidade do Minho**
Escola de Direito

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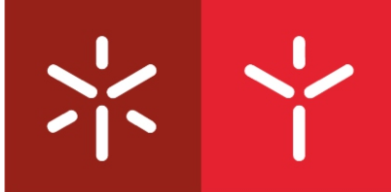
Julho de 2021



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# Online legal platforms, the beginning of the 4.0 law practice?

Dissertação de Mestrado
Mestrado em Direito e Informática

Trabalho efetuado sob a orientação da
**Professora Doutora Joana Covelo de Abreu**
e do
**Professor Doutor Paulo Novais**

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*"The national anthem of Portugal starts with the words 'Heróis do Mar'. It was the questioning of the geography of the world. We need to bring back that attitude, as a nation, in the way we approach the delivery of legal services."*

Andrew Arruda, Co-founder of ROSS Intelligence, Member of the Board of Advisors of the IAALS (Institute for the Advancement of the American Legal System), and member of the Task Force on Access Through Innovation of Legal Services of the State Bar of California. Interview with Andrew Arruda. Available at https://www.youtube.com/watch?v=PZvW59OpUbU&t=1042s.

## Abstract

The 4.0 revolution has reached the legal services industry. New online platforms are emerging to connect clients and lawyers, while also providing new and innovative legal services. Intermediation platforms such as *Advogadoo* or R*ocketlawyer* are helping to connect clients and lawyers but platforms like *DoNotPay* or *Wenigermiete* are taking the provision of legal services into their own hands, in what constitutes an enormous challenge to the current regulatory framework.

How can we guarantee that an intermediation platform respects the principle of the "*free choice of lawyer*" as laid in Article 67(2) of the *Estatuto da Ordem dos Advogados*? How do we safeguard the contractual freedom of clients and the independence of lawyers on these platforms? And how can we seize the benefits of these new technologies - that allow us to reduce costs and improve access to justice - while protecting consumers from erroneous legal services? How can we regulate companies that provide legal advice but are not constituted by lawyers? These are some of the questions posed by this new phenomenon.

In order to answer these questions, we analyse the characteristics of online legal platforms and their compliance with the statutes of the Portuguese Bar Association and National Law. Secondly, we examine the prohibition imposed by the Portuguese Bar Association of online intermediation platforms, taking into consideration ECJ's case law related to professional associations and European Union's competition law. Thirdly, we study the national legal framework of legal services in light of OECD's Competition Assessment Review of Portugal. Fourthly, we present the recent project by the Portuguese Competition Authority and note its similarities and compliance with ECJ's case law.

Furthermore, we look at similar regulatory reform initiatives, such as the "*Legal Services Act*" of England and Wales, the Spanish *"Ley Ómnibus"* and the Arizona State Bar *Task Force on Delivery of Legal Services.* Can these projects help us achieve *United Nation's 16th Sustainable Development Goal*, to "*provide access to justice for all*"? Lastly, we analyse the decision by Germany's Supreme Federal Court regarding online legal platform *Wenigermiete* and the case involving the Dutch Authority for Consumers and Markets and the Dutch Bar Association about the prohibition of lawyers in intermediation platforms. In a European Union where the regulation of legal services is far from being equal, could online legal platforms benefit from being established in more "liberal" jurisdictions? Can these emergent enterprises provide legal services across Member States' borders?

**Keywords**: *online legal platforms – legaltech - professional associations – European Competition Law – liberal professions – regulatory reform – Digital Single Market.*

**Resumo**

A revolução 4.0 chegou ao setor dos serviços jurídicos. Emergiram novas plataformas em linha para conectar clientes e advogados, assim como para prestar serviços jurídicos inovadores. Plataformas de intermediação como a *Advogadoo* ou a *Rocketlawyer* facilitam a ligação entre clientes e advogados, enquanto que plataformas como a *DoNotPay* ou *Wenigermiete* estão a tomar as rédeas da prestação de serviços jurídicos, o que consubstancia um enorme desafio para o atual quadro regulatório.

Como é que poderemos garantir que uma plataforma de intermediação é conforme ao princípio da "livre escolha de advogado" estabelecido no artigo 67(2) do Estatuto da Ordem dos Advogados? Como é que poderemos salvaguardar a liberdade contratual dos clientes e a independência dos advogados que participem nestas plataformas? E como poderemos aproveitar os benefícios destas novas tecnologias - que nos permitem reduzir custos e melhorar o acesso à justiça - ao mesmo tempo que protegemos os consumidores de serviços jurídicos? Como regular as empresas que prestam aconselhamento jurídico mas que não são constituídas por advogados? Estas são algumas das questões suscitadas por este novo fenómeno.

Para responder a estas questões, analisamos as características das plataformas jurídicas em linha e a sua conformidade com os estatutos da Ordem dos Advogados Portuguesa e com o Direito Nacional. Em segundo lugar, analisamos a proibição imposta pela Ordem dos Advogados de plataformas de intermediação, tendo em consideração a jurisprudência do TJUE relativamente a associações de profissionais e o direito da concorrência da União Europeia. Em terceiro lugar, estudamos o quadro jurídico nacional à luz da *Competition Assessment Review of Portugal* da OCDE. Em quarto lugar, apresentamos o recente projecto da Autoridade da Concorrência e registamos as suas semelhanças com a jurisprudência do TJUE.

Por fim, analisamos iniciativas semelhantes de reforma regulatória, tais como o "Legal Services Act" de Inglaterra e do País de Gales, a espanhola "Ley Ómnibus" e o Grupo de Trabalho da State Bar of Arizona sobre Prestação de Serviços Jurídicos. Poderão estes projectos ajudar-nos a alcançar o 16° Objectivo de Desenvolvimento Sustentável das Nações Unidas: "proporcionar acesso à justiça para todos"? Finalmente, analisamos a decisão do Supremo Tribunal Federal da Alemanha relativamente à plataforma jurídica *Wenigermiete* e o caso envolvendo a Autoridade Holandesa para os Consumidores e Mercados e a Ordem dos Advogados Holandesa sobre a proibição de advogados em plataformas de intermediação. Numa União Europeia onde a regulação dos serviços jurídicos está longe de ser igual, poderiam as plataformas jurídicas em linha beneficiar de serem estabelecidas em jurisdições mais "liberais"? Poderão estas empresas prestar serviços jurídicos para além das fronteiras dos seus Estados-Membros?

**Palavras-Chave**: *plataformas jurídicas em linha – legaltech – associações de profissionais – Direito Europeu da Concorrência – profissões liberais – reforma regulatória – Mercado Único Digital.*

## STATEMENT OF INTEGRITY

I hereby declare having conducted this academic work with integrity. I confirm that I have not used plagiarism or any form of undue use of information or falsification of results along the process leading to its elaboration.

I further declare that I have fully acknowledged the Code of Ethical Conduct of the University of Minho.

# Table of Content

**1. INTRODUCTION** **1**

1.1 Online Platforms 1

1.2 Types of Online Legal Platforms 4

**2 ONLINE LEGAL PLATFORMS IN VIEW OF THE *ESTATUTO DA ORDEM DOS ADVOGADOS* AND PORTUGUESE LAW** **6**

*2.1 Estatuto da Ordem dos Advogados* 6

2.1.1 Restrictions on Lawyers' Advertising 6

2.1.2 Prohibition of Client Solicitation 7

2.2 Portuguese Law - Unauthorized Practice of Law 9

**3. THE APPLICATION OF THE "ESSENTIAL FACILITIES DOCTRINE" TO LEGAL DATASETS - LEGAL DATASETS AS "BOTTLENECKS" TO THE DEVELOPMENT OF AI** **12**

**4 TWO-SIDED PLATFORMS AS AN ALTERNATIVE TO SEARCH ENGINES** **20**

**5 THE POSITION OF THE ORDEM DOS ADVOGADOS** **25**

*5.1 Parecer n.º 06/07*, 63/PP/2011-G, 7/PP/2017-C and 6/PP/2017-P 25

*5.2* The "Lawra Case" 27

5.3 A New Player Emerges: *Jurilink* 28

*5.3.1 Jurilink* as an Information Society Service Provider 29

5.3.2 e-Commerce Directive Internal Market Clause 33

***6*** **ORDEM DOS ADVOGADOS' PROHIBITION OF ONLINE PLATFORMS OF LAWYERS IN THE LIGHT OF EUROPEAN COMPETITION LAW.** **36**

6.1 The *Ordem dos Advogados* as an "association of undertakings" 36

6.2 The Opinion of the *Ordem dos Advogados* as a "decision by an association of undertakings" 39

6.3 OA's Opinion "may affect trade between Member States" 40

6.4 OA's Opinion having as an "object or effect the prevention, restriction or distortion of competition within the internal market" 40

6.5 The Position of other European Bar Associations 43

**7 RELEVANT CASE LAW** **45**

7.1 Decision from the Bundesgerichtshof (German Federal Court of Justice) on online legal platform Wenigermiete 45

7.2 Netherlands Authority for Consumers and Markets v. Orde van Advocaten 56

***8 AUTORIDADE DA CONCORRÊNCIA'S*** **PROJECT FOR LEGISLATIVE AND REGULATORY REFORM IN LIBERAL PROFESSIONS.** **62**

8.1 Changing the Paradigm of Self-Regulation 62

8.2 Reducing the Monopoly on Legal Services 63

8.3 Allowing Multidisciplinary Firms 64

**9 OTHER REFORMS OF THE LEGAL PROFESSIONS** **66**

9.1 European Union - Services Directive 2006/123/EC 66
9.1.1 Spain 67
9.1.2 Portugal 69

9.2 England and Wales – Legal Services Act 2007 75

9.3 United States of America 78
9.3.1 State Bar of Arizona Task Force on the Delivery of Legal Services 80

**10 CONCLUSION** **84**

**11. REFERENCES** **90**

# Abbreviations

| | |
|---|---|
| ABS | Alternative Business Provider |
| ACM | Netherlands Authority for Consumers and Markets |
| AdC | Autoridade da Concorrência |
| AI | Artificial Intelligence |
| BGB | Bürgerliches Gesetzbuch |
| E.O.A | Estatuto da Ordem dos Advogados |
| ECJ | European Court of Justice |
| EU | European Union |
| IAALS | Institute for the Advancement of the American Legal System |
| ISSP | Information Society Service Provider |
| LSA | Legal Services Act |
| NLP | Natural Language Processing |
| NOvA | Nederlandse Orde van Advocaten |
| OA | Ordem dos Advogados |
| OECD | Organisation for Economic Co-operation and Development |
| RDG | Rechtsdienstleistungsgesetz |
| TFEU | Treaty on the Functioning of the European Union |

# 1. Introduction

## 1.1 Online Platforms

The concept of online platforms covers a wide range of activities, including online advertising platforms, markets, search engines, social networks and platforms for the collaborative economy.[1] The concept is defined by the European Commission as "*software-based facilities offering two-or even multi-sided markets where providers and users of content, goods and services can meet*."[2]

When applied to the legal sector, the concept of online platform might be understood as being synonymous with the concepts of "*legaltech*" and "*lawtech*", since all of these terms represent *"technologies which aim to support, supplement or replace traditional methods for delivering legal services, or transactions; or which improve the operation of the justice system".*[3] [4]

These services present themselves as a tool to improve consumer choice, industry competitiveness and the access to information across borders.[5] In the context of the European Union's Digital Single Market, whose objectives lie in an increasing digitization of the economy[6] and in the improvement of access to information in the field of justice,[7] online legal platforms present themselves as an opportunity to accomplish these objectives.

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[1] European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the region, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, Brussels, 25.5.2016, COM(2016) 288 final, 2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0288&from=EN

[2] *European Commission, Commission Staff Working Document, A Digital Single Market Strategy for Europe - Analysis and Evidence,* Brussels, 6.5.2015, COM(2015) 192 final, 4.5, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015SC0100

[3] Law Society UK. "Introduction to Law Tech," in https://www.lawsociety.org.uk/support-services/documents/introduction-to-lawtech-october-2019/.

[4] "*There is no universally recognised definition for legal technology (short: LegalTech).* ***In this article, we will define the term LegalTech broadly as technology and software used in the legal profession." ,*** **(my emphasis)** in Bues, Micha-Manuel, and Emilio Matthaei. " LegalTech on the Rise: Technology Changes Legal Work Behaviours, But Does Not Replace Its Profession." In Liquid Legal, edited by Kai Jacob, Dierk Schindler, and Roger Strathausen, 89-109. Cham: Springer International Publishing, 2017. https://doi.org/10.1007/978-3-319-45868-7_7.

[5] European Commission*, Communication to the European Parliament...*

[6] "beyond the three pillars of the Digital Single Market Strategy, its objectives are digitization, namely, the conversion of the economy using ICT, removal of fragmentation, and the advance of the digital economy.", see Mărcuț, Mirela. "*Crystalizing the EU Digital Policy: An Exploration into the Digital Single Market"* (Springer International Publishing, 2017), 53.

[7] Council of the EU, "EU continues developing European e-justice", Available at: https://www.consilium.europa.eu/en/press/press-releases/2018/12/06/eu-continues-developing-european-e-justice/

This possibility is especially relevant given the characteristics of the Single Market, namely the freedom of movement between Member States with different legal norms.[8] How can a Slovakian citizen moving to Portugal find out which lawyer is best suited for his case?

On the other hand, online platforms can also provide a facilitated access to justice to an increasing percentage of the population.

Budget constraints[9] - which will worsen due to the pandemic crisis – will predictably shorten the amounts allocated for legal aid. Besides, the current legal aid system in Portugal already suffers from serious shortcomings, with delays of 6 to 8 months for a lawyer to be provided for those in an economically vulnerable situation.[10]

Access to justice risks becoming something available only for the well-off, and changes in the dynamics of the legal sector, with the decline of the *People Law Sector*,[11] and an increasing "juridification" of everyday life[12] demand innovative solutions for a better access to legal services.

A good example of the potential of online legal platforms can be found in the Hague. The social enterprise *HiiL* (The Hague Institute for Innovation of Law) has supported several justice innovators with its *Justice Accelerator Program*, helping platforms such as the Ukrainian *AirLaw*, the South African *rAInbow* or the Nigerian *Africlaim*.[13]

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[8] "The particularities of law rules in each Member-State are not comparable to other professions; one just has to account the differences between the legal systems of civil law and common law." See Fernandes, Liberal, "*O Exercício da Profissão de Advogado na União Europeia*", in "*Para Jorge Leite, Escritos Jurídico-Laborais*", Coimbra Editora. (free translation).

[9] "*As its public debt amounted to 131.5% of GDP in 2016, the year in which it corrected its excessive deficit, exceeding the 60% of GDP reference value of the Treaty, Portugal also needs to make sufficient progress towards compliance with the debt reduction benchmark in 2019 and to ensure compliance with the debt reduction benchmark as of 2020.",* European Commission, "Commission opinion on the updated 2020 Draft Budgetary Plan of Portugal", Brussels, 15.1.2020, available at https://ec.europa.eu/info/sites/info/files/economy-finance/commission_opinion_on_the_updated_2020_draft_budgetary_plan_of_portugal_en.pdf and *"in Portugal the economic and financial situation led to budget cuts", in Council of Europe, and European Commission for the Efficiency of Justice. European Judicial Systems: Efficiency and Quality of Justice, 2018.*

[10] See minute 8, statements by the *Presidente* of the *Conselho Regional de Lisboa, João Massano, "não é admissível que se espere seis meses a um ano pelo deferimento do pedido de apoio judiciário", in https://tvi24.iol.pt/videos/alexandra-borges-a-justica-nao-e-igual-para-todos-os-portugueses/5d09348d0cf21b722314d0aa , See also* "Apoio Judiciário: Demasiado Lento Para Quem Precisa," accessed July 22, 2020, https://www.deco.proteste.pt/familia-consumo/herancas/dicas/apoio-judiciario-demasiado-lento-para-quem-precisa and "Apoios Judiciários Com Sete a Oito Meses de Atraso - DN," accessed July 22, 2020, https://www.dn.pt/portugal/apoios-judiciarios-com-sete-a-oito-meses-de-atraso-9401510.html.

[11] William Henderson, The Decline of the People Law Sector, November 19, 2017, Post 037, available at https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/.

[12] "*The social developments of recent years, which have led to calls for a fundamental reform of the law on legal advice, have been aptly described by the keyword "juridification" in the sense of a legal penetration of almost all areas of life. This juridification concerns above all economic activities, but also medical, psychological or technical activities with the consequence that hardly any professional activity is possible without legal action and corresponding legal knowledge or remains without legal effect.",* Freely translated from: "*Die gesellschaftlichen Entwicklungen der vergangenen Jahre, die den Ruf nach einer grundlegenden Reform des Rechtsberatungsgesetzes haben laut werden lassen, sind zutreffend mit dem Stichwort der „Verrechtlichung" im Sinn einer rechtlichen Durchdringung nahezu aller Lebensbereiche beschrieben worden. Diese Verrechtlichung betrifft vor allem wirt-schaftliche, aber auch medizinische, psychologische oder technische Tätigkeiten mit der Folge, dass kaum eine berufliche Betätigung ohne recht-liches Handeln und entsprechende Rechtskenntnisse möglich ist oder ohne rechtliche Wirkung bleibt.*", in *Deutscher Bundestag Drucksache 16/3655 16. Wahlperiode 30. 11. 2006 Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Neuregelung des Rechtsberatungsrechts*, available at http://dipbt.bundestag.de/doc/btd/16/036/1603655.pdf

[13] HiiL. "Supporting Justice Innovations." Accessed February 9, 2020. https://www.hiil.org/what-we-do/the-justice-accelerator/.

Whether by facilitating the connection between legal services providers and consumers, or by providing legal information at a more affordable price, these innovative services might help us reach United Nation's 16th Sustainable Development Goal, to "*Promote the rule of law at the national and international levels and ensure equal access to justice for all".*[14]

On the other hand, there are also financial reasons for a regulatory reform that allows legal platforms to participate in one's economy.

According to the "*Legaltech Startup Report 2019*", produced by Thomson Reuters, UK and European *legaltech* companies have already raised 400 million euros in funding.[15] For example, online legal platform *Farewill* has raised 8,8 million euros[16] and *Lexfox* more than a million euros.[17] Barcelona based *Red Points* has raised more than 35 million euros.[18] According to this report, "*In 2018, investment of $500m into LegalZoom, a US-based company offering document templates and legal advice, valued the company at $2bn,*[19] ***making it the first legaltech/regtech unicorn."***[20] ***(my emphasis)***

However, one must tread cautiously when dealing with regulatory reform in the legal sector. There is a reason why this field has been so strictly regulated until now. There is a profound asymmetry of information between consumers and legal providers. Therefore, is there a way to readapt our regulation of legal providers to include non-lawyers? What solutions have been implemented in other countries?

And how can we adapt the deeply disruptive nature of platforms,[21] which have already shaken industries such as the hotel business, transport or retail, calling into question its traditional practices, to the deontological rules of lawyers? After all, lawyers are not simple commercial service

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[14] "Peace, Justice and Strong Institutions." United Nations Sustainable Development (blog). Accessed February 7, 2020. https://www.un.org/sustainabledevelopment/peace-justice/.

[15] "*From the 94 startups and scaleups in our cohort where funding data is available, the total raised is around £350m*", in Thomson Reuters, "Legaltech Startup Report 2019", available at https://legalsolutions.thomsonreuters.co.uk/content/dam/openweb/documents/pdf/uki-legal-solutions/report/tr-legaltech-startup-report-2019.pdf

[16] "Our Portfolio - Farewill | Augmentum: We Invest in Fintech Companies..." Accessed February 9, 2020. https://augmentum.vc/our-portfolio/farewill/.

[17] Loritz, Mary. "Berlin-Based Legaltech Startup LexFox Raises Seven-Digit Round to Build out Its Consumer and Tenants Rights Platform | EU-Startups." Accessed February 9, 2020. https://www.eu-startups.com/2019/09/berlin-based-legaltech-startup-lexfox-raises-seven-digit-round-to-build-out-its-consumer-and-tenants-rights-platform/.

[18] "Red Points Continues Rapid Growth with $38 Million in New Funding to Expand Its Market Leadership in Brand and IP Protection - Red Points." Accessed February 9, 2020. https://www.redpoints.com/press/38-million-in-new-funding/.

[19] "LegalZoom Gains $2 Billion Valuation in Funding Round." Bloomberg.Com, July 31, 2018. https://www.bloomberg.com/news/articles/2018-07-31/legalzoom-gains-2-billion-valuation-in-latest-funding-round.

[20] Meet all of the world's startups valued at $1B+ in our ongoing list of all unicorn companies in the US and abroad. "The Complete List of Unicorn Companies." Accessed February 9, 2020. http://instapage.cbinsights.com/research-unicorn-companies.

[21] "the new wave of digital companies is based on the logic of multi-sided markets that disrupt traditional offline interactions by reshaping the ways individuals transact" see Lobel, Orly, "*The Law of the Platform",* Minnesota Law Review, 2016; San Diego Legal Studies Paper No. 16-212. Available at SSRN: https://ssrn.com/abstract=2742380

providers, but collaborators in the fulfilment of justice.[22] Is a reform of lawyers' bylaws in order? Or are there technical solutions that allow us to preserve the core of the values of the legal profession?

## 1.2 Types of Online Legal Platforms

There are mainly three types of online legal platforms:

- Directories, which consist of a simple list, not pre-selected by the administrator, being similar to a phone book. Normally, the lawyers listed in the directory have not made any payment to be included, and sometimes this is done without their knowledge.[23] Examples of such platforms are www.advogados24h.com/lista-advogados or https://directorioprofissionaladvogados.pt/cgi-sys/suspendedpage.cgi, the latter of which has been suspended, as can be inferred from its domain.

- Two-sided Platforms, where an intermediary selects the lawyers who appear on the website, defining the order in which they appear, or referring them to potential clients.[24] This category corresponds to 'online intermediation services', as defined by Regulation 2019/1150.[25] Examples are http://www.zaask.pt, https://www.advogadoo.com or https://www.jurilink.pt/. Interestingly, the first announces that it helps us to "find the most efficient low-cost lawyers in Porto."[26] In my opinion, such adjectives go beyond a merely informative purpose and become propagandistic, and are thus prohibited according to article 94(4)(a) of the *E.O.A.*: "*Illegal acts of advertising are, namely, the placement of persuasive, ideological, self-aggrandizing and comparative contents.*"[27]

- Websites providing legal services, which are offered directly or indirectly, not necessarily by lawyers.[28] This category includes question and answer websites (https://answers.justia.com), legal chatbots (www.donotpay.com) and sites where legal documents are automatically drafted

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[22] Magalhães, Fernando Sousa. "*Ideias Soltas sobre o Futuro da Advocacia*". In "*Advocacia – Que fazer?".* Coimbra. 2001.

[23] Council of Bars & Law Societies of Europe, *"CCBE GUIDE on Lawyers' use of online legal platforms,* available at *https*://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Guides_recommendations/EN_DEON_20180629_CCBE-Guide-on-lawyers-use-of-online-legal-platforms.pdf

[24] Council of Bars & Law Societies of Europe, *"CCBE GUIDE on Lawyers' use of online legal platforms.. .*

[25] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, Article 2 (2)

[26] See https://www.zaask.pt/advogado-low-cost/porto/porto, accessed on 11 of March, 2019.

[27] Freely translated from: "*São, designadamente, atos ilícitos de publicidade: a) A colocação de conteúdos persuasivos, ideológicos, de autoengrandecimento e de comparação;*"

[28] Council of Bars & Law Societies of Europe, *"CCBE GUIDE on Lawyers' ...*

(https://lawhelpinteractive.org[29] or the Brazilian http://ruiapp.co[30] ). As far as it is possible to ascertain, this type of website is not yet a reality in Portugal.

This category corresponds to the business model of *legaltech*s called "*Substantive law solutions"* that *"support or even replace lawyers in the execution of core legal tasks in transactions and litigation cases.",* which includes "*commoditized law solutions that offer online services for highly standardized legal cases, mainly in consumer law."* [31]

[29] "*LawHelp Interactive is a website that helps you fill out legal documents for free. It's simple: we ask you questions and use your answers to complete the documents you need,* ***no lawyer necessary****"* (my emphasis).

[30] *"Through a conversation with Rui, your complaint will be automatically generated with the arguments capable of supporting your defense in the court."*

[31] Christian Veith, Michael Wenzler, Markus Hartung et. al., How Legal Technology Will Change the Business of Law, Final Report of Bucerius Law School And The Boston Consulting Group On Impacts Of Innovative Technology In The Legal Sector, available at https://www.bucerius-education.de/fileadmin/content/pdf/studies_publications/Legal_Tech_Report_2016.pdf

# 2 Online Legal Platforms in view of the *Estatuto da Ordem dos Advogados* and Portuguese Law

## *2.1 Estatuto da Ordem dos Advogados*

### 2.1.1 Restrictions on Lawyers' Advertising

One of the first issues raised by the platforms is the way in which they publicize lawyers' information.

Although the general prohibition of professional publicity has been overcome in Portugal,[32] there remains a distinction between publicity and advertising – the former being understood as objective and the latter as propagandistic, misleading. A barrier imposed for the sake of the decorum and dignity of the profession.[33]

As such, lawyers are allowed to publicize objective information like their area of expertise, or the languages they speak, but cannot advertise persuasive, ideological, self-aggrandizement and comparative content, mention the quality level of the practice, or promise a specific benefit.[34]

A similar, although less restrictive rule, is also stipulated in article 2.6.1 of the Code of Conduct for Lawyers in the European Union, *"A lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession"*[35]

Regarding the medium in which lawyers may advertise, this Code stipulates that "*personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the*

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[32] "Lithuania and Portugal report substantive change in the legal profession and both have freed up the effective prohibition to allow some 'publicity' type activities (although proactive promotional advertising is still prohibited).", see Commission of the European Communities, Commission Staff Working Document, "Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services", Brussels,5th of September, 2005, SEC(2005) 1064, Par. 84. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005SC1064&from=EN

[33] Free translation from "subsiste inalterada a barreira entre a publicidade informativa, pessoal e profissional, e a publicidade de tipo comercial ou propagandística, comparativa e tendencialmente enganosa, sendo aquela lícita e esta ilícita, barreira essa imposta por exigência do decoro e da dignidade da profissão".
Magalhães, Fernando Sousa, *Estatuto da AO anotado e comentado,* 10th Edition, 2015.

[34] Art. 94(4)(a) (b) (d) of the *Lei* 145/2015.

[35] Council of Bars & Law Societies of Europe, *"Charter of core principles of the European legal profession & Code of conduct for European lawyers"*, page 13, Point 2.6, Par. 1. Available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf

*requirements of 2.6.1*".[36] Therefore, lawyers are free to publicize in any medium, as long as the content is compliant with the rules stated above.

Taking into account the distinction between directory and two-sided platform, the presentation of lawyers in the latter may constitute a violation of deontological rules if the presentation is based on imprecise criteria chosen by the intermediary, such as "quality" or, as we have seen in www.zaask.pt, "effectiveness". Such a problem will not arise, in general, in directories, since there is no selection or cataloguing there.

Two-sided platforms raise another problem: if the intermediary chooses the lawyers he is referring according to non-transparent criteria, this could constitute an infringement of the principle of free choice of lawyer[37] as laid in Article 1170(1) of the Portuguese Civil Code (*a contrario*).

### 2.1.2 Prohibition of Client Solicitation

The prohibition of *client solicitation* is stipulated in article 90(2)(h) of the *E.O.A.*:

*"It is forbidden to solicit clients, by oneself or through an intermediary."*[38]

Regarding this concept, Fernando Sousa de Magalhães states that: "***The prohibition on soliciting clients referred to in article 90(2)(h) is closely linked to the principle of the free choice of lawyer*** *by the client or interested party, since it is understood that such a choice is the only one that guarantees the necessary relationship of trust between the lawyer and his client, as radically imposed by article 97(1). The principle of free choice, now enshrined in Articles 67(2) and 98(1) of the E.O.A., thus remains untouched*"[39](my emphasis).

Orlando Guedes da Costa states: *"It is the dignity and decorum of the profession that require that lawyers do not solicit clientele by themselves or others."*

*"Soliciting clients by a lawyer or through an intermediary would violate another duty of the lawyer towards the community*"[40] the author referring here to the free choice of lawyer.

[36] Council of Bars & Law Societies of Europe, *"Charter of core principles of the European legal profession & Code of conduct for European lawyers"*, page 13, Point 2.6, Par. 2. Available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf .

[37] Council of Bars & Law Societies of Europe, *"CCBE GUIDE on Lawyers'...* page 7.

[38] Translated from: "*Não solicitar clientes, por si ou por interposta pessoa"*.

[39] Sousa Magalhães, Fernando, "*Estatuto da Ordem dos Advogados, anotado e comentado"* 11th Edition, Almedina, Coimbra, January 2017, pages 132 and 133.

[40] Guedes da Costa, Orlando, "Direito Profissional do Advogado", 8th Edition, Almedina, Coimbra, p. 331 and 332.

It emerges from the above that the concept of "soliciting clients" is associated with the principles of dignity or of free choice of the lawyer. However, in order to verify whether two-sided platforms solicit clients, we will have to analyze this concept further.

In my opinion, the concept of "client solicitation" contemplates the offering of legal services when not requested, and without any context justifying it.

This act is considered a breach of the principle of free choice of lawyer, since it is an enticement, a persuasion, which aims at limiting the contractual freedom[41] of the client, by influencing his decision-making process, or by restricting the subjects with whom he can contract.

The connection of this concept with the principle of dignity of the Lawyer is obvious, as it constitutes a malicious practice, not compatible with the special ethical requirements inherent to the Profession.

Therefore, if the online platform engages in practices such as invasive advertising through unsolicited communications,[42] or "pull marketing" techniques, lawyers on the platform will be engaging in the practice of soliciting clients through an intermediary and, consequently, will be liable to disciplinary action.

However, if the platform is only referring clients who access its website by their own volition, the presence of lawyers on the platform cannot be prohibited on the basis of "client solicitation", since the contractual freedom of clients is not being limited. An indiscriminate ban on intermediation platforms would deprive consumers of the benefits of these new technologies – such as the ability to discover a wider range of legal practitioners, and of comparing them according to location and expertise[43] – which increase clients' contractual freedom.

On the other hand, the Bylaws of the Portuguese Bar Association state that lawyers are prohibited from sharing fees, even as a commission or other form of compensation, except with lawyers, trainee lawyers and solicitors (*solicitadores)* with whom they collaborate or who have given their cooperation.[44]

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[41] "Freedom to conclude contracts shall consist in the freedom to conclude contracts or to refuse to conclude them", See Pinto, Mota, "Teoria Geral do Direito Civil", 4th Edition, Coimbra Editora;
"The doctrine that people have the right to bind themselves legally; a judicial concept that contracts are based on mutual agreement and free choice, and **thus should not be hampered by external control" (my emphasis).** See Garner, Bryan A. Blacks Law Dictionary, 9th. St. Paul, MN: West Pub., p.735.

[42] "The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing". See article 13 of Directive 2002/58/EC.

[43] See *De Autoriteit Consument & Markt*, *"Gedragsregels advocaten mogen opkomst online platforms advocaten niet belemmeren"* Free translation: Lawyers' rules of conduct lawyers should not impede the attendance of online platforms ", 13 of December 2018, available at *https://www.acm.nl/nl/publicaties/gedragsregels-advocaten-mogen-opkomst-online-platforms-advocaten-niet-belemmeren*

[44] Article 107 of Lei n.º 145/2015 de 9 de setembro.

Therefore, if a Portuguese lawyer were to register in an online platform, he would be barred from paying a commission to the platform per earned client. The only viable option would be to pay a subscription to the platform. This solution would be, in effect, the same as paying for a newspaper or television advertisement, since the payment would not be dependent on cases received, and therefore it could not be considered as a "sharing" of fees.

## 2.2 Portuguese Law - Unauthorized Practice of Law

Since some online platforms also provide legal advice and draft contracts – the so called "*Substantive law solutions*", that *"support or even replace lawyers in the execution of core legal tasks in transactions and litigation cases.",* including "*commoditized law solutions that offer online services for highly standardized legal cases, mainly in consumer law.",*[45] they would be considered in light of Portuguese Law as incurring in the crime of *non-authorized legal practice*.

As stipulated in *Lei* 49/2004, only graduates in law with registration in force in the Portuguese Bar Association and solicitors registered in the Chamber of Solicitors may practice the acts of lawyers and solicitors.[46]

The scope of reserved legal activities in Portugal is quite wide, covering the judicial mandate but also legal advice,[47] the drafting of contracts[48] and the practice of preparatory acts aimed at the constitution, alteration or extinction of legal acts.[49]

The non-authorized practice of these acts is classified as a crime, with a prison sentence of up to 1 year or a fine of up to 120 days.[50]

Besides prohibiting the practice to non-qualified individuals, this provision also forbids its execution when done in conjunction with lawyers, in a collective manner – the so-called "*multidisciplinary activity*".[51]

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[45] Christian Veith, Michael Wenzler, Markus Hartung et. al., How Legal Technology Will Change the Business of Law, Final Report Of Bucerius Law School And The Boston Consulting Group On Impacts Of Innovative Technology In The Legal Sector, available at https://www.bucerius-education.de/fileadmin/content/pdf/studies_publications/Legal_Tech_Report_2016.pdf

[46] Article 1(1) of *Lei* 49/2004, of 23 of March.

[47] *Lei* 49/2004, Article 1(5)(b).

[48] *Lei* 49/2004, Article 1(6)(a).

[49] *Lei* 49/2004, Article 1 (6)(a).

[50] *Lei* 49/2004, Article 7.

[51] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 25 referes to Multidisciplinary Activity in the following manner: "Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities."

As stated in article 6 of *Lei* 49/2004, only legal persons that are "*composed exclusively of lawyers, solicitors or lawyers and solicitors*" or law firms, are allowed to practice acts reserved to lawyers and solicitors.

As such, under Portuguese law, if legal platforms provide legal advice and are not "*composed exclusively of lawyers, solicitors or lawyers and solicitors*",[52] or part of a law firm,[53] their practice will be considered a crime.

In October 2016, the OECD and the Portuguese Competition Authority – *Autoridade da Concorrência* – carried out an analysis of Portuguese rules and regulations that could have a negative effect on the functioning of markets, namely the norms of self-regulated professions such as lawyers and solicitors.[54]

In said analysis, the monopoly on legal activities stipulated in *Lei* 49/2004 was found as possibly leading "*to higher prices for those services and less diversity and innovation*"[55], a prohibition which may not be necessary to ensure consumer protection.[56] And thus, its revision was advised.[57]

In the opinion of OECD, "*opening up reserved activities to additional qualified professions could generate substantial consumer benefits, in the form of innovative and more diverse services at lower price*s."[58]

Regarding the prohibition of multidisciplinary law firms stipulated in article 6(a), it found that "*to rule out multidisciplinary activity in the same professional firm, between potentially complementary service providers, harms competition and can be detrimental to consumer welfare*";[59] "*this restriction does not allow for the full exploration of economies of scope that come with the offer of different services by a same «service delivery unit» that shares infrastructure and human capital. It foregoes gains from specialization and service quality that would result from the interaction between a wider range of professionals.*"[60]

The OECD's prediction that these rules could constitute an obstacle to innovation appears to have been correct.

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[52] *Lei* 49/2004 , Article 6(1).
[53] *Lei* 49/2004 , Article 6(1).
[54] Organisation for Economic Co-operation and Development, "*Portugal: Competition Assessment Project",* Lisbon 6 of July , 2018. http://www.oecd.org/competition/portugal-competition-assessment-project.htm .
[55] OECD (2018), OECD Competition Assessment Reviews: Portugal: Volume II - Self-Regulated Professions,OECD Publishing, Paris.https://doi.org/10.1787/9789264300606-en, page 204.
[56] OECD*, OECD Competition Assessment Reviews...*
[57] OECD*, OECD Competition Assessment Reviews...*
[58] OECD*, OECD Competition Assessment Reviews...*
[59] OECD*, OECD Competition Assessment Reviews... ,* page 207.
[60] OECD*, OECD Competition Assessment Reviews...* page 207.

*Legaltechs* such as the German helpcheck.de,[61] the French legalife.fr[62] and captaincontrat.com,[63] or the Spanish biglelegal.com[64] would all be prohibited under Portuguese law, since the companies' shareholders are not all lawyers, and thus would incur in the crime of *non-authorized legal practice*.

The problem is that for an online platform to be developed in an apt manner, it is necessary to have multidisciplinary knowledge, partnerships between IT professionals and lawyers.[65] In the case of captaincontract.com, for example, the clients fill out an online form, indicating all the information the lawyer needs. Then, the website's software creates the order, collects the information and transfers it directly to the lawyer.[66]

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[61] *"Helpcheck is a unique combination of lawyers, entrepreneurs and digital experts.*" See https://www.helpcheck.de/ueber-uns (free translation). "*Helpcheck was founded in 2016 (...) as a "justice-as-a-service" platform for consumer rights, providing people with easy access to justice, especially in the life insurance sector. Following a free calculation of each claim based on an extensive algorithm, consumers' claims are brought to court.*" See Mary Loritz, "Legal tech startup Helpcheck raises €11 million to defend consumer rights against big corporations", *EU-Startups,* January 16, 2019, https://www.eu-startups.com/2019/01/legal-tech-startup-helpcheck-raises-e11-million-to-defend-consumer-rights-against-big-corporations/.

[62] Whose founders are "*Timothée Rambaud, a mining engineer who worked for Wall Street, Pierre Aïdan, a lawyer who worked for Harvard and the major New York firms, and Stéphane Le Viet, a polytechnician who has already created several start-ups*". See Jean-Baptiste Jacquin, "La lutte sans merci des sites de services juridiques", *Le Monde,* 1th October, 2015, https://www.lemonde.fr/economie/article/2015/10/02/la-lutte-sans-merci-des-sites-de-services-juridiques_4781180_3234.html. (free translation).

[63] Founded by non-lawyers, the website allows companies to "*choose the type of document they want to obtain. About twenty are available: statutes, shareholders' agreements, copyright assignment contracts, etc. Then, they simply fill out an online form, indicating all the information the lawyer needs. Captain Contrat's own software then creates the order, collects the information and transfers it directly to the lawyer. The latter can therefore concentrate on writing the document (...) without wasting time.*" See Claire Bouleau, "Captain Contrat, la start-up qui facilite les demarches juridiques des PME", *Challenges*, 5th of May 2014, https://www.challenges.fr/entreprise/captain-contrat-la-start-up-qui-simplifie-les-demarches-juridiques-des-pme_140479 . (free translation).

[64] "*We're a young, growing team of legal professionals, technology specialists, designers, and startup geeks*!" See https://www.biglelegal.com/en/about-us/. "Barcelona-based Bigle Legal automatically generates legal documents for your business. Founded in 2016, Bigle's technology allows companies to automate the process of creating, reviewing, sending, signing, and archiving any type of contract or business document. Send your documents into Bigle, and it turns them into easy to use questionnaires that clients can fill in in a matter of minutes, using electronic signatures." See Mary Loritz, "10 Spanish startups to look out for in 2019", *EU-Startups,* January 7, 2019, https://www.eu-startups.com/2019/01/10-spanish-startups-to-look-out-for-in-2019/.

[65] "the majority of legaltech startup founders and co-founders have a background in law, technology such as computer science and software" in Thomson Reuters, "Legaltech Startup Report 2019", available at https://legalsolutions.thomsonreuters.co.uk/content/dam/openweb/documents/pdf/uki-legal-solutions/report/tr-legaltech-startup-report-2019.pdf

[66] Claire Bouleau, "Captain Contrat, la start-up qui facilite les demarches...

# 3. The Application of the "Essential Facilities Doctrine" to Legal Datasets - Legal Datasets as "Bottlenecks" to the Development of AI

According to the most recent literature, AI solutions in legal services can be grouped into one of three areas: document analysis, legal research and practice automation.[67] While the first two categories correspond to tools that support lawyers in their work, practice automation refers to the automation of lawyer's work.

Practice automation via AI tools might bring with it huge gains in productivity and a paramount change in the legal profession, with the automation not only of discovery (e-discovery) but also in the redaction of court briefs.[68]

For example, Neota Logic's PerfectNDA tool leverages the company's AI platform to streamline the process of creating non-disclosure agreements, LegalMation uses AI to automate generation of various litigation-related documents such as pleadings and discovery requests; WeVorce and Hello Divorce automate divorce-related processes via AI; Allstate uses AI to automate claim summary generation. In the UK, Keoghs has created multiple AI-powered systems that automate litigation for personal injury claims and in patent prosecution, Specifio's AI-based software automatically drafts a first-draft patent application from a user-provided set of claims.[69]

However, datasets are essential for AI systems, both as training material for developing AI algorithms but also as input material for its actual use.[70] Therefore, data (or the lack of it) might constitute a barrier to entry for small law firms or solo practitioners that might want to create their own AI systems. Data has been considered as a bottleneck in the past: In its decision v. Google

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[67] Marcos Eduardo Kauffman and Marcelo Negri Soares, "AI in Legal Services: New Trends in AI-Enabled Legal Services," *Service Oriented Computing and Applications* 14, no. 4 (December 1, 2020): 223–26, https://doi.org/10.1007/s11761-020-00305-x.

[68] "It is predicted that within ten to fifteen years software will routinely generate the first draft of most transactional documents" (...) computer generated-drafts could prove to be valuable and comparable to the efforts of associates who generate drafts that an experienced legal practitioner can then edit and refine for a valid final product" in Sergio David Becerra, The Rise of Artificial Intelligence in the Legal Field: Where We Are and Where We Are Going, 11 J. Bus. Entrepreneurship & L. 27 (2018)
Available at: https://digitalcommons.pepperdine.edu/jbel/vol11/iss1/2

[69] Marcos Eduardo Kauffman and Marcelo Negri Soares, "AI in Legal Services: New Trends...

[70] Marcos Eduardo Kauffman and Marcelo Negri Soares, "AI in Legal Services: New Trends...

(Shopping), the European Commission stated that the search data held by Google constituted a barrier to entry for other prospective market players.[71]

In the legal context, it has been described that most law firms are "document rich and data poor"[72] and public data such as judicial decisions and opinions are either not available or so varied in format as to be difficult to use effectively.[73]

Indeed, as stated by a Reddit user on r/machinelearning, "Legal datasets are extremely expensive because lawyers are, which has bottlenecked legal NLP".[74]

The importance of legal datasets can be illustrated by the company "LegalAI", a German company which automates consumer case assessment. LegalAI trained its NLP models "on legal data for 3,000 cases from a law firm that does consumer law".[75]

Therefore, it is important that legal databases are maintained as open access. With regards to case law databases, while in Portugal court decisions from higher courts and from "Julgados de Paz" are publicly accessible,[76] first instance court decisions are not.[77]

Besides, Portugal has no legal or policy framework regarding the online publication of court decisions.[78] Therefore, one must question if the case law on www.dgsi.pt (or other online public databases) constitutes a representative sample of total court decisions.[79]

According to the statistics provided by the Portuguese Constitutional Court, the total number of cases decided by the Constitutional Court in 2019 was 1683.[80] By searching for the year of 2019 in its online database,[81] we can see that 785 cases have been published online.

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[71] Commission Decision in Case AT.39740 – Google Search (Shopping) "6.2.2. Barriers to entry and expansion. (285) The Commission concludes that the national markets for general search services are characterised by the existence of a number of barriers to entry and expansion. (...) (287) Second, because a general search service uses search data to refine the relevance of its general search results pages, it needs to receive a certain volume of queries in order to compete viably. The greater the number of queries a general search service receives, the quicker it is able to detect a change in user behaviour patterns and update and improve its relevance.", available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

[72] Marcos Eduardo Kauffman and Marcelo Negri Soares, "AI in Legal Services: New Trends...

[73] Marcos Eduardo Kauffman and Marcelo Negri Soares, "AI in Legal Services: New Trends...

[74] "R/MachineLearning - [N] High-Quality Legal NLP Dataset," reddit, accessed April 29, 2021, https://www.reddit.com/r/MachineLearning/comments/j5yt90/n_highquality_legal_nlp_dataset/.

[75] artificiallawyer, " 'LegalAI' Automates Consumer Case Assessment," Artificial Lawyer (blog), April 27, 2021, https://www.artificiallawyer.com/2021/04/27/legalai-automates-consumer-case-assessment/.

[76] Available at www.dgsi.pt

[77] Marc van Opijnen et al., "On-Line Publication of Court Decisions in the EU: Report of the Policy Group of the Project 'Building on the European Case Law Identifier,'" SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 15, 2017), https://doi.org/10.2139/ssrn.3088495.

[78] Marc van Opijnen et al., "On-Line Publication of Court Decisions in the EU... p. 124.

[79] "Whereas in legal research (empirical data) is used anecdotally, in empiral research it is analysed systematically, with the aim of broadening understanding from the specific to the general. It is done to assess whether cases are unique or statistically and/or theoretically representative for a larger category of population." In Boom, Willem van, Pieter Desmet, and Peter Mascini. Empirical Legal Research in Action. Edward Elgar Publishing, 2018. https://doi.org/10.4337/9781785362750.

[80] "TC > Tribunal Constitucional > Estatísticas," accessed July 1, 2021, https://www.tribunalconstitucional.pt/tc/tribunal-estatisticas.html.

[81] "Tribunal Constitucional :: Pesquisa de Acórdãos," accessed July 1, 2021, http://w3.tribunalconstitucional.pt/AcordaosV22/.

With regards to the Portuguese Supreme Court, according to the statistics from the Portuguese Ministry of Justice, the Supreme Court has issued 1463 appeal decisions ("Recursos de Revista") regarding the year of 2019[82] and 785 have been published online.[83]

We can see that the ratio on decisions/published decisions is more or less of 2/1 with regards to higher courts.

With respect to Appeal Courts ("Tribunais da Relação"), we can see that 14,948 Appeal decisions ("Recursos de Apelação") were decided in 2019[84] but that only 3643 decisions were published online[85] (about a 5 to 1 ratio of decisions/published decisions).

The difference in the ratio between higher courts and appeal courts could be attributed to the fact that while the decisions from higher courts produce *erga omnes* legal effects, appeal court decisions are not usually binding on third parties (unless, of course, the object of the decision concerns a property right, for example) and "only" result in the so called "persuasive precedent".[86]

In this respect, it is important to mention the initiative of the *Porto District Council of the Portuguese Bar Association*, with the creation of the website "direitoemdia.pt". This website has the objective of publishing court decisions from first instance courts by way of agreements concluded with the presidencies of the Braga, Bragança, Porto, Porto Este, Viana do Castelo, Vila Real and Viseu district courts.[87] This initiative might help expand the online availability of case law.

Besides the *quantity* of the data, what is also relevant to assess is the *quality* of the data. In Portugal. Court decisions are only made available in the (X)HTML format.[88] Other formats, such as XML, would be preferable as an open data format for re-use, since metadata such as date, decision and relevant parties could be more easily coded into part of the XML file.[89]

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[82] "Recursos Cíveis Findos Nos Tribunais Judiciais Superiores," accessed July 7, 2021, https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Recursos-civeis-findos-nos-tribunais-judiciais-superiores.aspx.

[83] Data from 01/01/2019 to 31/12/2019 in "ECLI - Jurisprudência Portuguesa," accessed July 7, 2021, https://jurisprudencia.csm.org.pt/.

[84] "Recursos Cíveis Findos Nos Tribunais Judiciais Superiores," accessed July 7, 2021, https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Recursos-civeis-findos-nos-tribunais-judiciais-superiores.aspx.

[85] Data from 01/01/2019 to 31/12/2019 with regards to Tribunal da Relação de Coimbra, Tribunal da Relação de Évora, Tribunal da Relação de Guimarães, Tribunal da Relação de Lisboa and Tribunal da Relação do Porto Porto, in "ECLI - Jurisprudência Portuguesa," accessed July 7, 2021, https://jurisprudencia.csm.org.pt/

[86] Carneiro, Davide Rua, Paulo Novais, Francisco Carneiro Pacheco Andrade, John Zeleznikow, and José Neves. "The Legal Precedent in Online Dispute Resolution." IOS Press, 2009. https://doi.org/10.3233/978-1-60750-082-7-47.

[87] *"A plataforma DIREITO EM DIA incluirá o acesso às decisões de 1ª instância, mediante protocolos celebrados, por ora, com as presidências das Comarcas de Braga, Bragança, Porto, Porto Este, Viana do Castelo, Vila Real e Viseu, havendo a expectativa de que, a breve trecho, tais protocolos sejam replicados nas demais Comarcas do país.* " in "Direito Em Dia", https://www.direitoemdia.pt/welcome.

[88] Marc van

[89] "File Formats," accessed June 23, 2021, http://opendatahandbook.org/guide/en/appendices/file-formats/. "Recommendation 20: For re-use purposes court decisions should be made available in the most optimal computer-readable format possible, given the capabilities of the drafting process. JSON or RDF/XML are preferred" in Marc van Opijnen et al., "On-Line Publication of Court Decisions in the EU… p. 151.

European Competition Law might present another solution. According to the "essential facilities doctrine" emanating from Article 102 of the Treaty on the Functioning of the European Union, in exceptional circumstances a dominant undertaking must not refuse access to an asset that is indispensable for other undertakings wishing to compete.[90]

This doctrine had its origin in the US, in the *Terminal Railroad Association* case,[91] where the Supreme Court ordered the Terminal Railroad Association - a company which controlled all the local railroad crossings in the Mississippi River (an infrastructure "bottleneck") - to grant competitors access to this critical infrastructure.[92]

This doctrine applies to physical infrastructures – such as railways or airports - but it also covers intangible assets protected by property rights.[93]

According to Directive 96/9/EC,[94] "databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright". The database may imply a creative (intellectual) curation in selecting certain data to the detriment of others[95] and therefore be protected by copyright. On the other hand, Directive 96/6/EC provides for a *sui generis* right on databases that are the result of a "qualitatively and/or quantitatively substantial investment".[96] A dataset constituted by legal documents could theoretically be protected by both these rights.[97]

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[90] Graef, Inge, Rethinking the Essential Facilities Doctrine for the EU Digital Economy (April 4, 2019). TILEC Discussion Paper No. DP2019-028, Available at SSRN: https://ssrn.com/abstract=3371457 or http://dx.doi.org/10.2139/ssrn.3371457

[91] Brett Frischmann & Spencer Weber Waller, Revitalizing Essential Facilities, 75 ANTITRUST LAW JOURNAL 1, 6 (2008); Nikolas Guggenberger, The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myths, 23 YALE J.L. & TECH. forthcoming (2021); Marina Lao, Search, Essential Facilities, and the Antitrust Duty to Deal, 11 NORTHWESTERN JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY 276, 288 (2013); Robert Pitofsky et al., The Essential Facilities Doctrine under U.S. Antitrust Law, 70 ANTITRUST LAW JOURNAL 443, 445 (2002); James R. Ratner, Should There Be an Essential Facility Doctrine, 21 U.C. DAVIS L. REV. 327, 327 (1988); David Reiffen & Andrew N. Kleit, Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?, 33 J.L. & ECON. 419, 419 (1990); Zachary Abrahamson, Essential Data, 124 YALE L.J. 867, 869 (2014).

[92] In Guggenberger, Nikolas, Essential Platforms (September 30, 2020). Stanford Technology Law Review, Forthcoming, Yale Law & Economics Research Paper, Available at SSRN: https://ssrn.com/abstract=3703361 or http://dx.doi.org/10.2139/ssrn.3703361

[93] *Ibid.*

[94] DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 1996 on the legal protection of databases, article 3.

[95] VENÂNCIO, PEDRO DIAS, "Notas sobre o regime do Direito Especial do Fabricante de Bases de Dados", Actas do IV Congresso Internacional Ciências Jurídico-Empresariais, Escola Superior de Tecnologia e Gestão, Instituto Politécnico de Leiria, 2014, pp. 22-37, 2014

[96] DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 1996 on the legal protection of databases, article 7.

[97] On the applicability of both these rights, see "Analisando os seus sujeitos, conteúdo e objecto, parece-nos categórico que a Directiva comunitária admite que sobre uma mesma base de dados possam incidir simultaneamente um direito de autor e um direito sui generis" in VENÂNCIO, PEDRO DIAS, "Notas sobre o regime do Direito Especial do Fabricante de Bases de Dados", Actas do IV Congresso Internacional Ciências Jurídico-Empresariais, Escola Superior de Tecnologia e Gestão, Instituto Politécnico de Leiria, 2014, pp. 22-37, 2014

In *Microsoft,* which concerned Microsoft's refusal to license its "interoperability information", the General Court summarized the "exception circumstances" in which a dominant undertaking might be obliged to provide access to an asset:

"– in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;

– in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;

– in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand."[98]

The first requirement, on the indispensability of the asset, is generally considered as being particularly difficult to overcome.[99] In the Commission's Decision concerning the acquisition of DoubleClick by Google, the Commission stated that the data of Google and DoubleClick was not essential to provide advertising services in an online environment, since similar data was already available to Google's competitors (Yahoo and Microsoft) and the data could be acquired from third parties.[100]

With regards to legal datasets, these are a very important component of AI tools in the legal sector;[101] putting it metaphorically, data is the essential "raw material" for the creation of AI tools. It is doubtful that legal datasets could be acquired via third parties, in the same way as search data, especially if law firms have a large collection of documents that are specific to a particular area of law, which could not be replicated.

On the other hand, the requirement of "indispensability" has been lowered by the General Court. Where the ECJ in *Bonner* had stated that an asset would not be considered indispensable

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[98] Case T-201/04 EU:T:2007:289, par. 332.

[99] "Nevertheless, a significant legal burden has to be met in order to force a dominant platform provider to give competitors access to its data under European competition law. Especially the requirement of indispensability which demands that there are no economically viable alternatives for the required input seems hard to meet." in Graef, Inge; Wahyuningtyas, Sih Yuliana; Valcke, Peggy (2014) : Assessing access problems in online media platforms, 24th European Regional Conference of the International Telecommunications Society (ITS): "Technology, Investment and Uncertainty", Florence, Italy, 20th-23rd October, 2013, International Telecommunications Society (ITS), Calgary

[100] Graef, Inge; Wahyuningtyas, Sih Yuliana; Valcke, Peggy (2014) : Assessing access problems in online media platforms... See also Case No COMP/M.4731 – Google/ DoubleClick (Google/DoubleClick), 11 March 2008, par. 366.

[101] "Data are a critical part of AI systems as both training material for developing AI algorithms and input material for the actual use of AI. The development and use of AI algorithms in the provision of legal services is limited by a lack of easily accessible and analyzable datasets [24]." in Kauffman, M.E., Soares, M.N. AI in legal services: new trends in AI-enabled legal services. *SOCA* **14,** 223–226 (2020). https://doi.org/10.1007/s11761-020-00305-x )

if there were "economically viable" alternatives for the undertaking,[102] the General Court in *Microsoft* stated that competitors should be put "on an equal footing" and ordered *Microsoft* to give competitors full access to its interoperability information. [103]

Besides, even if we apply the "economically viable" criteria stipulated in *Bonner*, it is doubtful that undertakings might have alternatives with regards to legal datasets, especially if we take into consideration the high fixed costs of the large-scale collection and processing of data, which creates economies of scale and favours larger undertakings. As stated by Nikolas Guggenberger, in the context of search engine data: *"Smaller and especially nascent platforms do not have these possibilities. They do not have access to the same amount and quality of data and, thus, cannot train their algorithms equally well."*[104]

In relation to the requirement of elimination of competition in a neighbouring market, in *IMS Health,* which concerned a licence for a brick structure protected by an intellectual property right, the European Court of Justice affirmed that the fact that the request input has never been marketed separately does not preclude, from the outset, the possibility of identifying a separate market and of applying the essential facilities doctrine.[105]

The Court went on to state that "*It is sufficient that a potential market or even hypothetical market can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable*".[106]

With regards to legal datasets, it can be stated that these assets are not (or rather, will not) be marketed separately from the provision of legal services by the law firms. However, this fact alone is not sufficient to set aside the essential facilities doctrine.

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[102] "For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish, as the Advocate General has pointed out at point 68 of his Opinion, that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme." , in Case C-7/97 Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs [1998] ECR I-7791, par. 45.

[103] Case T-201/04 Microsoft v. Commission [2007] ECR II-3601(Microsoft), par. 647. See also Graef, Inge; Wahyuningtyas, Sih Yuliana; Valcke, Peggy (2014) : Assessing access problems in online media platforms, 24th European Regional Conference of the International Telecommunications Society (ITS): "Technology, Investment and Uncertainty", Florence, Italy, 20th-23rd October, 2013, International Telecommunications Society (ITS), Calgary

[104] In Guggenberger, Nikolas, Essential Platforms (September 30, 2020). Stanford Technology Law Review, Forthcoming, Yale Law & Economics Research Paper, Available at SSRN: https://ssrn.com/abstract=3703361 or http://dx.doi.org/10.2139/ssrn.3703361

[105] Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, ECLI:EU:C:2004:257, par. 42-43.

[106] Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, ECLI:EU:C:2004:257, par. 44.

In the context of online search engines, some authors have proposed that search engines should be obliged to share their data regarding search queries so that competition is possible in the downstream market of search algorithms.[107] A parallel can be established here with datasets and the creation of AI legal tools. Dominant undertakings could be obliged to share their legal datasets so that competition can occur in the downstream market of AI legal algorithms.

With regards to the third requirement, i.e., that the refusal prevents the appearance of a new product, it is sufficient that "technical development" is undermined. As stated by the General Court in *Microsoft,* it is not necessary that a "new product" is prevented from emerging. If technical development is harmed, the restrictive effects of the refusal are liable under article 102(b) TFEU.[108] In the case of AI algorithms, refusing access to datasets may constitute an obstacle for the emergence of better AI algorithms.

In sum, in the case of legal datasets, it could be understood that 1) datasets are indispensable to the creation of AI algorithms, since this data cannot be obtained via third parties; 2) that the refusal to supply said datasets might jeopardize competition on the downstream market of AI algorithms; 3) and that this refusal will prevent technical development, in this case, better AI algorithms and legal services.

A parallel might be established with the case of *Thomson Reuters Enterprise Centre Gmbh and West Publishing Corporation vs. Ross Intelligence Inc..*[109]

ROSS Intelligence, an AI company, claims that Westlaw (a legal publisher, owned by Thomson Reuters) is abusing its dominant position in the legal research market by prohibiting other undertakings from using its database on court decisions. ROSS cites Section 2 of the Sherman Act, which is the US equivalent to article 102 TFEU.[110]

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[107] Argenton, Cédric and Prufer, Jens, Search Engine Competition with Network Externalities (April 13, 2011). TILEC Discussion Paper No. 2011-024, Available at SSRN: https://ssrn.com/abstract=1808624 or http://dx.doi.org/10.2139/ssrn.1808624

[108] "**The circumstance relating to the appearance of a new product**, as envisaged in *Magill* and *IMS Health*, paragraph 107 above, **cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC.** As that provision states**, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development**." **(my emphasis)** in Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601(*Microsoft*), par. 647.

[109] "Amended ANSWER to 1 Complaint, with Jury Demand [Amended Partial Answer and Defenses], Amended COUNTERCLAIM against Thomson Reuters Enterprise Centre GmbH, West Publishing Corporation by ROSS Intelligence Inc for Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc. :," Justia Dockets & Filings, accessed April 28, 2021, https://docs.justia.com/cases/federal/district-courts/delaware/dedce/1:2020cv00613/72109/24.

[110] "The essential facilities doctrine forms an important part of current EU and US competition or antitrust law, in the context of respectively Article 102 of the Treaty on the Functioning of the EU (TFEU) and Section 2 of the Sherman Act. " in Graef, Inge, Rethinking the Essential Facilities Doctrine for the EU Digital Economy (April 4, 2019). TILEC Discussion Paper No. DP2019-028, Available at SSRN: https://ssrn.com/abstract=3371457 or http://dx.doi.org/10.2139/ssrn.3371457

ROSS claims that "*Westlaw controls the largest, most comprehensive, and most reliable public law database, but only makes that database available to those who also license its legal search tools through the Westlaw platform*." And that "*Westlaw denied ROSS access to the Westlaw platform and thus also the public law database"*.[111]

Interestingly, Westlaw does not market its legal database separately, but rather it sells it in a bundle alongside its legal search tools.[112] However, as we saw above, this fact does not mean that the legal database would be not considered as part of a separate market.

On the other hand, it also noting that ROSS claims that "*these restrictive licensing conditions stifle innovation (...) new companies would find ways to incorporate Westlaw's database into their products, or build technology that allows their search engines to be compatible with Westlaw's database."* This argument is quite similar to the one cited by the General Court in *Microsoft*, regarding the fact that a refusal to supply might prevent technical development.

In conclusion, the emergence of AI in the legal sector might bring with it new challenges, however, we have seen how there are legal instruments that may be used in order to ensure that competition in the AI legal algorithmic market is guaranteed. Besides, there is always the possibility that a market for "legal databases" might emerge, which would allow competing companies to build their own AI tools.

[111] "Amended ANSWER to 1 Complaint, with Jury Demand [Amended Partial Answer and Defenses], Amended COUNTERCLAIM against Thomson Reuters Enterprise Centre GmbH, West Publishing Corporation by ROSS Intelligence Inc for Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc. :," Justia Dockets & Filings, accessed April 28, 2021, https://docs.justia.com/cases/federal/district-courts/delaware/dedce/1:2020cv00613/72109/24.

[112] "104. Moreover, on information and belief, Westlaw has never provided consumers with an option to only license the public law database, or to only license the legal search tools, and does not plan to ever provide such an option.", *Ibid.*

# 4 Two-Sided Platforms as an Alternative to Search Engines

Online platforms may constitute a more transparent form of intermediation than the already allowed websites of lawyers.

As we have seen, lawyers are allowed to advertise *in any form of media such as by press, radio, television, by electronic commercial communications or otherwise*. [113] As such, online advertising through a website is permitted, but this raises the issue of how these websites are accessed by potential clients.

Although a website has a unique identifier in the form of a *domain* (for example www.amazon.com or www.google.com ), it is usually not sufficiently well known so that consumers access the website primarily through typing it in their browser - the so called "*Direct traffic*"[114] - because this implies that the website has previously built a strong notoriety or, in other words, a *strong brand*.

Unfortunately, the vast majority of websites cannot afford to pursue this objective.

As stated by the European Commission in its Antitrust decision against Google Inc. "*building a strong brand entails the investment of significant financial resources over a long period of time, without any guarantees of success. (...) For small and mid-sized companies, it is virtually impossible to conduct an expensive and time-consuming brand campaign while also focusing extensively on providing an excellent quality for users".*[115]

Consequently, search engines play a major role in the access to websites. Hence the importance of *Search Engine Optimization*[116] in *Digital Marketing*, as well as the establishment by the *European Court of Justice* of the *Right to be Forgotten* in search engines.[117] In short, if a website does not appear in search engine results, it is as if it does not exist. A fate well known by the UK's company *Foundem,* the lead complainant in the European Commission's case against Google

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[113] Council of Bars & Law Societies of Europe, *"Charter of core principles of the European legal profession & Code of conduct for European lawyers"*, page 13, Point 2.6, Par. 2. Available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf

[114] Direct traffic is defined as URL's that people either type in directly or reach via their browser bookmarks, See Eyal Eldar, "Getting a lot of Direct traffic? What does it really mean?", *Seperia,* July 25th, 2013, https://www.seperia.com/blog/what-direct-traffic-really-means/

[115] European Commission, "Antitrust Procedure - Council Regulation (EC) 1/2003", Case AT.39740 Google Search (Shopping), 27 June, 2017, par. 583. Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

[116] IMIS CLOUD PROFESSIONAL, "*Using RiSE to maximize SEO results*", "*the process of maximizing the number of visitors to a particular website by ensuring that the site appears high on the list of results returned by a search engine.*", available at https://help.imis.com/100_200/Features/RiSE/Site_Builder/Using_RiSE_to_maximize_SEO_results.htm

[117] Judgment of the Court (Grand Chamber), 13 May 2014. Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12, ECLI:EU:C:2014:317

Search,[118] whose website is still suspended[119] after the end of a process that resulted in a fine of 2 424 495 000 Euros to the American Company.[120]

The Commission found that Google skewed search results by *"positioning and displaying more favourably, in its general search results pages, its own comparison shopping service compared to competing comparison shopping services.",*[121] consequently; competitors' websites saw a decrease of traffic of as much as 90%,[122] while Google´s own service increased 45-fold.[123]

In addition to this episode, it was recently discovered that the majority of listings for car accident attorneys on Google in the USA are fake,[124] since Google's *"local algorithm strongly favors listings that have words in their business name that match the searcher's query"*[125] – whether or not they are real attorneys.

Bearing in mind that the criteria of these services are not transparent,[126] there is a real risk of a restriction of the clients' contractual freedom, since these are not informed of the way in which the search engines catalogue, or even omit, results.

The user who searches for "Porto Lawyer" on Google does not know why Lawyer X appears first than Lawyer Y (or why Lawyer Z does not even appear).

There may be an opportunity to provide customers with more trustworthy information, while simultaneously increasing the contractual freedom of clients, if two-sided platforms are based on objective and transparent criteria.

In the words of Esther Montalvá, Head of Digital Affairs at the *Colegio de Abogados de Madrid,*[127] "*If they just join supply and demand, they are a fabulous breakthrough. My opinion changes if one professional or another is placed depending on who pays more*."[128]

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[118] http://www.foundem.co.uk/hygiene/AboutUs.jsp
[119] http://www.foundem.co.uk/hygiene/Temporary_Announcement_2016.jsp
[120] European Commission, "Antitrust Procedure - Council Regulation (EC) 1/2003", Case AT.39740 Google Search (Shopping), 27 June, 2017, Article 2. Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.
[121] EUR-Lex - 52018XC0112(01). Par. 9. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018XC0112%2801%29.
[122] European Commission, "Antitrust Procedure - Council Regulation (EC) 1/2003", Case AT.39740 Google Search (Shopping), 27 June, 2017, Par. 465. Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.
[123] European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service", Press Release, available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm
[124] Joy Hawkins, "The majority of listings for car accident attorneys on Google are fake", *Search Engine Land,* March 25, 2019, https://searchengineland.com/the-majority-of-listings-for-car-accident-attorneys-on-google-are-fake-314569.
[125] Joy Hawkins, "The majority of listings for car accident.. ."
[126] In the case of Google, these algorithms are kept as trade secrets and not as patents. Consequently, these mechanisms do not have to be disclosed to the public or enter the public domain. See Frank Pasquale, "The Black Box Society", *Harvard University Press, 2015,* page 83.
[127] http://web.icam.es/actualidad/noticia/5319/La_Abogac%C3%ADa_en_el_umbral_del_cambio_digital_Art%C3%ADculo_de_la_diputada_Esther_Montalv%C3%A1_
[128] Free Translation From: "si se limitan a unir oferta y demanda, son un avance fabuloso. Mi opinión cambia si se asigna un profesional u otro en función de quién pague más". See Pedro Del Rosal, "*La 'Uberización' Llega Al Mundo Del Derecho*", *El País*, 6 Nov. 2018, Available At Https://Elpais.Com/Economia/2018/11/01/Actualidad/1541090769_034925.Html

Regarding this issue, it is relevant to mention the Regulation on promoting fairness and transparency for business users of online intermediation services (Regulation 2019/1150),[129] which will has entered into force on 12 July 2020.

By taking into account that *"online intermediation services are key enablers of entrepreneurship, trade and innovation, which can also improve consumer welfare*";[130] and that "*online search engines can be important sources of Internet traffic for undertakings which offer goods or services to consumers through websites*",[131] this proposal aims at increasing the transparency of these services.

As such, providers of online intermediation services – which could be included in the "two-sided platform" category – will be obliged to "*set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters*."[132]

On the other hand, providers of online search engines shall "*set out the main parameters, which individually or collectively are most significant in determining ranking and the relative importance of those main parameters, by providing an easily and publicly available description, drafted in plain and intelligible language, on the online search engines of those providers".*[133]

This Regulation will likely have a significant impact on digital commerce in the EU and abroad, since it will apply to providers of these services regardless of whether they are established in a Member State or outside the Union, if the business users or corporate website users are established in the EU and if they offer their goods or services to consumers located in the Union at least for part of the transaction.[134]

Therefore, legal two-sided platforms such as RocketLawyer – which are already providing intermediation services to lawyers in the Netherlands[135] or Spain[136] - will be covered by this Regulation, as well as Google, since both these platforms provide services to business users (lawyers) that are in the EU, and subsequently, these business users provide services to consumers

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[129] Regulation (Eu) 2019/1150 Of The European Parliament And Of The Council Of 20 June 2019 On Promoting Fairness And Transparency For Business Users Of Online Intermediation Services, Available At Https://Eur-Lex.Europa.Eu/Legal-Content/EN/TXT/?Uri=Uriserv:OJ.L_.2019.186.01.0057.01.ENG&Toc=OJ:L:2019:186:TOC

[130] European Commission, "Proposal For A Regulation Of The European... Recital 1.

[131] European Commission, "Proposal For A Regulation Of The European... , Recital 3.

[132] Regulation (Eu) 2019/1150 Of The European Parliament And Of The Council Of 20 June 2019 On Promoting Fairness And Transparency For Business Users Of Online Intermediation Services, Article 5 (1)

[133] Regulation (Eu) 2019/1150 Of The European Parliament And Of The CounciL Of 20 June 2019 On Promoting Fairness And Transparency For Business Users Of Online Intermediation Services, Article 5 (2)

[134] Regulation (Eu) 2019/1150 Of The European Parliament And Of The Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, Article 1 (2)

[135] "Juridische Zaken Makkelijk Gemaakt Met Rocket Lawyer." Accessed February 10, 2020. https://www.rocketlawyer.com/nl/nl.

[136] "El Derecho Sencillo Con Rocket Lawyer." Accessed February 10, 2020. https://www.rocketlawyer.com/es/es.

that are located in the Union. This interpretation is based on the concept of "business user" that is established on article 2 (1) of the Regulation, "*any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession*".

However, even though this Regulation will certainly increase the transparency of online platforms, lawyers' platforms raise specific problems, which need to be addressed by the respective Bar Associations.

Indeed, the lawyer-client relationship is characterized by a profound asymmetry of information, since practitioners are required to display a high level of technical knowledge which clients may not have.[137] As such, the client is not able to discern *ex ante* the competency of a practitioner.

Traditionally, this feature has been seen as one of the reasons for regulation of legal services,[138] since the Bar Association does what the individual client cannot: assess quality and signal it to potential consumers.[139]

As such, it can be argued that online legal platforms should also be regulated by these professional associations, in order to guarantee that the practitioners featured on these platforms have the necessary qualifications.

One of the ways in which this intervention can be made is through the implementation of codes of conduct, which would indicate to the public that certain sites have a minimum of seriousness and guarantees[140] – a project that is being implemented by the Spanish Bar Association.[141]

In fact, since online legal counselling can be considered as an Information Society service,[142] one has to consider the Directive 2000/31/EC ('Directive on electronic commerce')

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[137] European Commission, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions - Professional Services - Scope for more reform", COM/2005/0405 final, 05/09/2005, par. 11. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0405

[138] " Put succinctly, the public interest justification for self-regulation in a particular context is based on three conditions being fulfilled: first, that the activity is afflicted by some form of market failure, notably externalities or information asymmetries". See Ogus, Anthony "Rethinking Self-Regulation", *Oxford Journal of Legal Studies*, Volume 15, Issue 1, Spring 1995, Page 97, https://doi.org/10.1093/ojls/15.1.97

[139] Stephen, Frank H., Love, James H. and Rickman, Neil, (2012), "Regulation of the Legal Profession", in Regulation and Economics, Edward Elgar Publishing, https://EconPapers.repec.org/RePEc:elg:eechap:12771_15.

[140] As indicated by Louis Degos, Chairman of the Foresight and Innovation Commission of the CNB. See *Agefiactifs, "Prestations juridiques en ligne, la réponse du Conseil national des barreaux",* 3 November, 2016. https://www.agefiactifs.com/droit-et-fiscalite/article/prestations-juridiques-en-ligne-la-reponse-du-75103

[141] "el CGAE trabaja en ese sentido. «Estamos trabajando en un código de conducta y, quien se adhiera, contará con un sello de cumplimiento que aportará confianza en sus servicios»", cited in Pedro Del Rosal, "*La 'uberización' llega al mundo del Derecho*...

[142] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000. Recital 18 (*a contrario*) "activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services."

which recommends the usage of codes of conduct to safeguard *"the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession."*[143]

Via the implementation of codes of conduct, Bar Associations can make sure that while consumers are getting more information, the data they receive is trustworthy and is published in compliance with deontological rules.

Private entities can also do their part. In 2017, the "*Charte Ethique pour un marché du droit en ligne et ses acteurs*"[144] was signed, an agreement between *legaltechs*, law firms, legal publishers and digital notaries, through which these entities can demonstrate their compliance with the law and deontological rules. Some of the rules to be observed are:

1) the platform must disclose the use of algorithms, explaining their function[145] - which is important to ensure transparency and the principle of the free choice of lawyer, in the context of bilateral platforms;

2) the platform is obliged to take out professional civil liability insurance[146] - in order to safeguard against the risk inherent in platforms that provide legal services.

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[143] Directive 2000/31/EC, article 8 (1).

[144] https://www.charteethique.legal

[145] See https://www.charteethique.legal/englishversion *"The Signatories undertake to provide all non-confidential information which would allow the beneficiary of the service to understand its essential components, and notably whether it is performed personally by the actor, or by a third party subcontractor, in part or in full, or if it integrates the use of an algorithm." "In the latter case, they shall explain the role of such algorithm, and provide the relevant information required to understand the results of the processing by this latter."*

[146] https://www.charteethique.legal/englishversion, *"The Signatories undertake to subscribe to professional civil liability insurance adapted to their activities in order to guarantee against, and compensate for, damages which their activities may cause, both in respect of technical services and consultancy services."*

# 5 The Position of the Ordem dos Advogados

## 5.1 *Parecer n.º 06/07*, 63/PP/2011-G, 7/PP/2017-C and 6/PP/2017-P

As early as 2007, the General Council of the Portuguese Bar Association – *Conselho Geral da Ordem dos Advogados* - was asked to give its opinion on the theoretical possibility of an online directory of lawyers.[147]

The Council stated that if the search criteria allowed the consumer to find several lawyers of his choice according to objective, dignified and true information, there was no breach of deontological rules.[148]

As we can see, directories do not pose a big challenge to deontological rules.

But, in reality, directories do not represent any innovation since they are, in practice, mere online phone books. The crux of the matter is in the two-sided platforms.

In 2011, the General Council was asked to give its opinion on a platform aimed at "attracting clients on the Internet" by "adopting a «pull» strategy, which aims to attract the consumer to its message".[149]

On this basis, the GC decided that "*bearing in mind that the purpose of the platform in question is to «attract customers» by referring them, what is actually at issue is an act of soliciting customers that undermines the dignity of the legal profession and therefore lawyers are not allowed to voluntarily join the platform*".[150]

In 2017, the *O.A.*'s Regional Council of Coimbra, analyzing the two-sided platform *Advogadoo*, decided to prohibit this platform on the following basis:[151]

"*The registration on the site is aimed precisely at ensuring that the client can reach the lawyer through the entity that manages the site, which establishes contact between the parties. In our understanding this intermediation does not encourage a fair choice of lawyer*."[152]

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[147] Conselho Geral da Ordem dos Advogados, *Parecer n.º 06/07,* November 24th, 2007. Available at https://portal.oa.pt/advogados/pareceres-da-ordem/conselho-geral/2007/parecer-n%C2%BA-0607/ .

[148] Free translation from "*Na verdade, se por meio dos critérios de pesquisa estabelecidos, o consumidor puder encontrar vários Advogados à sua escolha e, de acordo com os elementos disponibilizados, puder escolher com base em informação objectiva, digna e verdadeira, como dispõe o artigo 89.º, n.º 1, não poderá nunca ser arguida qualquer desconformidade do serviço em questão com as normas deontológicas em vigor.*"

[149] Conselho Geral da Ordem dos Advogados, *Parecer N.º 63/PP/2011-G,* February 16th, 2012. Available at https://www.oa.pt/cd/Conteudos/Pareceres/detalhe_parecer.aspx?sidc=32517&idc=1365&idsc=158&ida=124713

[150] Free translation from *"tendo em conta que a plataforma informática em questão tem como objectivo "atrair clientes", encaminhando-os, do que se trata, na verdade, é de um acto de angariação de clientela que atenta contra a dignidade da profissão de advogado, não podendo, assim, deixar de se considerar que está vedada ao advogado a sua inclusão voluntária na referida plataforma."*

[151] Conselho Regional de Coimbra, *Parecer Nº 7/PP/2017-C*, 6 of Abril, 2017, available at http://www.oa.pt/cd/Conteudos/Pareceres/detalhe_parecer.aspx?sidc=64621&idc=1365&idsc=116053&ida=152440 .

[152] Translated from "*A inscrição no sítio visa exactamente que o cliente chegue ao/à Advogado/a pela via da entidade gestora do sitio, que possibilita o contacto entre ambos, não se entendendo que aquela potencia uma escolha justa do/a Advogado/a.*"

*"Customer acquisition should be carried out, unless better understood, through merit in the exercise of one's duties and its public recognition, and not through the mere formalization of a budget."*[153]

*The website in question is manifestly contrary to the principle of the dignity of the profession, whether by infringing the rules on advertising or by making it possible to attract customers through an intermediary".*[154]

The wording of the decision makes it seem like it was based on the specific characteristics of the platform *Advogadoo*.

Nevertheless, the following decision generalizes this prohibition to all platforms.

The O.A.'s Regional Council of Porto, in *Parecer* n° 6/PP/2017-P, stated that the presence of lawyers on this type of platforms is, without further ado, a disciplinary offence:[155]

"*The registration of a lawyer on a platform that promotes contact between lawyers and clients, such as the so-called (...), constitutes a disciplinary offence for violation of the duty not to solicit clients.*"

*"In our opinion, attracting clients through the said platform puts at risk the relationship of trust between lawyer and client, since it does not guarantee a free choice on the part of the client or interested party."*[156]

[153] Free translation from "*A angariação de clientela deve ser efectuada, salvo melhor entendimento, por via do mérito no exercício das funções e do reconhecimento público do mesmo, e não pela mera formalização de um orçamento."*

[154] Free translation from *"o sitio da internet em causa colide manifestamente com o princípio da dignidade da profissão, quer pela via da violação das regras relativas à publicidade quer pela possibilidade de angariação de clientela por interposta entidade.* http://www.oa.pt/cd/Conteudos/Pareceres/detalhe_parecer.aspx?sidc=31690&idc=76141&idsc=116053&ida=152440 .

[155] Conselho Regional do Porto, *Parecer N° 6/PP/2017-P*, 16 February 2017. Available at https://www.oa.pt/upl/%7B7e01641a-6cce-4f8c-8425-e854b727f0ff%7D.pdf .

[156] Free translation from "A inscrição de advogado em plataforma que promova o contacto entre advogados e clientes como a denominada (...), constitui ilícito disciplinar por violação do dever de não angariar clientes."

"Na nossa opinião, a angariação de clientela por intermédio da referida plataforma põe em risco a relação de confiança entre advogado e cliente, já que não garante a escolha livre por parte do mandante ou interessado."

### *5.2* The "Lawra Case"

*"Lawra",* a startup company from Fundão, wanted to offer an easier way for lawyers and clients to connect. The winner of the 1st Edition of SRS's "Startup-Lab", *Lawra* offered a two-sided platform in which clients could find a specialized lawyer "*for as little as 25€*".[157]

In a test launch made in the 21st of May of 2017, *Lawra* rapidly managed to register almost 150 lawyers in their platform.[158] However, 24 hours later, the General Council of the Portuguese Bar Association issued a statement with the following content:

*"Bearing in mind that the corporate purpose of the identified firm indicates the practice of acts that do not comply with the Statute of the Bar Association, we inform our colleagues that the necessary steps will be taken to concretely determine the acts that are at the origin of this operation, as well as to restore legality."*[159]

This enigmatic statement did not identify the rules *Lawra* supposedly broke. Nevertheless, it produced a *chilling effect* on the users of the platform who, fearing disciplinary reprisals, asked *Lawra* to delete their accounts,[160] and on *Lawra* itself, which has since closed its platform.[161]

The press statement of the *Ordem dos Advogados* was determinative for the market conduct of its member undertakings, since it forced the members of the platform to withdraw from it. Therefore, this act falls within the concept of a "decision", for the purposes of article 101 (1) TFUE. This will be discussed further below in chapter 6.

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[157] Link to Leaders. "Com a Lawra é possível contactar um advogado por 25€," October 3, 2018. https://linktoleaders.com/lawra-possivel-contactar-um-advogado-25e/.

[158] Link to Leaders. "Com a Lawra é possível contactar um advogado por 25€," October 3, 2018. https://linktoleaders.com/lawra-possivel-contactar-um-advogado-25e/.

[159] Freely translated from: "*tendo presente que o objeto social da identificada sociedade indicia a prática de actos não conformes ao Estatuto da Ordem dos Advogados, informamos os Exmos. Colegas de que irão ser desencadeadas as diligências necessárias à concreta determinação dos atos que estão na origem desta atuação, bem como à reposição da legalidade.*" "Comunicado Do Conselho Geral - Lawra, Lda - Ordem Dos Advogados." https://portal.oa.pt/comunicacao/comunicados/2018/comunicado-do-conselho-geral-lawra-lda/.

[160] This was communicated to me by one of Lawra's co-founders.

[161] See https://www.lawra.com/

## 5.3 A New Player Emerges: *Jurilink*

*Jurilink,* as the name suggests, is an online intermediation platform (or two-sided platform), that allows Portuguese consumers to connect with lawyers from a wide range of fields such as "Sports Law", "Real Estate Law" or "Private International Law".[162] (Interestingly, the *Regulamento Geral das Especialidades* - the bylaws of the Portuguese Bar Association that regulate the granting of the status of "specialist Lawyer"- does not contemplate any of these fields of law).[163]

As of July 2020, the website lists 26 lawyers.[164] *Jurilink* is owned by WE LINK, S.A.S., a company headquartered in Paris,[165] whose website portfolio spans across several European countries, such as the U.K.,[166] Spain,[167] France,[168] and since April 2020: Portugal.[169]

Since this website provides precisely the same service as the Portuguese Startup *Lawra*, it will be interesting to see if the Portuguese Bar Association will act in the same manner, and if so, if *Jurilink* will appeal to the courts, or make a complaint to the Portuguese Competition Authority or to the European Commission.[170]

The decisions of the *Ordem dos Advogados* can be judicially reviewed by the Administrative Courts, according to article 6(3) of the Statutes of the Portuguese Bar Association. Besides, according to article 3 of *Lei 22/2018,* associations of undertakings are obliged to fully compensate the injured parties for the resulting damage of the infringement of competition law. *Jurilink* could also make a complaint to the Portuguese Competition Authority according to article 8 of *Lei*

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[162] See the list of fields mentioned in https://www.jurilink.pt/

[163] See *Regulamento n.º 9/2016 (Série II), de 6 de janeiro de 2016, Anexo Especialidades reconhecidas*, available at https://www.oa.pt/cd/Conteudos/Artigos/detalhe_artigo.aspx?sidc=31634&idc=490&idsc=87204

[164] See https://www.jurilink.pt/advogado/solicitador?p=1 and https://www.jurilink.pt/advogado/solicitador?p=2

[165] https://www.infogreffe.fr/entreprise-societe/838778298-we-link-750118B093510000.html?typeProduitOnglet=EXTRAIT&afficherretour=true&tab=entrep

[166] https://www.jurilink.co.uk/

[167] https://www.jurilink.es/

[168] https://www.juri-link.fr/

[169] https://www.dns.pt/pt/ferramentas/whois/detalhes/?site=jurilink&tld=.pt

[170] See "*podemos dizer que o Regulamento n.º 1/2003 confere às autoridades e aos Tribunais nacionais, grosso modo, uma competência global de aplicação de tais regras – competência essa exercida, em concorrência e respectivamente, com a Comissão e Tribunal de Justiça da União Europeia*" Pedro Madeira Froufe, "*A Aplicação dos Artigos 81º e 82º do Tratado CE: O Novo Regime Instituído pelo Regulamento (CE) nº 1/2003 do Conselho*", *in TEMAS DE INTEGRAÇÃO*, Coimbra, 1º Semestre de 2005, nº 19., p. 161 e ss, and "*Com o Regulamento (CE) n.º 1/2003 (…) passou a implementar-se um regime de aplicação imediata e direta (dito de "exceção legal") que coloca, em primeira linha, a possibilidade (e a responsabilidade) da aplicação daquelas regras do Tratado (artigos 101.º e 102.º do TFUE) na esfera das autoridades administrativas, reguladoras e tribunais nacionais. A Comissão Europeia deixou de ter o (quase) monopólio de aplicação daquelas normas.*" Pedro Madeira Froufe and José Caramelo Gomes, in *Direito da União Europeia: elementos de direito e políticas da União* (Coimbra: Almedina, 2016), p. 462

*19/2012* and to the European Commission according to Article 7 of Regulation (EC) No 1/2003. Besides, the fact that *Jurilink* is providing a cross-border information society service adds an interesting European legal dimension to this analysis, as we shall see.

### *5.3.1* *Jurilink* as an Information Society Service Provider

There are four requisites for a service to be considered an "information society service", according to the definition of Article 1 (b) of Directive 98/34 (codified by Directive 2015/1535).

It firstly must be provided "*for remuneration*".

This requirement provokes an interesting reflection. Online intermediation platforms usually do not charge consumers or business users when they are in their start-up phase.[171] Would these platforms be denied the qualification as Information Society Service Providers (ISSPs)?

According to recital 18 of the e-Commerce Directive (2000/31/EC),[172] "*information society services are not solely restricted to services giving rise to on-line contracting but also,* ***in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them****, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data*" (***my emphasis***).

Therefore, the fact that an online legal platform does not charge its users does not signify that it would not be considered an ISSP. In *Papasavvas*, the Court of Justice considered that a free online newspaper, which was paid not by its users but via advertisements, was deemed an ISSP.[173] However, in the case of an online platform that is in its start-up phase, could the strategy of not

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[171] "*Platforms kiezen er soms voor om in de opstartfase advocaten geen kosten te rekenen, bijvoorbeeld omdat zij vinden dat zij advocaten nog niet genoeg potentiële klanten te bieden hebben om geld voor hun diensten te vragen.*", Case number ACM/17/012061, 14 December 2018: https://www.acm.nl/sites/default/files/documents/2019-01/besluit-handhavingsverzoek-legal-dutch.pdf

[172] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

[173] "*In the light of the foregoing, the answer to the fourth question is that Article 2(a) of Directive 2000/31 must be interpreted as meaning that the concept of 'information society services', within the meaning of that provision, covers the provision of online information services for which the service provider is remunerated, not by the recipient, but by income generated by advertisements posted on a website.*" See Case C-291/13, *Papassavas*, EU:C:2014:2209

billing its users in the short-term, with the expectation of long-term profits (the *Freemium* business model), be considered an "*economic activity*"?

According to a study by DLA PIPER,[174] commissioned by the European Commission's Information Society and Media Directorate-General, the fact that the definition of ISS excludes services that are not "normally provided for remuneration" may create risks for freemium web services.[175]

Although the concept of "remuneration" has been interpreted by the ECJ in a rather broad manner, covering other activities, such as sport activities performed by employed persons,[176] it seems like a freemium online legal platform would not be considered an ISSP.[177]

Nevertheless, in the case of *Jurilink,* as far as it was possible to ascertain, its services are remunerated via the billing of the lawyers that are on the platform. Therefore, it is without a doubt a remunerated service.

Regarding the other three criteria stipulated by article Article 1 (b) of Directive 98/34, the provision of services must be "at a distance", i.e., "*using distance communication techniques, which are therefore characterised by the fact that the parties (i.e. the service provider and the recipient) are not physically and simultaneously present.*"[178]

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[174] DLA PIPER, "Legal analysis of a Single Market for the Information Society", November 2009, available at https://ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=835

[175] **"The fundamental definition of "information society services" excludes services that are not "normally provided for remuneration**". Depending on the interpretation, this may create uncertainty for online activities that are provided for free, depend on indirect revenue models or are provided by public authorities. **This criterion particularly risks to expose "freemium" web services to liability"** (my emphasis), in DLA PIPER, "Legal analysis of a Single Market for the Information Society", November 2009, available at https://ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=835

[176] "*Having regard to the objectives of the Community, sport is subject to Community law* ***only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*** *(now, after amendment, Article 2 EC****). That applies to the professional or semi-professional activity of judokas, provided that they are working as employed persons or providing services for remuneration*** *and that the activity is genuine and effective and not such as to be regarded as purely marginal and ancillary."* (***my emphasis***) - Joined Cases C-51/96 and C-191/97, *Deliège*, EU:C:2000:199.

[177] *Hatzopoulos* and *Roma* mention the possibility of free intermediation services being considered an economic activity due to the selling of users data. In this case this would be considered a "remuneration", according to Article 3 (1) of Directive (EU) 2019/770. However, in the case of online legal platforms, the sensibility of the users data recommends that this option is not entertained. See "*Even in the cases where the use of a platform is apparently free, it will be typically making money either from publicity or from the secondary use of the users' data. In view of the extremely large definition of remuneration accepted by the Court and the fact that remuneration may be provided by a party other than the recipient (the so called triangular situations, typically in the field of advertising and publicity), almost all collaborative platforms will qualify as service providers in the sense of Article 57 TFEU. This large vision is also confirmed in the draft "digital economy" Directives, where it is specifically stipulated that remuneration exists where "a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data".* in Hatzopoulos, V. and Roma, S. (2017), 'Caring for sharing? The collaborative economy under EU law', Common Market Law Review, 54(1), pp. 81-127.

[178] European Commission, ed., *Directive 98/34/EC: An Instrument of Co-Operation between Institutions and Enterprises to Ensure the Smooth Functioning of the Internal Market: A Guide to the Procedure for the Provision of Information in the Field of Technical Standards and Regulations and of Rules on Information Society Services* (Luxembourg: Office for Official Publications of the European Communities, 2005).

It must also be provided "by electronic means", i.e., "*services whose constituent elements are transmitted, conveyed and received within an electronic network. The service must be conveyed from its point of departure to its point of arrival by means of electronic (processing and storage) equipment and by telecommunications means.*"[179]

And finally, it must be provided "at the individual request of a recipient of services", meaning it must "*be provided via the transmission of data at an individual request*". "*This constitutes the element of interactivity which characterises Information Society services and sets them apart from other services that are sent without a request from the recipient being necessary.*", such as radio and television broadcasting.[180]

Bearing the above in mind, the intermediation provided by *Jurilink* could be regarded as an ISS. The user and the service provider are physically distant, they establish their contractual relationship via electronic means and the intermediation is individually requested by each of the users that visit the platform.

However, even if *Jurilink* fulfils the aforementioned requisites, the concept of "information society service" is a broad but not an unlimited category.[181] [182] As we have seen with the *Uber-France* case,[183] [184] [185] online intermediation services provided by a platform might be considered ancillary to other main services. If that is the case, the intermediation services are absorbed by the

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[179] European Commission, ed., *Directive 98/34/EC: An Instrument of Co-Operation between Institutions and Enterprises to Ensure the Smooth Functioning of the Internal Market…*

[180] European Commission, ed., *Directive 98/34/EC: An Instrument of Co-Operation between Institutions and Enterprises to Ensure the Smooth Functioning of the Internal Market…*

[181] Centre on Regulation In Europe, "*Liability of Online Hosting Platforms. Should Exceptionalism End?*", available at https://www.cerre.eu/sites/cerre/files/180912_CERRE_LiabilityPlatforms_Final_0.pdf

[182] "30. *However, as the parties and the other interested parties involved in the present proceedings submit, the Court has held that, although an intermediation service which satisfies all of those conditions, in principle, constitutes a service distinct from the subsequent service to which it relates and must therefore be classified as an 'information society service', that cannot be the case if it appears that that intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification*" Case C-390/18, Airbnb Ireland, ECLI:EU:C:2019:1112

[183] Case C-320/16 *Uber France*, ECLI:EU:C:2018:221.

[184] "*The cases involving Uber in the CJEU had these questions at heart. Uber claimed to be an information society service provider according to the definition of Directive 98/34 (codified by Directive 2015/1535), that is, a service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service*" in Enes, G. (2019). Digital platforms and European Union law - challenges from a perspective of multilevel constitutionalism. *UNIO - EU Law Journal*, *5*(1), 16-39. https://doi.org/10.21814/unio.5.1.248

[185] "*Second, and more importantly, the CJEU underlines that Uber determines the maximum fare, receives the payment from the passengers which is partly transferred to the driver and partly kept by Uber as remuneration for the use of digital platform, and Uber exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can result in an exclusion of the driver from Uber's platform. Therefore, the CJEU concludes that Uber 'exercises decisive influence over the conditions under which that service is provided by those drivers'. As a consequence, according to the CJEU the service provided by Uber must be regarded 'as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as an information society service'*", in C. Busch, *The Sharing Economy at the CJEU: Does Airbnb pass the 'Uber test'?*, in *Journal of European Consumer and Market Law*, 2018, p. 172 *et seq.*

main services to which they are an accessory.[186] In the case of *Uber*, it was considered as being not an ISSP, but a *transport service*.[187]

The Court of Justice came to this conclusion due to two conditions:

- The "*company provided an application without which those drivers would not have been led to provide transport services and the persons who wished to make an urban journey would not have used the services provided by those drivers"* and
- The "*company exercised decisive influence over the conditions under which services were provided by those drivers inter alia by determining the maximum fare, by collecting that fare from the customer before paying part of it to the non-professional driver of the vehicle, and by exercising a certain control over the quality of the vehicles, the drivers and their conduct, which could, in some circumstances, result in their exclusion"*[188]

On the other hand, in *Airbnb Ireland,* the Court decided that since *Airbnb* did not set or cap "*the amount of the rents charged by the hosts using that platform*", only providing users "*with an optional tool for estimating their rental price (...) leaving responsibility for setting the rent to the host alone*",[189] it was an ISSP.[190]

Bearing this in mind, if an online platform limits itself to an intermediary role, it will be considered an ISSP. Therefore, *Jurilink* – at least for the time being – could be considered an ISSP. However, if this platform starts exercising a "*decisive influence*" over the conditions under which the services are provided, such as assigning the lawyers to consumers in a binding manner or

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[186] Centre on Regulation In Europe, "*Liability of Online Hosting Platforms. Should Exceptionalism End…*

[187] "*22. The Court found, on the basis of those factors, that the intermediation service at issue in that case had to be regarded as forming an integral part of an overall service the main component of which was a transport service and, accordingly, had to be classified, not as an «information society service»*", in Case C-320/16 *Uber France*, ECLI:EU:C:2018:221.

[188] Case C-320/16 *Uber France*, ECLI:EU:C:2018:221., p. 21.

[189] *"Finally, it is not apparent, either from the order for reference or from the information in the file before the Court, that Airbnb Ireland sets or caps the amount of the rents charged by the hosts using that platform. At most, it provides them with an optional tool for estimating their rental price having regard to the market averages taken from that platform, leaving responsibility for setting the rent to the host alone."* Case C-390/18, *Airbnb Ireland*, ECLI:EU:C:2019:1112, p. 56

[190] *"As such, it follows that an intermediation service such as the one provided by Airbnb Ireland cannot be regarded as forming an integral part of an overall service, the main component of which is the provision of accommodation."* And "*Even taken together, the services, optional or otherwise, provided by Airbnb Ireland and referred to in paragraphs 59 to 63 above, do not call into question the separate nature of the intermediation service provided by that company and therefore its classification as an 'information society service', since they do not substantially modify the specific characteristics of that service. In that regard, it is also paradoxical that such added-value ancillary services provided by an electronic platform to its customers, in particular to distinguish itself from its competitors, may, in the absence of additional elements, result in the nature and therefore the legal classification of that platform's activity being modified, as was observed by the Advocate General in point 46 of his Opinion."* Case C-390/18, *Airbnb Ireland*, ECLI:EU:C:2019:1112, p. 57

setting up the prices consumers must pay, then it could be considered as a *legal service.*[191] If the ISSP is based in a European jurisdiction where the provision of legal services is heavily regulated – such as Portugal – it could find itself in a difficult position.[192]

Compliance with the deontological principle of the free-choice of lawyer[193] has thus an added importance for online legal platforms.

### 5.3.2 e-Commerce Directive Internal Market Clause

In the light of the foregoing, *Jurilink* may benefit from the *"Internal Market Clause"* established in article 3 and 4 of the e-Commerce Directive.[194]

This clause establishes two complementary rules. On the one hand, a Member State must ensure that the provider that is established in its territory complies with its national provisions. On the other hand, the other Member States may not restrict the freedom to provide information society services from another Member State.[195] The only exceptions Member States may use are exceptional circumstances related to public policy, health, security or protection of consumers and investors.[196]

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[191] "*The matters mentioned by the referring court and recalled in paragraph 19 above do not establish that Airbnb Ireland exercises such* ***a decisive influence*** *over the conditions for the provision of the accommodation services to which its intermediation service relates, particularly since Airbnb Ireland does not determine, directly or indirectly, the rental price charged, as was established in paragraphs 56 and 62 above, still less does it select the hosts or the accommodation put up for rent on its platform."* (my emphasis), in Case C-390/18, *Airbnb Ireland*, ECLI:EU:C:2019:1112, p. 68

See also, *"**When they intervene establishing conditions to the lawyer-client relationship**, **such as fees or working hours, they become a contractual party face the end-user and as an employer face the lawyer whose services the former has been hired. In this case, the doctrine emanating from the leading case in Europe, about these platforms, which, as is known, is the case of Uber facing the Professional Association of Elite taxis**, which resulted in the decision of the European Court of Justice of 20 of December **2017 should be applied. In this sense, one can consider that its provision goes beyond brokerage since they provided the legal services required by the end-user**."* (my emphasis) In Navas, S. (2019) The Provision of Legal Services to Consumers Using LawTech Tools: From "Service" to "Legal Product". Open Journal of Social Sciences, 7, 79-103. doi: 10.4236/jss.2019.711007.

[192] This is, of course, if the legal services being provided are not ISS (at a distance and by electronic means).

[193] Article 67(2) of the *Estatuto da Ordem dos Advogados.* Also Article 1170(1) of the Portuguese Civil Code (*a contrario*).

[194] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

[195] "*The borderless nature of e-commerce required that the legal framework put in place for its operation had to provide legal certainty to both business and consumers. This legal certainty is brought about, along with other flanking measures, by the core feature of the Directive, the Internal Market clause. This provision takes the form of two complementary features: each Member State must ensure that a provider of information society services established on its territory complies with the national provisions applicable in that Member State which fall within the "coordinated field" [36], even when he provides services in another Member State; in turn, Member States may not, for reasons falling within the co-ordinated field, restrict the freedom to provide information society services from another Member State.*" See European Commission, "Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)" available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52003DC0702.

[196] Article 4 Directive 2000/31/EC

The e-commerce Directive is seen as "*lex specialis*", a concretization of the freedom to provide services established in article 56 of the TFUE. It narrows the restrictions that Member States may establish to the provision of ISS.[197] In contrast to the Services Directive, the list of possible restrictions is exhaustive.[198] Therefore, ISSPs benefit from an increased freedom of services.

*Jurilink* is free to provide its services across-borders, while being only covered by the national rules of the Member State in which it is established (the home state/country of origin principle).[199]

But where could we consider *Jurilink* to be established? Article 2 (c) of the Directive states that an "*established service provider*" is an "*a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period.*"

Recital 19 of the Directive adds that "*the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.".*

As we have previously said, *Jurilink* is owned by *WE LINK,* a company headquartered in Paris, France. Therefore, even though *WE LINK* has offices in Portugal,[200] we can consider its main economic activity as being situated in France.

Consequently, *Jurilink* must abide by the rules of its home Member State, France, while having the freedom to provide its services to Portuguese consumers.

If the Portuguese Bar Association were to prohibit *Jurilink* from providing its services in a way not related to the protection of public policy, health, security or protection of consumers and

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[197] *"La Directiva 2000/31/CE construye sobre el régimen de libre prestación de servicios establecido en el artículo 56 TFUE el marco especial de libre prestación de servicios de la sociedade de la información (lex specialis). Así, limita las restricciones que el Estado receptor puede imponer a la libre prestación de servicios desde el Estado de establiciemento" "De este modo, el Derecho europeo limita decisivamente la capacidade del Estado receptor de restringir la libertad de prestación de servicios de la sociedad de la información desde otro Estado,* in Moisés Barrio Andrés, *Manual de derecho digital*, 2020, p. 117

[198] "*La principal especificidade de la DCE es que fija una lista cerrada de motivos que pueden justificar una excepción al principio de libre prestación de servicios, frente a la falta de tal lista cerrada en la Directiva 2006/123/CE*" . *in* Moisés Barrio Andrés, *Manual de derecho digital*, 2020, p. 117

[199] "***Regarding market access, the e-Commerce Directive lays down two important principles: (a) the "country of origin" principle*** *and, (b) the principle of "exclusion of prior authorisation*" **(my emphasis)**, in Oliveira, Piedade Costa de. 2019. "Digital Single Market: Electronic Commerce and Collaborative Economy" . *UNIO - EU Law Journal* 5 (2):4-14. https://doi.org/10.21814/unio.5.2.2288.

[200] See "WeLink PORTUGAL Rua São Bento n31 1200-815 Lisboa" https://www.we-link.io/contact/

investors, that could be considered not only a breach of competition law, but also of the freedom of services provided by the e-commerce Directive and the national law that transposed this Directive.[201]

Since *Jurilink* is not providing a *reserved activity*, i.e., an activity where a certain professional has a professional monopoly, it benefits from a great degree of freedom. As we shall see in chapter 7.1, when an ISSP is taking up a reserved activity, some other legal issues may arise.[202]

[201] *DL n.º 7/2004, de 07 de Janeiro, Comércio Electrónico No Mercado Interno E Tratatamento De Dados Pessoais*

[202] "*For example, where legal advice is a reserved activity, no service provider is allowed to give advice or draft private deeds for others on a regular basis and for remuneration unless he is a lawyer, irrespective of whether the advice is given face-to-face or through a collaborative platform.*" , in

[202] Council of Bars & Law Societies of Europe, *"CCBE GUIDE on Lawyers' use of online legal platforms...*

# 6 Ordem dos Advogados'[203] Prohibition of Online Platforms of Lawyers in the light of European Competition Law.

## 6.1 The *Ordem dos Advogados* as an "association of undertakings"

Bearing in mind the aforementioned decisions by the *Ordem dos Advogados,* one must analyse them through the prism of the relevant legal provisions regarding bar associations and antitrust rules.

Article 101 of TFEU stipulates that "*the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*"

Lawyers exercise a liberal profession, since their activity is of an intellectual nature and its practice requires authorization and compliance with certain conditions.

However, this characteristic does not exclude lawyers and the corresponding professional associations from compliance with European competition laws.

As ruled in the Case C-35/96 - *Commission* v *Italy*,[204] the European Court of Justice affirms that liberal practitioners are considered "*undertakings*", since *"the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*"[205] and that "*any activity consisting in offering goods and services on a given market is an economic activity".*[206]

Simultaneously, the Court ruled that the public law status of a professional association does not exclude it from being considered an "*association of undertakings*".[207]

Therefore, the public law status[208] of the *Ordem dos Advogados* is considered irrelevant for the present research and, insofar, in matters under the EU law's scope of application.

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[203] Portuguese Bar Association

[204] Judgment of the Court (Fifth Chamber) of 18 June 1998, *Commission of the European Communities v Italian Republic*, Case C-35/96. ECLI:EU:C:1998:303.

[205] Case C-35/96 , par. 36 to 38.

[206] Case C-35/96 .

[207] "the public law status of a national body such as the CNSD does not preclude the application of Article 85 of the Treaty." See Case C-35/96 , par. 40; and also Judgment of the Court of 12 September 2000, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, par. 85, "Suffice it to say in this regard that the fact that a professional organisation is governed by a public-law statute does not preclude the application of Article 85 of the Treaty."

[208] Art. 1 (2) of the *Estatuto da Ordem dos Advogados, Lei* n.º 145/2015.

According to the Court's case law, professional associations are only exempt from complying with competition rules if:[209]

a) Its governing bodies are constituted by "experts who are independent of the economic operators concerned",[210] or by "representatives of the public authorities"[211] - the *personal requisite*;

And

b) if they are required under the law to take into account not only the interests of the undertakings they regulate, but also the public interest and the interests of undertakings in other sectors or users of the services in question[212] and if the State "retains its power to adopt decisions in the last resort"[213] – the *legal requisite*.

In the case of the *Ordem dos Advogados*, the fulfillment of these requirements is immediately precluded, since the Portuguese Constitution - *Constituição da República Portuguesa* - defines public associations as belonging to the "autonomous state administration".[214]

Consequently, the governing bodies of these institutions are democratically formed from its own members,[215] without the presence of public officials.

In the case of the Portuguese Bar Association, its governing bodies are constituted exclusively by members of the profession - as stipulated in article 11 of the E.O.A., *"Only lawyers with registration in force and in full exercise of their rights may be elected or appointed to anybody of the Order.*"[216]

This means that besides the absence of public officials, the governing bodies of the *Ordem dos Advogados* cannot be considered as comprised of "*independent experts*". In these cases, it can be presumed that governing bodies take greater account of the interests of the profession, than the public interest.[217]

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[209] See Sérvulo Correia, "Autoridade da Concorrência e Ordens Profissionais" in *Boletim da Ordem dos Advogados*, N.° 43, par. 3. available at https://www.servulo.com/pt/investigacao-e-conhecimento/Autoridade-da-Concorrncia-e-Ordens-Profissionais/2102/

[210] Judgment of the Court of 19 February 2002. Criminal proceedings against Manuele Arduino, third parties: Diego Dessi, Giovanni Bertolotto and Compagnia Assicuratrice RAS SpA. Case C-35/99. ECLI:EU:C:2002:97, par. 37. Also Judgment of the Court of 17 November 1993. Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG. Case C-185/91. ECLI:EU:C:1993:886. Par. 16 to 20. Also Judgment of the Court (Second Chamber) of 17 October 1995. DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chiogga. Joined cases C-140/94, C-141/94 and C-142/94. ECLI:EU:C:1995:330. Par. 18 and 19.

[211] Judgment of the Court (Sixth Chamber) of 5 October 1995. Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl. Case C-96/94. Par. 23 to 25. Also, Judgment of the Court (Second Chamber), 28 February 2013. Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência. Case C-1/12. ECLI:EU:C:2013:127. Par. 47.

[212] Judgment of the Court of 17 November 1993. - Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG. Case C-185/91. ECLI:EU:C:1993:886. Par. 18 and 24.

[213] Judgment Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap. Case C-309/99. ECLI:EU:C:2002:98. Par. 68.

[214] Article 199(d) of *Constituição da República Portuguesa*. See also Sérvulo Correia, "Autoridade da Concorrência e... par. 3.

[215] Article 267(4) of *Constituição da República Portuguesa.*

[216] Free translation from "Só podem ser eleitos ou designados para quaisquer órgãos da Ordem os advogados com inscrição em vigor e no pleno exercício dos seus direitos.".

[217] AG Jacobs. Cases C-67/96 etc., Albany/Brentjens'/Drijvende Bokken, [1999], par. 184.

Regarding the *legal requisite*, the "autonomous state administration" is defined as "*the set of administrative entities that not only differ from the State in that they have their own legal characterization, being distinct legal entities, but also in so far as they carry out, in the powers in which they are invested****, the pursuit of purposes that are freely established and interpreted from the corresponding substrates.***"[218] (***my emphasis***).

The *Ordem dos Advogados* freely pursuits the purposes to which it was constituted, with the State not controlling the merit of the decisions, enforcing only a legal control.

In addition, while the statutes and national law regarding professional associations may mention the public interest,[219] this general reference is not sufficient to fulfil this *legal requisite*, since "*the Court requires national legislation to foresee procedural arrangements and substantive requirements capable of ensuring, with reasonable probability, that a self-regulatory body conducts itself like an arm of the State working in the public interest*"[220] which does not seem to be the case, since, as said, professional associations are only controlled as to the legality of their acts.[221]

Only in extreme cases can the public interest demand the expropriation of statutory autonomy, with the State replacing the association in its ability to prepare and approve its statutes.[222]

Bearing this in mind, this *legal requisite* does not seem to be fulfilled; therefore, *Ordem dos Advogados* is considered an "association of undertakings", for the purpose of article 101.

This norm is drafted to include associations of undertakings so as to cover conduct that may have similar effects on competition, even if it does not originate from direct collusion between a multitude of undertakings.[223]

Besides, the Court has affirmed that "*it cannot be accepted that rules which organise the exercise of a profession fall as a matter of principle outside the scope of Article 81(1) EC (now*

[218] Free translation from "*a Administração Autónoma do Estado: o conjunto das entidades administrativas que não apenas se distinguem do Estado por ostentarem uma caracterização jurídica própria, sendo pessoas colectivas distintas, mas também na medida em que levam a cabo, nos poderes em que ficam investidas, a prossecução de fins que são estabelecidos e interpretados livremente a partir dos correspondentes substratos.*", in Bacelar Gouveia, Jorge "As Associações Públicas Profissionais no Direito Português", Lisbon, 16 October 2000, https://portal.oa.pt/media/117223/jbg_ma_14420.pdf.

[219] Article 3(a)(b)(h)(i) of the *Estatuto da Ordem dos Advogados, Lei* n.º 145/2015; and article 2, 3(1)(a) of *Lei* n.º 2/2013, 10 January.

[220] Wendt, Ida E. "EU Competition Law and Liberal Professions: an Uneasy Relationship?" (Nijhoff Studies in European Union Law). Martinus Nijhoff, 2012. Page 220.

[221] Only the regulations that deal with professional internships, the access to the profession and professional specialties are controlled by a member of government, but are considered authorized if there is no decision to the contrary within 90 days – See Article 45(5) of *Lei* 2/2013.

[222] J.J. Gomes Canotilho and Vital Moreira, "Constituição da República Portuguesa Anotada", Coimbra Editora, 4th Edition, Pg. 811. Nevertheless, this possibility seems to be limited to the statutory autonomy of the association, while the prohibition of anti-trust behavior is not limited to hard-law, such as statutes and the enforcement of disciplinary power, but also covers decisions that produce a *de facto* influence on the member undertakings.

[223] Wendt, Ida E. "EU Competition Law and Liberal Professions... Page 185.

*101[1] TFEU) merely because they are classified as «rules of professional conduct» by the competent bodies.*"[224]

## 6.2 The Opinion of the *Ordem dos Advogados* as a "decision by an association of undertakings"

Thirdly, the question that arises is whether the prohibition imposed by the Regional Councils of the *Ordem dos Advogados* constitutes a "*decision by an association of undertakings*", for the purposes of article 101 TFEU.

The concept of a decision is interpreted as "*vertical measures that are adopted by a collective body (...) to which the members conform.*",[225] as long as they are "*determinative for the market conduct of its member undertakings.*"[226]

Since the defining characteristic of a *decision* is its influencing capacity, it does not have to be formally binding[227] and can manifest itself in the form of recommendation.

As stated in the Commission's Antitrust Case *v. the Belgian Architects' Association*, "*According to the case law of the Court, an act described as a recommendation may be contrary to Article 81, whatever its legal status, if it constitutes the faithful reflection of a resolve on the part of an association of undertakings to coordinate the conduct of its members' on the market in accordance with the terms of the recommendation.*"[228]

In the case in point, even if the Opinions of the *Ordem dos Advogados* are interpreted as being non-bin ding, they produce a *de facto* influence on the behaviour of the members of the association, since they are informed that their presence on two-sided platforms is, without further ado, a disciplinary offense – having the *OA* the power to enforce disciplinary action.

Therefore, these acts are considered as a decision by an association of undertakings.

Regarding the press release issued by the O.A. that prohibited the *Lawra* platform, the *chilling effect* it produced on the platform and its users is considered in my view as a decision, since it influenced the conduct of the member undertakings.

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[224] Judgment of the Court of First Instance (Second Chamber) of 28 March 2001. *Institute of Professional Representatives before the European Patent Office v Commission of the European Communities.* Case T-144/99. Par. 64.

[225] Wendt, Ida E. "EU Competition Law and Liberal Professions..." page 191.

[226] Wendt, "'EU Competition Law and Liberal Professions... " page 193.

[227] Wendt , "EU Competition Law and Liberal Professions..." page 195.

[228] European Commission, *"Commission Decision of 24 June 2004 relating to a proceeding under Article 81 of the EC Treaty"*, Brussels, 24 June 2004, COMP/38.549, Par 64.

### 6.3 OA's Opinion "may affect trade between Member States"

Regarding the notion of "*may affect*", it implies that "*it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may haven an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.*"[229]

It is not necessary that the decision has, or has had, an effect on trade between Member States. This criterion is accomplished if the decision is merely "capable" of having said effect.[230]

Regarding the requirement that these decisions "*affects trade between Member States*", this criterion is already accomplished if the practice extends over the whole territory of a Member State, since it reinforces "*the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about*".[231]

Since the Opinions of the *OA* and the statement released regarding *Lawra*, influenced the conduct of all of the members of the Bar Association, whose practice extends beyond the borders of the Member State; to clients regardless of whether are established domestically or in another Member State[232], and also to visiting members of the profession who are registered in another Member State[233], it can be considered as affecting trade between Member States.

### 6.4OA's Opinion having as an "object or effect the prevention, restriction or distortion of competition within the internal market"

Lastly, does this practice have as "*object or effect the prevention, restriction or distortion of competition within the internal market*"?

[229] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, Official Journal C 101 , 27/04/2004 P. 0065 – 0077, paragraph 23.

[230] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, Official Journal C 101 , 27/04/2004 P. 0065 – 0077, paragraph 26

[231] Judgment of the Court of 19 February 2002. J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap. Case C-309/99. Par. 95. See also Wendt, Ida E. "EU Competition Law and Liberal Professions... page 157. And "*In that regard, it should be borne in mind that practices restricting competition which extend over the whole territory of a Member State have, by their very nature, the effect of reinforcing compartmentalization of national markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about (Vereniging van Cementhandelaren v Commission, cited above, paragraph 29, Remia and Others v Commission, cited above, paragraph 22, and Case T-29/92 SPO and Others v Commission [1995] ECR II-289, paragraph 229).",* in Joined Cases T-213/95 and T-18/96.

[232] Wendt, Ida E. "EU Competition Law and Liberal Professions... Page 162.

[233] Council Directive 77/249/EEC of 22 March 1977, article 4 (4). And Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998, article 7.

Since the Opinion of the *O.A.* intends to prohibit its member undertakings from participating in two-sided platforms, it seems that its objective is indeed the restriction of its members' professional practice.

On the other hand, it can also be argued that the conduct of the O.A. produced an anti-competitive effect on the internal market economy, since two-sided platforms would allow clients to easily access information related to potential service providers.

As stated in Regulation 2019/1150, intermediation platforms *"are key enablers of entrepreneurship and new business models (...) can also improve consumer welfare (...) They offer access to new markets and commercial opportunities allowing undertakings to exploit the benefits of the internal market. They allow consumers in the Union to exploit those benefits, in particular by increasing their choice of goods and services".*[234] With the aforementioned prohibitions, the OA is denying Portuguese legal consumers the access to an increased market of legal service providers.

This nefarious effect was particularly noticeable on the legal platform *Lawra,* which closed after the statement produced by the OA.

In addition, bearing in mind the existence of these kind of platforms in countries such as neighbours Spain, France, the Netherlands, Germany and the UK, it can also be argued that this prohibition increases the cost and complexity for foreign clients who seek professional services from across the border, and thus affects "the provision of services *out of* the territory on which the professional is established".[235]

Now, as stated by the European Commission, professional regulation rules "*must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective*"[236] - they must pass the so-called "*proportionality test*" - the effects restrictive of competition must not go beyond what is necessary in order to ensure the proper practice of the profession.[237]

In the case in hands, it can be argued that the Bar Association could have used other mechanisms instead of a total prohibition – such as the regulation of these platforms.

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[234] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, Recital 1

[235] Wendt, Ida E. "EU Competition Law and Liberal Professions... Page 163.

[236] European Commission, "Report on Competition in Professional Services", COM/2004/0083 final, 09/02/2004, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52004DC0083.

[237] European Commission, "Report on Competition in Professional Services".. .

Since "*according to article 3 of Regulation 1/2003 national competition authorities and courts are obliged to apply the EU competition rules where the jurisdictional criterion for their application is fulfilled*";[238] and bearing in mind the supremacy of EU law, if this prohibition were to be challenged before the administrative courts, as permitted by article 6 (3) of the E.O.A., the national courts would have to take these rules into consideration.

On the other hand, the national competition authority - the *Autoridade da Concorrência*[239] - is also obliged to apply these rules. The AdC has a parallel competence for the application of articles 101 and 102 of the TFUE, shared with the Commission.[240]

Since the introduction of *Lei* 19/2012, which mimics European standards,[241] the question of jurisdiction of European law is not as relevant.

However, the above analysis is relevant insofar as it clarifies the meaning of the rules now present in national law. In fact, this conduct could even be more easily considered a violation of competition rules under national law, since its parameter is simply part or all of the "national market", instead of the single European market.

In sum, a total ban on "*The registration of a lawyer on a platform that promotes contact between lawyers and clients*"[242] as decided by the *OA* seems to constitute a decision that excessively restricts the practice of the profession, and thus, could be considered as a breach of competition law.

Bearing in mind that Article 101 TFEU "*produces direct effects in relations between individuals and creates, for the individuals concerned, rights and obligations which national courts must enforce*"[243], that anyone "*can claim compensation before national courts for the harm caused*

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[238] Wendt, Ida E. "EU Competition Law and Liberal Professions... Page 170.

[239] Article 5 of *Lei* n.º 19/2012, 8 of May.

[240] See "*podemos dizer que o Regulamento n.º 1/2003 confere às autoridades e aos Tribunais nacionais, grosso modo, uma competência global de aplicação de tais regras – competência essa exercida, em concorrência e respectivamente, com a Comissão e Tribunal de Justiça da União Europeia*" Pedro Madeira Froufe, "*A Aplicação dos Artigos 81º e 82º do Tratado CE: O Novo Regime Instituído pelo Regulamento (CE) nº 1/2003 do Conselho*", *in TEMAS DE INTEGRAÇÃO*, Coimbra, 1º Semestre de 2005, nº 19., p. 161 e ss, and "*Com o Regulamento (CE) n.º 1/2003 (…) passou a implementar-se um regime de aplicação imediata e direta (dito de "exceção legal") que coloca, em primeira linha, a possibilidade (e a responsabilidade) da aplicação daquelas regras do Tratado (artigos 101.º e 102.º do TFUE) na esfera das autoridades administrativas, reguladoras e tribunais nacionais. A Comissão Europeia deixou de ter o (quase) monopólio de aplicação daquelas normas.*" Pedro Madeira Froufe and José Caramelo Gomes, in *Direito da União Europeia: elementos de direito e políticas da União* (Coimbra: Almedina, 2016), p. 462

[241] Article 12 of the mentioned Law states that: "Agreements between undertakings, concerted practices between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition in all or part of the national market, and in particular those which consist of ..."

[242] Conselho Regional do Porto, Parecer Nº 6/PP/2017-P, 16 February 2017. Available at https://www.oa.pt/upl/%7B7e01641a-6cce-4f8c-8425-e854b727f0ff%7D.pdf .

[243] Recital 3 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance

*to them by an infringement of those provisions"*,[244] and that *Lei n.º 23/2018* – which transposed Directive 2014/104/EU - states that an association of undertakings is liable to fully compensate the injured parties for the damages resulting from such infringement, in accordance with Article 483 of the Portuguese Civil Code,[245] the *Ordem dos Advogados* may be liable for damages arising from the aforementioned decisions.

## 6.5 The Position of other European Bar Associations

At a European level, the response of professional associations to online legal platforms has been very different from that of *Ordem dos Advogados*.

In France, the Regulation of the *Conseil National des Barreaux*[246] has been amended to include a new title, called *Prestations Juridiques En Ligne.*

Some of the rules to be observed are the following: the service provided should be personalized to the client;[247] the lawyer should seek to know his identity, due, for example, to potential conflicts of interest[248]; the lawyer should always be identifiable[249], it should always be possible to establish a personal and direct relationship with the user[250] and the lawyer's payment to the platform should be a fixed amount, not related to the client's fees he receives through the platform.[251]

But the CNB did not stop here and, in 2016, launched its own directory[252]: avocat.fr, where it is possible to search for lawyers according to their specialization and languages spoken.[253]

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[244] Recital 3 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance

[245] Article 3 (1) of *Lei n.º 23/2018*: "*A empresa ou associação de empresas que cometer uma infração ao direito da concorrência fica obrigada a indemnizar integralmente os lesados pelos danos resultantes de tal infração, nos termos previstos no artigo 483.º do Código Civil.*"

[246] *Réglement Intérieur National de la profession d'avocat*, available at https://www.cnb.avocat.fr/fr/reglement-interieur-national-de-la-profession-davocat-rin

[247] "La fourniture par transmission électronique de prestations juridiques par un avocat suppose l'existence d'un service personnalisé au client." Article 19(1).

[248] "il lui appartient de s'assurer de l'identité et des caractéristiques de la personne à laquelle il répond, afin de respecter le secret professionnel, d'éviter le conflit d'intérêts" Article 19(2).

[249] "L'avocat qui répond doit toujours être identifiable". Article 19(2).

[250] "l'avocat qui fournit des prestations juridiques en ligne doit toujours être en mesure d'entrer personnellement et directement en relation avec l'internaute." Article 19(3).

[251] "L'avocat inscrit sur un site Internet ou une plateforme en ligne de référencement ou de mise en relation peut être amené à participer de façon forfaitaire aux frais de fonctionnement de ce site ou de cette plateforme, à l'exclusion de toute rémunération établie en fonction des honoraires que l'avocat perçoit des clients avec lesquels le site ou la plateforme l'a mis en relation."

[252] https://www.cnb.avocat.fr/fr/actualites/la-plateforme-de-consultation-avocatfr-fete-son-premier-anniversaire-et-ses-bons-resultats

[253] http://avocat.fr/annuaire-des-avocats-de-france

In the UK, the Solicitors Regulation Authority found that the provision of legal services online did not require new rules: deontological duties apply regardless of the medium used. The duty of confidentiality, for example, applies to both an email and a letter or conversation.[254]

In the Netherlands, as we shall see in chapter 6.2, *De Orde van Advocaten* has presented a detailed explanation of which rules intermediation platforms have to comply with in order to be allowed under the *Gedragsregels Advocatuur*.[255]

The *Consejo General de la Abogacía Española* is drawing up a specific code of conduct for these platforms, on the basis of which it will certify platforms that comply with ethical rules.[256] And the *Colegio de Abogados de Madrid* will begin this year to organize a forum called *Abogacía 4.0*, to discuss the technological changes that are revolutionizing the sector.[257]

As we can see, it appears that European professional associations share a common vision: despite the challenges posed by online platforms for lawyers, they must not be banned but regulated.

[254] "Our regulation is based on the outcomes that firms achieve, not on the tools that firms use to meet them. The duty of confidentiality, for instance, applies to an email just as it applies to a letter or conversation." In https://www.sra.org.uk/sra/how-we-work/reports/technology-legal-services.page

[255] See Nederlandse orde van advocaten, Code of Conduct 2018, available at https://www.advocatenorde.nl/document/nova-code-of-conduct-gedragsregels-2018

[256] "el CGAE trabaja en ese sentido. «Estamos trabajando en un código de conducta y, quien se adhiera, contará con un sello de cumplimiento que aportará confianza en sus servicios»", in See Pedro Del Rosal, "*La 'uberización' llega al mundo del Derecho*...

[257] https://www.abogacia.es/2018/11/20/nace-abogacia-4-0-el-nuevo-foro-tecnologico-del-icam/

# 7 Relevant Case Law

## 7.1 Decision from the Bundesgerichtshof (German Federal Court of Justice) on online legal platform Wenigermiete

Berlin based platform *Wenigermiete.de* presents itself as the "*Guardian of tenants' rights",*[258] a website where tenants can find legal information concerning the termination of rental contracts, cosmetic repairs and specific issues such as rent control (*Mietpreisbremse).*[259]

The website offers an online calculator in which users can check whether their rent is above the legally prescribed rent limit.

If so, the website allows the tenant to transfer his rights to the company (§ 398 BGB) which then requests information from the landlord and reclaims the excessive payments. A special feature of the business model is that the tenant does not have to pay the service if no repayment is enforceable. In the event of success, the company retains one third of the annual rent saved.[260]

*Wenigermiete.de* is owned by *Lexfox*, a limited liability company domiciled in Berlin and registered with the Berlin Court of Appeal as a legal service provider for debt collection services.[261]

Besides *wenigermiete.*de ¸ *Lexfox* owns the online portals *weniger-internetkosten.de*, which gives web users the option to easily terminate their contract with their Internet Service Provider if their internet speed is lagging behind and demand the corresponding contractual compensation under EU Regulation 2015/2120,[262] and also the portal *mehrabfindung.de,* that provides analysis on the termination of employment contracts and demands a severance payment from the employer.[263]

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[258] https://www.wenigermiete.de/about_us

[259] https://www.wenigermiete.de/about_us

[260] *"Als Vergütung ("Provision") erhält die Klägerin nach ihren Allgemeinen Geschäftsbedingungen im Falle des Erfolges ihrer außergerichtlichen Bemü-hungen einen Anteil an der erreichten Mietrückzahlung in Höhe eines Drittels "der ersparten Jahresmiete", mithin die "Ersparnis für 4 Monate*"", par. 5 VIII ZR 285/18

[261] "*Die Klägerin ("Lexfox") ist eine Gesellschaft mit beschränkter Haftung mit Sitz in Berlin, die beim Kammergericht Berlin als Rechtsdienstleisterin für Inkassodienstleistungen registriert ist (§ 10 Abs. 1 Satz 1 Nr. 1 RDG).*" Accessed December 19, 2019. http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=57287326cd9c702a6e5aeb8b6b12475a&nr=92946&linked=pm&Blank=1.

[262] https://www.weniger-internetkosten.de/

[263] https://www.mehrabfindung.de/en

*Lexfox* has already received funding from venture capitalist companies, *TargetGlobal* and *EarlyBird*.[264]

The *Bundesgerichtshof* was called into question whether *Wenigermiete* was compliant with the rules stipulated by the *Rechtsdienstleistungsgesetz* (Act on Out-of-Court Legal Services).[265]

The *Rechtsdienstleistungsgesetz* allows for the delivery of legal services by registered entities in the fields of debt collection, pension services and foreign law.[266]

In the case of debt collection, the registered entity must have special expertise in the in the fields of law which are important for the collection activity for which an application is being made, in particular in civil law, commercial, securities and company law, the law of civil procedure, including debt recovery and insolvency law, as well as cost law.[267]

These entities can be natural or legal persons.[268]

In the case of legal persons, they must designate one natural person who fulfils all the aforementioned conditions, who must be permanently employed by the company, must be capable of acting independently and of issuing instructions on all matters concerning the company's legal services, and must be authorised to represent the company externally, called "*qualified persons*".[269]

This possibility constitutes a stark difference from the Portuguese legal system, where, as stated in article 6 of *Lei* 49/2004, only legal persons that are "*composed exclusively of lawyers, solicitors or lawyers and solicitors*" or law firms, are allowed to provide legal advice or negotiate the recovery of debts.

In practice, the entities allowed by Germany's RDG constitute true "multidisciplinary practices", since only one of their members is required to have legal qualifications.[270]

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[264] GmbH, LexFox. "LexFox' Series A Round: Earlybird and Target Globals First Major B2C Legaltech Investment." wenigermiete.de. Accessed February 4, 2020. https://www.wenigermiete.de/lexfox-wenigermiete-round-of-financing.

[265] The English version of the RDG, provided by the German Ministry of Justice, is available in https://www.gesetze-im-internet.de/englisch_rdg/englisch_rdg.pdf

[266] § 10 sentence 1 RDG

[267] § 10 sentence 1 RDG

[268] § 10 sentence 1 RDG

[269] "*Legal persons and companies without legal personality must designate at least* ***one natural person who fulfils all the conditions as required by subsection (1) no. 1 and no. 2 (qualified person).*** *The qualified person must be in the permanent employ of the company, must be capable of acting independently and issuing instructions on all matters concerning the company's legal services, and must be authorised to represent the company externally. Registered private individuals may designate qualified persons.*" (my emphasis) § 12 (4) RDG

[270] "***Are alternative legal service providers common?*** *If so, to what restrictions are they subject, if any?* ***Traditionally, the provision of legal services is reserved for lawyers. However, legal services may be provided as a supplementary service to another main profession (section 5, Legal Services Act (Rechtsdienstleistungsgesetz)).*** *This includes, for example, legal advice provided by insurance advisers related to legal aspects of insurance, or by banks related to investment management issues. In addition,* ***section 2 subsection 2 of the Legal Services Act allows for the collection of debts (Inkasso) as legal services."*** (my emphasis), See Thomson Reuters, "Regulation of the legal profession in Germany: overview" https://uk.practicallaw.thomsonreuters.com/2-638-8145?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

Besides the provision of legal advice and the negotiation of debts, these entities can also represent the parties in court in limited situations, according to §79 (2) Sentence 2 Nr. 4 of the German Civil Procedure Code (*Zivilprozessordnung*):

*"The parties may have themselves represented by counsel as attorneys-in-fact. Above and beyond this,* ***the following are authorised to represent parties as attorneys-in-fact****: (...)*

***Persons providing collection services (registered persons pursuant to section 10 (1), first sentence, number 1 of the Legal Services Act (Rechtsdienstleistungsgesetz, RDG)****) in summary proceedings for a payment order until the matter is transferred to the court hearing the dispute, in the case of petitions for a declaration of enforceability in compulsory enforcement proceedings against movable property for monetary claims, including proceedings for the administration of a statutory declaration in lieu of an oath and for an application for the issuance of an arrest warrant, in each case to the exception of procedural actions that initiate legal proceedings determining whether or not a claim is justified, or actions that are to be taken within such legal proceedings."*[271] ***(my emphasis).***

In the present case, *Lexfox* was commissioned by a tenant from Berlin to enforce its claims in connection with rent control (*Mietpreisbremse)*. *Lexfox* agreed with the tenant on the transfer of his rights and then pursued claims against the defendant housing association for repayment of excessive rent and for payment of related legal costs.[272]

The Local Court (*Amtsgericht)* granted the claim only in respect of the repayment of excessive rent. However, the Berlin Court of Appeal dismissed the action in its entirety.[273]

According to the Court of Appeal, *Lexfox* lacked the legitimacy to assert the disputed claims (A*ktivlegitimation*), since the transfer of the claim agreed between *Lexfox* and the tenant of the flat was null and void due to a violation of the statutory prohibition on the provision of unlawful legal

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[271] Taken from the English translation of the ZPO, provided by the German Ministry of Justice, available in https://www.gesetze-im-internet.de/englisch_zpo/index.html

[272] *"Im vorliegenden Fall war die Klägerin entsprechend ihrem Geschäftsmodell von einem Wohnungsmieter aus Berlin mit der Geltendmachung und Durchsetzung seiner Forderungen und etwaiger Feststellungsbegehren im Zusammenhang mit der sogenannten Mietpreisbremse (§ 556d BGB) beauftragt worden. Die Klägerin vereinbarte mit dem Mieter die Abtretung seiner diesbezüglichen Forderungen und machte – nach vorherigem Auskunftsverlangen und Rüge gemäß § 556g Abs. 2 BGB - gegen die beklagte Wohnungsgesellschaft Ansprüche auf Rückzahlung von nach Maßgabe des § 556d BGB überhöhter Miete (24,76 €) sowie auf Zahlung damit im Zusammenhang stehender Rechtsverfolgungskosten (166,90 €) geltend.",* "Bundesgerichtshof - Mitteilung der Pressestelle." Accessed December 19, 2019. http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=57287326cd9c702a6e5aeb8b6b12475a&nr=92946&linked=pm&Blank=1.

[273] "*Das Amtsgericht hat der Klage (nur) bezüglich der Rückzahlung überhöhter Mietzinsen stattgegeben. Das Berufungsgericht (LG Berlin, 63. Zivilkammer, Grundeigentum 2018, 1231) hat die Klage vollständig abgewiesen.", "Bundesgerichtshof - Mitteilung der Pressestelle.*" Accessed December 19, 2019. http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=57287326cd9c702a6e5aeb8b6b12475a&nr=92946&linked=pm&Blank=1.

services pursuant to § 134 BGB in conjunction with § 3 and other provisions of the *Rechtsdienstleistungsgesetz*.[274]

The Court of Appeal found that according to the *Lexfox'* business model, the focus of its activities was not the provision of collection services for which it is registered (§ 10 (1) No. 1, § 2 (2) RDG), but rather on legal advice (§ 2 (1) RDG) with only associated debt collection services.

In a restrictive interpretation of the RDG, the Berlin Court of Appeal affirmed that the collection service provider was permitted to provide legal advice but only to a certain extent, as an auxiliary service in relation to a claim which had already been asserted.[275]

In the case of *Lexfox,* it was considered as already acting in an advisory capacity before the conclusion of the transfer agreement, by providing its online rental calculator,[276] thus surpassing the restricted field of action allowed by the RDG and incurring in an illegal legal service not covered by its registration as a collection service provider.[277]

The Appeal Court affirmed that the online rent comparator should be classified as a legal service, according to § 2 para. 1 RDG, because the classification of the apartment in the Berlin rent index requires a subsumption of the special features of the apartment in dispute and its characteristics under the respective grid of the rent index. In this respect, it was not only a simple data comparison or a mere calculation, but legal advice not covered by § 2 para. 2 sentence 1, § 10 para. 1 sentence 1 no. 1 RDG.[278]

The *Bundesgerichtshof* contradicted this view, by affirming that the requirements for nullity under § 134 of the Civil Code in conjunction with § 3 of the RDG were not met, since *Lexfox* is registered as a collection service provider with the competent authority and the aforementioned

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[274] "*Der Klägerin fehle, so das Berufungsgericht, bereits die Befugnis, die streitigen Ansprüche geltend zu machen (sogenannte Aktivlegitimation), da die zwischen ihr und dem Wohnungsmieter vereinbarte Forderungsabtretung wegen eines Verstoßes gegen das gesetzliche Verbot zur Erbringung unerlaubter Rechtsdienstleistungen gemäß § 134 BGB in Verbindung mit § 3 und weiteren Bestimmungen des Rechtsdienstleistungsgesetzes (RDG) nichtig sei.*" "*Bundesgerichtshof - Mitteilung der Pressestelle*." Accessed December 19, 2019. http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=57287326cd9c702a6e5aeb8b6b12475a&nr=92946&linked=pm&Blank=1.

[275] "*Nach § 2 Abs. 2 Satz 1 RDG sei dem Inkassodienstleister zwar gestattet, in gewissem Umfang Rechtsberatung zu leisten, dies jedoch nur als Nebenleistung in Bezug auf eine einzuziehende, bereits entstandene Forderung.*", par. 14

[276] "*Nach dem Geschäftsmodell der Klägerin liege der Schwerpunkt ihrer Tätigkeit gerade nicht auf der Erbringung von Inkassodienstleistungen, für die sie registriert sei (§ 10 Abs. 1 Nr. 1, § 2 Abs. 2 RDG), sondern vielmehr im Bereich der Rechtsberatung (§ 2 Abs. 1 RDG) mit lediglich angeschlossener Inkassodienstleistung. Denn die Klägerin werde bereits vor Abschluss der Abtretungsvereinbarung rechtberatend tätig, indem sie mittels ihrer Onlineplattform die ortsübliche Vergleichsmiete ermittle und die jeweiligen Merkmale prüfe.*", "Bundesgerichtshof - Mitteilung der Pressestelle." Accessed December 19, 2019. http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=57287326cd9c702a6e5aeb8b6b12475a&nr=92946&linked=pm&Blank=1.

[277] "*Bereits die von der Klägerin angebotene Ermittlung der ortsüblichen Ver-gleichsmiete anhand ihres "Mietpreisrechners" stelle sich als eine unerlaubte, nicht von ihrer Registrierung als Inkassodienstleisterin umfasste Rechtsdienst-leistung dar.*", par. 15

[278] "*Die Vergleichsmietenermittlung sei als Rechtsdienstleistung nach § 2 Abs. 1 RDG zu qualifizieren, weil die Einordnung in den Berliner Mietspiegel zur Ermittlung der ortsüblichen Vergleichsmiete auch eine Subsumtion der Be-sonderheiten der streitgegenständlichen Wohnung und deren Merkmale unter die jeweiligen Rasterfelder des Mietspiegels und der Orientierungshilfe erforde-re. Insofern handele es sich nicht nur um einen schlichten Datenabgleich oder ein bloßes Rechenwerk, sondern um eine nicht von § 2 Abs. 2 Satz 1, § 10 Abs. 1 Satz 1 Nr. 1 RDG gedeckte Rechtsberatung.*", par. 15

activities performed by it for the tenant are still covered by the authorisation to provide legal services in the field of debt collection services:[279]

*"The Act on Out-of-Court Legal Services serves to protect those seeking legal advice, legal relations and the legal system from unqualified legal services (...) Therefore, according to § 3 RDG, the independent provision of extrajudicial legal services is only allowed to the extent that it is permitted by the Legal Services Act or by or on the basis of other laws."*[280]

*"§ 3 RDG should be interpreted in a way that its prohibition is only addressed to collection agencies which are not registered*[281] *(...) With its (indirect) prohibition, the provision of Paragraph 3 of the RDG is intended to prevent the provision of legal services only by those persons who cannot rely on any statutory authorisation."*[282]

The *Bundesgerichtshof* also stated that according to the provision of § 14 RDG, the competent authority shall revoke the registration if the person is no longer personally suitable (§ 14 No. 1 RDG), no longer has professional liability insurance (§ 12 RDG) or if the registered person provides legal services to a considerable extent beyond the scope of the registered competence or persistently violates conditions or obligations to present and inform pursuant to Section 11a RDG (Section 14 No. 3 RDG).[283]

Therefore, the *Bundesgerichtshof* concluded that the client is sufficiently protected from unqualified legal services by the aforementioned supervisory and intervention measures and in particular by the requirement of personal and professional suitability of the collection service

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[279] "*Entgegen der Auffassung des Beru-fungsgerichts sind die Voraussetzungen einer Nichtigkeit nach § 134 BGB in Verbindung mit § 3 RDG nicht gegeben. Denn die Klägerin ist als Inkasso-dienstleisterin bei der zuständigen Behörde registriert und die von ihr für den Mieter erbrachten vorgenannten Tätigkeiten sind durch die nach § 10 Abs. 1 Satz 1 Nr. 1, § 2 Abs. 2 Satz 1 RDG erteilte Befugnis zur Erbringung von Rechtsdienstleistungen im Bereich der Inkassodienstleistungen (noch) gedeckt*." Par. 19

[280] "*Das als Art. 1 des Gesetzes zur Neuregelung des Rechtsberatungs-rechts vom 12. Dezember 2007 (BGBl. I S. 2840) verabschiedete, am 1. Juli 2008 in Kraft getretene Gesetz über außergerichtliche Rechtsdienstleistungen (Rechtsdienstleistungsgesetz - RDG) dient dazu, die Rechtsuchenden, den Rechtsverkehr und die Rechtsordnung vor unqualifizierten Rechtsdienstleistun-gen zu schützen (...) Deshalb ist nach § 3 RDG die selbständige Erbringung außergerichtlicher Rechtsdienstleistungen nur in dem Umfang zulässig, in dem sie durch das Rechtsdienstleistungsgesetz oder durch oder aufgrund anderer Gesetze erlaubt wird", par. 39*

[281] *"Die vorgenannte Auffassung meint, § 3 RDG sei sowohl nach dem Wortlaut als auch unter Berücksichtigung der Gesetzessystematik, namentlich der §§ 3, 10 Abs. 1 Satz 1 Nr. 1, §§ 11 ff. RDG, sowie des Schutzzwecks des Rechtsdienstleistungsgesetzes und der mit den vorstehend genannten Bestimmungen verfolgten Zielsetzung so auszulegen, dass sich das in § 3 RDG enthaltene Verbot, soweit es um Inkassodienstleistungen gehe, nur an Inkassounternehmen richte, die nicht gemäß § 10 Abs. 1 Satz 1 Nr. 1 RDG registriert seien*", par. 44

[282] "*Mit ihrem (mittelbar) ausgesprochenen Verbot solle die Vorschrift des § 3 RDG die Erbringung von Rechts-dienstleistungen nur durch solche Personen verhindern, die sich auf keinen ge-setzlichen Erlaubnistatbestand berufen könnten*.", par. 44

[283] "*Gemäß der Vorschrift des § 14 RDG widerruft die zuständige Behörde die Registrierung unbeschadet des § 49 VwVfG oder entsprechender landes-rechtlicher Vorschriften unter anderem, wenn begründete Tatsachen die Annahme einer nicht mehr vorliegenden persönlichen Eignung oder Zuverlässig-keit rechtfertigen (§ 14 Nr. 1 RDG), eine Berufshaftpflichtversicherung nach § 12 Abs. 1 Nr. 3 RDG nicht mehr unterhalten wird (§ 14 Nr. 2 RDG) oder wenn begründete Tatsachen die Annahme dauerhaft unqualifizierter Rechtsdienstleis-tungen zum Nachteil der Rechtsuchenden oder des Rechtsverkehrs rechtferti-gen, was in der Regel der Fall ist, wenn die registrierte Person in erheblichem Umfang Rechtsdienstleistungen über die eingetragene Befugnis hinaus erbringt oder beharrlich gegen Auflagen oder Darlegungs- und Informationspflichten nach § 11a RDG verstößt (§ 14 Nr. 3 RDG*).", par. 49

provider.[284] On the other hand, it affirmed that the legislator had attached considerable importance to the protection of legitimate expectations in connection with the registration of legal service providers.[285]

For the *Bundesgerichtshof*, the decisive factor laid in the objective pursued by the legislator with the *Act on Out-of-Court Legal Services*:

***"The concept of legal services in the form of collection services (...) is not to be understood in too narrow a sense**, **taking into account the objective pursued by the legislator with the Act on Out-of-Court Legal Services** - in connection with the case-law of the Federal Constitutional Court - **of a fundamental reorganisation of the law on extrajudicial legal services, which is geared to the aspects of deregulation and liberalisation and allows the development of new professional profiles**."*[286] (***my emphasis***).

As we can see, the *Rechtsdienstleistungsgesetz* is interpreted by Germany's Federal Court as having the objective of liberalizing legal services and allowing for the emergence of new activities related to this field.

We can notice the similarities between this legislative act and AdC's proposal on legal services, which intends on reducing the monopoly on legal services, by "*ensuring criteria of necessity, appropriateness and proportionality with public policy objectives*"[287] with the goal of bringing "*More innovation and diversity and more competitive prices, for the benefit of consumers*".[288]

The *Bundesgerichtshof* thus decided that *"the fiduciary transfer of the tenant's claims in connection with the "Mietpreisbremse" which took place in this context does not (yet) violate a statutory prohibition (§ 3 RDG) and is therefore not null and void pursuant to § 134 BGB,* ***the debt***

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[284] "*Der Auftraggeber sei durch die genannten Aufsichts - und Eingriffsmaßnahmen sowie insbesondere durch das Erfordernis persönlicher und fachlicher Eignung des Inkassodienstleisters vor einer unqualifizierten Rechtsdienstleistung hinreichend geschützt (Tolksdorf, aaO S. 1403 f.; Hartung, aaO S. 359 f.).*", par. 50

[285] *"(a) Allerdings trifft es zu, dass der Gesetzgeber, wie sich den Gesetzes-materialien des Rechtsdienstleistungsgesetzes entnehmen lässt, im Zusammenhang mit der Registrierung von Rechtsdienstleistern im Rechtsdienstleis-tungsregister dem Gesichtspunkt des Vertrauensschutzes wesentliche Bedeu-tung beigemessen hat.*", par. 78

[286] "*Der Begriff der Rechtsdienstleistung in Gestalt der Inkassodienstleistung (...) erbringen darf, ist unter Berücksichtigung der vom Gesetzgeber mit dem Rechtsdienstleistungsgesetz - in Anknüpfung an die Rechtsprechung des Bundesverfassungsgerichts - verfolgten Zielsetzung einer grundlegenden,* ***an den Gesichtspunkten der Deregulierung und Liberalisierung ausgerichteten, die Entwicklung neuer Berufsbilder erlaubenden Neugestaltung des Rechts der außergerichtlichen Rechtsdienstleistungen*** *nicht in einem zu engen Sinne zu verstehen ausgerichteten", par. A)* and par. 98 VIII ZR 285/18

[287] *Autoridade d a Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa... page 29. *"Em regra, a reserva de atividades deve ser reduzida, em respeito por critérios de necessidade, adequação e proporcionalidade com vista ao cumprimento dos objetivos da regulamentação profissional em causa."*

[288] *Autoridade da Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa... page 29 , *"Esta abertura poderá conduzir a maior inovação e diversidade e preços mais competitivos pela prestação de diferentes serviços jurídicos, em benefício dos clientes, sejam eles famílias e empresas ou outros."*

***collection service provider is actively legitimized in court proceedings to assert these claims by way of legal action against the landlord.***"[289]

The ruling in consideration might be ground-breaking for the *legaltech* industry, since with its broad interpretation of the *Rechtsdienstleistungsgesetz*, the Court legitimizes the provision of legal services by an emerging field of *legaltech* companies.[290]

With *Wenigermiete* planning on an expansion to the European legal services market,[291] how could it do so? How can a *legaltech* provide its services across Member-State's borders?

## Cross-Border Provision of Online Legal Services

As we have seen with *Jurilink*, information society services providers (ISSPs) benefit from an increased freedom to provide services due to the Internal Market Clause that is established in the e-commerce Directive.

Could *Wenigermiete* use this freedom to expand across Europe and start providing legal advice to consumers based in other European jurisdictions? The regulation of legal services is far from being equal across the EU. There are the more "liberal" jurisdictions, such as Finland, Estonia and the Netherlands, and countries where lawyers have a very broad professional monopoly, like Germany or Portugal.[292] In some European jurisdictions the provision of legal advice

[289] "*Da damit (auch) die in diesem Rahmen erfolgte treuhänderische Abtretung der genannten im Zusammenhang mit der "Mietpreisbremse" stehenden Forderungen des Mieters (noch) nicht gegen ein gesetzliches Verbot (§3 RDG) verstößt und demzufolge nicht gemäß § 134 BGB nichtig ist,* ***ist der Inkassodienstleister im gerichtlichen Verfahren aktivlegitimiert, diese Ansprüche im Wege der Klage gegen den Vermieter geltend zu machen.", par. F)*** VIII ZR 285/18

[290] Interestingly, the possibility of a liberalizing judicial precedent had already been predicted by Jakob Weberstaedt in his work *"English Alternative Business Structures and the European Single Market"*, *"The approach would not be free of legal risk because the reach of the Annexkompetenz according to § 5 RDG was never tested in court* ***but a case involving an English ABS or with an otherwise European dimension would greatly increase the chances of obtaining a 'liberal' precedent: then a German court would not only have to interpret § 5 RDG in light of the German constitution, which already argues for a liberal reading of the provision, but also in light of European fundamental freedoms and possibly the 2006 EU Services Directive."*** in Jakob Weberstaedt, "English Alternative Business Structures and the European Single Market," International Journal of the Legal Profession 21, no. 1 (January 2, 2014): 103–41, https://doi.org/10.1080/09695958.2014.977791.

[291] Conny GmbH, "LexFox' Series A Round: Earlybird and Target Globals First Major B2C Legaltech Investment," wenigermiete.de, accessed August 3, 2020, https://www.wenigermiete/lexfox-wenigermiete-round-of-financing.

[292] "*The scope of reserved activities varies considerably between European countries: on the one hand, relatively 'liberal' régimes (for example in England or Denmark) with a limited list of reserved activities and, on the other hand, countries where lawyers enjoy a very broad professional monopoly (for example Germany, or – outside Europe – the United States)*". Jakob Weberstaedt (2014) English Alternative Business Structures and the European single market, International Journal of the Legal Profession, 21:1, 103-141, DOI: 10.1080/09695958.2014.977791. "*The monopoly of Dutch advocates is limited to representation in Court and use of the title advocate.*" Regarding Finland, "*Legal practice is unreserved. Only the use of the titles of "asianajaja" and "advokat" are reserved*", in International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*", available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=d7db79dc-0c70-4159-b70c-76ec1f3cba3c

is a *reserved activity*, i.e., an activity that is reserved to holders of a specific profession,[293] whilst in others it can be freely provided. In the latter the path to *legaltech's* expansion is seemingly easier.

A similar discussion arose regarding Alternative Business Structures and their freedom to provide legal services to European consumers.

In its communication to the Legal Services Board, UK's oversight regulator,[294] the CCBE stated that:

*"ABS will be able to be established abroad and provide legal services, where these services in the host state do not fall within the scope of reserved activities."*[295]

Using a similar reasoning, *legaltechs* could establish themselves on various European jurisdictions and provide legal services where they are not reserved. However, *legaltech* platforms do not even need to establish themselves in other European jurisdictions. Their business model is completely internet-based. They can simply take advantage of the freedom to provide services.

The crux of the matter is if a *legaltech* platform can provide its services to consumers that are based in European jurisdictions where legal advice is a reserved activity, such as Portugal.

In Portugal, providing legal advice by non-lawyers (or non-solicitors, or by legal persons that are not law firms), is considered a crime, with a prison sentence of up to 1 year or a fine of up to 120 days.[296]

However, according to the e-commerce Directive, the rules that apply to an ISSP are the rules of the home state (country of origin principle).

In the case of *Wenigermiete*, it is considered as having the authorization to provide legal advice in its action as a "debt collection service" (*Inkassodienstleister)* according to Germany's *Rechtsdienstleistungsgesetz* (Act on Out-of-Court Legal Services).[297]

If *Wenigermiete* were to establish itself in Portugal to provide legal advice, it would be considered as incurring in the crime of "*Procuradoria ilícita*" (unauthorized practice of law), since it is not a legal person constituted exclusively by lawyers or solicitors.

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[293] "*Reserves* of *activities* refers to professions where certain *activities* are *reserved* to the holders of a specific professional qualification." , in https://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=map_regulations

[294] Wendt, Ida E. "EU Competition Law and Liberal Professions: an Uneasy Relationship?" (Nijhoff Studies in European Union Law). Martinus Nijhoff, 2012. Page 227

[295] CCBE RESPONSE TO THE LEGAL SERVICES BOARD'S CONSULTATION ON A REGULATORY REGIME FOR ALTERNATIVE BUSINESS STRUCTURES, p. 5, available at https://www.ccbe.eu/NTCdocument/EN_CCBE_response_to_1_1253701378.pdf

[296] *Lei 49/2004*, Article 7.

[297] "*Da damit (auch) die in diesem Rahmen erfolgte treuhänderische Abtretung der genannten im Zusammenhang mit der "Mietpreisbremse" stehenden Forderungen des Mieters (noch) nicht gegen ein gesetzliches Verbot (§3 RDG) verstößt und demzufolge nicht gemäß § 134 BGB nichtig ist,* ***ist der Inkassodienstleister im gerichtlichen Verfahren aktivlegitimiert, diese Ansprüche im Wege der Klage gegen den Vermieter geltend zu machen.", par. F)*** VIII ZR 285/18

However, it could use the internal market clause of the e-Commerce Directive to provide legal advice to Portuguese consumers while being established in Germany.

*Wenigermiete* could be considered an ISSP, since it is providing a service, which is remunerated, the user and the service provider are physically distant, they establish their contractual relationship via electronic means and the intermediation is individually requested by each of the users that visit the website.

The European Commission has stated that *"where legal advice is a reserved activity, no service provider is allowed to give advice or draft private deeds for others on a regular basis and for remuneration unless he is a lawyer, irrespective of whether the advice is given face-to-face or through a collaborative platform."*[298]

The CCBE has also stated that "*Where legal advice is a reserved activity, no service provider is allowed to give advice or draft private deeds for others on a regular basis and for remuneration unless he is a lawyer, irrespective of whether the advice is given face-to-face or through a collaborative platform*."[299]

However, the Commission and the CCBE do not specify *where* legal advice would be considered a reserved activity. In the host state or in the home state?

In a communication from 2008, the CCBE stated, while citing the e-commerce Directive, that cross-border online legal services are regulated by the home state:

"*If a lawyer provides his/her services via e-mail, the rules which apply to the lawyer – client relationship depends on the location of the lawyer: As an example: An Irish lawyer gives advice, via e mail, to a client in Belgium. The lawyer-client relationship is, in accordance with the E-Commerce Directive, governed by professional rules in Ireland*." [300]

This position has also been stated in a study on the Legal Framework for the Free Movement of Lawyers by Maastricht University:

"*The result is that different professional rules apply to, on the one hand, temporary cross-border services that are provided under the E-Commerce Directive (host state rules) and, on the other hand, services that are provided by a lawyer who has travelled to a client in another country (the double deontology provision of the Lawyers' Services Directive).* ***This means that providing***

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[298] European Commission, SWD(2016) 184 - European agenda for the collaborative economy - supporting analysis, available at https://ec.europa.eu/docsroom/documents/16881/attachments/3/translations/en/renditions/pdf

[299] Council of Bars & Law Societies of Europe, *"CCBE GUIDE on Lawyers' use of online legal platforms...*

[300] Council of Bars & Law Societies of Europe, "*Electronic Communication And The Internet*", available at https://www.ccbe.eu/NTCdocument/EN_CCBE_Guidance_ele1_1231836053.pdf

***services personally could be governed by rules that are potentially more restrictive than when providing the services remotely by electronic means"***[301] (my emphasis)

The e-Commerce Directive establish a duality between the provision of legal services in an online manner and their provision in a physical setting.[302] This is especially beneficial for online legal services providers that are established in more "liberal" jurisdictions, where the monopoly on legal services is small.[303]

Member-States could prevent this expansion to their legal services markets by citing for example "public policy" or "consumer protection" measures, as is allowed under article 3 (4) of the e-Commerce Directive.[304]

However, this process is quite complex. Firstly, the measures should be necessary and proportionate. They must be suitable for the prosecution of its objective and must not go beyond what is necessary.[305]

Besides, the measures may only be taken if certain procedurals requirements are fulfilled: the Member State taking the measure has to consult with the Member State in which the provider is established, the former must not have taken any measures, and the Member State of destination (host state) must have notified the Commission and the Member State in which the provider is established (home state) of its intention to take such a measure.[306]

Possibly due to this complexity, this safeguard clause has been very rarely used by Member States (30 times).[307]

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[301] Claessens, S. et al. (2012) Panteia–Maastricht Report. Evaluation of the Legal Framework for the Free Movement of Lawyers: Final Report. Available at: https://ec.europa.eu/docsroom/documents/15035/attachments/1/translations/en/renditions/native

[302] *"Due to all these new developments, even those Directives that were pivotal for the uptake of the information society, now present lacunae, interpretation difficulties and outdated parts. These issues have been further exacerbated by the* ***legal duality****,* ***which is the assumption that the online environment must be regulated differently than the offline environment.*** *This legal duality is increasingly conflicting with the growing convergence and blurred distinction between the online and the offline environment."* , (my emphasis) in DLA PIPER, "Legal analysis of a Single Market for the Information Society", November 2009, available at https://ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=835

[303] The same is true of marketing activities. See "*The country of origin principle may especially be of advantage to online service providers being established in a Member State whose regulation of the relevant jurisdiction is more favourable for the service provider than the regulation of the same jurisdiction in other Member States which may have stricter marketing rules or just stricter law enforcement."* , in Ekstrand, Susie Stærk, and Jacob Thomsen. "Online Marketing of Food - The "Internal Market Clause" of the E-Commerce Directive from a Danish Perspective." European Food and Feed Law Review 1, no. 4 (2006): 193-202. Accessed August 10, 2020. www.jstor.org/stable/90008276.

[304] "*4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled: (a) the measures shall be: (i) necessary for one of the following reasons: - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons, - the protection of public health, - public security, including the safeguarding of national security and defence, - the protection of consumers, including investors;"* Article 3(4) of Directive 2000/31/EC

[305] *"(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives; (iii) proportionate to those objectives;*" Article 3(4) of Directive 2000/31/EC

[306] "*(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has: - asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate, - notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures."* Article 3(4) of Directive 2000/31/EC

[307] Commission Staff Working Document of 11 January 2012 on online services, including e-commerce, in the Single Market, SEC(2011) 1641, p. 21.

All in all, could Portugal prevent a European *Legaltech* from providing its services to Portuguese consumers? It seems like a difficult task.

Besides the e-commerce Directive, another option for some *Legaltech* platforms would be to take advantage of the freedom to provide temporary services established in article 4 of the Lawyers' Services Directive (Council Directive 77/249/EEC) that states:

*"4.* ***A lawyer pursuing activities other than those referred to in paragraph 1*** *(*paragraph 1 refers to representation of clients in legal proceedings or before public authorities*)* ***shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State,*** *especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity.* ***The latter rules are applicable only*** *if they are capable of being observed by a lawyer who is not established in the host Member State and* ***to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility****."*[308] (**my emphasis**)

For example, in Spain, lawyers are allowed to practice in *"Sociedades Profesionales".* A Spanish *legaltech* platform could take the form of a *"Sociedad Profesional"* and provide legal services to Portuguese consumers while relying for as long as possible on the freedom to provide services established in the aforementioned legal provision.[309]

The question that remains is if the rules concerning the prohibition on muldisciplinary practice are "*objectively justified*". If so, then the rules of the host state would apply (the so called "Double Deontology").[310]

[308] Article 4 (4), Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

[309] I'm using the rationale of Jakob Weberstaedt regarding the cross-border provision of legal services by Alternative Business Structures (ABS) "*ABS could go a long way with a legal strategy relying for as long as possible on the Freedom to Provide Services and denying that their activities in other European member states amount to establishment*" Weberstaedt, Jakob, English Alternative Business Structures and the European Single Market (September 29, 2013). Available at SSRN: https://ssrn.com/abstract=2333174 or http://dx.doi.org/10.2139/ssrn.2333174

[310] "*Hence it becomes clear that a lawyer who provides services in another Member State will have to abide by two sets of rules: the rules of professional conduct of the host Member State and those set by his home Member State. This phenomenon is often referred to as the Kumulationsprinzip1 or 'double deontology'.*", in Claessens, S. et al. (2012) Panteia–Maastricht Report. Evaluation of the Legal Framework for the Free Movement of Lawyers: Final Report.

However, according to the Services Directive, prohibitions on multidisciplinary practice are only valid "*in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct".*[311]

Is the complete prohibition of multidisciplinary practice – as is the case in Portugal - necessary to guarantee compliance with the deontogical rules of lawyers? Many European jurisdictions such as Spain,[312] Germany,[313] Italy,[314] France,[315] or the Netherlands,[316] who allow multidisciplinary practice in various degrees, would certainly disagree.

## 7.2 Netherlands Authority for Consumers and Markets v. Orde van Advocaten

*LegalDutch* is a two-sided online legal platform that connects clients and lawyers,[317] it claims to be "the largest independent legal platform of The Netherlands.", with over 160 lawyers on the platform.[318]

On 25 September 2017, *LegalDutch* requested the Netherlands Authority for Consumers and Markets (henceforth *ACM*) to take action against the Dutch Bar Association, *Nederlandse Orde van Advocaten* (henceforth *NOvA*).[319]

The complaint was related to the adoption by *NOvA*, on 22 February 2018, of Rule 2(3) of the *Gedragsregels Advocatuur (*Code of Conduct for the Legal Profession), that states the following:

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[311] Article 21 (1)(a), Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

[312] "*Los abogados podrán asociarse en régimen de colaboración multiprofesional con otros profesionales liberales no incompatibles, sin limitación de número y sin que ello afecte a su plena capacidad para el ejercicio de la profesión ante cualquier jurisdicción y Tribunal, utilizando cualquier forma lícita en derecho, incluidas las sociedades mercantiles, siempre que se cumplan las siguientes condiciones:" Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española,* article 29.

[313] "*Lawyers are permitted to form MDPs with patent lawyers, tax consultants, tax agents, accountants and certified auditors for the purpose of a common exercise of profession (section 59a, Federal Lawyer's Act). However, in a recent decision, the Federal Constitutional Court held that this limitation is in breach of the constitutional right to freely pursue professional activities (Bundesverfassungsgericht, decision of 12. January 2016, case no. 1 BvL 6/13). Therefore, MDPs formed of lawyers and, for example, physicians or pharmacists might be possible in the future.*" , in "Regulation of the Legal Profession in Germany: Overview | Practical Law," accessed August 10, 2020, https://ca.practicallaw.thomsonreuters.com/2-638-8145?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a518176.

[314] "*Italian lawyers may work as sole practitioners, in partnerships and in various forms that permit cooperation with other professions.*" , in International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*"...

[315] "*They may also practise in a "professional civil company" (société civile professionnelle, SCP) which is the equivalent of a partnership; a "liberal labour company" (société d' exercice libéral, SEL), either as a collaborator or as a salaried lawyer." In* International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*"...

[316] "*Dutch advocates may work in sole practice, in general or limited liability partnerships. Under certain limited circumstances they may also work in partnership with some other specific quasi-legal professions.*" , International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*"...

[317] https://www.legaldutch.nl/

[318] https://en.legaldutch.nl/about-us/

[319] Case number ACM/17/012061, 14 December 2018: https://www.acm.nl/sites/default/files/documents/2019-01/besluit-handhavingsverzoek-legal-dutch.pdf

"*The advocate may not grant or receive remuneration for securing engagements, unless he can demonstrate that he is not acting contrary to the core values and that the interest of the litigant is the only deciding factor".*[320]

This is called the "transaction fee rule", that prevents lawyers practising in the Netherlands from receiving payments for securing cases.[321]

A similar rule exists in the Bylaws of the Portuguese Bar Association, where it is stated that lawyers are prohibited from sharing fees, even as a commission or other form of compensation, except with lawyers, trainee lawyers and solicitors (*solicitadores)* with whom they collaborate or who have given their cooperation.[322]

According to *LegalDutch,* the legal uncertainty associated with the interpretation of Rule 2(3) rule by *NOvA* prevented the emergence of price-comparison websites for lawyers where these professionals would pay for the platform's intermediation via commissions.

*LegalDutch* argued that *NOvA's* decision to adopt Rule 2(3) of the Code of Conduct for the Legal Profession (*Gedragsregels Advocatuur*), resctricted competition within the meaning of Article 6 of the Dutch Competition Act and Article 101 of the TFEU.[323]

*ACM* confirmed this claim.[324]

According to *ACM*, participation by lawyers in online platforms that use a so-called subscription model is allowed under Rule 2(3), but participation in a platform that uses payment per assignment (i.e., a commission) is not.[325]

*ACM* made many interest remarks regarding online legal platforms. It emphasized the importance of online legal platforms to match supply and demand, allowing consumers to easily search, compare and select a lawyer. On the other hand, it mentioned that lawyers can also use

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[320] See Nederlandse orde van advocaten, Code of Conduct 2018, Article 2, available at https://www.advocatenorde.nl/document/nova-code-of-conduct-gedragsregels-2018

[321] FIDE Congress and Daniel Mândrescu, eds., *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (r)Evolution: The XXIX FIDE Congress in The Hague, 2020 Congress Publications, Vol. 3*, 2020., p. 374 available at https://boeken.rechtsgebieden.boomportaal.nl/publicaties/9789462361300

[322] Article 107 of Lei n.º 145/2015 de 9 de setembro.

[323] "*Volgens LD beperkt het besluit van de NOvA om Regel 2, derde lid van de Gedragsregels Advocatuur vast te stellen, op de naleving van deze regel toe te zien en deze te handhaven de mededinging in de zin van artikel 6 van de Mededingingswet (hierna: Mw) en artikel 101 van het Verdrag betreffende de werking van de Europese Unie (hierna: VWEU).*" in Case number ACM/17/012061...

[324] "*Het door de NOvA vaststellen van gedragsregels als Regel 2, derde lid van de Gedragsregels Advocatuur valt onder de toetsing van artikel 6 Mw en artikel 101 VWEU. Op basis van het eerste lid van dit artikel zijn besluiten die bedoeld zijn om de concurrentie op de markt te verhinderen, beperken of vervalsen ofwel dat tot gevolg hebben, verboden."* In Case number ACM/17/012061...

[325] *"Op 22 februari 2018 heeft de NOvA de 'herijkte' gedragsregels voor advocaten gepubliceerd. Volgens Regel 2, derde lid mag een advocaat niet betalen of betaald worden voor het verkrijgen van een opdracht, tenzij de advocaat kan aantonen dat hij daarbij niet handelt in strijd met de kernwaarden en voorts hierbij slechts het belang van de rechtzoekende bepalend is. De ACM maakt uit de toelichting op dat deelname door advocaten aan online platforms die een zogenoemd abonnementsmodel hanteren mogelijk wel is toegestaan, maar deelname aan een platform dat betaling per opdracht hanteert niet.*" In Case number ACM/17/012061...

online platforms to reach more clients. All in all, it affirmed that platforms enable a reduction in transaction costs and add value for consumers and lawyers.[326]

It also mentioned that online platforms have an important characteristic, the so called "network effect": an online platform increases in value the more lawyers are present in the platform. At the same time, the more consumers are present in the platform, the more the platform is attractive for the lawyers.[327] (In a previous case, regarding the platform InThuisbezorgd.nl, *ACM* had already discussed the network effects of meal delivery online platforms).[328]

Regarding the business model of the platform, *ACM* stated that an online legal platform must make the platform as attractive as possible for both consumers and lawyers. The willingness to pay on the supply and demand side is important in this respect, since the platform will bill those who are most willing to pay for the services. For the time being, the willingness to pay of consumers is limited. Therefore, most online platforms choose to bill the lawyers.[329] The success of the platform also depends on the distribution of risk between the platform and the lawyer.[330]

There is an interesting parallel to be made with the Portuguese legal system. As previously said, Portuguese lawyers are not allowed to share their fees via commissions with non-lawyers or businesses.[331] Therefore, if a Portuguese lawyer were to register in an online platform, the only viable option would be to pay a subscription to the platform. This solution would be, in effect, the same as paying for a newspaper or television advertisement, since the payment would not be dependent on cases received, and therefore it could not be considered as a "sharing" of fees.

However, *ACM* states that in this business model the most risk lies with the lawyer.

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[326] "*De markt voor diensten van een advocaat is zeer gebaat bij een goede koppeling van vraag en aanbod. Rechtzoekenden kunnen via online platforms eenvoudig een geschikte advocaat zoeken, vergelijken en selecteren. Advocaten kunnen zich via online platforms gericht presenteren en zo meer klanten bereiken. Platforms verlagen over het algemeen de transactiekosten, maken het aanbod transparanter en dragen daarom bij aan de totstandkoming van een betere prijs/kwaliteitsverhouding op de markt. Online platforms kunnen voorzien in een behoefte en bieden toegevoegde waarde, voor rechtzoekenden en advocaten. Rechtzoekenden hebben namelijk vaak een informatieachterstand ten opzichte van advocaten; zij weten niet altijd hoe zij een geschikte advocaat kunnen vinden. Daarnaast gaat het om niet zo frequente, maar vaak wel belangrijke en kostbare kwesties.*" In Case number ACM/17/012061…

[327] "*Een belangrijk kenmerk van online platforms is dat er zogenoemde 'netwerkeffecten' zijn. Een online platform waarop rechtzoekenden een advocaat kunnen vinden is voor rechtzoekenden aantrekkelijker naarmate er meer advocaten zijn aangesloten. Tegelijkertijd neemt voor advocaten de aantrekkelijkheid van het platform toe naarmate meer rechtzoekenden de website van het platform bezoeken. Platforms moeten voldoende rechtzoekenden én advocaten aan zich binden om waardevol te zijn.*", In Case number ACM/17/012061, 14 December 2018: https://www.acm.nl/sites/default/files/documents/2019-01/besluit-handhavingsverzoek-legal-dutch.pdf

[328] FIDE Congress and Daniel Mândrescu, eds., *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (r)Evolution*…

[329] "*Online platforms zullen daarom bij hun keuze voor een businessmodel allereerst bekijken hoe zij het platform zo aantrekkelijk mogelijk kunnen maken voor rechtzoekenden en advocaten om zich erbij aan te sluiten. De betalingsbereidheid aan de vraag- en aanbodzijde is daarbij belangrijk: het platform zal de rekening voor de diensten neerleggen bij degene die het meest bereid is ervoor te betalen. De betalingsbereidheid van rechtzoekenden, vooral consumenten, om direct te betalen is vooralsnog beperkt. De meeste online platforms kiezen er daarom voor om de advocaat te laten betalen. Vervolgens is de vraag hoe betaling door de advocaat het beste kan geschieden.*" In Case number ACM/17/012061…

[330] "*Hoe succesvol het platform kan worden hangt onder meer samen met de risicoverdeling tussen het platform en de advocaat. Dit verschilt per businessmodel.*" In Case number ACM/17/012061…

[331] Article 107 of *Lei n.º 145/2015 de 9 de setembro.*

With a subscription model, the lawyer periodically pays a fixed amount to the platform. In return, the platform takes care of the lawyers marketing and visibility. However, the lawyer's revenues may vary and he does not know, in advance, whether he will earn back his subscription fee, while the platform has a fixed and certain revenue.[332]

If the lawyer were to pay a certain amount per client earned (a commission), the lawyer's payment would not be fixed, but dependable on the orders he received on the platform. With this model, the risk would lie most with the platform, since lawyers would not have to pay in advance for an uncertain income. Besides, a payment per client earned provides a strong incentive for the platform to provide good services and good links, because only then will it generate income.[333]

In conclusion, the ACM observed that Rule 2 (3) of the Rules of Conduct for the Legal Profession, including the associated explanatory notes and its application, does not allow for a lawyer to pay for an online platform per client earned (commission model). And that it was also unclear on what was allowed within the commission rule in relation to online platforms. This had the effect of hindering lawyers from participating in these types of platforms and therefore could constitute a restriction of competition between lawyers, since it could thwart the emergence and development of new online platforms, which provide great added value.[334]

ACM submitted its findings to the *NOvA*.[335]

In response, *NOvA* amended the explanatatory notes related to Rule 2 (3) and published them on its website on 13 December 2018.[336] *NOvA* also published a press release regarding these

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[332] "*Bij een abonnementsmodel betaalt een advocaat periodiek een (vast) bedrag aan het platform. In feite 'abonneert' hij zich op een platform. In ruil hiervoor zorgt het platform voor marketing en zichtbaarheid van de advocaat. De kosten van de advocaat hebben geen link met concrete zaken. De opbrengsten variëren, zodat de advocaat vooraf niet weet of hij zijn abonnementsgeld terugverdient. Het platform heeft vaste inkomsten.* ***Bij dit model ligt het meeste risico bij de advocaat***" (my emphasis), In Case number ACM/17/012061…

[333] "*Bij betaling van een bedrag per opdracht betaalt de advocaat pas achteraf, als hij via het platform een opdracht aanneemt. In dit geval staat de betaling van de advocaat niet vast, maar is afhankelijk van de via het platform aangenomen opdrachten. Anders dan bij een abonnementsmodel heeft het platform bij betaling van een bedrag per opdracht variabele inkomsten, afhankelijk van het aantal opdrachten dat via het platform tot stand komt.* ***Bij dit model ligt er meer risico bij het platform.***
*Voor advocaten is betaling per opdracht aantrekkelijk om zich bij platforms aan te sluiten. Zij hoeven immers dan niet, zoals bij het abonnementsmodel, vooraf te betalen voor onzekere inkomsten. Voor platforms lijkt het abonnementsmodel wellicht aantrekkelijk, omdat het meeste risico in dit model bij de advocaat ligt. Maar als advocaten er om deze reden niet aan beginnen, komt het platform niet van de grond. Van betaling per opdracht gaat voor het platform een flinke prikkel uit om tot goede dienstverlening en goede koppelingen te komen, omdat het platform pas dan inkomsten genereert.*", (my emphasis) in Case number ACM/17/012061…

[334] "*De ACM constateert dat Regel 2, derde lid van de Gedragsregels Advocatuur inclusief de bijbehorende toelichting en de toepassing hiervan een advocaat niet de mogelijkheid biedt een online platform per opdracht te betalen. Ook is onduidelijk wat binnen de provisieregel in relatie tot online platforms wél is toegestaan. Dit heeft als uitwerking dat dit advocaten belemmert om deel te nemen aan dit soort platforms en vormt dus mogelijk een beperking van de concurrentie tussen advocaten. Dit kan de opkomst en de ontwikkeling van online platforms hinderen, terwijl platforms hier van grote waarde kunnen zijn.*", Case number ACM/17/012061…

[335] "*De ACM heeft haar bevindingen voorgelegd aan de NOvA*", in Case number ACM/17/012061…

[336] "Toelichting Provisieregels Uitgebreid | Nederlandse Orde van Advocaten," accessed July 31, 2020, https://www.advocatenorde.nl/nieuws/toelichting-provisieregels-uitgebreid.

explanatory notes on the same day. Besides, *NOvA* informed the lawyers registered in the Netherlands about this issue via its Bulletin (*Orde-bericht*).[337]

With the amendment to its explanatory notes, NOvA clarified the conditions under which lawyers are allowed to pay commissions to online platforms:

- The client should have an insight into how the intermediation is being done on the platform, i.e., know how the referral is made and what rewards were paid/received.[338]
- The criteria on which the referral is made, such as the lawyer's expertise, location, hourly rates and remuneration of the referral, should be clear to the consumer, and the lawyer's expertise should be the main criterion for the referral.[339]
- The choice of the lawyer has to be left to the consumer. It should be possible for the consumer not to enter into a contractual relationship with the referred lawyer even if there was a prior payment for the intermediation. The intermediation should be a mere suggestion, it may not be binding for the consumer.[340]
- The lawyer shall be able to demonstrate that the deontological values are not jeopardized by being transparent regarding the amount and type of remuneration to the platform, so that the client may form an opinion on the independence and impartiality of the services provided by the lawyer.[341]

After these clarifications, *ACM* concluded that Rule 2(3) was not an obstacle to the presence of lawyers on online legal platforms that used the "commission" business model, and that it was now up to the platforms, consumers and lawyers to further develop the market.[342]

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[337] "*In reactie op de bevindingen van de ACM heeft de NOvA de toelichting op Regel 2 van de Gedragsregels Advocatuur aangepast en op 13 december 2018 gepubliceerd op haar website. Tevens heeft de NOvA over de verduidelijking van de toelichting op dezelfde dag een nieuwsbericht uitgebracht. Via een 'Orde-bericht' informeert zij de in Nederland ingeschreven advocaten hierover. Ook zal de NOvA in het Advocatenblad van januari 2019 ingaan op de aanpassing van de toelichting op de gedragsregels.*" , in Case number ACM/17/012061...

[338] "*Firstly what is relevant is whether the litigant knows what is happening with his case, how the referral has gone and what remuneration has been paid/received. The advocate is expected to be transparent towards the litigant about both the fact of referral and his expertise in respect of the substance of the case.*" See Nederlandse orde van advocaten, Code of Conduct 2018, available at https://www.advocatenorde.nl/document/nova-code-of-conduct-gedragsregels-2018

[339] "*The criteria on which the selection is made (for example expertise, location, hourly rates, and referral fee) must be clear and transparent, and the criterion of expertise must therefore be the primary criterion for the referral*" , See Nederlandse orde van advocaten, Code of Conduct 2018...

[340] "*Ultimately, the litigant chooses his advocate. One should bear in mind that there should be the possibility, despite a payment for the referral, of the litigant not engaging the advocate. The referral is therefore a suggestion and not a mandatory recommendation*" , See Nederlandse orde van advocaten, Code of Conduct 2018...

[341] "*The advocate can demonstrate that the core values are not being breached by being transparent about the amount and type of remuneration, so that the client can form an opinion about – among other things – the independent and partial service provided by the advocate.*" , See Nederlandse orde van advocaten, Code of Conduct 2018...

[342] "*De NOvA heeft de toelichting op Gedragsregel 2, derde lid verduidelijkt. Uit de aangepaste toelichting blijkt dat advocaten onder voorwaarden mogen betalen voor het verkrijgen van een opdracht. De ACM acht het dan ook niet bij voorbaat in strijd met Regel 2, derde lid van de Gedragsregels Advocatuur als advocaten zich aansluiten bij een online platform dat als businessmodel 'betaling per opdracht' hanteert. Het is nu aan platforms (zoals LD), rechtzoekenden en advocaten om de markt verder te ontwikkelen.*" In Case number ACM/17/012061…

Therefore, *ACM* concluded that no further investigation was needed.[343]

The case involving *LegalDutch, ACM* and *NOvA* is important for many reasons.

Firstly, it shows the importance of online businesses being aware of their legal rights. *LegalDutch* knew that competition law gave it the right to fight back against *NOvA's* restrictive rules. And *LegalDutch* won. What if the Portuguese "*Lawra*" had done the same thing?

This case also illustrates the intersection between Competition Law, Deontological Rules and Bar Associations that characterizes the subject of "online legal platforms". It is a difficult balancing act to harmonize the decades-long traditions of legal professions with the *brave new world* of online platforms. However, *ACM* and *NOvA* have proven that it is not an impossible task. Once again, the Dutch prove that their notion of "*maakbaarheid*", the ability to form and control every aspect of their social and physical environment,[344] is alive and well.

[343] "*In deze situatie is een eventueel optreden door de ACM niet doeltreffend noch doelmatig. De ACM geeft daarom voorrang aan andere onderzoeken. Dit laat onverlet dat haar afweging op een later moment anders kan uitvallen*" in Case number ACM/17/012061…

[344] "*This is at the heart of the Dutch notion of maakbaarheid, the ability to shape, form and control every aspect of the social and physical environment… the believe that a country can be planned and made, from its physical environment to its social and cultural life*" See David Winner, *Brilliant Orange: The Neurotic Genius of Dutch Football*, Bloomsbury Paperbacks (London: Bloomsbury, 2001), p. 51.

# 8 *Autoridade da Concorrência's* project for legislative and regulatory reform in liberal professions.

The recent proposal by the *Autoridade da Concorrência* for legislative and regulatory reform for the liberal professions[345] addresses some of the concerns raised in this dissertation.

## 8.1 Changing the Paradigm of Self-Regulation

This national competition authority proposes a new structure for professional associations, with a change in the paradigm of self-regulation seeming to be desired, with the separation of the regulatory function from the representative function. The proposal recommends changes in the governing bodies of associations - which would now be supervised by an independent body constituted by representatives of the profession but also academics, representatives of consumer organizations and individuals from other regulatory bodies.[346]

With such a constitution, it could be argued that this supervisory board would be composed of "*independent experts*", and therefore the obligations imposed by competition law (European or national) would not apply to decisions issued by this body.

According to the jurisprudence of the ECJ, the fact that the governing body of an association is mainly composed of individuals who are independent of the interests of the undertakings they regulate, implies that its decisions "*cannot be regarded as agreements between traders*".[347]

[345] Autoridade da Concorrência, "Plano de Ação da AdC para a Reforma Legislativa e Regulatória", Available at http://concorrencia.pt/vPT/Estudos_e_Publicacoes/Politicas_Publicas/Documents/Relatorio%20AdC_%20Plano%20de%20A%C3%A7%C3%A3o%20da%20AdC%20para%20a%20Reforma%20Legislativa%20e%20Regulat.pdf

[346] Autoridade da Concorrência, "Plano de Ação da AdC para a Reforma Legislativa e Regulatória", page 28. *"Propõe-se que o legislador altere o quadro legislativo e regulatório separando a função regulatória da função representativa na Ordem Profissional. Tal separação envolverá a criação de um órgão independente, que poderá ser externo à Ordem Profissional e por setor de atividade, ou poderá ser criado um órgão dentro da atual Ordem Profissional, efetivamente separado dos restantes órgãos da Ordem Profissional. O órgão independente assumiria a principal regulamentação da profissão, como matérias que dizem respeito ao acesso à profissão. A direção do órgão regulador seria composta por representantes da própria profissão e de outras pessoas, incluindo indivíduos de alto perfil de outros órgãos reguladores ou organizações, representantes de organizações de consumidores e académicos."*

[347] Judgment of the Court of 19 February 2002. Criminal proceedings against Manuele Arduino, third parties: Diego Dessi, Giovanni Bertolotto and Compagnia Assicuratrice RAS SpA. Case C-35/99. ECLI:EU:C:2002:97, par. 36 and 37.
Also Judgment of the Court of 17 November 1993. Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG. Case C-185/91. ECLI:EU:C:1993:886. Par. 16 to 20.
And Judgment of the Court (Second Chamber) of 17 October 1995. DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chiogga. Joined cases C-140/94, C-141/94 and C-142/94. ECLI:EU:C:1995:330. Par. 18 and 19.

The proposal explicitly mentions that this amendment intends to mitigate the conflict of interest inherent in the system of self-regulation.[348] Thus, the *AdC* seems to be following the idea articulated by the *Advocate General Jacobs*,[349] that in the case of governing bodies who are exclusively constituted by members of the profession, it can be presumed that they take greater account of their own interests, than the public interest.

## 8.2 Reducing the Monopoly on Legal Services

On the other hand, this legislative project mentions the reduction of "*exclusive acts, ensuring criteria of necessity, appropriateness and proportionality with public policy objectives*"[350] with the goal of bringing "*More innovation and diversity and more competitive prices, for the benefit of consumers*".[351]

This measure seems to embrace the idea of the "*proportionality test*", put forward by the European Commission[352] as well as OECD's view that the monopoly on legal services could constitute an obstacle to innovation,[353] thus, the reserved legal services stipulated by *Lei n.º* 49/2004 would be altered.

According to the AdC, the monopoly on legal services must be diminished when: "

*(i) the protection is disproportionate to the public policy objective pursued, either because the activities or tasks can be performed by other equally well qualified professionals or because they do not represent a danger to safety, public health, quality of service, among others;*

*(ii) the protection is inadequate because there is excessive regulation of the protection of the professional title; or*

*(iii) the protection is unnecessary due to legal, social or professional developments that render the restriction obsolete by its objective."*[354]

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[348] *Autoridade da Concorrência*, "Plano de Ação da AdC... page 28 *"Contudo, a mesma situação pode levar à adoção de medidas legislativas e autorregulatórias que, acima de tudo, pretendam salvaguardar os próprios interesses dos advogados, em detrimento do interesse público, podendo, inclusive, ser restritivas da concorrência."*

[349] "[I]t can be presumed that private economic actors normally act in their own and not in the public interest when they conclude agreements between themselves." See AG Jacobs. Cases C-67/96 etc., Albany/Brentjens'/Drijvende Bokken, [1999], par. 184.

[350] *Autoridade da Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa... page 29. *"Em regra, a reserva de atividades deve ser reduzida, em respeito por critérios de necessidade, adequação e proporcionalidade com vista ao cumprimento dos objetivos da regulamentação profissional em causa."*

[351] *Autoridade da Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa... page 29 , *"Esta abertura poderá conduzir a maior inovação e diversidade e preços mais competitivos pela prestação de diferentes serviços jurídicos, em benefício dos clientes, sejam eles famílias e empresas ou outros."*

[352] European Commission, "Report on Competition in Professional Services...

[353] OECD (2018), OECD Competition Assessment Reviews: Portugal... page 204.

[354] *Autoridade da Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa... page 29. "*Em geral, as atividades ou tarefas reservadas para categorias específicas de profissionais devem ser abolidas nos casos em que: (i) a proteção é desproporcional em relação ao objetivo de*

Consequently, the AdC recommends an amendment to Lei 49/2004, "*It is proposed to allow legal advice to be provided by professionals (i.e. legal experts) and entities for whom they work who wish to provide legal advice on a regular basis."*[355]

## 8.3 Allowing Multidisciplinary Firms

Finally, the *AdC* also intends on abolishing the prohibition of multidisciplinary practice in professional societies,[356] a legislative amendment that would allow for the emergence of *legaltechs* in Portugal.

In the view of the AdC, multidisciplinary practice "*allows for the exploration of economies of scope and economies of scale resulting from greater specialization and quality of service resulting from the interaction between a wider range of professionals."*

However, according to the *Estatuto da Ordem dos Advogados,* "*Law firms are not allowed to directly or indirectly exercise their activity in any type of association or integration with other professions, activities and entities whose corporate purpose is not the exclusive exercise of the legal profession.*"[357] Besides, as we have previously seen, as stated in article 6 of *Lei* 49/2004, only legal persons that are "*composed exclusively of lawyers, solicitors or lawyers and solicitors*" or law firms, are allowed to practice acts reserved to lawyers and solicitors.

Therefore, a professional partnership between a lawyer and a software engineer - the type of agreement which may constitute the backbone of *legaltech* companies - is currently not allowed in Portugal, since Portuguese lawyers are not allowed to provide their services while partnering with any other professionals.

As we shall see below, even though the Services Directive 2006/123/EC was meant to produce changes in this field, the Portuguese law that transposed this directive, *Lei 2/2013,*

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*política pública prosseguido, seja porque as atividades ou tarefas podem ser executadas por outros profissionais igualmente bem qualificados ou porque não representam um perigo para a segurança, saúde pública, qualidade do serviço, entre outros; (ii) a proteção é desadequada atento que existe uma excessiva regulamentação da proteção do título profissional; ou (iii) a proteção é desnecessária devido a desenvolvimentos legais, sociais ou profissionais que tornem a restrição obsoleta pelo seu objetivo."*

[355] *Autoridade da Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa... page 36, "*Propõe-se que se permita o exercício de consultoria jurídica por profissionais (ou seja, especialistas jurídicos) e entidades para quem estes trabalham que desejam fornecer aconselhamento jurídico de forma regular."*

[356] *Autoridade da Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa... page 32. "*Propõe-se que o legislador elimine as normas que restringem, total ou parcialmente, a detenção da propriedade de sociedades de profissionais, permitindo que a detenção da totalidade ou da maioria desse capital social, bem como da maioria dos direitos de voto, possam ser detidos por indivíduos e entidades não profissionais e/ou não registados numa determinada Ordem Profissional."*

[357] Lei n.º 145/2015 de 9 de setembro, " *Estatuto da Ordem dos Advogados* " , Article 213 (7), " *Não é permitido às sociedades de advogados exercer direta ou indiretamente a sua atividade em qualquer tipo de associação ou integração com outras profissões, atividades e entidades cujo objeto social não seja o exercício exclusivo da advocacia."*

allowed the bylaws of professional associations – such as the *Estatuto da Ordem dos Advogados* – to prohibit the multidisciplinary practice of their members.[358]

[358] "*A resposta ou – se quisermos, em termos menos aguerridos – a "válvula de escape" para a solução consagrada no RIN encontra-se aos olhos de todos nós e também do legislador parlamentar. Se atentarmos à parte final do n.º 1 e ao n.º 4 do artigo 27.º da LAPP, aí se ressalva, respetivamente, a necessidade de observância do "regime de incompatibilidades e impedimentos aplicável" e a faculdade de aposição de "reservas (…) por via do disposto nos estatutos das associações públicas profissionais…",* Carlos Filipe Fernandes de Andrade Costa "As sociedades multiprofissionais no ordenamento jurídico português e no quadro regulamentar europeu: A diversidade de opções e as questões deontológicas que suscitam".

# 9 Other reforms of the legal professions

## 9.1 European Union - Services Directive 2006/123/EC

*"Just think what Europe could be. Think of the innate strengths of our enlarged Union. Think of its untapped potential to create prosperity and offer opportunity and justice for all its citizens. Europe can be a beacon of economic, social and environmental progress to the rest of the world."*[359]

This auspicious introduction belongs to the Communication from the European Commission, "*Working together for growth and jobs - A new start for the Lisbon Strategy".*

To reach Europe's "*untapped potential*" for prosperity, the Lisbon Strategy aimed at the completion of the Single Market in the areas of energy, transport, public procurement, financial services, and, in what is relevant to this study, in the area of regulated professions.[360]

The Services Directive (2006/123/EC) played an important role in this objective, since it required Member States to take concrete legislative measures to abolish the restrictions on the freedom to provide services that were found as being unnecessary and disproportionate.[361]

This also encompassed the rules on the liberal professions, such as fixed minimum or maximum tariffs (article 15[2][g]), restrictions on advertising (article 24), and – most importantly – restrictions on multidisciplinary partnerships (article 25).

Restrictions on multidisciplinary practice are an obstacle to the emergence of *legaltech* companies, since these enterprises provide services that are the result of the combination of different areas of expertise (namely Law and Technology).

The objective of article 25 of the Services Directive was to "*remove restricting the exercise of different activities jointly or in partnership where such restrictions are unjustified while at the same time ensuring that conflicts of interest and incompatibilities are prevented and that the*

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[359] Commission Communication "*Working together for growth and jobs* – A new start for the Lisbon Strategy" COM (2005) 24 of 02.02.2005.
[360] Commission Communication "*Working together for growth and jobs...* P. 16
[361] Rego, Raquel, ed. The Trend towards the European Deregulation of Professions and Its Impact on Portugal under Crisis. Palgrave Pivot. Basingstoke: Palgrave Macmillan, 2013, p. 43

*independence and impartiality required for certain service activities is secured"*[362] that may be stipulated in national legislation or in rules of professional bodies.

This norm states certain conditions that must be met for these restrictions to be maintained. Clearly inspired by the case law of the European Court of Justice, in particular the exception established by *Wouters*, that allows for restrictions that could reasonably be considered to be necessary for the proper practice of the legal profession,[363] article 25 allows for restrictions in multidisciplinary practice "*in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality".*

Besides the aforementioned obligations, Member States had the duty to report to the Commission which providers are subject to restrictions on multidisciplinary practice, the content of the requirements and the rationale behind these restrictions.[364]

It is relevant to compare the impact of the Services Directive on Portugal and Spain and observe which of these countries has removed the barriers to multidisciplinary practice, and consequently, may accommodate *legaltech* companies, due to this Directive.

### 9.1.1 Spain

Spain's relevant provisions for this subject are *Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales,* and *Ley 2/2007, de 15 de marzo, de sociedades profesionales*.

These norms were the subject of important amendments due to the Services Directive, with changes introduced by *Ley 25/2009, de 22 de diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre ele libre acesso a las actividades de servicios y su ejercicio* (Ley

[362] European Commission, and Directorate-General for the Internal Market and Services. Handbook on Implementation of the Services Directive. Luxembourg: Publications Office, 2007.

[363] "*4. It is not contrary to Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerne*d." Judgment of the Court of 19 February 2002. J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap. Case C-309/99.

[364] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, articles 39(1) and 25(3)

Omnibus), and *Ley 17/2009, de 23 de noviembre, sobre ele libre acceso a las actividades de servicios y su ejercicio* (the Ley Paraguas).[365]

Restrictions and barriers to multidisciplinary professional activity were lowered as follows:

- The exercise of a profession in the form of a partnership is now no longer to be obstructed by any rules of professional bodies that may impose restrictions beyond those present in legislation.[366]
- Regarding professional partnerships, the requirement related to the composition of members' share capital and voting rights were made less restrictive by lowering professional partners' minimum holding from three-quarters to a simple majority.[367]

On the other hand, the bylaws of the Spanish Bar Association, the *Estatuto General de La Abogacía Española,* state that "*Lawyers may enter into multi-professional partnerships with other non-incompatible liberal professionals, without limitation in number and without affecting their full capacity to practise before any jurisdiction and court, using any legal form, including commercial companies*"[368], provided the purpose of the association is to provide specific joint services, including specific legal services that complement those of the other professions[369], that the activity does not affect the correct practice of law by the member lawyers[370] and members who are lawyers must separate themselves when any of their members violates the rules on prohibitions, incompatibilities or deontology proper to the legal profession.

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[365] María Jesús Guerrero Lebrón, Zofia Bednarz, Antonio F. Galacho Abolafio, *Commercial and Economic Law in Spain,* Kluwer Law International, Retrieved from https://books.google.pt/books?id=OSyRDwAAQBAJ&lpg=PT65&dq=Ley%20Paraguas%20commercial%20law%20spain&hl=pt-PT&pg=PT65#v=onepage&q&f=true

[366] "*El ejercicio profesional en forma societaria se regirá por lo previsto en las leyes.* ***En ningún caso los colegios profesionales ni sus organizaciones colegiales podrán, por sí mismos o través de sus estatutos o el resto de la normativa colegial, establecer restricciones al ejercicio profesional en forma societária****", Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales.* Article 2(6) See also: "*Las sociedades profesionales podrán ejercer varias actividades profesionales, siempre que su desempeño no se haya declarado incompatible* ***por norma de rango legal****.", Ley 2/2007, de 15 de marzo, de sociedades profesionales.* Article 3.

[367] "*Como mínimo,* ***la mayoría del capital y de los derechos de voto****, o la mayoría del patrimonio social y del número de socios en las sociedades no capitalistas,* ***habrán de pertenecer a socios profesionales***". *Ley 2/2007, de 15 de marzo, de sociedades profesionales,* Article 4.2, See also "Informe Sobre La Transposición de La Directiva de Servicios En España: Ministerio de Hacienda.", "REPORT ON THE TRANSPOSITION OF THE SERVICES DIRECTIVE" Accessed February 3, 2020. https://www.hacienda.gob.es/es-ES/Areas%20Tematicas/Internacional/Union%20Europea/Paginas/InformeTransposiciondelaDirectivadeServicios.aspx., p. 100.

[368] "*Los abogados podrán asociarse en régimen de colaboración multiprofesional con otros profesionales liberales no incompatibles, sin limitación de número y sin que ello afecte a su plena capacidad para el ejercicio de la profesión ante cualquier jurisdicción y Tribunal, utilizando cualquier forma lícita en derecho, incluidas las sociedades mercantiles, siempre que se cumplan las siguientes condiciones:" Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española,* article 29.

[369] "Que la agrupación tenga por objeto la prestación de servicios conjuntos determinados, incluyendo servicios jurídicos específicos que se complementen con los de las otras profesiones", *Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española,* article 29 (1)(a)

[370] "*Que la actividad a desempeñar no afecte al correcto ejercicio de la abogacía por los miembros abogados", Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española,* article 29 (1)(b)

In theory, a *Legaltech* may take the form of a "*sociedade profesional"*, since one can consider engineers as being part of a liberal profession, by taking into account the case law of the ECJ[371] and the definition included in the Directive on the recognition of professional qualifications 2005/36/EC[372] and since Spanish bylaws allow for partnership between lawyers and other liberal professionals.

However, given that legal advice or the drafting of legal documents are not reserved activities in Spain,[373] many *Legaltech* companies in Spain that provide this type of service have taken the form of "*sociedades limitadas*" (limited liability companies) such as *FormalDocs,*[374] *BigleLegal*[375] or *Legaliboo.*[376]

Spain already allowed for the provision of legal services in a multidisciplinary way. However, the Services Directive allowed for a further liberalization of these services.

All in all, we can observe that the Spanish legal services market is much more liberalized than the Portuguese one, with no monopoly being conferred on the provision of legal services and with Spanish legal professionals being allowed to practice with other liberal professionals in a multidisciplinary manner.[377]

### 9.1.2 Portugal

In Portugal and Spain - as well as Italy – the regulation of joint professional practices was done via the creation of "*an overarching legal framework for all joint professional practice or of liberal*

[371] ECJ 11 October 2001, C 267/99, ECR 2001, I-7467 (Adam), para. 3.

[372] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, Recital 43.

[373] "*Are there certain activities that are "reserved" to those who are licensed to practise law in the jurisdiction? Spanish legislation provides that lawyers have the exclusive right to practise the Legal Profession before any Court, administrative body, association, corporation or public entity.*" , See International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*", available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=d7db79dc-0c70-4159-b70c-76ec1f3cba3c

[374] "*Las presentes condiciones de uso de la página web, regulan los términos de acceso y uso de www.formaldocs.com, propiedad de **FORMALDOCS SL***" *,* (my emphasis), in https://formaldocs.com/condiciones-de-uso

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[376] "Sitio Web: legaliboo.legaliboo.com y sus respectivos subdominios o páginas webs. Titular: **Legaliboo Tech, S.L.** (en adelante el Titular)" (my emphasis), in https://www.legaliboo.com/aviso-legal

[377] "*Are multi-disciplinary practices (MDPs) allowed in your jurisdiction? Yes. Lawyers can practise in association with other compatible liberal professions on a multi-professional co-operative basis, which does not affect their capacity to fully practise in any jurisdiction or before any court, provided (article 29, RDEGA)*" , in "Regulation of the Legal Profession in Spain: Overview | Practical Law," accessed August 11, 2020, https://uk.practicallaw.thomsonreuters.com/Document/Ie844615a966011e698dc8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search).

*professions organized into chambers, in order to achieve a harmonisation of conditions in view of inter-professional collaboration,"*[378] respectively named "*Sociedades de Profissionais*", "*Sociedades Profesionales*" and "*Società tra Professionisti*".

In Portugal, the relevant legal provision is *Lei 2/2013, de 10 de Janeiro, Criação, Organização e Funcionamento das Associações Públicas Profissionais.*[379]

This law partially transposed the Services Directive, covering two major fields: the legal framework of professional associations and the establishment of new rules regarding joint professional practices.[380]

While Spain reduced the restrictions on multidisciplinary practice and prevented the bylaws of professional associations from prohibiting these enterprises,[381] Portugal took the opposite path.

*Lei 2/2013*, in its article 27 (1), stipulated that "***Join Professional Practices*** *of professionals whose principal object is the pursuit of professions organised in a single public professional association* ***may be set up in conjunction or separately with the pursuit of other professions or activities".***[382] (***my emphasis***)

However, article 27 (4) established the following exception: "***Restrictions*** *on the provisions of the preceding paragraphs* ***may be laid down in the statutes of professional public associations".***[383] (***my emphasis***)

[378] European Commission, and Directorate-General for the Internal Market and Services. Handbook on Implementation of the Services Directive. Luxembourg: Publications Office, 2007, p. 80.

[379] This law was later developed by *Lei n.º 53/2015 de 11 de Junho, que estabelece o regime jurídico da constituição e funcionamento das sociedades de profissionais que estejam sujeitas a associações públicas profissionais.*

[380] *"Com efeito, na verdade e em bom rigor, como concluíram Pedro Costa Gonçalves e Diogo Freitas do Amaral, a LAPP corporiza "duas leis" - rectius, compreende dois grandes temas -, a saber, por um lado, o estatuto jurídico das associações públicas profissionais - ordens e câmaras profissionais - e o estabelecimento de novas regras sobre as sociedades de profissionais."* Carlos Filipe Fernandes de Andrade Costa "*As sociedades multiprofissionais no ordenamento jurídico português e no quadro regulamentar europeu: A diversidade de opções e as questões deontológicas que suscitam*", p. 168.

[381] "*El ejercicio profesional en forma societaria se regirá por lo previsto en las leyes.* ***En ningún caso los colegios profesionales ni sus organizaciones colegiales podrán, por sí mismos o través de sus estatutos o el resto de la normativa colegial, establecer restricciones al ejercicio profesional en forma societária****", Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales.* Article 2(6) See also: "*Las sociedades profesionales podrán ejercer varias actividades profesionales, siempre que su desempeño no se haya declarado incompatible* ***por norma de rango legal****.", Ley 2/2007, de 15 de marzo, de sociedades profesionales.* Article 3.

[382] Lei 2/2013, Article 27 (1), "1 - Podem ser constituídas sociedades de profissionais que tenham por objeto principal o exercício de profissões organizadas numa única associação pública profissional, em conjunto ou em separado com o exercício de outras profissões ou atividades, desde que seja observado o regime de incompatibilidades e impedimentos aplicável."

[383] Lei 2/2013, Article 27 (4),

By making it possible for these entities to be prohibited by the statutes of professional associations - unlike in Spain - this norm rendered the creation of joint professional practices between lawyers and non-lawyers impossible.

In fact, even though *Lei 2/2003* stipulated a revision of the statutes of the Bar Association,[384] and therefore a preliminary draft of the bylaws included the possibility of multidisciplinary practice,[385] the statutes that were ultimately adopted did not allow these enterprises – thus maintaining the prohibition established in the Bylaws of 2005.[386] [387]

In sum, the Services Directive did not produce a significant effect regarding multidisciplinary practice in Portugal, since the Portuguese Legislator – and the Portuguese Bar Association – prevented these partnerships.

This prohibition was considered by the *Conselho Superior do Ministério Público* as "*an illegitimate limitation on the principle of freedom to provide services and as such may pose problems of conformity with European Union law (...) An imbalance could arise between Portuguese firms and law firms incorporated in other European jurisdictions where such a limitation does not exist".*[388]

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[384] Lei 2/2013, Article 27 (3), "No prazo máximo de 30 dias a contar do primeiro dia útil seguinte ao da publicação da presente lei, cada associação pública profissional já criada fica obrigada a apresentar ao Governo um projeto de alteração dos respetivos estatutos e de demais legislação aplicável ao exercício da profissão, que os adeque ao regime previsto na presente lei."

[385] "Ordem Dos Advogados - Lisboa - Notícias - Alterações Ao EOA." Accessed February 12, 2020. http://www.oa.pt/cd/Conteudos/Artigos/detalhe_artigo.aspx?sidc=31634&idc=8351&idsc=21852&ida=134121.

[386] "*Mas se é verdade que se operaram algumas alterações relevantes com o Estatuto aprovado pela Lei n.º 145/2015, de 9 de setembro,* ***a verdade é que, no que se refere à possibilidade de constituição de sociedades multidisciplinares, o EOA de 2015 manteve, a solução legal que já resultava do EOA de 2005: tendo em conta a especial natureza da função de advogado, proíbe-se a criação e constituição de sociedades multiprofissionais***!" (my emphasis), Carlos Filipe Fernandes de Andrade Costa "trtões deontológicas que suscitam", p. 192

[387] "*Ao contrário do estabelecido na lei-quadro das APP e na lei-quadro das sociedades de profissionais*[2828], ***o EOA – aproveitando a permissão de derrogação do regime geral, prevista no art. 27.º, 4 da Lei n.º 2/2013 – não admite a possibilidade de os sócios serem não profissionais****. Os sócios apenas poderão ser advogados ou outras sociedades de advogados (art. 213.º, 2*[29]*),* (my emphasis), Paulo de Tarso Domingues, "Lei n.º 53/2015, de 11 de junho – Regime jurídico da constituição e funcionamento das sociedades de profissionais que estejam sujeitas a associações públicas profissionais / Lei n.º 145/2015, de 9 de setembro – Novo Estatuto da Ordem dos Advogados", available at http://bdjur.almedina.net/fartigo.php?id=53

[388] See Official Letters 1555/2015 and 9132/2015 sent by the "*Conselho Superior do Ministério Público*" to the Justice Minister and to Parliament, where the draft was being assessed, in: www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=39176

Since the prohibition on multidisciplinary practice does not exist in Spain,[389] Germany,[390] Italy,[391] France,[392] or the Netherlands,[393] the total prohibition of multidisciplinary practice as established in Portuguese law may constitute a disproportionate obstacle to the freedom to provide services. Besides, Portuguese legal professionals could be placed at a competitive disadvantage vis-à-vis their European counterparts.

This situation would be even more severe if *legaltechs* from across the European Union start providing their services to Portuguese consumers. A hypothesis that I raised in chapter 7.1.

More recently, other legal arguments have been raised against this prohibition.

Pedro Correia *et. al.*, have affirmed that preventing Portuguese lawyers from practicing alongside other professionals might be unconstitutional, since article 18 of the Constitution of the Portuguese Republic states that fundamental rights may only be limited in a proportionate manner, and only when necessary to safeguard other rights. This prohibition is considered as excessively restricting the Freedom to Choose a Profession (article 47) and the Freedom of Private Enterprise (article 61).[394] These authors also affirm that this prohibition might constitute a breach of the Services Directive.[395]

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[389] "*Los abogados podrán asociarse en régimen de colaboración multiprofesional con otros profesionales liberales no incompatibles, sin limitación de número y sin que ello afecte a su plena capacidad para el ejercicio de la profesión ante cualquier jurisdicción y Tribunal, utilizando cualquier forma lícita en derecho, incluidas las sociedades mercantiles, siempre que se cumplan las siguientes condiciones:" Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española,* article 29.

[390] "*Lawyers are permitted to form MDPs with patent lawyers, tax consultants, tax agents, accountants and certified auditors for the purpose of a common exercise of profession (section 59a, Federal Lawyer's Act). However, in a recent decision, the Federal Constitutional Court held that this limitation is in breach of the constitutional right to freely pursue professional activities (Bundesverfassungsgericht, decision of 12. January 2016, case no. 1 BvL 6/13). Therefore, MDPs formed of lawyers and, for example, physicians or pharmacists might be possible in the future.*" , in " Regulation of the Legal Profession in Germany: Overview | Practical Law," accessed August 10, 2020, https://ca.practicallaw.thomsonreuters.com/2-638-8145?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a518176.

[391] "*Italian lawyers may work as sole practitioners, in partnerships and in various forms that permit cooperation with other professions.*" , in International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*"...

[392] "*They may also practise in a "professional civil company" (société civile professionnelle, SCP) which is the equivalent of a partnership; a " liberal labour company" (société d' exercice libéral, SEL), either as a collaborator or as a salaried lawyer." In* International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*"...

[393]"*Dutch advocates may work in sole practice, in general or limited liability partnerships. Under certain limited circumstances they may also work in partnership with some other specific quasi-legal professions.*" , International bar Association, "*The IBA Global Cross Border Legal Services in the EU and EFTA Report 2019*"...

[394] "*A proibição do exercício da advocacia em sociedades multidisciplinares parece, pois, introduzir uma compressão aos citados direitos constitucionais (…) o princípio da proporcionalidade ínsito no Artigo 18 da Lei Fundamental deve ser respeitado, sendo crucial proceder aos testes da adequação, da necessidade e da exigibilidade no caso concreto.*" in Correia, Pedro & Jesus, Inês & Pereira, Sandra. (2019). A Problemática das Sociedades Multidisciplinares na Área do Direito: O Caso da Advocacia Portuguesa. 22. 93-104.

[395] "*Com a consagração de sociedades multidisciplinares de advogados, Portugal evita ser condenado por incumprimento de normas da União Europeia, mormente da Diretiva 2006/123*" , in Correia, Pedro & Jesus, Inês & Pereira, Sandra. (2019). A Problemática das Sociedades Multidisciplinares na Área do Direito: O Caso da Advocacia Portuguesa. 22. 93-104.

On the other hand, it should also be borne in mind that fundamental rights are safeguarded by the Charter of Fundamental Rights of the European Union.[396]

The review of Member State's action in light of the Charter prevents a situation in which the level of protection of fundamental rights varies according to the national law involved. Its objective is to protect "*the unity, primacy and effectiveness of EU Law*".[397]

Article 16 of the Charter establishes the Freedom to conduct a business, which encompasses the principle of contractual freedom[398] and also the freedom to choose a profession.[399]

According to article 51 of the Charter, the provisions of the Charter apply only when Member States are "implementing Union law".

*Lei 2/2013* corresponds to the national transposition of the Services Directive,[400] therefore it can unequivocally be considered that this legislative act is under the scope of EU Law and is therefore seen under the Charter's light and scope of application.

On the other hand, the Bylaws of the Portuguese Bar Association, although approved in a first phase by the internal bodies of the Bar Association, are consequently passed by the Portuguese National Parliament, taking the form of national law: *Lei 145/2015.*

Could *Lei 145/2015* also be considered as an "implementation of EU law"?

As stated in *Mangold,* the term "implementation" refers not only "*to the original transposition of (a) Directive"* but also covers "*all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted."*[401]

[396] The simultaneous protection of fundamental rights through both national laws and the Charter is referred to as the "multilevel protection of fundamental rights". See Raffaele Bifulco, Marta Cartabia, and Alfonso Celotto, eds., L'Europa Dei Diritti: Commento Alla Carta Dei Diritti Fondamentali Dell'Unione Europea (Bologna: Il mulino, 2001), p. 348.

[397] Judgment of the Court of 6 March 2014, Siragusa, C-206/13, EU:C:2014:126, paragraph 32

[398] "Mas, em que é que se traduz a referida «liberdade económica» (ou livre iniciativa económica) que integra, no fundo, a «liberdade de empresa»? Por um lado, falamos, no âmbito das manifestações daquela liberdade, da *liberdade contractual."* In Pedro Madeira Froufe, "Liberdade de Empresa", p. 219 Alessandra Silveira, ed., Carta dos direitos fundamentais da União Europeia: comentada (Coimbra: Almedina, 2013).

[399] "Depois, concretiza, igualmente, a «liberdade económica» a denominada *liberdade de trabalho."* In In Pedro Madeira Froufe, "Liberdade de Empresa"…

[400] "National transposition measures communicated by the Member States concerning: Directive 2006/123/EC", "EUR-Lex - 32006L0123 - EN - EUR-Lex," accessed January 30, 2021, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32006L0123

[401] Case C-144/04, *Mangold,* ECLI:EU:C:2005:709, p. 51

Under *Kücükdeveci,* the notion of "implementation" was equalled *"to Member State legislation that is not intended to implement a directive in a strict sense but otherwise touches upon fields regulated by that act".*[402]

While *Lei 2/2013* establishes the overarching framework for professional associations, it is *Lei 145/2015* that stipulates the concrete professional rules that bind Portuguese Lawyers. It is an addition, an implementation, of *Lei 2/2013.*

Therefore, *Lei 145/2015* can be considered as an implementation of EU Law, and thus, it must abide by Article 16 of the Charter.

However, according to the *Tedeschi* principle, *"rules of primary law can apply only in the absence of more specific secondary law".*[403]

As stated in Article 6 of the Treaty on European Union, the Charter has the same legal value as the EU treaties and is thus considered as primary law.[404]

In the case in point, the Services Directive is applicable, and therefore, one must ascertain whether *Lei 145/2015* and *Lei 2/2013* are in compliance with the Directive.

As previously stated, article 25 of the Services Directive, clearly inspired by the case law of the European Court of Justice, in particular the exception established by *Wouters*, that allows for restrictions that could reasonably be considered to be necessary for the proper practice of the legal profession,[405] allows for restrictions in multidisciplinary practice "*in so far as is justified in order to*

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[402] Carlino Antpöhler, Armin von Bogdandy, Johanna Dickschen, Simon Hentrei, Matthias Kottmann, Maja Smrkolj, 'Reverse Solange–Protecting the essence of fundamental rights against EU Member States', (2012), 49, Common Market Law Review, Issue 2, pp. 489-519, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/49.2/COLA2012018. See **Case C-555/07**, **Kücükdeveci**, ECLI:EU:C:2010:21, p. 25, *"On that date, that directive had the effect of bringing **within the scope of European Union** law the national legislation at issue in the main proceedings, **which concerns a matter governed by that directiv**e, in this case the conditions of dismissal." **(my emphasis).***

[403] Tobler, Christa. (2013). The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach. 10.1007/978-90-6704-897-2_24. See "**Where**, in application of Article 100 of the Treaty, **Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health** and establish Community procedures to check that they are observed, **recourse to Article 36 is no longer justified** and **the appropriate checks must be carried** out and the measures of protection adopted **within the framework outlined by the harmonizing directive. (my emphasis).** in Case 5-77 Carlo Tedeschi v Denkavit Commerciale s.r.l. [1977] ECR 1555, para 35.

[404] "However, only with the adoption of the Treaty of Lisbon on 1 December 2009 did the Charter come into direct effect, as provided for by Article 6(1) TEU, **thereby becoming a binding source of primary law**." **(my emphasis),** in "The Protection of Fundamental Rights in the EU | Fact Sheets on the European Union | European Parliament," accessed January 31, 2021, https://www.europarl.europa.eu/factsheets/en/sheet/146/European-Union-Charter.

[405] "*4. It is not contrary to Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerne*d." Judgment of the Court of 19 February 2002. J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap. Case C-309/99.

*guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality".*

However, the blanket ban that was imposed by the Portuguese legislator goes beyond these criteria of proportionality and necessity, and therefore, it can be considered as a breach of the Services Directive.

## 9.2 England and Wales – Legal Services Act 2007

The Legal Services Act is commonly cited amongst academics in the field of legal services regulation.[406] Preceded by the Clementi report,[407] its regulatory objectives were namely to improve access to justice, promote competition in the regulation of regulated services and increase public understanding of the citizen's legal rights and duties.[408]

The LSA designates certain legal works as reserved activities - such as the exercise of a right of audience or the conduct of litigation - and requires that they only be performed by "authorized persons".[409] The provision of legal advice or the drafting of documents do not constitute reserved activities.[410]

In the UK there are nine different categories of legal professionals who are considered "authorized persons" : solicitor, barrister, legal executive, notary, licensed conveyancer, patent attorney, trademark attorney, costs lawyer and chartered accountant. [411]

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[406] See Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering, 67 Hastings Law Journal 1191 (2016), also Wendt, Ida E. "EU Competition Law and Liberal Professions: an Uneasy Relationship?" (Nijhoff Studies in European Union Law). Martinus Nijhoff, 2012. Page 227. Hill, Louise Lark, Alternative Business Structures for Lawyers and Law Firms: A View from the Global Legal Services Market (2017). Oregon Review of International Law, v. 18, 2017, Widener University Delaware Law School Legal Studies Research Paper Series No. 17-14, Available at SSRN: https://ssrn.com/abstract=3042934 and Nuno Garoupa, "Globalization and Deregulation of Legal Services," *International Review of Law and Economics* 38 (June 2014): 77‑86, https://doi.org/10.1016/j.irle.2013.07.002.

[407] Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales*, London: Department of Constitutional Affairs (2004).

[408] Legal Services Act 2007, c. 29, § 1(1) (Eng. & Wales).

[409] Legal Services Act 2007, c. 29, § 12(1) (Eng. & Wales).

[410] Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation…

[411] Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation…

Besides these legal professionals, the LSA also allows for the carrying on of reserved legal activities by "licensed bodies" named "Alternative Business Providers" (or ABS).[412] This allows non-lawyers to own up to 100% of a legal service provider.[413]

These entities are licensed by five authorities: the Solicitors Regulatory Authority, the Bar Standards Board, the Council of Licensed Conveyancers, the Institute for Chartered Accountants and the Intellectual Property Regulation Board.[414]

The creation of these entities, which allow alternative legal service providers (ALSPs) to easily operate in the legal services market, is seen as one of the major reasons for the attractiveness of the UK's legal sector for *legaltech* startups.[415]

*Legaltech*s such as *Lawbite - "an online, virtual law firm"*[416] - or *Farewill* – "*UK's best-rated death experts"*,[417] where consumers can "*write a will online in as little as 15 minutes"*[418] – are registered as Alternative Business Structures.[419]

Both the ABS and the authorized persons working within it are regulated via the LSA. Both can potentially lose their license to practice or the authorization to practice if they incur in a breach of rules.[420]

The licensing authority must also approve of anyone who holds a material interest in an ABS,[421] i.e., holds at least 10% of the shares[422] or is able to exercise significant influence by ownership or voting rights, in the entity or its parent.[423] A non-authorised person's holding of a material interest "*will be approved if the licensing authority is satisfied that it would not compromise*

[412] See Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation… and Weberstaedt, Jakob, English Alternative Business Structures and the European Single Market (September 29, 2013). Available at SSRN: https://ssrn.com/abstract=2333174 or http://dx.doi.org/10.2139/ssrn.2333174 and Legal Services Act 2007, c. 29, § 18(1) (Eng. & Wales).

[413] Weberstaedt, Jakob, English Alternative Business Structures and the European Single Market…

[414] See Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation…

[415] Thomson Reuters, "Legaltech Startup Report 2019", available at https://legalsolutions.thomsonreuters.co.uk/content/dam/openweb/documents/pdf/uki-legal-solutions/report/tr-legaltech-startup-report-2019.pdf

[416] "Lawbite," Legal Geek (blog), accessed July 27, 2020, https://www.legalgeek.co/startup-map/lawbite/.

[417] "About Us," accessed July 27, 2020, https://farewill.com/about.

[418] "Online Will Writing Service | Legal Will In 15 Minutes," accessed July 27, 2020, https://farewill.com/make-a-will-online.

[419] See Solicitors Regulation Authority, "ABS Search,", https://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search/, Also https://www.sra.org.uk/solicitors/firm-based-authorisation/abs-register/622808/ regarding *Lawbite* and https://www.sra.org.uk/solicitors/firm-based-authorisation/abs-register/647565/ regarding *Farewill*.

[420] See Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation…

[421] Legal Services Act 2007, c. 29, § 89, sch. 13 (Eng. & Wales).

[422] Legal Services Act 2007, c. 29, § 89, sch. 13 (Eng. & Wales).

[423] Legal Services Act 2007, c. 29, § 89, sch. 13 (Eng. & Wales).

*the regulatory objectives or compliance by the licensed body and the licensing authority must also be satisfied that the person is a fit and proper person to hold the interest*".[424]

Reserved activities may be carried out only by authorized persons within the ABS.[425]

Similarly to what happens with the German *Rechtsdienstleistungsgesetz* (Act on Out-of-Court Legal Services), where legal persons must designate one "qualified person",[426] ABS must have at least one manager who is authorized to engage in the reserved activities for which the ABS is licensed.[427] This requirement is also present in the Portuguese Law regarding joint professional practices ("*Sociedades de Profissionais*"), *Lei 53/2015.*[428]

ABS must also have a Head of Legal Practice, approved by the licensing authority, *"that serves as a compliance officer responsible for ensuring that only authorized persons carry out reserved activities and that unauthorized persons do not violate their duty under the Act not to cause the licensed body or its employees and managers to breach applicable regulations."*[429]

Parallel to this liberalization of legal services, the LSA introduced a new regulatory framework via the creation of the Legal Services Board, whose role is to supervise professional bodies that assume regulatory functions, taking the role of "oversight regulator".[430]

If a similar reform were to be implemented in Portugal, this would imply the creation of a new regulatory body that would supervise the *Ordem dos Advogados* and the *Ordem dos Solicitadores e Agentes de Execução.*

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[424] Explanatory Notes to the Legal Services Act 2007, Commentary on § 89, p. 232. Available at https://www.legislation.gov.uk/ukpga/2007/29/notes/division/7/5/1/19

[425] "Licensing rules must provide that a licensed body may carry on a licensed activity only through a person who is entitled to carry on the activity." In Legal Services Act 2007, c. 29, sch. 11, Part 3, 16.

[426] "Legal persons and companies without legal personality **must designate at least one natural person who fulfils all the conditions as required by subsection (1) no. 1 and no. 2 (qualified person).** The qualified person must be in the permanent employ of the company, must be capable of acting independently and issuing instructions on all matters concerning the company's legal services, and must be authorised to represent the company externally. Registered private individuals may designate qualified persons. " (my emphasis) § 12 (4) RDG. The English version of the RDG, provided by the German Ministry of Justice, is available in https://www.gesetze-im-internet.de/englisch_rdg/englisch_rdg.pdf

[427] "At least one of the licensed body's managers must be a person (other than a licensed body) who is an authorised person in relation to a licensed activity." Legal Services Act 2007, c. 29, sch. 11, Part 2, 9(2) (Eng. & Wales).

[428] "***Os sócios e administradores não precisam de ter as qualificações exigidas para o exercício da respetiva atividade profissional. No entanto, pelo menos um dos administradores deverá ter tais qualificações*** *(o que significa que a maioria dos membros do órgão de administração não precisa de as ter). Já no que respeita aos sócios, a maioria do capital deve pertencer a profissionais estabelecidos no território nacional ou a outras sociedades de profissionais portuguesas ou constituídas num Estado-Membro ou do Espaço Económico Europeu (cfr. art. 27.º, 3).*" (my emphasis) In Paulo de Tarso Domingues, "Lei n.º 53/2015, de 11 de junho - Regime jurídico da constituição e funcionamento das sociedades de profissionais que estejam sujeitas a associações públicas profissionais / Lei n.º 145/2015, de 9 de setembro - Novo Estatuto da Ordem dos Advogados", available at http://bdjur.almedina.net/fartigo.php?id=53

[429] See Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation...

[430] Wendt, Ida E. "EU Competition Law and Liberal Professions: an Uneasy Relationship?" (Nijhoff Studies in European Union Law). Martinus Nijhoff, 2012. Page 227

The creation of an independent body to enable a separation between the regulatory and representative functions of the profession is mentioned by the *Autoridade da Concorrência* in its regulatory reform proposal.[431]

The LSB has the power to grant and withdraw authorization of professional or other bodies to act as "approved regulators", and these regulators must have appropriate governance arrangements that provide for a separation between their regulatory and representative functions.[432]

All in all, the Autoridade da Concorrência's project for legislative and regulatory reform in liberal professions was clearly inspired by the Legal Services Act of 2007. However, we can notice that some of the measures brought forward by this legislative act are already in force within the Portuguese legal framework, such as the regulation of multidisciplinary entities via *Lei 53/2015.*

An adaptation of *Lei 53/2015* that would allow lawyers to practice in joint professional entities, while introducing requirements such as compliance officers similar to the "Head of Legal Practice", would be an interesting path forward for the Portuguese Legislator.

## 9.3 United States of America

The United States is currently facing an Access to Justice crisis. According to the American Bar Association Commission on the Future of Legal Services, *"despite sustained efforts to expand the public access to legal services unmet, significant needs persist"* and *"most people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need."*[433]

[431] "*Propõe-se que o legislador altere o quadro legislativo e regulatório* ***separando a função regulatória da função representativa na Ordem Profissional. Tal separação envolverá a criação de um órgão independente, que poderá ser externo à Ordem Profissional*** *e por setor de atividade, ou poderá ser criado um órgão dentro da atual Ordem Profissional, efetivamente separado dos restantes órgãos da Ordem Profissional" in Autoridade da Concorrência*, (my emphasis), "Plano de Ação da AdC para a Reforma Legislativa… page 28.

[432] See Section 27 of the Legal Services Act 2007: "*(1) In this Act references to the 'regulatory functions' of an approved regulator are to any functions the approved regulator has— (a) under or in relation to its regulatory arrangements, or (b) in connection with the making or alteration of those arrangements. (2) In this Act references to the 'representative functions' of an approved regulator are to any functions the approved regulator has in connection with the representation, or promotion, of the interests of persons regulated by it."*

Section 29 of the Legal Services Act 2007: *"(1) Nothing in this Act authorises the Board to exercise its functions in relation to any representative function of an approved regulator. (2) But subsection (1) does not prevent the Board exercising its functions for the purpose of ensuring— (a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, or (b) that decisions relating to the exercise of an approved regulator's regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions."*

[433] Commission on the Future of Legal Services, Report on the Future of Legal Services in the United States, 11-14 (American Bar Association 2016), available at
https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf

The rising cost of hiring lawyers[434] and, simultaneously, the decrease in revenues of small firm lawyers, who primarily serve the "*PeopleLaw sector*" (instead of corporate clients),[435] has created a "*justice gap*", where many individual litigants have been forced to forego using professional legal services and either represent themselves or ignore their legal problems.[436]

It is considered that small firm lawyers are spending roughly the same amount of time looking for legal work and running their business as they are performing legal work for clients[437] and that this lack of legal productivity may be the result of ethical rules that restrict ownership of law firms to lawyers.[438]

Therefore, several reform initiatives have surged in the United States, such as the Utah State Bar Work Group on Regulatory Reform, the California State Bar Task Force on Access Through Innovation of Legal Services and the Arizona State Bar Task Force on the Delivery of Legal Services, who intend on changing the rules of the profession so as to allow for the entrance of non-lawyers into the ownership or even management of law firms.

Since the regulatory paradigm of these States is quite similar to the Portuguese one – with similar rules regarding non-lawyer ownership of firms or the unauthorized practice of law - I have made a review of the changes happening in the State of Arizona that are most similar to the ones proposed by the *Autoridade da Concorrência.*

[434] William Henderson, The Decline of the People Law Sector, November 19, 2017, Post 037, available at https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/.
[435] William Henderson, The Decline of the People Law Sector.
[436] William Henderson, The Decline of the People Law Sector.
[437] Clio, 2017 Legal Trends Report, 17 (2017), https://www.clio.com/resources/legal-trends/2017-report/.
[438] William D. Henderson, Legal Market Landscape Report, July 2018, available at http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf

### 9.3.1 State Bar of Arizona Task Force on the Delivery of Legal Services

The State Bar of Arizona is the "integrated" bar association - i.e., an association of attorneys in which membership and dues are required as a condition of practicing law[439] - of the U.S. state of Arizona, and it operates under the supervision of the Arizona Supreme Court,[440] with the goal of assisting the Court with the "*regulation and discipline of persons engaged in the practice of law*".[441]

The State Bar is governed by a Board of Governors,[442] which is composed of sixteen elected governors and ten appointed governors. Four of these governors are designated as "*public*" governors, which means they must not be members of the State Bar and must not have, other than as consumers of legal services, a financial interest in the practice of law.[443] (The option of including non-members, who do not have a financial incentive on the practice of law, on the governing body of the State Bar, is similar to the one suggested by AdC for the *Ordem dos Advogados.*[444])

On November 21, 2018, the *Task Force on Delivery of Legal Services* was established with namely the following purposes:

- *"Examine and recommend whether nonlawyers, with specific qualifications, should be allowed to provide limited legal services"*
- *"Recommend whether Supreme Court rules should be modified to allow for co-ownership by lawyers and nonlawyers in entities providing legal services."*[445]

[439] Keller v. State Bar of California, 496 U.S. 1 (1990)
[440] Rule 32(a), Rules of The Supreme Court of Arizona, "*The Supreme Court of Arizona maintains under its direction and control a corporate organization known as the State Bar of Arizona*"
[441] Rule 32(a)(2)(d), Rules of The Supreme Court of Arizona.
[442] Rule 32(d), Rules of The Supreme Court of Arizona.
[443] Rule 32(e) and 32(e)(4)(a), Rules of The Supreme Court of Arizona.
[444] Autoridade da Concorrência, "Plano de Ação da AdC para a Reforma Legislativa e Regulatória" , page 28. *"A direção do órgão regulador seria composta por representantes da própria profissão e de outras pessoas, incluindo indivíduos de alto perfil de outros órgãos reguladores ou organizações, representantes de organizações de consumidores e académicos."*
[445] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services*, Report and Recommendations, October 4, 2019, p. 1 available at https://iaals.du.edu/sites/default/files/documents/publications/az_lstf_final_report_and_recommendations_100419.pdf

The recommendations of the Task Force were published on a report made public on October 4, 2019, as follows:

- *"1. Eliminate Arizona's Rules of Professional Conduct (ER) 5.4 and 5.7 and amend ERs 1.0 through 5.3 to* ***remove the explicit barrier to lawyers and nonlawyers co-owning businesses that engage in the practice of law*** *while preserving the dual goals of ensuring the professional independence of lawyers and protecting the public."*[446] (my emphasis)
- *"6.* ***Develop****, via a future steering committee,* ***a tier of nonlawyer legal service providers****, qualified by education, training, and examination, to provide limited legal services to clients, including representation in court and at administrative proceedings."* (my emphasis).

In the opinion of the Task Force, "*lawyers have the ethical obligation to assure legal services are available to the public, and that if the rules of professional conduct stand in the way of making those services available, then the rules should be changed, albeit in a way that continues to protect the public.*"[447]

Therefore, it concluded that "*that no compelling reason exists for maintaining ER 5.4* (which prohibits sharing fees with nonlawyers and forming partnerships with nonlawyers if any part of the partnership's activities include the practice of law) *because its twin goals of protecting a lawyer's independent professional judgment and protecting the public are reflected in other ethical rules which can be strengthened.*"[448]

However, several issues are raised by the possibility of the provision of legal services by non-lawyers: the breach of professional secrecy, the threat of diminishing the independence of lawyers, or the emergence of possible conflicts of interest between the partners of this new entity, whose interests may not be aligned with the best interests of the client. These are commonly identified as the main barriers for the implementation of multidisciplinary firms.[449]

[446] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services*, p. 3.
[447] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 17 and 18.
[448] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 19.
[449] "*Assim, de entre o elenco de atributos deontológicos que norteiam a profissão, permita-se-nos destacar três deles: a independência, o respeito pelo segredo profissional e a necessidade de evitar conflitos de interesses*", in Carlos Filipe Fernandes de Andrade Costa "*As sociedades*

Furthermore, since non-lawyers are not members of the Bar Association, they are exempt from its disciplinary action.

The solution reached by the Task Force was to expand the responsibility of lawyers for compliance with deontological rules - which until now was limited to their assistants[450] - to include their non-lawyer partners.

Arizona's rules of Professional Conduct establish a joint responsibility between lawyers' assistants and themselves. Rule 5.3 (c) states that a lawyers is deemed responsible for a breach of conduct by an assistant if "*the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."* This rule was amended to include the conduct of non-lawyer partners.[451]

In relation to the duty of professional secrecy, the Task Force clarified that regardless of whether a client is receiving legal services from a lawyer or receiving nonlegal services from a nonlawyer, the traditional protections of the client's information apply to all aspects of the business.[452]

It was thus stipulated that the lawyer is required to *"act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision including individuals who are providing nonlegal services through the firm. Lawyers shall establish reasonable safeguards within firms to assure that all information learned from or about a firm client shall remain confidential even if the only services provided to the client are nonlegal services."*[453]

Regarding the independence of the lawyers, Ethical Rule 5.3 was amended to include an obligation by the lawyers to *"prevent nonlawyers in a firm from directing, controlling or materially limiting the lawyer's independent professional judgment on behalf of clients or materially*

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*multiprofissionais no ordenamento jurídico português e no quadro regulamentar europeu: A diversidade de opções e as questões deontológicas que suscitam".*

[450] E.R. 5.3., Arizona Rules of Professional Conduct, available at https://www.azbar.org/ethics/rulesofprofessionalconduct/

[451] "***A lawyer shall be responsible for conduct of a nonlawyer*** *that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer", (*my emphasis), See Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services...* p. 93

[452] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 17.

[453] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 75.

*influencing which clients a lawyer does or does not represent".*[454] In my interpretation of this norm, I infer that a majority stake by non-lawyers would not be allowed.

With respect to possible conflicts of interest, the rules regarding conflicts of interest between lawyers of the same firm were changed to include non-lawyers, "(*a) While lawyers and nonlawyers are associated in a firm, none of them shall knowingly represent a client on legal or nonlegal matters when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9"*[455]

As we can see, the responsibility of ensuring the compliance with the ethical rules was placed on the lawyers. This obligation is reinforced when non lawyers have an equity interest or managerial authority in the firm. In this case, *"any lawyer practicing therein shall ensure that a lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules."*[456] This lawyer has a role similar to the "Head of Legal Practice" that was established in the Legal Services Act of 2007.

The Task Force opted on placing the onus of compliance on the lawyers who partner with non-lawyers, instead of regulating these new legal entities as a whole. However, this option was not definitely excluded, since the Task Force affirmed that *"Entity regulation should be explored as an additional tool to ensure lawyer independence, client confidentiality, and consumer protection."*[457]

As we have previously seen, the regulation of alternative legal services providers already exists in the United Kingdom. The regulation of legal entities in the model of the U.K. – via Alternative Business Structures – is also mentioned in the AdC's project for the *Ordem dos Advogados*.[458]

All in all, we can see that the recommendations of the Task Force are very similar to the ones proposed by the AdC: reduce lawyers' monopoly and allow for multidisciplinary practice.

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[454] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 93.
[455] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 87.
[456] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 94.
[457] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 20.
[458]Autoridade da Concorrência, "Plano de Ação da AdC para a Reforma Legislativa e Regulatória", page 36. "*Propõe-se que o legislador elimine a proibição da prática multidisciplinar em sociedades de profissionais de advogados* ***e permita a criação de "estruturas de negócios alternativas",*** *permitindo que diferentes formas de modelos de negócio surjam no mercado, para atender a diferentes tipos de agentes de mercado, tornando o setor mais dinâmico, mais inovador e com uma maior gama de serviços."* **(my emphasis).**

# 10 Conclusion

Portugal must take heed of the lessons learned in other jurisdictions, such as Germany, the Netherlands, Spain, the UK and the United States of America, that were briefly alluded to in this work. These countries have showed us that it is possible to innovate in the provision of legal services, whilst also protecting consumers. An institutional redesign is needed, and a political discussion that involves legal professionals, academics and most importantly, consumers of legal services, is of paramount importance.[459]

We saw how the European legislator has pushed for a liberalization of the regulated professions, via the Services Directive (and most recently, Directive 2018/958, on a proportionality test before adoption of new regulation of professions).[460] The Portuguese legislator has resisted these changes, to the detriment of Portuguese consumers and its legal market and, in doing so, it has incurred in a breach of the Services Directive.[461]

This resistance to change can also be observed in the Portuguese Bar Association's institutional position. By establishing a total ban on the participation of lawyers in online legal platforms, it has incurred in a breach of competition law. In the Netherlands, the Dutch Bar Association established new professional rules to deal with this phenomenon.[462]The current Portuguese legal framework seems to be based on the traditional paradigm of legal services: provided mostly by lawyers, who make themselves known only through "*word of mouth*" and who practice their profession without partnering with colleagues from other areas.

[459] Andrew Arruda, interview via Zoom, 18 january 2021.

[460] "De facto, a tendência europeia das últimas décadas tem sido no sentido da máxima liberalização das designadas profissões reguladas. É isso mesmo que resulta da recente Diretiva 2015/958 relativa a um teste de proporcionalidade obrigatoriamente a realizar pelos Estados-membros antes da aprovação de novas regras que imponham restrições ao acesso ou ao exercício de determinadas profissões." In Eduardo Castro Marques, "Sociedades de Advogados Multidisciplinares," Dinheiro Vivo, October 20, 2020, https://www.dinheirovivo.pt/opiniao/sociedades-de-advogados-multidisciplinares-12943028.html.

[461] See also "No entanto, o atual Estatuto da Ordem dos Advogados aprovado pela Lei n.º 145/2015, de 09 de setembro não seguiu o movimento de liberalização das profissões reguladas e como resposta à LAPP continuou a vedar a possibilidade de exercício multidisciplinar da advocacia, o que configura um incumprimento do Direito Comunitário que poderá resultar na condenação do Estado Português pela violação da Diretiva 2006/123/CE", in Roberto Pereira, "O Regime Jurídico Especial das Sociedades de Advogados A problemática em torno das Sociedades Multidisciplinares", ISCTE

[462] See chapter 6.2

While we are witnessing the emergence of new technological legal services across the world - that enable consumers to access justice more easily - it seems that Portugal is still clinging to traditional practices, and it is being left out of this digital revolution.

There is a need to reform the current legal framework, so that it allows for the use of new technologies in the legal sector, while also protecting consumers.

The monopoly on legal services should be reconsidered, since "*there is no scope for using digital applications (such as artificial intelligence) systems or providing legal advice through online or digital systems (...) the entity that would make an algorithm as a legal research tool for obtaining legal advice commercially available, would be practicing a reserved act illegally, unless he were a lawyer.*"[463]

Many Member States, like Spain or the Netherlands, do not confer a monopoly on legal advice. This fact should elicit a reflection.

Besides reducing the scope of reserved activities, another option would be to create a multi-tiered provision of legal services providers, besides lawyers, as was proposed by the State Bar of Arizona Task Force on the Delivery of Legal Services,[464] (in a similar vein to what already occurs in the medical sector[465]).

The prohibition on multi-disciplinary firms should also be reconsidered, so as to allow for the existence of partnerships between lawyers and IT professionals, which are essential for *legaltech* enterprises.[466]

As stated by Andrew Arruda, the founder of *ROSS Intelligence* and member of IAALS (Institute for the Advancement of the American Legal System) by prohibiting non-lawyer ownership of law firms, a lawyer or law firm has to be able to pay the salary of an engineer or other business professional, instead of being able to start a law firm by dividing its shares amongst different professionals. This prohibition is detrimental to the less wealthy, since unless there is capital to

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[463] OECD (2018), OECD Competition Assessment Reviews: Portugal… page 88.

[464] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services*, p. 3.

[465] "*Fast forward to 2020. We now have a medical field with many subspecialties* ***and a multi-tiered system of certified professionals delivering medical services****. A patient's treatment is no longer either batched as something a physician can help with or something a barber-surgeon should assist with. In other words: given the unique facts of a situation, the best team of professionals to drive the best outcome possible for the patient is put together using whatever methods result in the most successful outcome.* (…)A collaborative, cross-disciplined, multi-tiered approach of certified medical professionals and skillsets is something we think of as a no-brainer when we seek out medical services. **So the question is—why doesn't the same approach exist for legal services? (my emphasis)**, See Andrew Arruda, "Haircuts, Pulling Teeth, and Reregulating Law," accessed February 1, 2021, https://iaals.du.edu/blog/haircuts-pulling-teeth-and-reregulating-law.

[466] "*the majority of legaltech startup founders and co-founders have a background in law, technology such as computer science and software*" in Thomson Reuters, "Legaltech Startup Report 2019", available at https://legalsolutions.thomsonreuters.co.uk/content/dam/openweb/documents/pdf/uki-legal-solutions/report/tr-legaltech-startup-report-2019.pdf

invest in salaries, it is particularly difficult to create a modern law firm that is composed of professionals of several fields of knowledge.[467]

We have seen how the regulation of joint professional practices already exists in the Portuguese legal framework: via *Lei 2/2013,* that regulates the so called "*Sociedades de Profissionais*", and that was later developed by *Lei n.º 53/2015 de 11 de Junho.*

These norms provide a response to the traditional obstacles raised to joint professional practice in the legal sector, namely the provision of services by non-qualified personnel, the possible breach of professional secrecy and the potential for the arising of conflicts of interest.[468]

Similarly to the German *Rechtsdienstleistungsgesetz*,[469] through which the German legislator liberalised the legal services sector,[470] *Lei 53/2015* requires that "*at least one of the managers or directors of the professional society, who performs executive functions, must be legally established on national territory for the exercise of the profession in question, regardless of the type of establishment*".[471] Thus, these enterprises must have at least one person with the necessary qualifications to practice the profession in question. In the case of the provision of legal services, this will correspond to law graduates with registration in force in the Portuguese Bar Association and solicitors registered in the Chamber of Solicitors (Lawyers and Solicitors).[472]

The latter shall have a supervisory duty over their collaborators, under the terms of article 18 (2) paragraph b),[473] being jointly and severally liable for any infractions committed by the joint practice, under the terms of article 18 (8).[474]Furthermore, if the corporate purpose of the Joint

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[467] Andrew Arruda, interview via Zoom, 18 january 2021.

[468] "*Assim, de entre o elenco de atributos deontológicos que norteiam a profissão, permita-se-nos destacar três deles: a independência, o respeito pelo segredo profissional e a necessidade de evitar conflitos de interesses*", in Carlos Filipe Fernandes de Andrade Costa "*As sociedades multiprofissionais no ordenamento jurídico português e no quadro regulamentar europeu: A diversidade de opções e as questões deontológicas que suscitam*".

[469] "*(4)* ***Legal persons and companies without legal personality must designate at least one natural person who fulfils all the conditions as required by subsection (1) no. 1 and no. 2 (qualified person****). The qualified person must be in the permanent employ of the company, must be capable of acting independently and issuing instructions on all matters concerning the company's legal services, and must be authorised to represent the company externally. Registered private individuals may designate qualified persons.*", in *http://service.juris.de/englisch_rdg/englisch_rdg.html*

[470] "*Der Begriff der Rechtsdienstleistung in Gestalt der Inkassodienstleistung (…) erbringen darf, ist unter Berücksichtigung der vom Gesetzgeber mit dem Rechtsdienstleistungsgesetz - in Anknüpfung an die Rechtsprechung des Bundesverfassungsgerichts - verfolgten Zielsetzung einer grundlegenden,* ***an den Gesichtspunkten der Deregulierung und Liberalisierung ausgerichteten, die Entwicklung neuer Berufsbilder erlaubenden Neugestaltung des Rechts der außergerichtlichen Rechtsdienstleistungen*** *nicht in einem zu engen Sinne zu verstehen ausgerichteten", par. A)* and par. 98 VIII ZR 285/18

[471] Freely translated from "*Pelo menos um dos gerentes ou administradores da sociedade de profissionais, que desempenhe funções executivas, deve estar legalmente estabelecido em território nacional para o exercício da profissão em causa, independentemente da modalidade de estabelecimento.*", article 9 (3) of *Lei 53/2015*

[472] Article 1(1) of *Lei* 49/2004, of 23 of March.

[473] "*2 - As entidades referidas no número anterior são responsáveis pelas infrações disciplinares quando cometidas: (…) b) Por quem aja sob a autoridade das pessoas referidas na alínea anterior,* ***em virtude de uma violação dos deveres de vigilância ou controlo que lhes incumbem.***" (my emphasis) article 18 (2)(b) of *Lei 53/2015*

[474] "*8 - Sem prejuízo do direito de regresso quanto às quantias pagas, as pessoas que ocupem uma posição de liderança são subsidiariamente responsáveis pelo pagamento das multas em que a entidade for condenada, relativamente às infrações: a) Praticadas no período de exercício do seu cargo, sem a sua oposição expressa; b) Praticadas anteriormente, quando tiver sido por culpa sua que o património da entidade se tornou*

Practice contemplates the provision of acts reserved to Lawyers or Solicitors, Article 22 of the aforementioned Law requires the professional firm to be registered with the respective Bar Association.[475] The same obligation is in force in Spain, regarding the "*sociedades profesionales*".[476]

The Joint Practice shall also be subject, under the terms of article 18, to disciplinary responsibility before the Bar Association.[477]

In the light of the foregoing, consumers will be duly safeguarded regarding the provision of legal services by joint practices.

Regarding professional secrecy, one might object joint practices on the grounds that the non-professional partners are not binded by this duty.

However, non-professional partners, as is already the case with all the "non-professionals" who currently collaborate with Lawyers or Solicitors in the provision of legal services, are legally obliged to preserve professional secrecy, according to article 92 (5) and (7) of the *Estatuto da Ordem dos Advogados*[478] in conjunction with article 141 (7) and (9) of the *Estatuto da Ordem dos Solicitadores e dos Agentes de Execução* [479] and the article 135 (1) of the *Código de Processo Penal*[480] (Code of Criminal Procedure). Therefore, professional secrecy would not be jeopardized by joint practices.

On the subject of conflicts of interest, article 9 (4) states that the joint practice is prohibited from providing a service if there is a conflict of interest between the joint practice and its professional partners.[481] Therefore, if an individual lawyer is forbidden from engaging with a certain

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*insuficiente para o respetivo pagamento; ou c) Praticadas anteriormente, quando a decisão definitiva de as aplicar tiver sido notificada durante o período de exercício do seu cargo e lhes seja imputável a falta de pagamento."* article 18 (8) of *Lei 53/2015*

[475] "*Após o registo definitivo do contrato de sociedade de profissionais, esta é inscrita, no seguimento de mera comunicação prévia pela sociedade de profissionais, na associação pública profissional que organiza a atividade profissional objeto principal da sociedade, sendo-lhe emitida a respetiva cédula profissional."* , Article 22 of *Lei 53/2015*

[476] "4**. *La sociedad se inscribirá igualmente en el Registro de Sociedades Profesionales del Colegio Profesional*** *que corresponda a su domicilio, a los efectos de su incorporación al mismo y de que éste pueda ejercer sobre aquélla las competencias que le otorga el ordenamiento jurídico sobre los profesionales colegiados."* , (my emphasis), Article 8 (4) of Ley 2/2007, de 15 de marzo, de sociedades profesionales.

[477] *"1 - As sociedades de profissionais e as organizações associativas referidas no artigo 27.º respondem, enquanto membros, disciplinarmente perante a associação pública profissional em que se encontram inscritas, nos termos da legislação que rege a atividade em causa."* , Article 18 (1) of *Lei 53/2015*

[478] *"5 - Os atos praticados pelo advogado com violação de segredo profissional não podem fazer prova em juízo.; 7 - O dever de guardar sigilo quanto aos factos descritos no n.º 1 é extensivo a todas as pessoas que colaborem com o advogado no exercício da sua atividade profissional, com a cominação prevista no n.º 5."* , in article 92 of *Lei n.º 145/2015 de 9 de setembro*

[479] *"7 - Os atos praticados pelo associado em violação de segredo profissional não podem fazer prova em juízo.; 9 - O dever de guardar sigilo é extensivo a todas as pessoas que colaborem com o associado no exercício da sua atividade profissional, com a cominação prevista no n.º 7."* In article 141 of *Lei n.º 154/2015, de 14 de Setembro*

[480] "*1 - Os ministros de religião ou confissão religiosa e os advogados, médicos, jornalistas, membros de instituições de crédito* ***e as demais pessoas a quem a lei permitir ou impuser que guardem segredo*** *podem escusar-se a depor sobre os factos por ele abrangidos.*" (my emphasis), in article 135 of DL n.º 78/87, de 17 de Fevereiro

[481] "4 - *A sociedade de profissionais e os seus sócios profissionais autorizados a exercer atividade profissional a título individual, nos termos do n.º 5 do artigo 8.º, não podem prestar serviços que consubstanciem, entre eles, uma situação de conflito de interesses."* In article 9(4) of *Lei n.º 53/2015*

client – for example if he previously assisted the opposing party[482] - the joint practice as a whole will also be prohibited from doing so.

In addition, in a similar vein to what occurs with *Alternative Business Structures* in the UK, multidisciplinary firms could be required to have a "head of legal practice", that "*serves as a compliance officer responsible for ensuring that only authorized persons carry out reserved activities and that unauthorized persons do not violate their duty under the Act not to cause the licensed body or its employees and managers to breach applicable regulations".*[483] A similar proposal was made by State Bar of Arizona Task Force, that stated that law firms must make sure that a "*lawyer has been identified as responsible for establishing policies and procedures within the firm to assure nonlawyer compliance with these rules.*"[484] [485]

Regarding professional associations, there is a need to change the paradigm of self-regulation through the introduction of independent actors in the governing bodies of professional associations, so as to better safeguard the public interest.

Professional associations should not be simple "*associations of undertakings*". They should take greater account of the interests of consumers. If this is not the case, competition laws have to be enforced. As stated by US Federal Trade Commission, "*active market participants cannot be allowed to regulate their own markets free from antitrust accountability.*"[486]

The legislative proposal of the *Autoridade da Concorrência* has kickstarted a much-needed political discussion.

The Portuguese Government has committed to following its recommendations, by eliminating any practices that limit or hinder access to the regulated professions, to ensure the right to freedom of choice and access to the profession.[487] Therefore, it is expected that it will propose the elimination of the prohibition of multidisciplinary practice.

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[482] "*1 - O advogado deve recusar o patrocínio de uma questão em que já tenha intervindo em qualquer outra qualidade ou seja conexa com outra em que represente, ou tenha representado a parte contrária.*" , article 99 of *Lei n.º 145/2015*

[483] See Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation...

[484] Supreme Court of the State of Arizona, *Task Force on the Delivery of Legal Services,* p. 94.

[485] See also "3. Criação da figura do "advogado-responsável", o qual responderia em primeira linha ou solidariamente pelos incumprimentos das normas deontológicas por parte de profissionais não-advogados;" in Eduardo Castro Marques, "Sociedades de Advogados Multidisciplinares," Dinheiro Vivo, October 20, 2020, https://www.dinheirovivo.pt/opiniao/sociedades-de-advogados-multidisciplinares-12943028.html.

[486] Geoffrey Green and Melissa Westman-Cherry, "Supreme Court: Self-interested boards must be actively supervised", Bureau of Competition, Feb 26, 2015, https://www.ftc.gov/news-events/blogs/competition-matters/2015/02/supreme-court-self-interested-boards-must-be-actively

[487] *"O Governo, para assegurar o direito à liberdade de escolha e acesso à profissão, constitucionalmente garantido, irá impedir práticas que limitem ou dificultem o acesso às profissões reguladas, em linha com as recomendações da Organização para a Cooperação e Desenvolvimento Económico (OCDE) e da Autoridade da Concorrência."* Governo da República Portuguesa, "Grandes Opções do Plano 2020-2023", p. 30, available at http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679595842774f6a63334e7a637664326c756157357059326c6864476c3259584d7657456c574c33526c654852766379397763477304c56684a5669356b62324d3d&fich=ppl4-XIV.doc&Inline=true

The Portuguese Liberal Party (*Iniciativa Liberal)* has also proposed eliminating the prohibition of multidisciplinary practice, reducing the monopoly of legal services, changing the organization of Professional Associations, and eliminating the legal rules that prohibit non-lawyers from owning shares in joint professional practices.[488]

It is expected that this subject will thus be the focus of further political discussion.

On the other hand, the expansion of *legaltechs* across the European Union might constitute an interesting challenge to the current regulation of legal services, specially to the more "protectionist" Member States such as Portugal.

Besides, if this scenario comes about – a hypothesis that is suggested by the entrance of *Jurilink* into the Portuguese market and by the announcement by *Wenigermiete* that it is planning on expanding across Europe[489] - Portuguese law firms might find themselves in a difficult position: bound by their traditional professional rules, no access to venture capital, and with a shrinking professional monopoly, all the while facing increasing competition from foreign *legaltech* companies.

Will this economical pressure provide the needed political capital for a regulatory reform in this sector? We have seen how previous initiatives to liberalize the legal profession, such as the Services Directive in 2006, have faced resistance from the Portuguese legal sector. Will the waves of change finally reach the Portuguese coast?

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[488] Iniciativa Liberal, "PREC Liberal", p. 32, available at https://iniciativaliberal.pt/wp-content/uploads/2020/05/PREC-Liberal-v1.1.pdf

[489] Conny GmbH, "LexFox' Series A Round: Earlybird and Target Globals First Major B2C Legaltech Investment," wenigermiete.de, accessed August 3, 2020, https://www.wenigermiete/lexfox-wenigermiete-round-of-financing.

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