



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

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*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. Nonetheless, several questions arise regarding these new businesses: How do they fare under the Portuguese regulatory framework? Is there a need for legislative reform? And how are Bar Associations dealing with this new reality? In order to answer these questions, we analyze 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 by the Portuguese Bar Association of online intermediation platforms, taking into consideration the ECJ's case law related to professional orders and the EU's competition law. Thirdly, we study the national legal framework of legal services in light of OECD's Competition Assessment Review of Portugal. Lastly, we present the recent project by the Portuguese Competition Authority and note its similarities with the ECJ's case law.*

*KEYWORDS: digital platforms – legaltech – professional associations – european competition law – liberal professions.*

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## I. Online platforms in view of the *Estatuto da Ordem dos Advogados*<sup>1</sup> and national law

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<sup>2</sup>. These services present themselves as a tool to improve consumer choice, industry competitiveness, and the access to information across borders.<sup>3</sup>

In the context of the European Union's Digital Single Market (hereinafter, DSM), whose objectives lie in an increasing digitization of the economy<sup>4</sup> and in the improvement of access to information in the area of justice,<sup>5</sup> online legal platforms present themselves as an opportunity to accomplish these objectives.

This possibility is especially relevant given the characteristics of the Single Market, namely the freedom of movement between Member States with different legal norms.<sup>6</sup> How can a Slovakian citizen moving to Portugal find out which lawyer is best suited for his case? Such platforms might make the process of finding answers to such questions easier.

However, this path is not without its difficulties, since the deeply disruptive nature of the technology in question,<sup>7</sup> which has already shaken industries such as the hotel business, transport or retail, calling into question its traditional practices, will have to be made compatible with the deontological rules of lawyers, who are not simple commercial service providers, but collaborators in the fulfillment of justice.<sup>8</sup>

Regarding lawyer services, there are mainly three types of online 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.<sup>9</sup>

<sup>1</sup> Statutes of the Portuguese Bar Association (henceforth E.O.A.), Portuguese Bar Association (Ordem dos Advogados) is henceforth abbreviated as "O.A.".

<sup>2</sup> 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>.

<sup>3</sup> European Commission, Communication to the European Parliament.

<sup>4</sup> "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 Mirela Mărcuț, *Crystalizing the EU Digital Policy: An Exploration into the Digital Single Market* (New York: Springer International Publishing, 2017), 53.

<sup>5</sup> 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/>.

<sup>6</sup> "The particularities of legal 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 Liberal Fernandes, "O Exercício da Profissão de Advogado na União Europeia", in Para Jorge Leite, *Escritos Jurídico-Laborais*, coord. Liberal Fernandes, Maria Regina Gomes Redinha, João Reis and João Leal Amado (Coimbra: Coimbra Editora, 2015) (free translation).

<sup>7</sup> "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 Orly Lobel, "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>.

<sup>8</sup> Fernando Sousa Magalhães, "Ideias Soltas sobre o Futuro da Advocacia", in *Advocacia – Que fazer?* (Coimbra: Minerva, 2001).

<sup>9</sup> 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](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).

Examples of such platforms are [www.advogados24h.com/lista-advogados](http://www.advogados24h.com/lista-advogados) or <https://directoriprofissionaladvogados.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.<sup>10</sup> Examples are <http://www.zaask.pt> or <https://www.advogadoo.com>. Interestingly, the first announces that it helps us to, “*find the most efficient low-cost lawyers in Porto.*”<sup>11</sup> In my opinion, such adjectives go beyond a merely informative purpose and become propagandistic, and 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 content*”.<sup>12</sup>

- Websites providing legal services, which are provided directly or indirectly, not necessarily by lawyers.<sup>13</sup> This category includes question and answer websites (<https://answers.justia.com>), legal chatbots ([www.donotpay.com](http://www.donotpay.com)) and sites where legal documents are automatically drafted (<https://lawhelpinteractive.org>,<sup>14</sup> or the Brazilian <http://ruiapp.co>).<sup>15</sup> As far as it is possible to ascertain, this type of website is not yet a reality in Portugal.

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,<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

<sup>10</sup> Council of Bars & Law Societies of Europe, “CCBE GUIDE on Lawyers’ use of online legal platforms”.

<sup>11</sup> See <https://www.zaask.pt/advogado-low-cost/porto/porto>, accessed on 11 of March 2019.

<sup>12</sup> Freely translated from: “São, designadamente, atos ilícitos de publicidade: a) A colocação de conteúdos persuasivos, ideológicos, de autoengrandecimento e de comparação”.

<sup>13</sup> Council of Bars & Law Societies of Europe, “CCBE GUIDE on Lawyers”.

<sup>14</sup> “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” (emphasis added).

<sup>15</sup> “Through a conversation with Rui, your complaint will be automatically generated with the arguments capable of supporting your defense in the court”.

<sup>16</sup> “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, 5<sup>th</sup> of September, 2005, SEC(2005) 1064, Para. 84, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005SC1064&from=EN>.

<sup>17</sup> 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”. Fernando Sousa Magalhães, Estatuto da AO anotado e comentado, 10<sup>th</sup> Edition (Coimbra: Almedina, 2015).

<sup>18</sup> Article 94(4)(a) (b) (d) of the Lei 145/2015.

Regarding the medium in which lawyers may advertise, the Code of Conduct for Lawyers in the European Union 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 requirements of 2.6.1*”.<sup>19</sup> 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](http://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<sup>20</sup> as laid out in Article 1170(1) of the Portuguese Civil Code (*a contrario*). (This issue will be developed later in light of the concept of *client solicitation*).

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.<sup>21</sup>

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’s no breach of deontological rules.<sup>22</sup>

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”.<sup>23</sup>

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*”.<sup>24</sup>

<sup>19</sup> 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, Para. 2, available at [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/DEONTOLOGY/DEON\\_CoC/EN\\_DEON\\_CoC.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf).

<sup>20</sup> Council of Bars & Law Societies of Europe, “CCBE GUIDE on Lawyers”, 7.

<sup>21</sup> Conselho Geral da Ordem dos Advogados, Parecer No. 06/07, November 24<sup>th</sup>, 2007, available at <https://portal.oa.pt/advogados/pareceres-da-ordem/conselho-geral/2007/parecer-n%C2%BA-0607/>.

<sup>22</sup> 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, No. 1, não poderá nunca ser arguida qualquer desconformidade do serviço em questão com as normas deontológicas em vigor”.

<sup>23</sup> Conselho Geral da Ordem dos Advogados, Parecer No. 63/PP/2011-G, February 16<sup>th</sup>, 2012, available at [https://www.oa.pt/cd/Conteudos/Pareceres/detalhe\\_parecer.aspx?sidc=32517&idc=1365&idsc=158&ida=124713](https://www.oa.pt/cd/Conteudos/Pareceres/detalhe_parecer.aspx?sidc=32517&idc=1365&idsc=158&ida=124713).

<sup>24</sup> 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”.

In 2017, the O.A.'s Regional Council of Coimbra, analyzing the two-sided platform *Advogadoo*, decided that:<sup>25</sup>

*“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”*.<sup>26</sup>

*“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”*.<sup>27</sup>

*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”*.<sup>28</sup>

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* No. 6/PP/2017-P, affirmed that the presence of lawyers on this type of platforms is a disciplinary offence:<sup>29</sup>

*“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”*.<sup>30</sup>

At the same time, the Commission of Combat of Non-authorized Legal Practice, of the O.A.'s Regional Council of Évora, affirmed that the platform incurs in the crime of non-authorized legal practice.<sup>31</sup>

As we can see, two-sided platforms are prohibited by the *Ordem dos Advogados* on the basis of the prohibition of *client solicitation* and the crime of *non-authorized legal practice*. These concepts will be analyzed separately, since the former is related to members of the profession, and the latter to the rest of the population.

<sup>25</sup> Conselho Regional de Coimbra, *Parecer* No. 7/PP/2017-C, 6 Abril 2017, available at [http://www.oa.pt/cd/Conteudos/Pareceres/detalhe\\_parecer.aspx?side=64621&idc=1365&idsc=116053&ida=152440](http://www.oa.pt/cd/Conteudos/Pareceres/detalhe_parecer.aspx?side=64621&idc=1365&idsc=116053&ida=152440).

<sup>26</sup> Translated from “A inscrição no sítio visa exactamente que o cliente chegue ao/à Advogado/a pela via da entidade gestora do sítio, que possibilita o contacto entre ambos, não se entendendo que aquela potencia uma escolha justa do/a Advogado/a”.

<sup>27</sup> 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”.

<sup>28</sup> Free translation from “o sítio 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”, available at: [http://www.oa.pt/cd/Conteudos/Pareceres/detalhe\\_parecer.aspx?side=31690&idc=76141&idsc=116053&ida=152440](http://www.oa.pt/cd/Conteudos/Pareceres/detalhe_parecer.aspx?side=31690&idc=76141&idsc=116053&ida=152440).

<sup>29</sup> 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>.

<sup>30</sup> 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”.

<sup>31</sup> Comissão de Combate à Procuradoria Ilícita do Conselho Distrital de Évora da Ordem dos Advogados, Comunicado, 2 February 2015, available at [https://www.oa.pt/cd/Conteudos/Artigos/detalhe\\_artigo.aspx?side=31923&idc=32006&idsc=40570&ida=139291](https://www.oa.pt/cd/Conteudos/Artigos/detalhe_artigo.aspx?side=31923&idc=32006&idsc=40570&ida=139291).

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”*.<sup>32</sup>

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”*<sup>33</sup> (emphasis added).

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”*<sup>34</sup> the author referring here to the free choice of lawyer.

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 to limit the contractual freedom<sup>35</sup> of the client, by influencing his decision making process, or by limiting 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,<sup>36</sup> 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. This indiscriminate ban on intermediation platforms deprives consumers of the benefits of these new technologies – such as the ability to discover a wider range

<sup>32</sup> Translated from: “Não solicitar clientes, por si ou por interposta pessoa”.

<sup>33</sup> Fernando Sousa Magalhães, *Estatuto da Ordem dos Advogados, anotado e comentado*, 11th Edition (Coimbra: Almedina, 2017), 132 and 133.

<sup>34</sup> Orlando Guedes da Costa, *Direito Profissional do Advogado*, 8<sup>th</sup> Edition (Coimbra: Almedina, 2015), 331 and 332.

<sup>35</sup> “Freedom to conclude contracts shall consist in the freedom to conclude contracts or to refuse to conclude them”, See Mota Pinto, *Teoria Geral do Direito Civil*, 4<sup>th</sup> Edition, (Coimbra: Coimbra Editora, 2005); “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” (emphasis added). See Bryan A. Garner, *Blacks Law Dictionary*, 9<sup>th</sup>. (St. Paul, MN: West Pub., 2000), 735.

<sup>36</sup> “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.

of legal practitioners, and of comparing them according to location and expertise<sup>37</sup> – which actually increase clients’ contractual freedom.

Now, since these platforms also provide legal advice and draft contracts, 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.<sup>38</sup>

The scope of reserved legal activities in Portugal is quite wide, covering the judicial mandate but also legal advice,<sup>39</sup> the drafting of contracts<sup>40</sup> and the practice of preparatory acts aimed at the constitution, alteration or extinction of legal acts.<sup>41</sup>

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.<sup>42</sup>

Besides prohibiting the practice to non-qualified individuals, this provision also forbids its execution when done in conjunction with lawyers, in a collective manner.

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*”,<sup>43</sup> or part of a law firm,<sup>44</sup> 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.<sup>45</sup>

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*”,<sup>46</sup> a prohibition which may not be necessary to ensure consumer protection.<sup>47</sup> Thus, its revision was advised.<sup>48</sup>

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 prices*”.<sup>49</sup>

<sup>37</sup> See De Autoriteit Consument & Markt, “Gedrageregels 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/gedrageregels-advocaten-mogen-opkomst-online-platforms-advocaten-niet-belemmeren>.

<sup>38</sup> Article 1(1) of Lei 49/2004, of 23 of March.

<sup>39</sup> Lei 49/2004, Article 1(5)(b).

<sup>40</sup> Lei 49/2004, Article 1(6)(a).

<sup>41</sup> Lei 49/2004, Article 1 (6)(a).

<sup>42</sup> Lei 49/2004, Article 7.

<sup>43</sup> Lei 49/2004, Article 6(1).

<sup>44</sup> Lei 49/2004, Article 6(1).

<sup>45</sup> Organisation for Economic Co-operation and Development, “Portugal: Competition Assessment Project”, Lisbon 6 of July, 2018, available at: <http://www.oecd.org/competition/portugal-competition-assessment-project.htm>.

<sup>46</sup> OECD, OECD Competition Assessment Reviews: Portugal: Volume II - Self-Regulated Professions (Paris: OECD Publishing, 2018), 204, available at: <https://doi.org/10.1787/9789264300606-en>.

<sup>47</sup> OECD, OECD Competition Assessment Reviews.

<sup>48</sup> OECD, OECD Competition Assessment Reviews.

<sup>49</sup> OECD, OECD Competition Assessment Reviews.

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*”;<sup>50</sup> “*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*”.<sup>51</sup>

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

*Legaltechs* such as the German [helpcheck.de](http://helpcheck.de),<sup>52</sup> the French [legalfife.fr](http://legalfife.fr)<sup>53</sup> and [captaincontrat.com](http://captaincontrat.com),<sup>54</sup> or the Spanish [biglelegal.com](http://biglelegal.com)<sup>55</sup> would all be prohibited under Portuguese law, since the company’s 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. In the case of [captaincontract.com](http://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.<sup>56</sup>

<sup>50</sup> OECD, OECD Competition Assessment Reviews, 207.

<sup>51</sup> OECD, OECD Competition Assessment Reviews, 207.

<sup>52</sup> “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/>.

<sup>53</sup> 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](https://www.lemonde.fr/economie/Article/2015/10/02/la-lutte-sans-merci-des-sites-de-services-juridiques_4781180_3234.html). (free translation).

<sup>54</sup> 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 démarches juridiques des PME”, *Challenges*, 5<sup>th</sup> of May 2014, [https://www.challenges.fr/entreprise/captain-contrat-la-start-up-qui-simplifie-les-demarches-juridiques-des-pme\\_140479](https://www.challenges.fr/entreprise/captain-contrat-la-start-up-qui-simplifie-les-demarches-juridiques-des-pme_140479) (free translation).

<sup>55</sup> “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/>.

<sup>56</sup> Claire Bouleau, “Captain Contrat, la start-up qui facilite les démarches”.



In consequence of the OECD's report, the *Autoridade da Concorrência* has produced a proposal for legislative and regulatory reform for the liberal professions<sup>57</sup> which addresses some of the concepts raised. This will be analyzed further below.

Now, 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*.<sup>58</sup> 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](http://www.amazon.com) or [www.google.com](http://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*"<sup>59</sup> - 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*".<sup>60</sup>

Consequently, search engines play a major role in the access to websites. Hence the importance of *Search Engine Optimization*<sup>61</sup> in *Digital Marketing*, as well as the establishment by the *European Court of Justice* of the *Right to be Forgotten* in search engines.<sup>62</sup> 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 Search,<sup>63</sup> whose website is still suspended<sup>64</sup> after the end of a process that resulted in a fine of 2 424 495 000 Euros to the American Company.<sup>65</sup>

<sup>57</sup> *Autoridade da Concorrência*, "Plano de Ação da AdC para a Reforma Legislativa e Regulatória para as profissões liberais", 6 July 2018, available at: [http://www.concorrencia.pt/vPT/Noticias\\_Eventos/Comunicados/Documents/AdC%20Impact%202020-%20Plano%20de%20A%C3%A7%C3%A3o%20da%20AdC%20-%20Propostas-Chave%20-%20Profiss%C3%B5es%20Liberais.pdf](http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/AdC%20Impact%202020-%20Plano%20de%20A%C3%A7%C3%A3o%20da%20AdC%20-%20Propostas-Chave%20-%20Profiss%C3%B5es%20Liberais.pdf).

<sup>58</sup> Council of Bars & Law Societies of Europe, "Charter of core principles of the European legal".

<sup>59</sup> 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 25<sup>th</sup>, 2013, <https://www.seperia.com/blog/what-direct-traffic-really-means/>.

<sup>60</sup> European Commission, "Antitrust Procedure - Council Regulation (EC) 1/2003", Case AT.39740 Google Search (Shopping), 27 June, 2017, para. 583, available at: [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).

<sup>61</sup> 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](https://help.imis.com/100_200/Features/RiSE/Site_Builder/Using_RiSE_to_maximize_SEO_results.htm).

<sup>62</sup> 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

<sup>63</sup> See <http://www.foundem.co.uk/hygiene/AboutUs.jsp>.

<sup>64</sup> See [http://www.foundem.co.uk/hygiene/Temporary\\_Announcement\\_2016.jsp](http://www.foundem.co.uk/hygiene/Temporary_Announcement_2016.jsp).

<sup>65</sup> European Commission, "Antitrust Procedure - Council Regulation (EC) 1/2003", Article 2.

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*”,<sup>66</sup> consequently competitors’ websites saw a decrease of traffic of as much as 90%,<sup>67</sup> while Google’s own service increased 45-fold.<sup>68</sup>

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,<sup>69</sup> since Google’s “*local algorithm strongly favors listings that have words in their business name that match the searcher’s query*”<sup>70</sup> – whether or not they are real attorneys.

Bearing in mind that the criteria of these services are not transparent,<sup>71</sup> 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*<sup>2</sup>, “*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*”.<sup>73</sup>

Regarding this issue, it is relevant to mention the proposal by the European Commission for a Regulation on promoting fairness and transparency for business users of online intermediation services.<sup>74</sup>

By taking into account that “*online intermediation services are key enablers of entrepreneurship, trade and innovation, which can also improve consumer welfare*”,<sup>75</sup> and that “*online search engines can be important sources of Internet traffic for undertakings which offer goods or services to consumers*

<sup>66</sup> EUR-Lex - 52018XC0112(01). Para. 9, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018XC0112%2801%29>.

<sup>67</sup> European Commission, “Antitrust Procedure - Council Regulation (EC) 1/2003”, Para. 465.

<sup>68</sup> 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](http://europa.eu/rapid/press-release_IP-17-1784_en.htm).

<sup>69</sup> Joy Hawkins, “The majority of listings for car accident attorneys on Google are fake”, Search Engine Land, March 25, 2019, available at: <https://searchengineland.com/the-majority-of-listings-for-car-accident-attorneys-on-google-are-fake-314569>.

<sup>70</sup> Joy Hawkins, “The majority of listings for car accident”.

<sup>71</sup> 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 (Cambridge, MA: Harvard University Press, 2015), 83.

<sup>72</sup> See [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\\_](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_).

<sup>73</sup> 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 November 2018, available at [https://elpais.com/economia/2018/11/01/actualidad/1541090769\\_034925.html](https://elpais.com/economia/2018/11/01/actualidad/1541090769_034925.html).

<sup>74</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services”, COM(2018) 238 final 2018/0112(COD), Brussels, 26.4.2018, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0238>.

<sup>75</sup> European Commission, “Proposal for a Regulation of the European”, Recital 1.

through websites”,<sup>76</sup> this proposal aims to increase the transparency of these services. As such, “providers of online intermediation services should therefore outline the main parameters determining ranking beforehand, in order to improve predictability for business users, to allow them to better understand the functioning of the ranking mechanism and to enable them to compare the ranking practices of various providers.” While “providers of online search engines should therefore provide a description of the main parameters determining the ranking of all indexed websites”.<sup>77</sup>

While this Regulation – which is still in discussion – has the potential to solve some of the issues raised above, 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.<sup>78</sup> 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,<sup>79</sup> since the Bar Association does what the individual client cannot: assess quality and signal it to potential consumers.<sup>80</sup>

As such, it can be argued that online legal platforms should also be regulated by these professional associations.

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<sup>81</sup> – a project that is being implemented by the Spanish Bar Association.<sup>82</sup>

In fact, since online legal counselling can be considered as an Information Society service,<sup>83</sup> one has to consider the Directive 2000/31/EC (‘Directive on electronic commerce’) 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”.<sup>84</sup>

<sup>76</sup> European Commission, “Proposal for a Regulation of the European”, Recital 3.

<sup>77</sup> European Commission, “Proposal for a Regulation of the European”, Recital 18.

<sup>78</sup> 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, para. 11. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0405>.

<sup>79</sup> “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 Anthony Ogus, “Rethinking Self-Regulation”, *Oxford Journal of Legal Studies*, Volume 15, Issue 1 (Spring, 1995): 97, <https://doi.org/10.1093/ojls/15.1.97>.

<sup>80</sup> Frank H. Stephen, James H. Love and Neil Rickman, “Regulation of the Legal Profession”, in *Regulation and Economics* (Cheltenham, UK: Edward Elgar Publishing, 2012), [https://EconPapers.repec.org/RePEc:elg:eechap:12771\\_15](https://EconPapers.repec.org/RePEc:elg:eechap:12771_15).

<sup>81</sup> As indicated by Louis Degos, Chairman of the Foresight and Innovation Commission of the CNB. See Agefactifs, “Prestations juridiques en ligne, la réponse du Conseil national des barreaux”, 3 November, 2016, <https://www.agefactifs.com/droit-et-fiscalite/Article/prestations-juridiques-en-ligne-la-reponse-du-75103>.

<sup>82</sup> “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”.

<sup>83</sup> 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”.

<sup>84</sup> Directive 2000/31/EC, Article 8 (1).

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*”<sup>85</sup> 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<sup>86</sup> - 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<sup>87</sup> - in order to safeguard against the risk inherent in platforms that provide legal services.

## II. *Ordem dos Advogados*’ prohibition of online platforms of lawyers in light of European competition law

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*,<sup>88</sup> the CJEU 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*”<sup>89</sup> and that “*any activity consisting in offering goods and services on a given market is an economic activity*”.<sup>90</sup>

Simultaneously, the Court ruled that the public law status of a professional association does not exclude it from being considered an “*association of undertakings*”.<sup>91</sup>

<sup>85</sup> See <https://www.charteethique.legal>.

<sup>86</sup> 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”.

<sup>87</sup> See <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”.

<sup>88</sup> 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.

<sup>89</sup> Case C-35/96, para. 36 to 38.

<sup>90</sup> Case C-35/96.

<sup>91</sup> “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, para. 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, para. 85, “Suffice it to say in this regard that

Therefore, the public law status<sup>92</sup> of the *Ordem dos Advogados* is considered irrelevant.

According to the Court's case law, professional associations are only exempt from complying with competition rules if:<sup>93</sup>

a) Its governing bodies are constituted by “experts who are independent of the economic operators concerned”,<sup>94</sup> or by “representatives of the public authorities”<sup>95</sup> - 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<sup>96</sup> and if the State “retains its power to adopt decisions in the last resort”<sup>97</sup> - 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”.<sup>98</sup>

Consequently, the governing bodies of these institutions are democratically formed from its own members,<sup>99</sup> 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.*”

This means that besides the absence of public officials, the governing bodies of the O.A. 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.<sup>100</sup>

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the fact that a professional organisation is governed by a public-law statute does not preclude the application of Article 85 of the Treaty”.

<sup>92</sup> Article 1(2) of the Estatuto da Ordem dos Advogados, Lei No. 145/2015.

<sup>93</sup> See Sérvulo Correia, “Autoridade da Concorrência e Ordens Profissionais”, Boletim da Ordem dos Advogados, No. 43 (2006): para. 3, <https://www.servulo.com/pt/investigacao-e-conhecimento/Autoridade-da-Concorrncia-e-Ordens-Profissionais/2102/>.

<sup>94</sup> 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, para. 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. Para. 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. Para. 18 and 19.

<sup>95</sup> Judgment of the Court (Sixth Chamber) of 5 October 1995, Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl. Case C-96/94. Para. 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. Para. 47.

<sup>96</sup> 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. Para. 18 and 24.

<sup>97</sup> 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. Para. 68.

<sup>98</sup> Article 199(d) of Constituição da República Portuguesa. See also Sérvulo Correia, “Autoridade da Concorrência”, 3.

<sup>99</sup> Article 267(4) of Constituição da República Portuguesa.

<sup>100</sup> AG Jacobs. Cases C-67/96 etc., Albany/Brentjens'/Drijvende Bokken, [1999], para. 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.*”<sup>101</sup> (my emphasis).

The O.A. freely pursues 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,<sup>102</sup> this general reference is not sufficient to fulfill 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*”<sup>103</sup> which does not seem to be the case, since, as said, professional associations are only controlled as to the legality of their acts.<sup>104</sup>

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.<sup>105</sup>

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

This norm is drafted to include associations of undertakings to cover conduct that may have similar effects on competition, even if it does not originate from direct collusion between a multitude of undertakings.<sup>106</sup>

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 101[1] TFEU) merely because they are classified as “rules of professional conduct” by the competent bodies.*”<sup>107</sup>

<sup>101</sup> 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 Jorge Bacelar Gouveia, “As Associações Públicas Profissionais no Direito Português”, Lisbon, 16 October 2000, [https://portal.oa.pt/media/117223/jbg\\_ma\\_14420.pdf](https://portal.oa.pt/media/117223/jbg_ma_14420.pdf).

<sup>102</sup> Article 3(a)(b)(h)(i) of the Estatuto da Ordem dos Advogados, Lei No. 145/2015; and Article 2, 3(1)(a) of Lei No. 2/2013, 10 January.

<sup>103</sup> Ida E. Wendt, *EU Competition Law and Liberal Professions: an Uneasy Relationship?* (Netherlands: Brill/Nijhoff, 2012), 220.

<sup>104</sup> 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.

<sup>105</sup> J.J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, 4<sup>th</sup> Edition (Coimbra: Coimbra Editora, 2014), 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.

<sup>106</sup> Wendt, *EU Competition Law and Liberal Professions*, 185.

<sup>107</sup> 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. Para. 64.

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*”,<sup>108</sup> as long as they are “*determinative for the market conduct of its member undertakings*”.<sup>109</sup>

Since the defining characteristic of a *decision* is its influencing capacity, it does not have to be formally binding<sup>110</sup> and can manifest itself in the form of a 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*”.<sup>111</sup>

In the case in point, even if the *Opinions* of the *Ordem dos Advogados* are interpreted as being non-binding, they produce a *de facto* influence on the behavior of the members of the association, since they are informed that their presence on two-sided platforms is a disciplinary offense – giving the *OA* the power to enforce disciplinary action.

Regarding the requirement that this decision “*may affect 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*”.<sup>112</sup>

Since the *Opinions* of the *OA* influence the conduct of all of its registered members, whose practice extends beyond the borders the Member State; to clients regardless of whether they are established domestically or in another Member State,<sup>113</sup> and also to visiting members of the profession who are registered in another Member State,<sup>114</sup> it can be considered as affecting interstate trade.

Lastly, does this practice have as an “*object or effect the prevention, restriction or distortion of competition within the Internal Market*”?

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 be argued that the conduct of the *O.A.* produces 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.

<sup>108</sup> Wendt, EU Competition Law and Liberal Professions, 191.

<sup>109</sup> Wendt, EU Competition Law and Liberal Professions, 193.

<sup>110</sup> Wendt, EU Competition Law and Liberal Professions, 195.

<sup>111</sup> 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, Para. 64.

<sup>112</sup> 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*, interveners: Raad van de Balies van de Europese Gemeenschap. Case C-309/99. Para. 95. See also Wendt, EU Competition Law and Liberal Professions, 157.

<sup>113</sup> Wendt, EU Competition Law and Liberal Professions, 162.

<sup>114</sup> 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.

In addition, bearing in mind the existence of these kind of platforms in countries such as neighbors 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*”.<sup>115</sup>

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*”<sup>116</sup> – 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.<sup>117</sup>

In the case in point, 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.

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*”,<sup>118</sup> 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*<sup>119</sup> – is also obliged to apply these rules.

Since the introduction of Lei 19/2012, which mimics European standards,<sup>120</sup> 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 the 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*”<sup>121</sup> as decided in the *Opinion the Porto’s Regional Council*, seems to constitute a decision that excessively restricts the practice of the profession, and thus, could be considered as a breach of competition law.

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

<sup>115</sup> Wendt, EU Competition Law and Liberal Professions, 163.

<sup>116</sup> 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>.

<sup>117</sup> European Commission, Report on Competition in Professional Services.

<sup>118</sup> Wendt, EU Competition Law and Liberal Professions, 170.

<sup>119</sup> Article 5 of Lei No. 19/2012, 8 of May.

<sup>120</sup> 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”.

<sup>121</sup> 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>.



In France, the Regulation of the *Conseil National des Barreaux*<sup>122</sup> 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;<sup>123</sup> the lawyer should seek to know his identity, due, for example, to potential conflicts of interest;<sup>124</sup> the lawyer should always be identifiable,<sup>125</sup> it should always be possible to establish a personal and direct relationship with the user<sup>126</sup> 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.<sup>127</sup>

But the CNB did not stop here, and in 2016 launched its own directory:<sup>128</sup> *avocat.fr*, where it is possible to search for lawyers according to their specialization and languages spoken.<sup>129</sup>

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.<sup>130</sup>

In the Netherlands, *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*.<sup>131</sup>

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.<sup>132</sup> 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.<sup>133</sup>

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

<sup>122</sup> Règlement Intérieur National de la profession d'avocat, available at <https://www.cnb.avocat.fr/fr/reglement-interieur-national-de-la-profession-davocat-rin>.

<sup>123</sup> "La fourniture par transmission électronique de prestations juridiques par un avocat suppose l'existence d'un service personnalisé au client" Article 19(1).

<sup>124</sup> "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).

<sup>125</sup> "L'avocat qui répond doit toujours être identifiable" Article 19(2).

<sup>126</sup> "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).

<sup>127</sup> "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".

<sup>128</sup> See <https://www.cnb.avocat.fr/fr/actualites/la-plateforme-de-consultation-avocatfr-fete-son-premier-anniversaire-et-ses-bons-resultats>.

<sup>129</sup> See <http://avocat.fr/annuaire-des-avocats-de-france>.

<sup>130</sup> "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>.

<sup>131</sup> See Nederlandse orde van advocaten, Code of Conduct 2018, available at <https://www.advocatenorde.nl/document/nova-code-of-conduct-gedragsregels-2018>.

<sup>132</sup> "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 Del Rosal, "La 'uberización' llega al mundo del Derecho".

<sup>133</sup> See <https://www.abogacia.es/2018/11/20/nace-abogacia-4-0-el-nuevo-foro-tecnologico-del-icam/>.

### III. *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<sup>134</sup> addresses some of the concerns raised in this paper.

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 to 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.<sup>135</sup>

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*”.<sup>136</sup>

The proposal explicitly mentions that this amendment intends to mitigate the conflict of interest inherent in the system of self-regulation.<sup>137</sup> Thus, the *AdC* seems to be following the idea articulated by the Advocate General Jacobs,<sup>138</sup> 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.

<sup>134</sup> Autoridade da Concorrência, Plano de Ação da AdC para a Reforma Legislativa e Regulatória, available at [http://concorrencia.pt/vPT/Estudos\\_e\\_Publicacoes/Políticas\\_Publicas/Documents/Relatorio%20AdC\\_%20Plano%20de%20A%C3%A7%C3%A3o%20da%20AdC%20para%20a%20Reforma%20Legislativa%20e%20Regulat.pdf](http://concorrencia.pt/vPT/Estudos_e_Publicacoes/Políticas_Publicas/Documents/Relatorio%20AdC_%20Plano%20de%20A%C3%A7%C3%A3o%20da%20AdC%20para%20a%20Reforma%20Legislativa%20e%20Regulat.pdf).

<sup>135</sup> 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”.

<sup>136</sup> 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, para. 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. Para. 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 Chioggia. Joined cases C-140/94, C-141/94 and C-142/94. ECLI:EU:C:1995:330. Para. 18 and 19.

<sup>137</sup> Autoridade da Concorrência, Plano de Ação da AdC para a Reforma Legislativa, 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”.

<sup>138</sup> “[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], para. 184.

On the other hand, this legislative project mentions the reduction of, “*exclusive acts, ensuring criteria of necessity, appropriateness and proportionality with public policy objectives*”<sup>139</sup> with the goal of bringing “*more innovation and diversity and more competitive prices, for the benefit of consumers*”.<sup>140</sup>

This measure seems to embrace the idea of the “*proportionality test*”, put forward by the European Commission<sup>141</sup> as well as OECD’s view that the monopoly on legal services could constitute an obstacle to innovation,<sup>142</sup> thus, the reserved legal services stipulated by Lei No. 49/2004 would be altered.

Finally, the AdC also intends on abolishing the prohibition of multidisciplinary practice in professional societies,<sup>143</sup> a legislative amendment that would allow for the emergence of *legaltechs* in Portugal.

In general, this project poses challenges to the current constitutional framework but may also represent an opportunity to pave the way for the emergence of new knowledge-based industries.

#### IV. Conclusion

The current 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.

While we are witnessing the emergence of new technological legal services in countries such as Brazil, France, Germany, Spain and the UK – 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*”.<sup>144</sup>

The prohibition on multi-disciplinary firms should also be reconsidered, to allow for the existence of partnerships between lawyers and IT professionals, as is the case with companies such as *rocketlawyer.com* or *captaincontract.com*.

<sup>139</sup> 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”.

<sup>140</sup> 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”.

<sup>141</sup> European Commission, Report on Competition in Professional Services.

<sup>142</sup> OECD, OECD Competition Assessment Reviews: Portugal, 204.

<sup>143</sup> Autoridade da Concorrência, Plano de Ação da AdC para a Reforma Legislativa, 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”.

<sup>144</sup> OECD, OECD Competition Assessment Reviews: Portugal, 88.

On the other hand, 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*”.<sup>145</sup>

Hopefully, the recent legislative project by the *Autoridade da Concorrência* could pave the way for a much-needed reform.

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<sup>145</sup> Geoffrey Green and Melissa Westman-Cherry, “Supreme Court: Self-interested boards must be actively supervised”, Bureau of Competition, February 26 2015, <https://www.ftc.gov/news-events/blogs/competition-matters/2015/02/supreme-court-self-interested-boards-must-be-actively>.