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ABSTRACT

In this dissertation I seek to assess whether - in the market for legal services - the regulator should only preserve and encourage competition on price and quantity or other relevant interests, such as deontological and professional ethics objectives and other competition policy goals like the final consumer protection, should be taken into account. The *file rouge* and ultimate goal of this dissertation is to understand and justify whether and to what extent introducing, within the scope of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), considerations that are linked to the pursuit of additional public-interest objectives is possible and legitimate.

When assessing the legitimacy of potentially anticompetitive restrictions that occurred in the market for legal services, I find that competition law enforcers should also take into consideration the positive impact that such limitations might have on several other (constitutional) interests, such as the right of defence. Thus, following a broader and more holistic approach, these public policy goals and interests cannot be deemed alien to competition law and policy and need to be fully integrated into a new, dynamic, and evolutionary concept of competition law to be applied in the lawyers' market.

I also find that a full liberalization of the lawyers (commercial) advertisement might be to some extent detrimental for consumer welfare. That is, in the legal services market both information asymmetries and lawyers' reputation still play a fundamental role in affecting clients' choices of the most suitable lawyer and of the legal services needed. Therefore, even in the digital era, in addition to the ban on misleading advertising, proportionate advertisement restrictions – also when based on the decorum and dignity – should still fall outside the scope of Article 101(1) TFUE when they are objectively necessary to allow clients to knowingly choose a good quality lawyer in order to guarantee the consumer's constitutional right of defence and to protect the lawyer reputation, that is strictly related to the quality of the legal services offered to the ultimate consumer.

Ai miei genitori,

a Sara.

LAWYERS' ADVERTISEMENT AND COMPETITION LAW

Jacopo De Luca

Beneficiario di borsa di studio erogata dalla Fondazione Fratelli Confalonieri

CONTENTS

INTRODUCTION 11

CHAPTER I - BALANCING THE CONFLICT BETWEEN LAWYERS' CODES OF CONDUCT AND ADVERTISING LIBERALIZATIONS 15

1. Introduction: purpose and structure of the chapter 15

2. Preliminary considerations on the objectives and justifications of the deontological limitations 16

2.1 Members of the professions' inclusion in the notion of undertaking and *Wouters case* 16

2.2. Balancing different kinds of interests in the lawyers' market 18

2.3. The public-interest objective pursued by the deontological limitations 20

3. The complex relationship between the provisions in the lawyers' deontological code of conduct on the decorum and dignity of the profession, and the liberalisation of legal advertisement: The Italian case 24

3.1. The Italian *Codice Deontologico Forense*'s restrictions to lawyers' advertisement 24

3.2. The *Consiglio Nazionale Forense* enforcing the compliance with the dignity and decorum criteria and the need to reform the monopolistic and publicist Italian professional associations 29

3.3. Recent Italian case law and the aim of the restrictive measures based on dignity and decorum 31

4. Conflicting positions on the lawyers' advertisement restrictions in the European scenario 35

5. The economics of the lawyers' advertisement regulation 38

5.1. The general economic theory on lawyers' advertising 38

5.2. A few comments on comparative advertising… 40

5.3. … on the relationship between advertisement and barriers to entry and on the consequences of advertising prices 41

6. Market failures justifying some degree of regulation in the lawyers' market....43

6.1. Information asymmetries 44

6.2. Liberal professions and public goods....48

7. A different interpretation on the US settlement mills' advertisement case 50

7.1. Settlement mills: the new attorney advertisers 50

7.2. Implications of the Settlement mills type of advertising 52

8. Towards a broader concept of competition law in the lawyers' market 55

CHAPTER II - LAWYERS' ADVERTISEMENT IN GERMANY AND ITALY 59

1. Introduction: purpose and structure of this chapter....59

SECTION I – GERMANY 60

1. Lawyers advertising in the German literature and jurisprudence....60

1.1. German lawyers' advertisement current scenario 60

1.2. Interests justifying lawyers' advertisement limitations in the German literature and jurisprudence 62

1.2.1. Protection of third parties' rights, distinction between lawyers and entrepreneurs, high costs of the advertising campaigns and lawyers' independence 62

1.2.2. Lawyers' image distortion, risk of excessive consumption of legal services, and risks of lawyers disturbing each other 64

1.2.3. Proper functioning of justice 66

2. Lawyers' advertisement: history and regulations 69

2.1. *Rechtsanwaltsordnung* (RAO) and *Reichsrechtsanwaltsordnung* (RRAO)....70

2.2. *Bundesrechtsanwaltsordnung* (BRAO) – Federal lawyers' act – and *Richtlinien für die Ausübung des Rechtsanwaltsberufs* (Guidelines on the exercise of the lawyer's profession)....71

2.3. Criticisms concerning the Guidelines on the exercise of the legal professions 72

2.4. *Bastille Case*, § 43b BRAO and BORA....74

3. Lawyers' Advertisement and the German *Grundgesetz*....75

3.1. Article 12 GG: freedom of occupation....76

3.2. Article 5 GG: freedom of expression....77

3.3. Article 24 Directive 2006/123/EC and German Constitutional law....78

4. Relevant German legislation on lawyers' advertising....79

4.1. *Berufsbezogenheit* (professionalism)....80

4.2. *Sachlichkeit* (objectivity/dispassion)....83

4.2.1. Material/Objective form and content....85

4.2.2. Value judgments....87

4.2.3. Misleading advertisement....89

4.2.4. Completely exaggerated, creepy advertising. The *Marktschreier case*....89

4.2.5. Selected individual cases....91

4.2.5.1. Price advertising in Germany....92

4.2.5.2. Comparative advertising in Germany....94

4.2.6. Individual advertisement (*Einzelfallwerbung*): lawyers' advertisement shall not be aimed at soliciting specific instructions or a specific brief....97

4.2.6.1. Potential or actual danger? How to assess the inadmissibility of an *Einzelfallwerbung*.... 101

4.2.6.2. Ambulance chasing case and distribution of flyers.... 105

4.3. *Gesetz zur Bekämpfung des unlauteren Wettbewerbs* (UWG) - act against unfair competition.. 106

4.3.1. History of the law.... 107

4.3.2. Structure of the UWG.... 108

4.3.3. Misleading commercial practices.... 111

4.3.4. Advertisement on the admission of the lawyers to the exercise of the legal profession.. 112

4.3.4.1 *Spitzenstellungswerbung*.... 114

SECTION II – ITALY.... 115

1. Regulated professionals' advertisement in Italy.... 115

1.1. Regulated professionals' advertisement within the Italian Constitution.... 116

1.2. Preliminary considerations: How consumers choose regulated professionals in Italy..... 116

1.3. The Italian Legal Framework ... 117

1.3.1. Article 4 D.P.R. 7 August 2012, n. 137 ... 118

1.4. Italian Regulated Professionals' advertisement: the current scenario ... 123

2. Lawyers' advertisement in Italy ... 126

2.1. Article 10 Law 31 December 2012, n. 247 ... 127

2.2. Article 35 of the new Italian Lawyers Code of Conduct ... 134

3. Preliminary findings ... 136

CHAPTER III – LAWYERS' ADVERTISEMENT ON THE INTERNET ... 139

1. Introduction: purpose and structure of this chapter ... 139

2. The rapid development of lawyers' advertisement on the internet ... 141

2.1. A review of the current regulation concerning lawyers' advertising on the internet and how to possibly address new emerging issues. ... 143

2.2. Regulations' harmonization and enforcement ... 147

3. Lawyers' advertising practices on the internet ... 149

3.1. Whether and how to regulate lawyers' advertising on the internet ... 149

3.2. What is a computer-accessed communications? ... 151

3.3. Law firms and lawyers' websites ... 152

3.4. Keyword stuffing ... 156

3.4.1 Pay-per-click, pay-per-lead advertisement and Keyword advertising ... 157

3.4.2. Competitive Keyword advertising ... 161

3.5. Spamming and direct email solicitation ... 168

3.6. Defensive domain names ... 173

3.7. Blogs and discussion Forum ... 174

3.8. Social and professional networking services ... 177

3.8.1. Facebook ... 181

3.8.2. LinkedIn and Twitter ... 185

4. Italian specificity ... 191

CONCLUSION 195

BIBLIOGRAPHY 199

1. Case law 199

   a. European case law 199

   b. US case law 200

   c. German case law 201

   d. Italian case law 207

2. Doctrine 208

INTRODUCTION

In this dissertation I seek to assess whether in the lawyers market the regulator should only preserve and encourage competition on price and quantity or other relevant interests should be taken into account, such as deontological and professional ethics objectives and other competition policy goals like the final consumer protection. In the lawyers' market, the deontological and professional ethics limitations are often aimed at protecting the proper practice of the legal profession as organized in the respective Member States in order to ensure that the final consumers of legal services and the sound administration of justice will be provided with the necessary guarantees in relation to the integrity and experience of the lawyers offering the needed services on the market. In this respect, the *file rouge* and ultimate goal of this dissertation would be to try to understand and justify whether and to what extent introducing, within the scope of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), considerations that are linked to the pursuit of additional public-interest objectives should be possible and legitimate.

The fundamental pillar of this dissertation is that, in the legal services market, the economic goals of regulation cannot be limited to the supply of the most efficient quantity of legal services or to the supply of legal services at the lowest possible price. Competition law in this peculiar field has also to focus on another parameter of competition, that is the quality of the services offered on the market. More specifically, the need to allow clients to consciously choose a good quality lawyer having the right degree of integrity and experience seems to be crucial in order to guarantee the consumers' proper access to justice. Therefore, when assessing the legitimacy of potentially anticompetitive restrictions that occurred in the legal services market, competition law enforcers should also take into consideration the positive impact that such limitations might have on other several constitutional interests, such as the right of defence. Thus, following a broader and more holistic approach, these public policy goals and interests cannot be deemed alien to competition law and policy and have to be fully integrated in a new, dynamic, and evolutionary concept of competition law to be applied in the lawyers' market.

When the above considerations are applied to lawyers' adverting practises – given that in the legal services market both information asymmetries and lawyers' reputation still play a fundamental role in affecting clients' choices of the most suitable lawyer and of the legal services needed – a full liberalization of the lawyers (commercial) advertisement might be to some extent detrimental for consumer welfare. As a corollary – despite the limitations set out by the lawyers' code of conducts (especially those concerning the dignity and the decorum of the legal profession) might make the search of information concerning legal services more complex and time-consuming – deontological restrictions, if necessary to protect the final consumers and proportionate, should be deemed lawful. Consumers are indeed the weak part in the professional relationship with lawyers, and the disadvantage could be exacerbated by information overload. Consumers might find it difficult to distinguish truthful and useful information from the worthless and deceptive one. This is clearly the case for those messages that include indecorous or undignified contents being purely emotional, suggestive and fascinating; or for those aggressive, incessant and intrusive (because not avoidable) messages being indecorous or undignified the ways in which they are advertised or the means and the mechanisms with which they are carried out. In this view, the limitations based on the decorum and dignity set out by lawyers' code of conducts might be fully understandable and justifiable in order to guarantee a wider and more accurate concept of competition law and to better protect the final customers of legal services.

Taking into consideration this new and broad concept of competition law, the dissertation will then examine two historically highly regulated markets: the German and the Italian markets.[1] In these jurisdictions, lawyers might advertise their legal services

[1] It is worth noting that the Italian lawyers' market, after the latest reforms, is much less regulated. In this respect, see EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions on the reform recommendation for regulation in professional services*, COM (2016) 820 final, 10 January 2017. More precisely, the graph below, which is based on very recent information, shows the main restrictiveness indicators in relation to the lawyers' market (i.e. exercise requirements, other entry requirements, qualification requirements and regulatory approach). The figure below demonstrates that, thanks to the latest liberalizations of the Italian

subject to several (deontological) restrictions set out by their respective professional bodies and by the applicable law. The reasons for the German and Italian legal and professional frameworks to be studied in the context of this dissertation are that, over the years, (i) lawyers' advertisement has always been restricted by the law and/or by the professional code of conducts in these two countries and (ii) the Bar associations and the jurisprudence in these two countries have always played a very active role in detecting lawyers advertising messages contrary to the law or to the deontological limitations. These two factors help structuring a systematic reconstruction which includes a vast set of legal and deontological restrictions to lawyers' advertising as well as the interests that might be involved in order to justify the advertisement's limitations if the objective is to protect clients and to guarantee and enhance consumers welfare in the legal services market.

Lastly, to test the effectiveness of the new, dynamic and evolutionary concept of competition law, the last chapter of the dissertation will examine how, in recent years, fast and ongoing technological developments have been deeply modifying the way in which lawyers might advertise their services. It is worth noting that, lawyers are nowadays mainly using the internet in order to advertise their services especially because this technology lowers the costs to be endured when carrying out an advertising campaign, makes it much easier and faster for lawyers to advertise their services also guaranteeing a widespread geographic circulation of the advertising messages. These features of the internet have been encouraging the continuous and fast growing creation of new ways,

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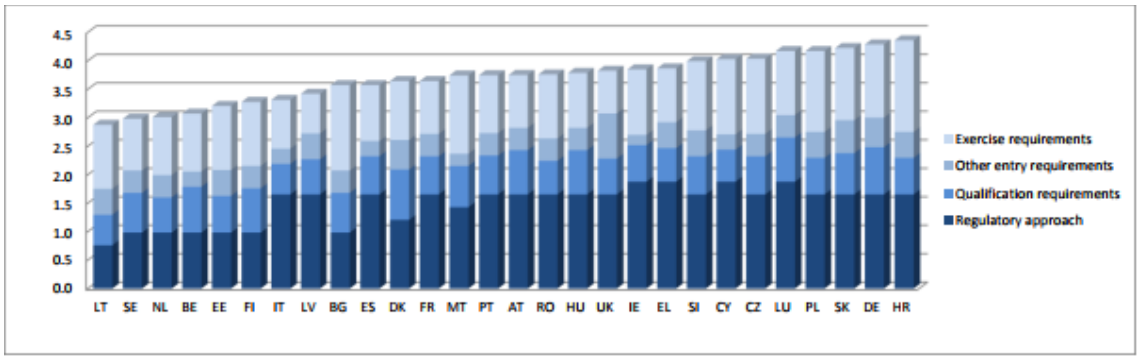
legal services market, Italy is now placed among the less regulated Member States, while Germany continues to be one of the most regulated.



Source: European Commission, November 2016.

tools and mechanisms to promote legal services and might entail that lawyers will carry out innovative advertising campaigns which might be unlawful and detrimental for consumers. Therefore, the last chapter of this dissertation will analyse the lawyers' modern advertising practices on the internet as well as the potential need to limit and restrict them and the enforcement of the unlawful lawyers' advertising messages. More specifically, the dissertation will focus on how the United States, where lawyers' advertisement on the internet has always been at the forefront, has been reacting to the advent and dissemination of the lawyers' advertising messages on the internet.

CHAPTER I - BALANCING THE CONFLICT BETWEEN LAWYERS' CODES OF CONDUCT AND ADVERTISING LIBERALIZATIONS

1. Introduction: purpose and structure of the chapter

Looking at the lawyers' market, this chapter will try to assess to what extent some reasonable rules restricting lawyers' conducts in the field of advertisement, will fall outside the scope of Article 101(1), when they are objectively necessary to achieve some other legitimate purposes or objectives. The purpose of the research consists in demonstrating that purely commercial, suggestive, emotional, aggressive and incessant advertisement should be restricted in order to guarantee an efficient consumer protection and to preserve the proper functioning of justice. As a consequence, it appears that in the legal services market, competition law should be aimed at guaranteeing lower prices and the most efficient quantity of legal services, as well as other public policy goals and interests such as the right of defence and ensuring that individuals have proper access to the law and justice. The aim of this, given the information asymmetry between the lawyer and the consumer, is to ensure to the latter the maximum degree of protection.

The rest of the chapter is structured as follows: Section 2 will provide some preliminary considerations on the purpose and the justifications of the deontological limitations set out by the Bar associations' professional code of conducts, in particular analysing the judgment of the European Court of Justice in *Wouters*. Section 3 will explore the relationship between the deontological provisions on dignity and decorum set out by the Italian National Bar Association, and the liberalisation of the lawyers' advertisement, observing the developments in the recent Italian case law. Broadening the scope of the analysis, Section 4 will study the conflicting opinions on the regulation of professional advertisement in the European scenario, especially focusing on the interesting European Court of Human Right's approach. Then, Section 5 will focus on the different positions in the economic literature in relation to the positive or negative effects generated by the liberalization of several aspects of the legal advertisement; while, Section 6 will approach the two market failures which typically justify some degree of regulation in the lawyers' market. These are information asymmetry and the presence of a public good. In light of

the above, Section 7 will apply the previous sections' findings to a new interpretation of the "US settlement mills" way to advertise. Finally, Section 8 will try to justify the deontological limitations to lawyers' advertisement based on the decorum and dignity of the profession, proposing a broader concept of competition applicable to the professional market.

2. Preliminary considerations on the objectives and justifications of the deontological limitations

2.1 Members of the professions' inclusion in the notion of undertaking and *Wouters case*

The European Commission has always been much concerned with the application of the competition rules to professional services.[2] Likewise, the European Court of Justice (ECJ), adopting a functional approach, has established that professionals can be *undertakings* for the purpose of the application of competition rules in several and consolidated cases.[3] Specifically, while the TFEU does not define what an undertaking is, the ECJ clarified its meaning in three leading cases. First of all, in *Höfner and Elser* the ECJ held that: "*the concept of undertaking encompasses every entity engaged in an economic activity regardless*

[2] See, for instance EUROPEAN COMMISSION, *Communication of 9 February 2004, Report on Competition in Professional Services*, COM (2004) 83 final, 9 February 2004; *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"*, Follow-up to the Report on Competition in Professional Services, COM (2005) 405 final, 5 September 2005.

[3] See, among others ECJ, Joined Cases C-180/98 to C-184/98, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, EU: C: 2000: 428, para. 77, for medical specialists; Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, EU: C: 2013: 81, paras 37-38, for accountants; Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v. SOA Nazionale Costruttori — Organismo di Attestazione S.p.A*, EU: C: 2013: 827, paras 27-35, for attestation agents; Case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato*, EU: C: 2013: 489, para. 44, for geologists.

of the legal status and the way in which it is financed".[4] Secondly, in *Pavel Pavlov* the ECJ added that "*any activity consisting in offering goods or services on a given market is an economic activity*".[5] Finally, in *Wouters* the ECJ specified that the competition rules in the Treaty "*do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity … or which is connected with the exercise of the powers of a public authority*".[6] Thus, applying the previous broad notion of undertaking, lawyers would fall within the notion of undertakings, National Bar Associations would be associations of undertakings and the professional rules adopted by a National Bar Associations would be decisions adopted by an associations of undertakings.[7]

Furthermore, in *Wouters* the ECJ ruled on the multidisciplinary partnerships regulation set by the Dutch National Bar Association, which prohibited lawyers practising in Netherlands from entering into multidisciplinary partnerships with members of the professional category of accountants. In this circumstance, the ECJ concluded that the previous rule adopted by the Dutch National Bar Association did not infringe Article 101(1) TFEU because neither its object nor its effects prevent, restrict, or distort competition in the lawyers' market. Some authors read this judgment in the sense that, in certain cases, in the ECJ's view, it is possible to balance non-competition objectives against restrictions of competition, and to reach the conclusion that the former outweigh the latter, with the consequence that there is no infringement of Article 101(1) TFEU.[8]

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[4] See ECJ, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, EU: C: 1991: 161, para. 21.

[5] See again ECJ, Joined Cases C-180/98 to C-184/98, *Pavel Pavlov*, para. 75.

[6] See ECJ, Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh e Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, EU: C: 2002: 98, para. 57.

[7] *Ibid.*, paras 48-49, 50-71.

[8] In this respect, see R. WHISH & D. BAILEY, *Competition Law*, 8th ed., (Oxford: Oxford University Press, 2015), 139 et seq., which believe that restrictions on conduct do not infringe Article 101(1) where they are ancillary to some other legitimate purposes; see also A. JONES & B. SUFRIN, *EU Competition Law*, 5th ed., (Oxford: Oxford University Press, 2014), 248, which read the case as an example that some weighing of anti-competitive and pro-competitive effects, and even other non-competition public interest objectives, should take place under Article 101(1) TFEU. Moreover, Jones & Sufrin point out that other commentators have offered different explanations for the *Wouters* case. Indeed, some authors stated that the ECJ combined and operated Article 101(1) and Article 101(3) TFEU as if they were a single provision

This interpretation is corroborated by several judgments where the ECJ has ruled that an object restriction of competition may fall outside Article 101(1) TFEU where there is an objective justification for it, for instance the protection of other relevant public interests involved such as health or safety.[9]

However, in *Wouters*, by stating that the Dutch National Bar Association's regulation did not fall within the scope of Article 101(1) TFEU, the ECJ did not approach the complex issue concerning whether the professional rules of ethics could be exempted through the application of Article 101(3) or through Article 106(2) on the grounds that the rules were necessary to the task entrusted by statute to the Dutch Bar Association.[10]

2.2. Balancing different kinds of interests in the lawyers' market

This chapter will seek to understand whether and to what extent the restrictions set out by the National Bar associations in the lawyers' advertising space could be considered as proportionate and reasonable limitations to competition in the market for

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(see J. GOYDER & A. ALBORS-LLORENS, *Goyder's EC Competition Law*, 5th ed., (Oxford: Oxford University Press, 2009), 115 et seq.). Some others believed that in *Wouters* the activity was regulatory and regulation is not an economic activity. In this view, the Dutch National Bar association's rule came within the scope of Article 101, not because it was an economic activity, but because it was promulgated by an association of undertakings (see, O. ODUDU, *The Boundaries of EC Competition Law: The Scope of Article 81*, (Oxford: Oxford University Press, 2006), 53), which state that once within Article 101 TFEU, the ECJ challenge in *Wouters* was to find an appropriate standard by which to assess the non-economic, regulatory, activity. In Odudu's view, the principles applied by the ECJ were free-movement rather than competition ones. Finally, other commentators stated that the ECJ transposed its analysis in free movement cases to the competition case law, weighing non-discriminatory national rules against domestic mandatory requirements of public policy and allowing the ECJ to take into account non-competition factors which relate to domestic interests (G. MONTI, *Article 81 EC and Public Policy*, in *Common Market Law Review* 39, (2002): 1057, 1087 et seq.).

[9] See, among others, ECJ, Case C-403/04, *Sumitomo Metal Industries Ltd v. Commission*, EU: C: 2007: 52, paras 39, 45-46; see also EUROPEAN COMMISSION, *Guidelines on Vertical Restraints*, C: 2010: 130: TOC, para. 60.

[10] See again, A. JONES & B. SUFRIN, *supra*, 219.

legal services because they are designed to achieve significant and legitimate public policy objectives, like "*ensuring that individuals have proper access to the law and justice*".[11]

From a general perspective, it is crucial to note that in the ECJ's view, for the purpose of application of Article 101(1) TFEU, the objectives of the association of undertakings' decisions and regulations must be taken into account. Indeed, for instance, in *Wouters* the Dutch National Bar Association's regulation objective seemed to be "*connected with the need to make rules relating to organization, qualification, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound of justice are provided with the necessary guarantees in relation to integrity and experience*".[12] That is why also in the pro-liberalizations European Commission's view, in addition to Article 101(3) TFEU, a *Wouters* exception exists, whereby certain professional regulations that restrict competition are permitted.[13]

Looking specifically at the lawyers' market, it will be necessary to strike a balance between different kinds of relevant interests characterizing the market at issue, like deontological and professional ethics objectives, on the one hand, and the main competition policy goal, which can be reasonably assumed to be consumer welfare,[14] on the other hand. Indeed, recently some authors have correctly pointed out that competition policy has never been only about economics (that is, economic efficiency

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[11] ECJ, Case C-309/99, *Wouters*, para. 53.

[12] ECJ, *Ibid.*, para. 97.

[13] In this respect see EUROPEAN COMMISSION, *Communication of 9 February 2004, Report on Competition in Professional Services*, COM (2004) 83 final, 9 February 2004, paras 74-75. According to the European Commission, such professional regulations must be: "*Connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of professional services and a specific public interest purpose are provided with the necessary guarantees in relation to integrity and experience. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and if they are therefore necessary in order to ensure the proper practice of the profession, as it is organised in the Member State concerned. The effects restrictive of competition must not go beyond what is necessary in order to ensure the proper practice of the profession (proportionality test)*".

[14] For the purpose of this dissertation we will work on this assumption. Nevertheless, for a detailed discussion on the purpose of competition policy in Europe, see among others, R. WHISH & D. BAILEY, *supra*, 19 et seq.

and/or consumer welfare) but also about social justice, democratic development and constitutional values.[15]

Considering the liberal professionals market, the December 11th, 2003 European Parliament resolution stated that: "*the goal of promoting competition in the professions must, in each individual case, be reconciled with the objective of maintaining purely ethical rules specific to the profession and that the pursuit of this goal must respect the public interest tasks with which liberal professions are entrusted*".[16] Moreover, in its March 23rd, 2006 Resolution,[17] the European Parliament includes some cautionary remarks taking into specific consideration the legal professions. First of all, the European Parliament recognizes the crucial role played by the legal professions in a democratic society in terms of the protection of fundamental rights, the safeguard of the rule of law, and ensuring certainty in the application of the law. This is both when lawyers represent and defend clients in court and when they are giving their clients legal advices. Secondly, according to the cited Resolution, the European Commission has to bear in mind that the aims of the rules governing legal services are the protection of the general public, the safeguard of the right of defence and access to justice, and the security in the application of law, and that for these reasons they cannot be tailored to the degree of sophistication of the client.

2.3. The public-interest objective pursued by the deontological limitations

The first step in our analysis will consist into determining the boundaries of the deontological and professional ethics objectives in the lawyers' advertisement field. These

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[15] See J. DREXL, *Competition Law in Media Markets and its Contribution to Democracy – a global perspective*, in *Max Planck Institute for Innovation & Competition Research Paper* 14-16 (2014), 2.

[16] EUROPEAN PARLIAMENT, *European Parliament Resolution on Market Regulations and Competition Rules for the Liberal Professions*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P5-RC-2003 0430+0+DOC+XML+V0//EN&language=bg>, 11 December 2003, para. 9.

[17] EUROPEAN PARLIAMENT, *European Parliament Resolution on The Legal Professions and the General Interest in the Functioning of Legal System,* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0108+0+DOC+XML+V0//EN>, 23 March 2006.

deontological limitations are aimed at protecting the proper practice of the legal profession as organized in the Member States concerned[18] in order to ensure that the final consumers of legal services and the sound administration of justice will be provided with the necessary guarantees in relation to the integrity and experience of the lawyers offering the needed service on the market.[19] In other words, it is time to understand and justify whether and to what extent it should be possible to introduce into the provisions of Article 101(1) TFEU considerations that are linked to the pursuit of a public-interest objective.[20]

In relation to that, some scholars have pointed out that "*insofar as provisions aim at enhancing access to justice, strengthening consumer rights and guaranteeing high-quality lawyers' services, these important concerns in public interest cannot be sacrificed for deregulation, which would be then become deregulation merely for its own sake*".[21] However, from a general point of view, the

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[18] See, among others, ECJ, Case C-309/99, *Wouters*, para. 110.

[19] See again R. WHISH & D. BAILEY, *supra*, 138.

[20] In this respect, see C. TOWNLEY, *Which goals count in article 101 TFEU? Public policy and its discontents*, in *European Competition Law Review*, No. 9 (2011), 442, which believes that recent EU court judgments confirm public policy's relevance both in articles 101(1) and 101(3) TFEU. In Townley's view, the consideration of public policy concerns within article 101 TFEU is difficult to understand on a mere textual interpretation of this article. Nevertheless, Townley believes that it is justified by the hierarchy of the EU treaties' provisions and because of the presence of several policy-linking clauses there. See also C. TOWNLEY, *The Goals of Chapter I of the UK's Competition Act 1998*, in *Yearbook of European Law* 29(1), (2010), 307 et seq.

Moreover, on several occasions the ECJ has recognised that regulation may be necessary to protect overriding public interests. See, among others, ECJ, Case C-71/76, *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris*, EU: C: 1977: 65; Case C-76/90, *Manfred Säger v. Dennemeyer & Co. Ltd.*, EU:C:1991:331; Case C-309/99, *Wouters*, paras 138-142, where the ECJ held that restrictive professional rules that are proportionate and ancillary to a regulatory system that protects a legitimate public interest fall outside the scope of Article 101(1) TFEU.

On the contrary, see O. ODUDU, *Editorial - Competition Efficiency and Other Things*, in *Competition Law Review* 6, (2010): 1 et seq., which believes that public policy interests have to be taken into account when the European Union legislates rather than when the European Union legislation is enforced.

[21] In this regard, see M. HENSSLER, M. KILIAN, *Position paper on the study carried out by the Institute for Advanced Studies, Vienna: Economic Impact of Regulation in the Field of Liberal Professions in Different Member States*,

Court of First Instance in *Professional Representatives* held 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 merely because they are classified as 'rules of professional conduct' by the component bodies*".[22] From a general perspective, in order to achieve some public goals, in some sectors some regulation may be needed. In other words, regulation is not something that should be completely removed or to be wary of. Nevertheless, at the same time, regulation should guarantee the existence and the protection of competition in the market, without providing any implied immunity to any category of competitors. In light of the above, taking into account the legal services market, the only solution seems to be to ascertain, following a case-by-case approach, whether provisions in the professional codes of conducts are effectively aimed at guaranteeing relevant public interests (such as the ultimate consumers' protection) and/or even constitutional values (such as consumers' proper access to the law and the justice in order for the right of defence to be adequately guaranteed), without unduly or disproportionally restricting competition in the market.

Therefore, lawyers' codes of conduct often include provisions on the decorum and the dignity of the profession, which in the European Commission's and the National Competition Authorities' views could be at odds, for instance, with the liberalisation of lawyers' advertisement, which loosens also the rules on the objects and the forms of advertisement.[23] However, the fundamental issue is related to the consideration that the ECJ in *Wouters* clearly stated that the National Bar associations enjoy a margin of discretion in order to establish what has to be considered appropriate and necessary to

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<http://www.anwaltverein.de/downloads/praxis/Positionspapier-Henssier-Kilian-Englisch-Endversion.pdf.>, Sep. 2003.

[22] See COURT OF FIRST INSTANCE, Case T-144/99, *Professional Representatives before the European Patent Office v. Commission*, EU: T: 2001: 105, para. 64.

[23] According to the understanding of this author in most of the cases the provisions on the decorum and dignity of the professions will converge or even strengthen the European competition law goal that is consumer welfare. Indeed, the dignity and decorum canons are both aimed at guaranteeing the quality of the legal services. For this reason, it is more convincing to consider that they are not (or not only) provided for protecting the regulated professional category, but also for safeguarding the ultimate consumer's welfare.

protect the proper practice of the profession, in light of their respective national legal frameworks and of the prevailing perceptions of the profession in their respective Member State.[24]

Furthermore, it has to be considered that also at a European level the Council of Bar and Law Societies of Europe (CCBE) has adopted two foundation texts: The Charter of Core Principles of the European Legal Profession on 2006 and the Code of Conduct for European Lawyers on 1988 (and following amendments). The Charter contains a list of ten core principles common to the national and international rules regulating the legal profession. Among these principles – to which European lawyers are committed and which are essential for the proper administration of justice, access to justice and the right to a fair trial – there is the canon related to the dignity and the honour of the legal profession, and the integrity and good reputation of the individual lawyer.[25] The Code of Conduct for European Lawyers is binding on all Member States and all lawyers who are

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[24] See ECJ, Case C-309/99, *Wouters*, para 108, where the Court stated that "*the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regime by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means*" and para. 107 in which the ECJ concluded that "*a regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned*".

See also CCBE, *Comments on the Commission Legal Analysis in its Report on Competition in Professional Services*, <http://www.ccbe.eu>, Jun. 30, 2004, 6, in which the Council of Bar and Law Societies of Europe states that since the Bar associations are better placed to fully evaluate whether a restrictive professional regulation is necessary to protect the core values of the legal profession, they must retain the power to opt for the solution that they reasonably deem necessary to this end.

[25] See CCBE, *Charter of Core Principles of the European Legal Profession and Code of Conducts for European Lawyers*, 2013 ed., http://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf, principle (d), stating as follow: "*To be trusted by clients, third parties, the courts and the State, the lawyer must be shown to be worthy of that trust. That is achieved by membership of an honourable profession; the corollary is that the lawyer must not do nothing to damage either his or her reputation or the reputation of the profession as a whole and public confidence in the profession. This not mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession. Disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession*".

members of the Bars of these countries have to comply with the Code in their cross-border activities within the European Union.

3. The complex relationship between the provisions in the lawyers' deontological code of conduct on the decorum and dignity of the profession, and the liberalisation of legal advertisement: The Italian case

3.1. The Italian *Codice Deontologico Forense*'s restrictions to lawyers' advertisement

In every country, traditionally, lawmakers and Bar associations have taken into account two main justifications for regulating legal advertising. First of all, advertising may mislead consumers of legal services and, second of all, it could damage the consumers' perception of lawyers.[26] Initially, even in the homeland of Antitrust law, with the two exceptions of business cards and letterhead, legal advertisement was banned entirely,[27] without consideration to its effect on the information passed on the consumers.

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[26] See, among others, F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, in *San Diego Legal Studies Paper No. 07-16* (2006): 1.

[27] See AMERICAN BAR ASSOCIATION, *Canon of Ethics*, Canon 27, (1908), which stated as follows: "*Solicitation of business by circulars or advertisement […] is unprofessional […] Indirect advertisement by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been engaged, or concerning the manner of their conduct, the magnitude of the interest involved, the importance of lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable*".

See also AMERICAN BAR ASSOCIATION, *Code of Professional Responsibility*, DR 2-101(A), DR 2-101(B), (1969), in which it was stated that: "*A lawyer shall not […] use […] any form of public communication that contains professional self-laudatory statements calculated to attract lay clients*" and moreover "*a lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other mean of commercial publicity, nor shall he permit others to do so in his behalf […]*".

Over the years, the regulation of lawyers advertising has swung from a longstanding blanket prohibition on all lawyers advertising to the 1977 U.S. Supreme Court's recognition of lawyers advertising as commercial free speech protected under the First Amendment, in *Bates v. Arizona*, 433 U.S. 350 (1977).

Looking at the current Italian legal framework, there are still many behavioural measures arranged by the Italian National Bar associations (*Consiglio Nazionale Forense*) to regulate the lawyers' advertisement field.[28] The restrictions seem to be rooted either to

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The Supreme Court in *Bates* declared: "*It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumers*" and that "*the only services that lend themselves to advertising are the routine ones*" such as "*the uncontested divorce, the simple adoption, the uncontested personal bankruptcy,* [and] *the change of name*".

Nevertheless, the U.S. Supreme Court left to the States the authority to continue regulating lawyers advertising. For instance, states retained the authority to prohibit false, deceptive or misleading advertising. Moreover, in *Bates v Arizona*, the U.S. Supreme Court embraced the so called "*commercial speech doctrine*" without establishing a clear standard for assessing the constitutionality of a regulation on commercial speech. However, in 1980, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), articulated a standard four-part analysis to balance a lawyer's First Amendment right with the State's interest in regulating lawyer advertising and preventing deception of the public: if the first two inquires yield positive answers, the Court then turns to the third and fourth inquiries. Briefly, using the Central Hudson analysis the Supreme Court will assess: "*1) whether the expression is protected by the First Amendment because it concerns lawful activity and is not misleading; 2) whether the asserted governmental interest is substantial; 3) whether the regulation directly advances the governmental interests; and 4) whether it is not more extensive than is necessary to serve that interest*".

Following the *Central Hudson* decision, several First Amendment cases dealing with individual lawyer advertising and State regulation were decided based upon the mentioned test. In each of these cases, the regulations in question failed to satisfy the *Central Hudson*'s analysis and thus violated the First Amendment (see, among others, *In re R.M.J.*, 455 U.S. 191 (1982); *Zauderer v. Office Disciplinary Council*, 471 U.S. 626 (1985); *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990); *Alexander v. Cahill*, WL 2120024 (2007); *Public Citizen v. Louisiana Attorney Disciplinary Board*, 642 F. Supp. 2d 539 (2009); *Harrell v. The Florida Bar*, No. 3:2008cv00015 (2010); *Rubenstein v. The Florida Bar*, No. 1:2014cv20786 (2014); *Searcy et al. v. the Florida Bar*, No. 4:13cv664-RH/CAS, (2015)). To conclude, the U.S. Supreme Court requires to the government to prove that the regulation which it is promoting and defending does advance an important regulatory interest, refusing to accept mere common sense or speculation as a sufficient basis for restrictions on advertising (in this respect see, ASSOCIATIONS OF PROFESSIONAL RESPONSIBILITY LAWYERS, *2015 Report of the APRL Regulation of lawyer advertising committee*, <https://aprl.net/>, 2015).

[28] See article 17 of the Italian Lawyers' Code of Conduct (official English translation) – 'Information on the practice of the professional activity' – which states as follows: "*1. A lawyer is allowed, for the protection of the community reliance, to inform people about his professional activity, the organization and structure of his law office, and about any achieved specializations and scientific qualifications. 2. Disclosure in public by any means, including computer,*

ethical reasons or to the fact that the regulated professionals, as opposed to entrepreneurs, should be characterized by a greater integrity and decorum. [29] As a

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shall be transparent, truthful, correct, unambiguous, Non-misleading, Non-denigrating or suggestive, and not comparative. 3. In any case, the information provided shall refer to the nature and extent of the professional obligation".

See also 35 of the Italian Lawyers' Code of Conduct (official English translation) – 'Duty to provide correct information' – stating that: "*1. A lawyer who provides information on his professional activity shall respect the duties of truth, integrity, openness, secrecy and confidentiality, anyway referring to the nature and limits of the professional obligation. 2. A lawyer shall provide neither comparative information about other professionals nor ambiguous, misleading, denigrating, evocative, otherwise containing reference to qualifications, roles or jobs not concerning his professional activity. [...] 9. Forms and methods of providing information shall anyway respect the principles of dignity and decorum of the profession*".

[29] Part of the Italian literature believes that the Italian Entrepreneur's Statute (which includes the competition law regime) should not be directly applicable to lawyers because of an ancient legislative choice based on the different *status* attributable to lawyers, on the one hand, and entrepreneurs, on the other hand. In this respect, see G. F. CAMPOBASSO, *Manuale di diritto commerciale*, 5th ed., (Torino: Utet Giuridica, 2010), 19, where it is stated that the Italian legislator historically granted to lawyers a privilege in the light of the peculiar social consideration which traditionally surrounded these professionals. See also P. SPADA, *Diritto commerciale II. Elementi*, 2nd ed., (Padova: Cedam, 2009), 48, which believes that lawyers' immunity from the application of the Italian Entrepreneur's Statute consists in a category's privilege born in the Middle Ages because of the excellence of the services carried out by this professional category. See G. PRESTI, M. RESCIGNO, *Corso di diritto commerciale*, 6th ed., (Bologna: Zanichelli, 2013), 16, which state that lawyers' immunity would have been granted thanks to the massive historical presence of lawyers in the Italian law-making bodies. Moreover, Presti & Rescigno believe that, nowadays, to try to justify the incompatibility between the Italian Entrepreneur's Statute and the lawyers on the basis of a precise and ancient legislative choice would be in contrast with the current European and national legislations.

Furthermore, other part of the Italian literature tries to justify an incompatibility between the Italian Entrepreneur's Statute and the lawyers on the basis of the lack of the corporate organization's requirement in lawyers' activities case. In other words, in the mere hypothesis of professional activity's performance, it will not be possible to separate the professional, on the one hand, from the assets which he uses to daily carry out his professional activity. Thus, in this view, an objective economic entity, having its own productivity independently from the personal activity carried out by the professional, does not exist. In this regard, see G. OPPO, *Realtà giuridica globale dell'impresa nell'ordinamento italiano*, in *Riv. dir. civ.* (1976), 594; G. MARASÀ, *Società tra professionisti e impresa*, *Riv. not.* (1997): 1349; G. BERTOLOTTI, *Esercizio in forma societaria delle professioni intellettuali e impresa*, Torino, G. Giappichelli Editore, 2012, 133 et seq., which believes that, in general, it should not be possible to apply the Italian Entrepreneur's Statute

consequence, articles 17 and 35 of the new Italian lawyers' Code of Conduct (*Codice Deontologico Forense*) allow only those contents defined as *informative*, forbidding *suggestive* and *promotional* messages.[30] Moreover, the *Consiglio Nazionale Forense* (CNF) – which drafted the *Codice Deontologico Forense* – could pursue objectives, such as the protection of values like dignity and decorum, introducing further limitations to professional advertisement. Such limits, concerning the integrity and ethical responsibility of the professions, would be even stricter than those generally prescribed for every other economic activity by article 1 of the Italian Legislative Decree 2 August 2007, n. 145, which concerns in particular the decency and the truthfulness of the advertising messages.

The issue whether professional associations, such as the Italian CNF, should intervene on cases other than decency and truthfulness is still much debated in the literature and in the recent case law both in Italy and in Europe. Nonetheless, it is interesting to note that European lawyers seem to be increasingly aware that dignity and decorum have a price. For instance, when Belgian lawyers seemed to lose business to Dutch and British law firms, the Belgian professional association decided to reduce constrains on advertisement.[31]

In Italy, the Italian *Corte di Cassazione* and the CNF, still believe that the professional associations' further restrictions based on the dignity and decorum, and

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discipline to lawyers; however, this would be possible in the hypothesis of a big law firm organized on a capitalist basis and, for this reason, comparable to a commercial undertaking.

[30] It is worth noting that both the ECJ and the Italian Administrative Courts expressly recognized that the codes of conducts represent decisions by associations of undertakings for the purpose of the application of Article 101 of the Treaty. See, among others, ECJ, Case C-136/12, *Consiglio nazionale dei geologi*; CONSIGLIO DI STATO, Sez. VI, *Judgment of the 22 January 2015*, *n. 238*, <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=U3MNDCHJTFUVHAGDYGYTZZ4IUI>; TAR LAZIO, Sez. I, *Judgment of the 1 April 2015*, *n. 4943*, <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=FSPIE4IURHNEGW5F2N766J7LHQ&q>.

[31] See M. FAURE, *Regulation of Attorneys in Belgium*, in *Regulation of Professions: a Law and Economics Approach to the Regulation of Attorneys and Physicians in the US, Belgium, the Netherlands, Germany and the UK*, eds. M. Faure, J. Finsinger, J. Siegers, R. Van den Bergh, (Antwerp: Maklu, 1993) 89 et seq.

created to limit the form and the object of the professional advertisement, are necessary to protect the consumers from unfair behaviours.[32] On the contrary, according to the current Italian regulated professions regulation (that is the D.P.R. 7 August 2012, n. 137), as well as part of the Italian literature, and the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*), these additional limitations should be considered detrimental because they would limit competition in a too restrictive way, clashing with the content of the law which states that the regulated professionals are allowed to use any means in order to advertise their informative communication.[33]

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[32] See, among others, CORTE DI CASSAZIONE, Sezioni Unite, *Judgement of the 18 November 2010, n. 23287*, <http://ilcappio.com/wp-content/uploads/2012/07/scansione0093.pdf>; Sezioni Unite, *Ordinance of the 10 August 2012, n. 14368*, <http://ilprocessotelematico.webnode.it/news/commento-a-ordinanza-corte-di-cassazione-del-9-luglio-2015-n-14368-la-suprema-corte-dichiara-erroneamente-nulla-la-notifica-in-proprio-via-pec-effettuata-prima-del-15-maggio-2014/>; Sezioni Unite, *Judgement of the 13 November 2012, n. 19705*, <http://www.altalex.com/documents/massimario/2013/01/21/avvocati-pubblicita-informativa-modalita-attuative-illecito-disciplinare-atipicita>.

[33] See, among others, M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, *Riv. dir. ind.* (2012), 259, where the author argues that in the near future the issue will consist into justifying, case by case, the use of the dignity criterion on a public interest motivation basis. Moreover, in the author's view, the application of the dignity canon during the next few years should be increasingly narrower. This is why the meaning of the dignity criterion should switch from the generic old safeguard for ethical and moral forms of advertisement to a more substantial and specific significance only banning particular violations (for instance, deceptive advertising where the consumer is offered to win in every trial). See also AGCM, *IC 34 on the professional associations' field* (2009), <http://www.agcm.it/stampa/comunicati/3466-ic34-indagine-conoscitiva-riguardante-il-settore-degli-ordini-professionali-chiusura-indagine-conoscitiva.html>, which launched a market study to evaluate whether the limitations established by the professional codes of conducts, particularly in the sector of the professional advertisement, are necessary and proportional to the scope. In this case, the AGCM underlined that limitations should be justified only if they are considered functional to the public interest protection and should not obstacle the right to freely carry out a professional activity; see also AGCM, *Decision n. 25868, 10 February 2016*, <http://www.agcm.it/bollettino-settimanale/8110-auto-genera-dal-titolo.html>, in which the *Autorità Garante delle Concorrenza e del Mercato* sanctioned the CNF with a 912.536,40 Euro fine for having banned a new way to advertise Italian lawyers' most affordable rates via an internet website platform.

3.2. The *Consiglio Nazionale Forense* enforcing the compliance with the dignity and decorum *criteria* and the need to reform the monopolistic and publicist Italian professional associations

On the other side of the ocean, long time ago, the Commission on Advertising of the American Bar Association, recognized that dignity is a fundamental element in the debate of liberal professional advertising. However, the Commission reached the questionable conclusion that it could not be a factor subject to regulation because, in its view, good taste in liberal professions advertising is something that is intangible, subjective and simply unenforceable.[34]

Applied to the Italian scenario, this latter interpretation might be not satisfactory because the dignity and decorum *criteria* seem to be both enforceable and not arbitrarily evaluated and balanced with other relevant interests by the Italian CNF. First of all, in Italy, the protection of the dignity is a goal pursued not only by the *Codice Deontologico Forense*'s rules set out by the CNF[35] but also by the Italian primary law itself.[36] Thus, according to our own view, also the Italian legislator acknowledged the significance of the dignity *criterion*, assigning it the legal recognition and protection.

It is worth noting that the members of the CNF and of the Italian Local Bar associations are lawyers. One could argue they might have the incentive to protect their professional category by restricting competition in the sector. More specifically, there seems to be a conflict of interests when it comes to allowing new entry in the market – that is, setting the rules for becoming a registered lawyer. Nevertheless, they will surely

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[34] See AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING, *Lawyer Advertising at the Crossroads*, *Professional Policy Recommendations*, (Chicago: American Bar Association, 1995), 112.

[35] See again the content of articles 17 and 35 of the Italian *Codice Deontologico Forense*.

[36] In Italy, the dignity *criterion* seems to be fully legitimated again by article 34(3) legislative decree 59/2010 stating as follow: "*The codes of conduct assure that the commercial communications concerning the services supplied by professionals which carry out a regulated profession are issued in line with the professional rules, in compliance with the Community law, concerning, in particular, the independence, the dignity and the integrity of the profession, as well as the professional secrecy, considering the specificity of each profession. The professional rules concerning commercial communications must be non-discriminatory, justified by overriding reasons of general interest and proportionate*".

know better than anyone else how the legal services' market works, in terms of the lawyers' and the consumers' needs. That is why, it should be possible for the CNF's members to strike a balance between the different interests involved in the legal profession and in the lawyer market. Among these various interests, the protection of the dignity and the decorum and the enhancement of the competition in the market should coexist.

However, a quick and penetrating reform of the current monopolistic and publicist Italian professional associations seems crucial and desirable. Indeed, in order to protect the affiliated lawyers as well as the interests of the legal services' consumers, the reformed professional associations should not operate in a public monopoly position (taking into account a more Anglo-Saxon perspective) and have a different composition.

First of all, the new Italian professional associations should operate in a competitive environment with the purpose to certify the quality of the legal services offered and the skills of their members, to control their professional activity and, to some extent, to protect them. These new reformed professional associations should adopt the structure of private associations instead of being entrusted as public association by the State. As a result, with many private professional associations operating in the same professional market, their survival will be strictly related to their reputation. It will depend on the quality and professional skills of their affiliated professionals and, moreover, on the single professional association ability to promptly intervene punishing professionals' incorrect conducts carried out by the professional in violation of the professional association's deontological rules. Moreover, in this new scenario, the single professional should not be obliged to join a private professional association. However, for instance, lawyers may voluntarily decide to choose and join a professional association in order to prove their professionalism.[37]

Moreover, in comparison to the current homogeneous and unitary composition of professional associations (entirely made of professionals – e.g. lawyers), a heterogeneous composition would guarantee a more effective protection of the public interests involved

[37] See C. GOLINO, *Gli ordini professionali: tensioni tra disciplina corporativa e disciplina concorrenziale*, <http://www.side-isle.it/ocs/viewpaper.php?id=257&cf=2>, 10 October 2008.

in the practice of the regulated professions. Representatives of university students in legal faculties, representatives of the related public institutions (e.g. Ministry of Justice employees) and representatives of the consumers must be part of the new professional associations. Thus, the reformed heterogeneous professional associations will effectively become advocates of the single pieces of the society's mosaic, acquiring much more independence and credibility compared to the current CNF.

In the hope of a future Italian professional associations' reform, in the current Italian scenario, the CNF should try to take into account these various interests either *ex ante* in drafting and amending the *Codice Deontologico Forense*, or *ex post*, in enforcing (when necessary) the rules concerning the dignity and the decorum of the messages advertised. The relevant and – one might argue – also convergent needs are, respectively, for consumers to obtain fair and complete information in order to reduce the information asymmetry and to be able to choose the most suitable lawyer in every specific case; and for the lawyers to avoid that crass and tacky commercial conducts carried out by some professionals will impact the whole category of lawyers' image. More specifically, the more inexperienced clients might choose a low-quality lawyer instead of a good or an average quality one only because the former aggressively and suggestively advertises his/her services.

3.3. Recent Italian case law and the aim of the restrictive measures based on dignity and decorum

In the current Italian *Codice Deontologico Forense* there is only a general and not clearly specified ban to advertise suggestive, emotional, (purely) commercial and comparative messages, and to advertise using means that would infringe the dignity and the decorum of the legal profession. In other words, there is no clear black list of the banned conducts in the *Codice Deontologico Forense*. Nevertheless, by looking at the numerous CNF's and Italian Local Bar associations' restrictive measures against

undignified advertising,[38] in most of the cases upheld by the Italian *Corte di Cassazione*,[39] and at the typical undignified behaviour provided for the numerous guidelines set out by

[38] See, among others, CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI BRESCIA, *Decision 16 March 2009*, <http://www.ordineavvocatibrescia.it/>, in which the *Consiglio dell'Ordine* sanctioned two Italian lawyers which, in order to enlarge the number of clients and to attract consumers, opened in Milan a legal shop located directly on the main road with a real shop window, a suggestive sign (stating "*A.L.T. Assistenza Legale per tutti*") and with the misleading indication "*Prima consulenza gratuita*" in the front door. The previous disciplinary measure was confirmed in the merit by CONSIGLIO NAZIONALE FORENSE, *Decision n. 183, 21 December 2009*, <http://www.codicedeontologico-cnf.it/?tag=1832009>, because the two lawyers' actions were considered again to be contrary to the decency and decorum *criteria*, and, moreover, was examined by AGCM, *Decision n. 24553, 17 October 2013*, <http://www.agcm.it/component/joomdoc/bollettini/43-13.pdf/download.html>, which ruled in the sense that the disciplinary measure adopted by the *Consiglio dell'Ordine degli Avvocati di Brescia* did not consist into a violation of article 2 Law 10 October 1990, n. 287 (that is the mirror of article 101 TFEU). Indeed, even in the *Autorità Garante delle Concorrenza e del Mercato*'s view the mentioned disciplinary measure did not restrict competition in the legal services market being necessary and proportionate in order to protect a general interest such as the quality of the legal services offered on the market. Moreover, in its decision, the AGCM surprisingly added that, nowadays, the decorum *criterion* should not be interpreted as a way to protect the lawyer category but as a way to defend the lawyer reputation that is strictly related to the (high) quality of the legal services offered to the ultimate consumers (see para. 33 of the Decision).
See also CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI MONZA, *Decision 24 June 2009*, <http://www.ordineavvocatimonza.it/Pages/>, in which five lawyers were sanctioned because of their advertising messages in the advertising box of a famous Italian newspaper in consideration of their suggestive style and their more emotional and, to some extent, deceptive rather than informative content. Also in this case, the disciplinary measure was reviewed by the *Consiglio Nazionale Forense* (see, CONSIGLIO NAZIONALE FORENSE, *Judgement 29 October 2011*, <http://www.avvocati-part-time.it/index.php/scopo-del-sito-e-accesso-mainmenu-36/2186-sentenza-del-consiglio-nazionale-forense-su-pubblicita-di-avvocato>) which only reduced the sanction from the suspension to the mere admonition of the lawyers.

[39] See, among others, CORTE DI CASSAZIONE, Sezioni Unite, *Judgement 18 November 2010, n. 23287*, *supra*, in which the Italian *Corte di Cassazione* ruled on the legitimacy of the mentioned disciplinary measure (see footnote 38) adopted by the *Consiglio dell'Ordine degli avvocati di Brescia* and previously confirmed on a merit base by the *Consiglio Nazionale Forense*; CORTE DI CASSAZIONE, Sezioni Unite, *Judgement 13 novembre 2012, n. 19705*, *supra*, in which the Italian *Suprema Corte* ruled on the legitimacy of the *Consiglio*

the Italian Local Bar Associations[40] it should be possible and quite easy for an Italian lawyer to understand the deontological boundaries which she is expected not to cross. Following the constant approach of the CNF on that issue, according to our own view, an abstract principle might be formulated: it consists in the ban to advertise messages and slogans with evocative or suggestive contents or means which do not include any useful informative content and are harmful to the dignity and decorum *criteria* that every lawyer needs to respect for his own interest.

As a result, it is more convincing to consider that the professional associations' restrictive measures concerning the dignity or the decorum of a specific advertising message are not based on a speculative and subjective evaluation. Moreover, in punishing undignified behaviours, the National or Local Bar associations have to take into account the enforceable general provisions laid down in the *Codice Deontologico Forense* on the dignity and the decorum of the advertising and (if available) the list of the specific banned conducts. Furthermore, in Italy, the sanctioned lawyer's right to defence would be adequately guaranteed from the possible arbitrary, subjective and unfair judgments held by the Local Bar associations in three ways: (i) the sanctioned lawyer could appeal to the CNF for a merit revision of the case; (ii) the Italian *Corte di Cassazione* could review the CNF's decision, only on the aspects concerning the legitimacy of the sanctions and not the merit of it; lastly, (iii) the sanctioned professionals might inform the *Autorità Garante della Concorrenza e del Mercato*, which could open an investigation and take a decision sanctioning the *Consiglio Nazionale Forense* if the adopted disciplinary measure represents, to some extent, a restriction of the competition in the Italian lawyers market.

It is worth noting that the restrictive measures based on dignity and decorum adopted by the Italian CNF must be aimed at regulating the mere ethical aspects related to the exercise of the legal profession and at eliminating single lawyers' conducts which

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dell'Ordine degli Avvocati di Monza's mentioned measure (see footnote 38) adopted against five lawyers which advertised their personal details in the advertising insert of an Italian newspaper.

[40] See, among others, CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI ROMA, *Guidelines on Lawyers Advertisement*, 9 January 2014, <https://www.ordineavvocatiroma.it/Documenti/LINEE%20GUIDA%20PUBBLICITA'%20AVVOCATI.pdf>.

could cause lack of consumers' confidence in relation to the entire category of lawyers. On the contrary, these restrictive measures must not unduly restrict competition in the legal services market being non-proportionate and non-necessary in order to reach the described objectives. All in a view to improve consumers' protection and to defend clients by crass, indecorous, tacky, emotional and suggestive lawyers' commercial messages, which would not provide them with the information they need in order to reduce information asymmetry.

In sum, the Italian scenario is designed to permit informative advertisement but to eliminate the use of emotional and suggestive contents and any form of dramatization. Thus, taking into consideration also the mentioned *Autorità Garante della Concorrenza e del Mercato*, decision 17 October 2013, n. 24553 (see *infra* footnote 38), one can have the impression that is amply accepted that the Italian Local Bar associations and the CNF could intervene in a larger number of circumstances and with more severe restrictions in the lawyers' case rather than those generally applicable to the entrepreneurs' advertisement. In conclusion, it is increasingly hard to legitimate the described disparity of treatment in the advertisement restrictions between lawyers and entrepreneurs without accepting the presence of an intrinsic difference between the former and the latter, which could be the only justification for the existence of more restrictive limitations in the lawyers' advertisement field.[41]

[41] Briefly, a significant part of the Italian doctrine identifies a difference between the regulated professionals (among which the lawyers) and the undertakings both on quantitative and qualitative basis (see, among others, G. F. CAMPOBASSO, *Le società fra professionisti,* in *Diritto privato comunitario-lavoro impresa e società*, ed. V. Rizzo (Napoli: Esi 1997), 518 et seq.; G. OPPO, *Antitrust e professioni intellettuali*, in *Riv. dir. civ.* (1999), 124; F. GALGANO, *Le professioni intellettuali e il concetto comunitario di impresa*, in *Contratto e impresa – Europa* (1997), 3; C. IBBA, *Professione intellettuale e impresa*, in *Riv. dir. civ.* (1982): 373 et seq.). In other words, in this view, a person involved in a liberal profession should not be exposed to the same level of competition rules as an entrepreneur, especially when it comes to advertisement. For an up to date position on the difference between the lawyers and the entrepreneurs see G. BERTOLOTTI, *supra*, 133 et seq.

4. Conflicting positions on the lawyers' advertisement restrictions in the European scenario

Enlarging the analysis' scope to the European scenario, the fundamental *criterion* in the space of the advertisement of the lawyers seems to be the following: an outright ban of professional advertisement is not possible;[42] it is nevertheless possible to specifically regulate it.[43] While the European Commission stated in many occasions that the regulated professionals' services advertisement area should be only regulated by general rules on deceptive advertisement, the European rules, however, maintain a high level of speciality in the field of the professional advertisement. Indeed, Article 24(2) of Directive 123/2006/EC states that Member States shall ensure that commercial communications by regulated professions (among which the lawyers) comply with professional rules, in conformity with community law, which relates, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of the profession.

Concerning the interpretation of Article 24(1) of Directive 123/2006/EC, it is interesting to analyse Advocate General Mazák's view on a recent case concerning canvassing. Mazák poses the question whether it must be accepted that the specific features of the services provided by the regulated professions no longer require regulation of their commercial communications other than that applicable to other services, and he finds that in the light of Article 24(2) of Directive this cannot be the case. In other words, Article 24(2) supplements the principle laid down in Article 24(1) and consequently, on the one hand, excluded any total prohibitions on any commercial communication by the

[42] See Article 24(1) of Directive 123/2006/EC ('Commercial communications by the regulated professions').

[43] See Article 24(2) of Directive 123/2006/EC; See also ECJ, Case C-446/05, *Criminal proceedings against Ioannis Doulamis*, EU: C: 2008: 157, para. 24, in which it is stated as follows: "*Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector*".

regulated professions; while, on the other hand, allows for the Member States to enact prohibitions on the content of a commercial communication. Thus, in Mazák's view, "*the Community legislature intended rather to remove any total prohibition on a form of commercial communication and not only the total prohibition on any commercial communication by the regulated professions*".[44]

Furthermore, with respect to the interpretation of Article 24(2) of Directive 123/2006/EC, it must be understood which are the overriding reasons on the basis of which the (restrictive) professional rules may be justified. In Mazák's view, again, Article 16(1)(b) of Directive 123/2006/EC – in accordance with Member States may not make access to or exercise of service activity in their territory subject to compliance with any requirements which are not justified for reasons of public policy, public security, public health or the protection of the environment – should be considered as a *lex generalis* compared to Article 24(2) which, instead, represents a *lex specialis* applicable to the commercial communications by the regulated professions. Thus, one step further in Mazák's reasoning consists into considering the protection of values like independence, dignity, integrity and the professional secrecy of the regulated professions as an overriding reason relating to the public interest within the meaning of Article 24(2) of Directive 2006/123.[45] As a consequence, following Mazák's approach: "*for the purposes of regulating the*

[44] See OPINION OF ADVOCATE GENERAL MAZÁK, Case C-119/09, *Société fiduciaire nationale d'expertise comptable v. Ministre du Budget, des Comptes publics et de la Fonction publique*, EU: C: 2010: 276, para. 39, in which it is also stated that: "*Such an interpretation of Article 24 may be corroborated by Recital 100 in the preamble to Directive 2006/123, according to which the removal of total prohibitions on commercial communications by the regulated professions does not concern bans on the content of a commercial communication but bans which, in a general way and for a given profession, forbid one or more forms of commercial communication*".

[45] See again OPINION OF ADVOCATE GENERAL MAZÁK, Case C-119/09, *Société fiduciaire nationale d'expertise comptable*, para. 63, which in the conclusion states as follow: "*Since canvassing is a specific method of practising one of the forms of commercial communication, namely advertising, Article 24(2) of Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as not precluding a Member State's legislation, such as that at issue in the main proceedings, under which qualified accountants are prohibited from engaging in any unsolicited canvassing with a view to offering their services to third parties, where that legislation is non-discriminatory, justified by one of the overriding reasons relating to the public interest cited by way of example in Article 24(2) of Directive 2006/123, and proportionate*".

content and the methods of commercial communications by the regulated professions, the overriding reasons relating to the public interest laid down non-exhaustively in the former provision [Art. 24(2)] and which differ from the justifying reasons referred to in Article 16(1)(b) of Directive 2006/123 are also to be accepted".[46]

In the light of the above interpretation, one could argue that a difference between the regulated professionals and the entrepreneurs seems to be supported by the EU law. Indeed, the EU law in the field of commercial communications provides a more restrictive form of regulation for the professional advertisement. However, in several judgments, the ECJ stated that: "*the concept of undertakings encompasses every entity engaged in an economic activity regardless of the legal status and the way in which it is financed*"[47], and moreover: "*it has also been consistently held that any economic activity consisting in offering goods or services on a given market is an economic activity*".[48] It worth noting that the ECJ's inclusion of every economic activity (among which the activities carried out by the lawyers) into the wider concept of undertaking in 1991, was not followed by a decisive and coherent liberalization of the regulated professions. Instead, these circumstances allowed the conservative part of the society, which was more averse to any form of liberalization, to gain more and more ground.

Furthermore, within the European scenario, Article 10(1) of the European Convention on Human Rights states that "*everyone has the right to freedom of expression*" which includes the freedom to hold opinions and to receive and impart information. However, the second paragraph of the provision declares that the exercise of these freedoms "*may be subjected to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society*" to guarantee the public interest.[49] The European Court of Human Rights (ECHR) has the duty to ascertain if, in the specific cases, the limitations arranged by the Member States could be considered reasonable and proportioned to protect the consumer welfare and to guarantee the loyalty in commercial practices. Looking at the

[46] OPINION OF ADVOCATE GENERAL MAZÁK, Case C-119/09, *Société fiduciaire nationale d'expertise comptable*, para. 64.

[47] ECJ, C-41/90, *Höfner and Elser*, para. 21.

[48] See ECJ, Joined Cases C-180/98 to C-184/98, *Pavel Pavlov*, para. 75.

[49] See article 10 of the European Convention on Human Rights.

ECHR's holdings concerning advertisement of professional services, it is interesting to note that there is a clear-cut distinction between the informative and descriptive advertisement, on the one hand, and the commercial advertisement, on the other hand. The former type of advertisement increases the consumer knowledge about a specific service offered to the public, reducing the information asymmetry. The latter type of advertisement, instead, is aimed at increasing sales of a specific service offered by the regulated professionals. To conclude, in line with the ECHR reasoning, in case of commercial advertisement, the Member States should have a greater margin of discretion in terms of limiting the possibility to advertise the professional services than in restricting the informative advertisement.[50]

5. The economics of the lawyers' advertisement regulation

5.1. The general economic theory on lawyers' advertising

By looking at the economics of the lawyers' advertisement, it is possible to identify several diverging positions in terms of liberalisation. There seems to be no consensus in the economic literature on the positive or negative effects related to the liberalization of several aspects of the professional advertisement.

In the European Union scenario, the European Commission noted that the restrictions in the field of the professional advertisement would make the search of information concerning the quality and the price of the professional services more complex.[51] The European Commission's findings seem to be confirmed by part of the

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[50] See ECHR, *Casado Coca v. Spain*, 24 February 1994, <http://caselaw.echr.globe24h.com/>; *Id.*, *Villnow v Belgium*, 29 January 2008, <http://caselaw.echr.globe24h.com/>; *Id.*, *Barthold v Germany*, 25 March 1985, <http://caselaw.echr.globe24h.com/>; *Id.*, *Stambuk v Germany*, 17 October 2002, <http://caselaw.echr.globe24h.com/>.

[51] See, EUROPEAN COMMISSION, *Communication of 9 February 2004, Report on Competition in Professional Services*, COM (2004) 83 final, 9 February 2004), paras 43-45, mentioning the following research on advertising restrictions in the legal profession F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal*

economic literature which shows that if the regulated professionals increase the use of non-deceptive advertisement, consumers would be able to select the suitable services and professionals more easily, reducing the time and the costs involved in their search.[52] Consequently, in this view, lawyers' advertising reduces price dispersion and enhances competition. Restrictions on advertising, instead, could raise search costs with the result that consumers give up searching before attaining their optimal quality-price combination. Following this approach, firms exploit what is in effect a more inelastic demand curve by increasing price well above marginal cost and extracting additional rent as opposed to a more elastic demand curve.[53]

Profession, in *Encyclopedia of Law and Economics, Volume III: The Regulation of Contract*, eds. B. Bouckaert and G. De Geest, (Cheltenham: Edward Elgar, 2000), 987 et seq.

[52] See L. BENHAM, *Regulating Through the Professions: A Perspective on Information Control*, in *Journal of Law and Economic* 18 (1975): 421 et seq.; G. J. STIGLER, *The Economics of Information*, in *Journal of Political Economy* 69 (1961): 213 et seq., which argues that producer advertising is equivalent to a large amount of search by a large number of consumers; see also AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING, *Lawyer Advertising at the Crossroads*, *Professional Policy Recommendations*, (Chicago: American Bar Association, 1995), where it is stated that in the lawyers market, the poorer consumer, which are less likely to know how to obtain a lawyer by personal referral, are more likely to obtain one through advertising avenues or by electronic media.

[53] See E. CANTON, D. CIRIACI, I. SOLERA, *The economic impact of Professional Services Liberalization*, <http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp533_en.pdf>, 2014, 7; see also F. H. STEPHEN, J. H. LOVE, *Deregulation of Legal Services Markets in the UK: Evidence from Conveyancing*, in 4 *Hume Papers on Public Policy* (1996): 53, which pointed out that restrictions on advertising increase the fees charged for the profession's services and that the more advertising there is the lower are fees. However, there is one previous study contradicting Stephen and Love findings and that was conducted by J. A. RIZZO, R. J. ZECKHAUSER, *Advertising and the Price, Quantity and Quality of Primary Physician Services*, in 28 *Journal of Human Resources* (1992): 381 et seq.

Many other empirical studies on advertising by members of legal profession find that law firms which advertise charged lower fees rather than those that did not advertise (See, among others, S. COX, A. C. DE SERPA, W. C. CANBY, *Consumer Information and the Pricing of Legal Services*, in 30 *Journal of Industrial Economics*, (1982): 305 et seq.; FEDERAL TRADE COMMISSION, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising*, (Washington: FTC, 1984); S. R. COX, J. SCHROETER, S. SMITH, *Advertising and Competition in Routine Legal Services Markets: An Empirical Investigation*, in 36 *Journal of Industrial Economics* (1987): 49 et seq.; J. H. LOVE, F. H. STEPHEN, D. D.

5.2. A few comments on comparative advertising…

In the European Commission's view, the fact that in some European countries the comparative advertising practice is forbidden or allowed with several restrictions might hinder competition, preventing new professionals from entering the market. [54] Considering the comparative advertisement issue, one should note that the professional services tend to be highly complex, and are not completely and easily comparable, as opposed to other services characterised by greater understanding from the side of the consumer, and commonly understood and objective comparison metrics (e.g. mobile phone tariffs). For instance, consumers might be able to compare the size of law firms' offices, the number of lawyers or the number of administrative staff. However, these measures are not good predictors of their professional ability. Indeed, often a smaller law firm could provide a higher quality service compared to a larger-sized firm. Similarly, the number of cases won should not be considered as a good measure because there might be

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GILLANDERS, A. A. PATERSON, *Spatial Aspects of Deregulation in the Market for Legal Services*, in 26 *Regional Studies* (1992): 127; F. H. STEPHEN, *Advertising, Consumer Search Costs and Prices in a Professional Service Markets*, in 26 *Applied Economics* (1994): 1177 et seq.).

On the contrary, some commentators hypothesized that permitting attorney advertising would make the prices goes up because, in their view, promotional activity costs would be passed on consumers (see B. M. ABEL, *President's Message: A "Fresh" Look at the State Bar*, in 49 *CAL. ST. B. J.* 502 (1974), 503). Other commentators disagreed with the latest approach stating that advertising is likely to be cheaper than other means of client generation such as county club memberships and community contacts (see T. J. MURIS & F. S. MCCHESNEY, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, in *AM. B. FOUND. RES. J.* 179 (19899: 189).

[54] See, EUROPEAN COMMISSION, *Communication of 9 February 2004, Report on Competition in Professional Services*, COM (2004) 83 final, February 9, 2004, paras 43-45, in which the Commission stated as follow: "*Research suggests that advertising restrictions may under certain circumstances increase the fees for professional services without having a positive effect on the quality of those services. The implication of these findings is that advertising restrictions as such do not, necessarily, provide an appropriate response to asymmetry of information in professional services. Conversely, truthful and objective advertising may actually help consumers to overcome the asymmetry and to make more informed purchasing decisions*".

other factors affecting the outcome of a trial that are independent from the lawyer's ability. This leads to the conclusion that, in the legal services sector, comparative advertisement should not be banned if absolutely objective. However, some forms of regulation should be maintained in order to prevent lawyers from using the described proxies as a way to compare the quality of their professional services and show their (unprovable) superiority. In other words, it should be possible for a big law firm, using a pure quantitative and informative approach, to objectively underline on its website to have the widest network of lawyers in a Member State. Nevertheless, that information, considering the way in which it is provided, must not lead to the conclusion that the big law firm is qualitatively better than a (smaller) competitor, because this may clearly mislead perspective clients.

5.3. … on the relationship between advertisement and barriers to entry and on the consequences of advertising prices

In some authors' view, the regulated professionals themselves would benefit from a liberalised advertising system, as it reduces the reputational barriers to entry. In other words, younger, least known professionals would have the same opportunity to promote their services and gain new clients as the very renowned ones.[55] However, those in favour of limiting advertising in this space might argue that limitations are necessary to protect consumers who, due to a lack of technical competences, could be damaged by information overload that would increase the informational gap between the professionals and the clients, being very difficult for the consumers to discern the truthful and useful information from the deceptive one. As a result, the lack of consumer information on quality could lead to lawyers competing purely on price, at the expense of quality.[56]

[55] See C. FUMAGALLI, M. MOTTA, *Restrizioni alla pubblicità nelle libere professioni*, in *Mercato, conc. Regole* (1999): 421 et seq.; J. H. LOVE, F. H. STEPHEN, D. D. GILLANDERS, A. A. PATERSON, *supra*, 127 et seq.; A. PISANI MASSAMORMILE, *La legge professionale forense e l'esigenza di formazione dell'avvocato*, in *Giur.it.*, 1990, 21.

[56] See W. P. ROGERSON, *Price Advertising and the Deterioration of Product Quality*, in 55 *Review of Economic Studies*, (1988): 215 et seq., which examined the relationship between advertising and quality. The author

Accordingly, it might be desirable to limit advertisement to ensure a high-quality level of professional services and prevent concentration in the market,[57] facilitating the entry of new and less known professional. Indeed, the more a lawyer or a law firm could invest, the more advertising they could afford and this may help well-know and more influent lawyers to maintain or strengthen their position in the legal services market at the expense of new entrant lawyers with fewer resources.

To conclude, briefly examining advertisement of prices (i.e. rates), it is worth noting that it might be welfare-enhancing because it improves consumer choice.[58] However, if the advertisement of prices is undertaken exclusively or principally by low

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shows that even if the price can communicate no information directly about the quality, it can do so indirectly because price is a positive signal of quality when price advertising is allowed. See also S. R. COX, J. SCHROETER, S. SMITH, *Attorney Advertising and the Quality of Routine Legal Services*, in 2 *Review of Industrial Organization* (1986), 340 et seq., which found that quality is lower in those regions with greater lawyer advertising.

Contra, see S. DOMBERGER & A. SHERR, *The Impact of Competition on Pricing and Quality of Legal Services*, in 9 *International Review of Law and Economics* (1989), 41 et seq., which found that quality rose due to the liberalization of rules on advertising in England and Wales.

[57] See G. COLAVITTI, *La pubblicità degli avvocati tra «diritto vivente» della giurisprudenza disciplinare e disciplina della concorrenza*, in *Rass. for.* (2004): 725 et seq.

Contra see, I. PATERSON, M. FINK, A. OGUS et al., *Economic Impact of regulation in the field of liberal professions in different Member States,* <http://ec.europa.eu/competition/sectors/professional_services/studies/executive_en.pdf>, 2003, 5, where the authors find no apparent evidence of market breakdown in those Member States which are less regulated compared to the others. In these authors opinion, there is no basis for questioning the high quality and essential values of existing professional services, regardless of the presence of high or low levels of regulation. In conclusion, in this perspective, the lower regulation strategies, which work in one Member State may be put in place in another Member States without decreasing the quality of professional services in the ultimate interest of the consumer.

[58] See G. J. STIGLER, *The Economics of Information*, in 69 *J. POL. ECON.*, (1961), 224, which stated that "*The effect of advertising prices, then, is equivalent to that of the introduction of a very large amount of search by a large portion of the potential buyers*".

price and low quality suppliers, it becomes an adverse signal on quality.[59] When information about price is easier to obtain than information about quality (which is usually true for credence good), increasing the availability of price advertising might discourage quality competition and encourage price competition, leading to a degradation of the average quality of the services offered in the market.[60] As a consequence, the last argument may support some restriction on advertising on prices.[61]

6. Market failures justifying some degree of regulation in the lawyers' market

A vast economic literature has shown that there is a need for some degree of regulation of the legal profession because a totally free market will lead to serious market

[59] See F. H. STEPHEN & J. H. LOVE, *Regulation of the Legal Profession*, in *Encyclopaedia of Law and Economics* III, Regulation of Contracts, (2000), 987 et seq.; see also M. ABRAMOWICZ, *On the Alienability of Legal Claims*, in 114 *YALE L.J.*, (2005): 738; J. A. RIZZO, R. J. ZECKHAUSER, *Advertising and the Price, Quantity and Quality of Primary Physician Services*, in 28 *Journal of Human Resources*, (1992), 381 et seq., which pointed out that consumers who are not able to assess the quality of the services offered both *ex ante* and *ex post* and who observe a low price for a non-standardized service may assume that more knowledgeable purchasers have assessed the service of being of low quality.
See also G. W. MURDOCK & J. WHITE, *Does Legal Services Advertising Serve the Public's Interest? A Study of Lawyer Ratings and Advertising Practices*, in 8 *Journal of Consumer Policy*, (1985), 153 et seq., which stated advertisers are more likely to be low quality firms. *Contra,* see R. THOMAS, *Legal Services Advertising – A comment on the Paper by Murdock and White*, in 8 *Journal of Consumer Policy* (1985): 165 et seq., which argued that Murdock and White's previous finding is not warranted by any strong evidence.

[60] See F. H. STEPHEN, *The Market Failure Justification for the Regulation of Professional Service Markets and the Characteristics of Consumers*, in *European Competition Law Annual 2004: The Relationship between Competition Law and (Liberal) Professions*, eds. C. Ehlermann & I. Atanasiu, (Oxford: Hart Publishing, 2006), which states as follows: "*It is reasoned that consumers who are unable to assess quality* ex ante *(and possibly even* ex post*) and who observe a low price for a non-standardised service may assume that more knowledgeable purchasers have assessed the service as being of low quality. Professional are keen to avoid such adverse signals on quality, and so it is concluded that price advertising will be uncommon in most professions*".

[61] See D. LEVI-FAUR, *Handbook on the Politics of Regulation*, (Cheltenham: Edward Elgar Publishing, 2011), 461.

failures.[62] That is, the regulation of the legal profession was the solution to several markets necessities. Instead, other professions (e.g. mathematicians, physicists) – which are characterized by some intellectuality and by a relevant social utility, but do not really involve an interaction between the professional and clients – do not need any form of regulation.[63] Indeed, like in any other case of public regulation, also in the liberal professions' field the need of regulation emerges from a market failure. In the specific case of legal service, the market failure arises from three different factors: (i) information asymmetries, (ii) the need to supply public goods and (iii) negative externalities. However, negative externalities will not be analysed in this chapter because it does not appear that much more liberalization of lawyers' advertising may affect (either increasing nor decreasing) the offer and provision of low quality services in the legal services market.

6.1. Information asymmetries

The first justification for regulation in lawyers' activities is the presence of asymmetric information between the professional (the agent) and the client (the principal). According to this market failure argument, consumers are generally not in a position to fully assess the quality of the legal service they buy and, being in a position of relative disadvantage, need to be protected.[64] Thus, pure informative, truthful and objective lawyers' advertisement may be useful in order to reduce or overcome the

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[62] See, among others, R. VAN DEN BERGH, *Towards Efficient Self-Regulation in Markets for Professional Services*, in *European Competition Law Annual 2004: The Relationship between Competition Law and (Liberal) Professions*, eds. C. Ehlermann & I. Atanasiu, (Oxford: Hart Publishing, 2006), 155 et seq.; COPENHAGEN ECONOMICS, *Economic Assessment of the Barriers to the Internal Market for Services, Final Report,* <http://ec.europa.eu/internal_market/services/docs/services-dir/studies/2005-01-cph-study_en.pdf>, 2005.

[63] See AGCM, *IC 15 on the professional associations' field* (1997), <http://www.agcm.it/indagini-conoscitive-db/download/C12564CE0049D161/11CF181CD81D9243C12564C3004594AC.html?a=p2523.pdf>.

[64] See E. CANTON, D. CIRIACI, I. SOLERA, *The economic impact of Professional Services Liberalization*, *supra*, 7.

information asymmetry between the professional and the consumer and to allow the latter to make more informed purchasing decisions. On the contrary, some forms of mere commercial advertisement – being, indecorous, undignified, crass, tacky, emotional, suggestive, fascinating, aggressive, incessant or intrusive (because not avoidable) – may unduly influence consumers' choice. In this view, advertisement restriction can be used to protect consumers from this kind of manipulative and exaggerated messages. Indeed, due to the strong asymmetries of information between practitioners and consumers of legal services, it will be difficult for the latter to assess the reliability of the information about legal services and, therefore, consumers will need protection from misleading and manipulative claims.[65]

Professional services often fall into the category of credence (or trust) goods because of their nature of highly technical services.[66] Thus, even after buying a particular professional service or after consumption, a consumer may not be able to judge its quality adequately, and make his/her decisions based on the average quality he/she expects. This

[65] It should be mentioned that the information asymmetry could be partly tackled using different private alternatives, rather than the mere public regulation. First of all, consumers could ease the asymmetry by sharing information among consumers. Lawyers, on the other hand, could find it profitable to create autonomous quality certification systems, which would help signalling quality. For instance, consumers might increase the information flows between them, using referral mechanisms as a way to create useful and reliable feedback for every lawyer offering services on the market (one of the most developed lawyers evaluation internet platform nowadays is Avvo.com.). On the positive effect of referral system see A. FLETCHER, *The liberal professions: getting the regulatory balance right*, in *European Competition Law Annual 2004: The Relationship between Competition Law and (Liberal) Professions*, eds. C. Ehlermann & I. Atanasiu, (Oxford: Hart Publishing, 2006), 83, who argues that referrals will allow the less expert and capable consumers would be guided to already tested lawyers offering good quality services.

[66] In this respect, see P. NELSON, *Information and Consumer Behaviour*, in 78 *Journal of Political Economy* (1970): 311; M. DARBY & E. KARNI, *Free Competition and the Optimal Amount of Fraud*, in 16 *Journal of Law and Economics*, (1973), 111 et seq., in which it is stated that, for most of the clients, legal services have to be considered credence goods while in some cases they are experience good (because these services can only be assessed after they have been consumed). See also, C. FUMAGALLI & M. MOTTA*, Restrizioni alla pubblicità nelle libere professioni, supra*, 426; T. HEREMANS, *Professional Services in the EU Internal Market*, (Oxford: Hart Publishing, 2012), 29 et seq.; EUROPEAN COMMISSION, *Communication of 9 February 2004, Report on Competition in Professional Services*, COM (2004) 83 final, 9 February 2004, para. 25.

is why, many authors highlighted a severe principal-agent problem in the legal context.[67] Indeed, in the legal services market, lawyers play a double role: the so-called "agency function" (defining consumers needs and choosing the best strategies) and the so-called "service function" (using technical expertise to implement the chosen strategy).[68] Thus,

[67] Nevertheless, some authors (among which see F. H. STEPHEN, J. H. LOVE, *Regulation of the Legal Profession*, in *Encyclopedia of Law and Economics, Volume III: The Regulation of Contract*, eds. B. Bouckaert and G. De Geest, (Cheltenham: Edward Elgar, 2000), 987 et seq.) pointed out that the information asymmetry does not apply to all clients in the same way. Indeed, many commercial clients are repeat purchasers in the market for legal services. Thus, they will acquire experience and knowledge of the market reducing the information asymmetry. See also OECD, *Competition in Professional Services,* <http://www.oecd.org/regreform/sectors/1920231.pdf>, 1999, 17, in which it is stated that the entity of the asymmetries varies depending on both the legal service needed and the category of client who asks for it.

[68] See J. QUINN, *Multidisciplinary Services and Preventive Regulation*, in *Lawyers and the Consumers Interest*, eds. R.M. Evans & M. J. Trebilcock, (Toronto: Butterworths, 1982); M. FAURE, *Regulation of Attorneys in Belgium*, in *Regulation of Professions: a Law and Economics Approach to the Regulation of Attorneys and Physicians in the US, Belgium, the Netherlands, Germany and the UK*, eds. M. Faure, J. Finsinger, J. Siegers, R. Van den Bergh, (Antwerp: Maklu, 1993); M. FAURE, J. FINSINGER, J. SIEGERS, R. VAN DEN BERGH, *Regulation of Professions,* (Antwerp: Maklu, 1993); FEDERAL TRADE COMMISSION, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising*, (Washington: FTC, 1984); K. HELLIGMAN, *An Economic Analysis of the Regulation of Lawyers in the Netherlands*, in *Regulation of Professions: a Law and Economics Approach to the Regulation of Attorneys and Physicians in the US, Belgium, the Netherlands, Germany and the UK*, eds. M. Faure, J. Finsinger, J. Siegers, R. Van den Bergh, (Antwerp: Maklu, 1993); H. HERMANN, *Regulation of Attorneys in Germany: Legal Framework and Actual Tendencies in Deregulation*, in *Regulation of Professions: a Law and Economics Approach to the Regulation of Attorneys and Physicians in the US, Belgium, the Netherlands, Germany and the UK*, eds. M. Faure, J. Finsinger, J. Siegers, R. Van den Bergh, (Antwerp: Maklu, 1993; H. M. KRITZER, *The Justice Broker: Lawyers and Ordinary Litigation*, (Oxford: Oxford University Press, 1990); S. LEVMORE, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards*, in 36 *Journal of Law and Economics*, (1993), 503 et seq.; R. C. O. MATTHEWS, *The Economics of Professional Ethics: Should the Professions be more like Businesses?*, in 101 *Economic Journal*, (1991), 737 et seq.; J. K. SMITH & S. R. COX, *The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism*, in 14 *Journal of Legal Studies* (1985), 167 et seq.; A. O. SYKES, *Some Thoughts on the Real Estate Puzzle: Comment on Levmore "Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards"*, in 36 *Journal of Law and*

the lawyer may always have a pecuniary interest in suggesting expensive strategies to the consumers, for which the lawyer will be paid to implement later.[69] As a consequence, some protection for the infrequent consumer of professional services is surely needed.[70]

Under such circumstances, adverse selection could arise because lawyers may have an incentive to reduce quality and may offer substandard services while charging a sort of average price. In other words, the opacity of the legal services offered to the consumers could result in the clients only being prepared to pay an average price for an unknown (hence presumed average) quality, encouraging producers of higher quality services (who expect higher prices) to exit the supply side. Lower quality services may then proliferate and the market for high quality service may even fail (so called "*race to the bottom*"). The net effect would be a downward spiral of quality and prices.[71] In the described scenario, advertising's opponents defended advertising restrictions in order to protect legal services quality. Indeed, given that the legal services quality is difficult to assess, opponents argued that advertising would tempt some practitioners to offer discounted low-quality legal

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Economics (1993), 541 et seq.; C. W. WOLFRAM, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, in 47 *Law and Contemporary Problems* (1984), 293 et seq.

[69] See R. VAN DEN BERGH, *Towards Efficient Self-Regulation in Markets for Professional Services*, in *European Competition Law Annual 2004: The Relationship between Competition Law and (Liberal) Professions*, eds. C. Ehlermann & I. Atanasiu, (Oxford: Hart Publishing, 2006), 155 et seq.

[70] See B. ARRUÑADA, *The Economics of the Notaries*, in 3 *European Journal of Law and Economics*, (1996): 5 e seq.; R. DINGWALL, P. FENN, *A Respectable Profession? Sociological and Economic Perspectives on the Regulation of Professional Services*, in 7 *International Review of Law and Economics*, (1987): 51 et seq.; R.M. EVANS & M. J. TREBILCOCK, *Lawyers and the Consumers Interest: Regulating the Market for Legal Services*, (Toronto: Butterworths, 1982).

[71] This argument is taken by analogy from the well-known literature on the "*market for lemons*" (See the famous G. A. AKERLOF, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, in *Quarterly Journal of Economics* 84, (1970): 488 et seq.). See also I. PATERSON, M. FINK, A. OGUS et al., *Economic Impact of regulation in the field of liberal professions in different Member States,* <http://ec.europa.eu/competition/sectors/professional_services/studies/executive_en.pdf>, 2003, 17.

services. This could drive high-quality lawyers out of the market or to lower their prices and quality of services.[72]

In addition, consumers could be faced with a moral hazard issue. Indeed, in the described situation a seller could have an incentive to set higher than competitive prices, oversupplying the service to the client, when its own rent generating goals and practices run counter to the objectives of the client, and where the asymmetry of information on the price-quality relationship stands in the way of fair bargaining.[73]

6.2. Liberal professions and public goods

The second reason why regulation in the lawyers' market is needed lies on the consideration that liberal professions often deliver public goods that are of value for the society as a whole. Indeed, it seems not to be arguable that the correct administration of justice, the proper functioning of the law, of the accounting system and of the health care system are essential features of the infrastructure of every society and constitute to some degree public goods. Thus, there could be a risk that, without any degree of regulation, some professional services markets might undersupply or inadequately supply these public goods.[74] In relation to this, it appears that misleading, intrusive, aggressive, pure emotional and suggestive messages may be legitimately limited in order to guarantee the proper functioning of justice and to preserve the honest image and dignity of the legal profession avoiding the risk of a society's loss of confidence in the individual lawyer and

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[72] See R. S. BOND, J. E. KWOKA, J. J. PHELAN, I. T. WHITTEN, *Staff Report on Effects of Restrictions on Advertising and Commercial Practice in The Professions: The Case of Optometry*, <https://www.ftc.gov/sites/default/files/documents/reports/effects-restrictions-advertising-and-commercial-practice-professions-case-optometry/198009optometry.pdf>, 1980, 32.

[73] See K. J. ARROW, *Essays in the Theory of Risk-Bearing*, (Chicago: Markham Publishing Co., 1971); I. PATERSON, M. FINK, A. OGUS et al., *Economic Impact of regulation in the field of liberal professions in different Member States, supra*, 17.

[74] See EUROPEAN COMMISSION, *Communication of 9 February 2004, Report on Competition in Professional Services*, COM (2004) 83 final, 9 February 2004.

in the legal professional as a whole.[75] In Germany, for instance, the so-called *Marktschreier* case was a typical example of completely exaggerated, charlatan and noisy advertisement. More specifically, the German Federal Court of Justice – *Bundesgerichtshof* (BGH) – and the German Constitutional Court – *Bundesverfassungsgericht* (BVerfG) – were concerned with the planned advertising campaign of two lawyers who wanted to distribute cups on which the image of a weeping woman sitting on a bed with both the hands holding up a gun under her chin was printed. In addition to this image, there was the sentence "*Nicht verzagen, R. fragen*" (which literally means "Do not despair, ask to R.") and the contact details of the two lawyers.[76] The BGH judged the described advertising campaign as a violation of the objectivity rule which would be able to damage the legal profession considered as an honourable category of defenders and advocates of the clients' interests.[77] Moreover, the BVerfG did not admit the subsequent lawyers' complaint concerning the non-admission decision held by the BGH because there was not a violation of the two lawyers' fundamental rights.[78]

In sum, the described promotional activity seems to go beyond mere matters of taste and to be able to negatively affect the public confidence in the individual lawyers, as well as in the entire legal profession, especially if such messages or advertisement campaigns will become a common practice among lawyers. These kinds of shocking messages are likely to distort the honourable image of the lawyer and may generate a decrease in the clients' demand of legal services, severely affecting the proper functioning of the justice.[79] It is evident, therefore, that this kind of messages may loosen or damage the fiduciary relationship between lawyer and client due to the lawyers' inappropriate promotion of legal services. As a consequence, the unethical conducts carried out by single lawyers, may negatively influence consumers' perception of lawyer category. In

[75] In this regard, in the German jurisprudence, see BVerfG GRUR 2008, S. 352, 353; BVerfG NJW 2004, S. 2656, 2657; BVerfG NJW 2000, S. 3195, 3195.

[76] See AnwGH Nordrhein-Westfalen BeckRS 2013, 16345.

[77] See BGH, NJW 2015, S. 72, Rn. 14.

[78] See BVerfG GRUR 2015, S. 507, Rn. 18, Werbetassen.

[79] See AnwGH Nordrhein-Westfalen BeckRS 2015, 11106, concerning advertising on the robe; LG Hannover DStRE 2010, S. 583, 584, concerning tax consultant.

turn, this could induce clients not to demand legal advice, when they would actually need it. This could therefore severely affect the proper functioning of justice, which is undoubtedly an overriding public interest to be protected.

7. A different interpretation on the US settlement mills' advertisement case

7.1. Settlement mills: the new attorney advertisers

Commercial advertising is seen by some as a means of overcoming or mitigating asymmetries; whilst others claim that advertising exacerbates the problems. In the Advocate General Jacobs' view "*in order to counter the effects of asymmetry a certain level of regulation of those (professional) markets is necessary*".[80] In this context, it is worth looking at the so-called settlement mills' advertising in order to take a reasoned position on the mentioned *querelle*.

In the U.S. literature, the so-called "*settlement mills*" are high volume, heavy advertising, personal injury law firms active in the United States.[81] The settlement mills use every possible channel to advertise their services, and their messages are often characterized by commercial, very emotional and suggestive contents, and are typically conveyed in highly aggressive and incessant fashion. Nevertheless, the U.S. doctrine shows that there is some evidence that advertising has made legal services more readily available to those clients with limited means, at least in the personal injury context.[82] After forty year since the 1977 leading case *Bates v. State Bar of Arizona*, the composition of the attorneys who advertise has changed considerably.[83] While the legal service providers in

[80] See OPINION OF ADVOCATE GENERAL JACOBS, Joined Cases C-180/98 to C-184/98, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, EU: C: 2000: 151, para. 86.

[81] See, among others, N. F. ENGSTROM, *Legal Access and Attorney Advertising*, in *Journal of Gender, Social Policy & the Law* 19, (2011): 1083 et seq.

[82] *Ibid.*, 1083 et seq.

[83] See G. C. HAZARD Jr., R. PEARCE & J. STEMPEL, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, in 58 *N.Y.U. L. REV.*, 1983, 1087, which argued that advertising would be used only by attorneys providing standardisable services (legal clinics) and that "[A]*dvertising will have a*

1977 were legal clinics – law firms that handled routine matters, such as wills, uncontested divorces, name changes and personal bankruptcies for flat, transparent and reasonable rates to middle-income clients; in recent years, in the U.S., the most aggressive attorney advertisers are the personal injury lawyers.[84] If advertising reduces fees, as many studies have found, and settlement mills are the most aggressive advertisers, one might argue that we should have observed a reduction in personal injury (contingency) fees in the recent years. However, all the available evidence points to the contrary.[85]

Furthermore, there is some strong evidence that the settlement mills' legal services are predominantly used by low-income clients. In the Commission on Advertising of the American Bar Association's view there are three explanations why the less affluent clients might prefer lawyers, who advertise.[86] First of all, low-income consumers know fewer lawyers and are less likely to have used legal services in the past.[87] They are potentially less likely to be familiar with some lawyers, and be aware of the reputation of various

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beneficial effect on the market for standardizable legal services, while having little effect on the market for individualized legal services"; See N. F. ENGSTROM, *Attorney Advertising and the Contingency Fee Cost Paradox*, in 65 *Stanford Law Review*, 2013, 633 et seq., which noted that by the legal clinics' advertising in around the 1980s, new clients were reached, prices were displayed and thus compared, fees were apparently reduced and the problem of unmet legal need was ameliorated.

[84] See S. DANIELS & J. MARTIN, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, in 80 *Texas Law Review*, 2004, 1789.

[85] See N. F. ENGSTROM, *Attorney Advertising and the Contingency Fee Cost Paradox*, *supra*, 639; FEDERAL TRADE COMMISSION, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising*, (Washington: FTC, 1984), which found that "*attorney that advertised personal injury services appeared to charge about a 3% higher contingent fee if the case were settled before trial than those who did not advertise personal injury service*"; D. T. GRAHAM, Comment, *Professional Responsibility - An Economic Analysis of Shapero v. Kentucky Bar Association: Is There Any Possibility of Overreaching in a Targeted, Direct Mail Solicitation?*, in 14 *J. CORP. L.*, 1989, 824; R. D. PELTZ, *Legal Advertising - Opening Pandora's Box?*, in 19 *STETSON L. REV.*, 1989, 108

[86] See AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING, *Lawyer Advertising at the Crossroads*, *Professional Policy Recommendations*, (Chicago: American Bar Association, 1995).

[87] Moreover, in the personal injury realm, repeat purchase is rare because consumers in this market are overwhelmingly one-shotters (See N. F. ENGSTROM, *Attorney Advertising and the Contingency Fee Cost Paradox*, *supra*, 673).

practitioners. Secondly, some lawyers' messages specifically target low-income clients. Thirdly, the evidence shows that low-income consumers tend to believe that lawyers who advertise are actually better as compared to the non-advertisers. Indeed, several studies show that the least educated consumers believe that lawyers who advertise for certain types of cases necessarily have specialized knowledge and training skills in handling those cases.[88] On the contrary, there is evidence that aggressive attorney advertisers are in most of the case brokers, distributing the cases they receive to other practitioners.[89] Moreover, there is no evidence that settlement mills employ particular expert counsel[90] or guarantee to the clients economically advantageous settlements[91] or invest more heavily in the cases they accept.[92]

7.2. Implications of the Settlement mills type of advertising

The settlement mills' advertising, described in the previous section, seems to impact consumers unevenly. For low-income consumers, the information asymmetry seems to increase because their choice is skewed due to the resonance of the advertising;

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[88] See, among others, J. DEWITT, *Report of Findings: Nevada Lawyers' Advertising Survey*, in 55 *Inter Alia*, 1990, 16; M. G. PARKINSON, S. NEELEY, *Attorney Advertising: Does it Meet Its Objective?*, in 24 *Servs. Marketing Q.*, 2003, 25 et seq.

[89] See J F. WITT, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, in 56 *DEPAUL L. REV.*, 2007, 286, which stated as follows: "*Many lawyers who advertise as personal injury specialists are little more than referral mills. They serve as intake offices for claims that they then farm out to specialized lawyers in return for a contingent referral fee*".

[90] See N. F. ENGSTROM, *Sunlight and Settlement Mills*, in 86 *N.Y.U. L. REV.*, (2011), 845 et seq.

[91] See S. M. MYERS, A. B. PADDERUD & A J. FERRI, *A Survey of Jurors' Attitudes Toward Attorney Advertising*, in *Inter Alia Journal of the State Bar of Nevada 56(3)*, 1991, 14, which showed that plaintiffs represented by television advertisers obtained favourable trial verdicts less often than clients represented by non-advertisers.

[92] See S. COX, A. C. DE SERPA & W. C. CANBY, *Consumer Information and the Pricing of Legal Services*, in 30 *Journal of Industrial Economics*, 1982, 343, which conducted a survey of lawyers who performed routine legal services (excluding personal injury cases) and found that advertising lawyers, in comparison with non-advertising lawyers, devoted less time to each case.

while the same messages have a milder effect on more affluent and educated consumers.[93] It should also be noted that the Commission on Advertising of the American Bar Association found that today consumers are more likely to be mildly amused than offended by lawyers performing incessant solicitations.[94] Such a statement seems to be fairly concerning in light of the findings presented above where those most likely to be attracted by the advertising are those part of consumers who will also overestimate the quality of the service.[95] Furthermore, other studies show how poor and less-educated consumers overestimate the stringency of the attorney advertisement's regulation. More precisely, most of the least educated consumers believe that advertising lawyers are legally required to be specialized and expert in the area in which they advertise.[96] As a

[93] See F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, *supra*, 27 which, in relation to the elite law firms' advertising demonstrated that, in this case, "*because the potential clients are more sophisticated, the advertisements of elite firms are less likely to mislead than the advertisements of the lower classes of the bar*".

[94] See AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING, *Survey on the image of lawyers in advertising*, (Chicago: American Bar Association, 1990): 14, which finds a "*significantly more acceptance of the idea of lawyer advertising among consumers than among lawyers*"; See also F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, *supra*, 9.

[95] AMERICAN BAR ASSOCIATION, *Findings Of The Comprehensive Legal Needs Study*, <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.authcheckdam.pdf>, 1994, which discovered that the poor are significantly more likely to choose a lawyer on the basis of attorney advertising as compared to their wealthier counterparts; M. G. PARKINSON, S. NEELEY, *Attorney Advertising: Does it Meet Its Objective?*, *supra*, 24 et seq., which, based on a survey of more than 1500 respondents, showed that attorney "*advertising is most likely to attract lower income and lower education non-Caucasian clients*". Moreover, a 1992 New Mexico survey found that poor and less-educated believed that lawyers advertisers were of higher quality than non-advertisers and inclined to give a better deal (see *Petition for Writ of Certiorari app. at 51-52, Members of the Disciplinary Board v. Revo, 521 U.S.* 1121, 1997, No. 96-1780, appending a December 1992 survey of Albuquerque adults' responses to direct mail advertisement).

Contra see J. A. HENDERSON, Comment, *Attorney Advertising: Does Television Advertising Deserve Special Treatment?*, *28 J. Legal Prof.*, 2003, 153 et seq., arguing that "*the public is aware of the subjective and manipulative nature of television advertising*".

[96] See *Petition for Writ of Certiorari app. at 51-52, Members of the Disciplinary Board v. Revo, 521 U.S.* 1121, 1997, No. 96-1780; J. DEWITT, *Report of Findings: Nevada Lawyers' Advertising Survey*, *supra*, 16.

consequence, clients who choose advertising lawyers erroneously think that selecting an advertiser will guarantee some experience, expertise and quality.

Moreover, it is worth noting that lawyers are different from the other merchants and so are the services offered on the legal market. Indeed, legal services are typically non-standardized. In addition, given the sharp information asymmetry characterising this market, consumers – as shown in the settlement mills' case – may be easily attracted by fascinating, emotional and suggestive advertisement, most of the time performed by low quality services lawyer, without being able to (fully) understand that the lawyers who advertise are in several occasions less qualified than their messages suggest. Indeed, it is demonstrated that most of the settlement mills are not transparent on prices,[97] while their adverts tend to overstate their quality.[98]

Given the discussion presented in this section, it seems fair to conclude that purely commercial, suggestive, emotional, aggressive and incessant advertisement should be restricted both in order to protect clients and in order to safeguard lawyers themselves. That is, to prevent potential consumers (especially the low-income low-education groups) from being misled into selecting an inappropriate lawyer, or a lawyer of lower quality compared to what was expected; and to maintain a level playing field among lawyers, avoiding unfair competition.[99]

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[97] See N. F. ENGSTROM, *Attorney Advertising and the Contingency Fee Cost Paradox*, *supra*, 682; J. O'CONNELL et al., *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiffs' Personal Injury Bar - And a Proposed Solution*, in 6 *CONN. INS. L.J.*, 2000, 425.

[98] See again N. F. ENGSTROM, *Attorney Advertising and the Contingency Fee Cost Paradox*, *supra*, 684, which in her sample of 518 Yellow Pages found many lawyers' extravagant claims such as, for instance, "GET THE MAXIMUM POSSIBLE SETTLEMENT", "MAXIMUM RECOVERY", "MAXIMUM LEGAL POWER", "More experience in the courtroom", "Exceptional Lawyers" and "WE ARE THE BEST".

[99] See F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, *supra*, 12, who believes that a way to minimize the ability of lawyers to advertise their superiority include limits on testimonials, claims of specialization, and statements that raise expectations concerning the ability of the particular lawyer to succeed. See also Cal. R. Of Professional Conduct, 1-400 Standard (1), <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule1400.aspx>, 2005, that in order to prevent consumers from gaining inflated hopes of filing successful litigation, adopted a

8. Towards a broader concept of competition law in the lawyers' market

In the light of the above, in a market like the market for legal services, in which both the information asymmetry and the lawyer reputation play a fundamental role in affecting the clients' choice of the suitable lawyer and of the service needed, a full liberalization of the lawyer (commercial) advertisement might be to some extent detrimental for consumer welfare.

First of all, it is worth noting that when a new client needs a lawyer, because of the significance of the right of defence involved in the transaction, the consumer will usually try to choose the professional who could perform better without considering exclusively or essentially the price of the service. Typically, due to the deeply-rooted information asymmetries and to the technicality and complexity of the professional services offered on the legal services market, clients would hardly choose a new entrant or someone who has not been recommended. That is why reputation plays yet a fundamental role in the market. Indeed, empirical studies showed that most of the consumers will preferably choose a lawyer that is also a friend or, at least, a professional recommended by a really well-known person due to the fiduciary relationship they will have to build.[100]

Despite it is undisputed that lawyers' informational advertisement could become a new form of artificial reputation-builder, and new entrants and young lawyers entering the professional market might benefit from that; it is at the same time evident that advertising

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presumption of violation for all advertising that contains a prediction regarding the results of representation.

[100] This argument is prone to two kinds of critics to the previous consideration. The main risk is that the "friend lawyer" which in the past had the opportunity to show her professional and ethical skills serving friends or relatives of the new client, might not be specialized in handling the legal field in which the new client needs his/her professional advice. On top of that, only in a few cases the non-specialized lawyer will refuse the mandate in the new client interests, while in most of the cases he/she will accept it. Moreover, another consideration to take into account is that if the non-specialized lawyer will accept such a case, probably it is because he/she is not so busy and this circumstance, in some cases, may be linked to mediocre professional skills causing poor client flow.

has a cost and it could conversely become a new barrier to entry for young and less-known professional.[101] Indeed, the more money a lawyer or a law firm is willing and able to invest, the more advertising they could afford. That is why, aggressive and incessant advertisement could increase the gap between big well-know and more influent law firms, and newer lawyers with fewer resources.

Furthermore, in the case of personal injury legal services, empirical studies showed that less prepared lawyers or law firms (e.g. settlement mills) will use the more aggressive and suggestive form of advertisement. Thus, given the difficulty in assessing the quality of the services advertised, consumers could be misled by this kind of commercial advertising, and the information asymmetries might increase rather than decrease. This is why, in the legal services market, the economic goals of regulation cannot be limited to the supply of the most efficient quantity of legal services or to the supply of legal services at the lowest possible price. In general, competition law in the liberal professional field has also to focus on another parameter of competition, which is the quality of the service.[102] In other words, in assessing potentially anticompetitive conducts in the legal services market, competition law enforcers should also take into account the impact of such conducts on several other constitutional interests, such as the right of defence, in the lawyers' market, and the right of health, in the doctors' markets. Following a broader and more complete approach, these public policy goals and interests are not alien to competition law and policy and can fully be integrated in a dynamic and evolutionary concept of competition.

More specifically, in light of the findings presented in the previous sections, it comes out that despite the limitations set out by the code of conducts (concerning the dignity and the decorum of the legal profession) might make the search of information

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[101] See *Brief of the State Bar of North Carolina as Amicus Curiae in Support of the State Bar of Arizona, Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (No. 76-316), 1976 WL 181246*, at *35; on the contrary, see D. B. MOSKOWITZ, *The Great Ad Venture: The Legal Marketplace After Bates & O'Steen*, in *JURIS DR.*, (1977): 22, which stated that permitting advertising would increase attorney supply, helping young lawyers to break into practice.

[102] In relation to the media products markets see J. DREXL, *Competition Law in Media Markets and its Contribution to Democracy – a global perspective*, *supra*, 9 et seq.

concerning the legal services more complex, these kinds of deontological restrictions might be necessary in order to protect consumers. Indeed, consumers are in a weaker position in the professional relationship with the lawyer, and the disadvantage could be exacerbated by information overload, being very complicated for the consumer to distinguish the truthful and useful information from the worthless and deceptive one. This is clearly the case for those messages that include indecorous or undignified contents being purely emotional, suggestive and fascinating or for those aggressive, incessant and intrusive (because not avoidable) messages being indecorous or undignified the ways in which the messages are promoted or the means and the mechanisms with which they are carried out.

To conclude, the limitations based on the decorum and dignity set out by the professional code of conducts are fully understandable and justifiable in order to guarantee the wider concept of competition law set out above. This is why these kinds of restrictions could be correctly included in the boundaries of the already mentioned *Wouters* exceptions, as their objective is connected with both the need to defend the lawyer reputation, that is strictly related to the quality of the legal services offered to the ultimate consumer, and the need to allow clients to knowingly choose a good quality lawyer, with the right degree of integrity and experience in order to guarantee the consumer's constitutional right to defence.

CHAPTER II - LAWYERS' ADVERTISEMENT IN GERMANY AND ITALY

1. Introduction: purpose and structure of this chapter

On the basis of the assumption that a broader concept of competition law in the lawyers' market needs to be applied, this second chapter will analyse further both the German and Italian lawyers' markets. In these two markets, lawyers might advertise their services subject to several restrictions and limitations set out by the respective professional bodies or by the applicable laws. Therefore, the German and Italian legal frameworks provide a significant set of restrictions to lawyers' advertisement which (i) eases the compiling efforts aimed at analysing a vast variety of limitations and (ii) allows to examine in depth the justifications and the rationale that both the German and Italian legislators as well as the professional bodies have been using so far in order to justify advertising restrictions. Moreover, in these two markets both the national competition authorities and the national courts have joined the debate on whether such restrictions are deemed to be held legitimate, reaching very interesting findings which are worth exploring.

The rest of the chapter is structured as follows: Section I will analyse the German market particularly: (i) addressing the relevant interests and reasonable considerations justifying the limitations to lawyers' advertisement that the German literature and jurisprudence have referred to so far; (ii) providing an historical overview on how the lawyers' advertising matter has been treated over time in Germany; (iii) focusing on the legal provisions related to lawyers' advertisement contained in the German *Grundgesetz* and in the German relevant legislation. In doing so, this section will track down the main restrictions related to the content and the form lawyers might face when advertising their messages (e.g. restrictions to price advertising, comparative advertising, completely exaggerated or creepy advertising) and will refer to the relevant case law (e.g. the famous *Marktschreier* case) which helps drawing the boundaries of the legitimacy of the advertising limitations and understanding their underpinned justifications.

Section II will then analyse the Italian market. More precisely, (i) it will focus on how consumers currently choose lawyers in Italy; (ii) it will also examine the legal

provisions related to lawyers' advertisement contained in the Italian Constitution as well as within the Italian primary and secondary legislation; (iii) it will then describe the current scenario regarding the limitations to lawyers' advertisement in Italy, analysing the liberalization process and the most important restrictions that are still in force; (iv) lastly, it will focus on the new Italian *Codice Deontologico Forense* and on the Italian most recent case law on lawyers' advertisement.

SECTION I – GERMANY

1. Lawyers advertising in the German literature and jurisprudence

1.1. German lawyers' advertisement current scenario

In Germany, nearly all law firms have their own website in which they typically present their areas of practice, the list of professionals working for the firm, the firm' values, the offices location, etc. Over the years, more and more law firms have been creating and daily using social media such as Facebook, and Twitter, and have been increasingly using Google AdWords to carry out much more targeted advertising campaigns.[103] Moreover, legal services, in particular the more standardized ones (e.g. formal notices), are also auctioned on online platform such as Ebay.de.[104]

In addition to direct advertising methods (e.g. advertisement, flyers, etc.), German lawyers and law firms have also been using other forms of publicity, such as sponsoring seminars or publishing papers and articles in specialized magazines or daily newspapers. Furthermore, third parties' activities, such as the publication of ranking lists or the award of prizes to the best lawyer or the best law firm in specific practice areas may have a publicity element, as they raise the reputation and enhance the visibility of the lawyers and law firms mentioned there.[105]

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[103] See LG HAMBURG NJOZ, S. 2072 et seq.; LG München I NJOZ 2007, S. 470 et seq.

[104] See BVerfG GRUR 2008, S. 618 et seq.

[105] In this respect, see BGH GRUR 1997, S. 914 et seq.; BVerfG NJW 2003, S. 277 et seq.; BGH GRUR 2006, S. 875 et seq.

In light of the above, it is worth noting that German lawyers have a strong interest in advertising to draw potential clients' attention, to obtain much more mandates with the effect to win or maintain their market shares.[106] At the same time, advertising can benefit those who are looking for a suitable lawyer. Indeed, informative advertisement will fill the potential consumers' lack of information allowing them to choose the most suitable lawyer for their specific legal issue much more quickly and in a much-informed way.[107] In this view, lawyers informative advertising is an important source of information that enhances transparency in the legal market for the benefit of both lawyers and consumers, reducing information asymmetries. However, legal services are credence goods, and lawyers' advertisement and the legal services behind them are intrinsically difficult to assess for consumers. Therefore, it is clear that the interest of the consumers consists only into obtaining adequate and correct information and therefore not into being exposed to false, misleading and harassing advertising messages.[108]

Moreover, German lawyers have a strong economic interest into maintaining or expanding their market shares. They will usually try to reach the former goal by using moderate advertising campaigns as well as suggestive means or emotional advertising messages. However, considering the lawyer category as a whole, lawyers have a strong interest into not allowing any untrue, misleading, harassing and otherwise unacceptable advertising measure or message in order to not jeopardize the trust and high reputation of the legal profession as a whole.[109]

According to the German jurisprudence, among the liberal professions, lawyers' advertisement is not the only one that needs to some extent to be restricted. Concerning the physicians, for instance, the advertising restrictions may be justified in order to prevent the risk of impairing the essential trust relationships between physicians and

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[106] In this respect see, S. DÖBBELT, *Werbebeschränkungen im anwaltlichen Berufsrecht. Eine kritische Analyse unter Berücksichtigung der verfassungs-, europa- und wettbewerbsrechtlichen Rahmenbedingungen*, Hamburg, 2008, S. 109; M. KILIAN, *Wirksamkeit anwaltlicher Werbemaßnahmen*, Deutscher Anwaltverlag Gm, 2012, S. 143.

[107] See BVerfG NJW 2004, S. 2656, 2657.

[108] See BVerfG NJW 1988, S. 194, 195; BGH GRUR 1991, S. 917,920; BGH GRUR 2002, S. 84, 86.

[109] In this respect see M. RINGER, *Anwaltswerbung in Deutschland und England, Zugleich ein Beitrag zur Ausgestaltung der Schnittstelle zwischen Berufs- und Lauterkeitsrecht*, Köln, 2016, S. 70.

patients and ultimately to guarantee the proper functioning of the public health.[110] Even in this sector, indeed, when doctors decide which health treatment the patients have to make, they should not operate with a pure profit-making interest.[111] Similarly, concerning pharmacists, consumers should be able to rely on the fact that pharmacists, even if traders, will not let themselves being dominated by a purely profit-making's approach. In this view, the advertising bans are intended to counteract the misuse or abuse of medicines and pills and to guarantee the proper professional practice, preserving and promoting the general public's trust in the professional integrity of the pharmacists that have to contribute to the protection of the public health.[112] Moreover, accountants' advertisement may be legitimately restricted in order to protect consumers' trust on the fact that accountants will not advertise and provide their services for purely commercial and profit-making's purposes and that they will align their performances with the clients' interest (but not in the clients' economic advantages) guaranteeing the protection of the proper functioning of the tax administration.[113]

1.2. Interests justifying lawyers' advertisement limitations in the German literature and jurisprudence

1.2.1. Protection of third parties' rights, distinction between lawyers and entrepreneurs, high costs of the advertising campaigns and lawyers' independence

In Germany, the literature has always sought to address the question concerning the extent to which lawyers' advertising can be legitimately restricted. First of all, it is

[110] Concerning physicians' advertisement, see BVerfG GRUR 2012, S. 72, Rn. 21; BVerfG NJW 2002, S. 1864, 1865; BGH GRUR 2010, S. 1024, Rn. 28; BGH GRUR 2004, S. 164, 165;

[111] See BVerfG NJW 2002, S. 1864, 1865; BVerfG GRUR 2004, S. 164, 165.

[112] See BVerfG GRUR 1996, S. 899, 903; OVG Münster BeckRS 2012, 53048; H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 4, Rn. 11.11 et seq.

[113] See BVerfG NJW 2004, S. 3765, 3767, BGH GRUR 2010, S. 349, Rn. 25; LG HANNOVER DStRE 2010, S. 583, 584.

worth noting that the protection of consumers rights (third parties' rights) has been always considered as one of the prominent justification to advertising restrictions aimed at avoiding false, misleading and harassing advertisement methods.[114]

Second, in Germany, historically, advertisement limitations were justified on the basis of the traditional distinction between lawyers and entrepreneurs in force of which the former should have been characterized by much more dignity and decorum compared to the latter.[115] Moreover, in this view, lawyers would have been different from entrepreneurs also because in pursuing their activities the former would not be (or not only) guided by the will of making profit but by the protection of the clients' rights.[116] However, it has to be said that a pure altruistic intent cannot be tracked down in the lawyer profession. The essence of lawyer advertising seems to be (like in every other cases of adverting messages) the will to attracting new clients.[117] At the same time, however, purely commercial and profit-oriented advertising methods do not fit with the lawyer profession interpreted as an organ of the administration of justice.[118] This poses the question as to whether a distortion of the nature of legal profession may to some extent justify advertising restrictions.[119]

Third, part of the German literature justified advertisement restrictions in order to avoid lawyers transferring the high costs related to their expensive advertising strategies to the clients, increasing the costs of the legal services offered.[120]

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[114] See BVerfG NJW 2004, S. 2656, 2657; BVerfG GRUR 2008, S. 352, 353.

[115] In this regard, it has to be said that, even if this approach seems to be overtaken, Article 24 of the Directive 2006/123/EC still states as follows: "*Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession* …"

[116] See BVerfG NJW 1992, S. 1613, 1613; BVerfG NJW 1992, S. 1614.

[117] See BVerfG NJW 1996, S. 3067, 3070; BVerfG NJW 2004, S. 3765, 3767; BVerfG GRUR 2008, S. 352, 353.

[118] See BVerfG NJW 2000, S. 3195, 3195; BVerfG NJW 2004, S. 2656, 2657; BVerfG GRUR 2008, S. 352, 353.

[119] In this regard, see M. RINGER, *Supra*, S. 74.

[120] See T. ROEBEN, *Berufsrechtliche Werbebeschränkungen im Spiegel von Verfassungs- Wettbewerbs- und Kartellrecht*, Aachen, 1997, S. 25; S. DÖBBELT, *Supra*, S. 55 f.

Other authors argued that the limitations to lawyers' advertisement are necessary in order to guarantee the independence of lawyers as an organ of the administration of justice[121]. It is not completely clear, however, how advertising restriction may guarantee lawyers independence.[122]

1.2.2. Lawyers' image distortion, risk of excessive consumption of legal services, and risks of lawyers disturbing each other

Looking deeper at the mentioned interests justifying lawyers' advertisement limitations, the earlier German jurisprudence argued that advertising restrictions would be justifiable for preventing the lawyers image distortion.[123] However, part of the German literature initially did not uphold the professional image distortion as a legitimate public interest by which legitimizing advertisement restrictions. In the current German literature, the legal profession is something very heterogeneous. Hence, a truly unitary image of the profession could be neither tracked down nor distorted.[124] In other words, to protect the

[121] See BVerfG GRUR 2003, S. 965, 966; BVerfG NJW 2004, S. 2656, 2657; BVerfG GRUR 2015, 507, Rn. 24; AnwGH NORDRHEIN-WESTFALEN BeckRS 2014, 13284.

[122] Some authors believed that advertisement will have endangered lawyers' independence because it will have made the legal profession more and more dependent on the clients, being the advertising useful for acquiring new mandates (See among others, W. HARMS, *Gebührenwettbewerb unter Architekten und Rechtsanwälten? Zur Anwendung des GWB auf Freie Berufe*, NJW 1976, S. 1294; S. A. KÖHLER, *Das Werbeverbot für Rechtsanwälte und Steuerberater: eine kritische Analyse aus betriebswirtschaftlicher Sicht*, Baden-Baden, 1988, S. 36). Other authors believed that advertising restrictions cannot be beneficial to gain more lawyers independence (see E. SENNINGER, AnwBl. 1991, S. 532).

[123] See, BVerfG NJW 1972, S. 1504, 1509 (for the doctors); BVerfg NJW 1982, S. 2487, 2488 (for the accountants); BVerfG NJW 1988, S. 194, 195; BVerfG NJW 1992, S. 1614; BVerfG NJW 1994, S. 123, 124.

[124] On the one hand, part of the German literature believes that a unitary concept of lawyer does not exist because of the year by year changes in the legal profession way to be carried out (see among others, K. POHLMANN, *Die Beschränkung anwaltlicher Werbung in Berufs- und Wettbewerbsrecht und deren Verhältnis zueinander*, Leipzig, 2002, S. 209 f.; U. HOCKE, *Werbung für anwaltliche Dienstleistungen. Eine rechtsvergleichende Untersuchung zur Regelung der Werbung im Bereich der Anwaltschaft des deutschen und US-amerikanischen Recthtskreises*, Essen Bonn, 1990, S. 133; K. NAGEL, *Werbeverbote: Die grundrechtliche Problematik generaller*

unitary image (or the category) of lawyers will not be possible because of the huge number of lawyers in Germany (over 160.000) and the widely different fields of activities and ways they operate (*e.g.* lawyers offering services in rural areas as opposed to international law firms operating through hundreds of lawyers in huge and industrial cities).[125]

Despite the developments throughout the years, one could still argue that there is instead a fundamental feature common to all legal professionals, which may represent a legitimate public interest, the protection of which can justify advertising limitations. Indeed, a new strand of the German literature considers the lawyers' interaction with the functioning and the proper administration of justice as a legitimate public interest, which may be able to justify (to some extent) advertising restrictions.[126] Embracing this interpretation, some authors argued that advertising restrictions are needed to avoid an excessive consumption of legal services, which would overload the German judicial authority, causing inefficiencies and disruptions.[127] Nevertheless, the described view can be easily criticized because it failed to show that, enhancing legal advertisements, lawyers receive an excessive amount of requests for representation. Moreover, even if such (untested) hypothesis was true, the risk related to an escalation in the use of the judiciary

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Werbeeinschränkungen – dargestellt am Beispiel von Werbeverboten für Anwälte und Genußmittel unter besonderer Berücksichtigung der betroffenen Dienstleistung- bzw. Produktanbieter, Baden-Baden, 1992, S. 81 ff.; S. MÄLZER, *Werbemöglichkeiten für Rechtsanwälte in der Europäischen Union*, Bonn 1995, S. 141; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 9).

On the other hand, other German authors find qualitative difference between lawyers operating in the market (See among others, V. M. JÄNICH, *Wettbewerbsrecht der freien Berufe*, in: GLOY/LOSCHELDER/ERDMANN, *Handbuch des Wettbewerbsrechts*, 4. Aufl., München 2010, § 67 Rn. 7; *Contra* see K. VON LEWINSKI, *Werbung*, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 49.

[125] See RINGER, *Supra*, S. 75.

[126] See RINGER, *Supra*, S. 75.

[127] See G. MANSENN, in: VON MANGOLDT/KLEIN/STARCK, *Kommentar zum Grundgesetz: GG*, Art. 12 Rn. 168; W. BOMBA, *Verfassungsmäßigkeit berufs- und standesrecthlicher Werbebeschränkungen für Angehörige freier Berufe. Dargestellt am Beispiel der Regelungen für Rechtsanwälte, Ärzte und Apotheker*, Berlin, 2003, S. 230.

system is yet to be demonstrated. Indeed, lawyers should (or must) always advice clients whether to launch an appropriate legal action only in cases with a sufficient prospect of success[128] and, moreover, many legal disputes may be settled out of Tribunals or Courts.

Other German authors tried to justify advertising limitations to avoid lawyers disturbing each other using improper advertisement's messages and means. In this view, lawyers will be much more focused on fighting against illegal advertising carried out by their colleagues instead of focusing their efforts in advising clients, hence guaranteeing the proper functioning of justice.[129] However, one could argue that the National Competition Authorities, the Courts or the Bar associations are responsible and empowered to enforce and sanction the unlawful advertising messages. Hence, the individual lawyers could not directly get involved in carrying out these kinds of activities. However, single practitioners may report to the competent authority or to the National or Local Bar Association advertising practices or campaigns that, in their view, could damage consumers, competitors or the lawyers' category as a whole.

1.2.3. Proper functioning of justice

The German literature and jurisprudence, in light of the ECJ's line in *Wouters*, eventually justifies advertisement restrictions with the purpose of ensuring the proper functioning of justice. One should now understand to what extent the proper functioning of justice may be considered as a legitimate justification for limiting lawyers' advertising in Germany. The German literature defined this interest as wide as possible ensuring clients' access to (qualified) lawyers[130]. Lawyers seem to carry out a crucial role participating to the administration of justice, guaranteeing the clients against the risk to lose their rights of defence and justice.[131]

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[128] See S. DÖBBELT, *Supra*, S. 61.

[129] See K. POHLMANN, *Die Beschränkung anwaltlicher Werbung in Berufs- und Wettbewerbsrecht und deren Verhältnis zueinander*, Leipzig, 2002, S. 219. *Contra* S. DÖBBELT, *Supra*, S. 62.

[130] See V. RÖMERMANN, in: HARTUNG/RÖMERMANN, BORA/FAO, § 6 BORA Rn. 73

[131] See BVerfG NJW 1988, S. 191, 193.

It is worth noting that generally lawyers' advertisement should be directly proportional to the proper administration of justice, facilitating the clients' access to legal advice and representation[132]. However, untrue, misleading and harassing promotional messages (instead of purely or mainly informative advertising messages) and those with a pure profit intent may be a threat for the administration of justice because »*der mit diesen Mitteln und auf diese Art Werbende werde nicht die Gewähr dafür bieten, aus Rücksicht auf die Rechtspflege oder die Interessen seiner Mandanten das persönliche Gewinnstreben hintanzustellen*[133]« (which roughly means that, using those means, an advertisers will consider his own profit instead of assuring the interests of their clients and/or the proper administration of justice).

The previous mentioned forms of advertisement might undermine the essential trust which is the basis of every relationship between client and lawyer[134]. Without this crucial trust, a significant number of clients might decide not to use legal services anymore.[135] In other words, if informative advertisement may help to establish and maintain the needed trust between client and lawyer,[136] unlawful advertising messages may make the clients sceptical and increase the information asymmetries between clients and lawyers. As a consequence, the general public may lose its trust in the single lawyers as well as in the legal profession as a whole. In this scenario, lawyers will lose their social function aimed at contributing to the proper functioning and administration of justice as well as the protection of the clients' rights of justice and defence.[137]

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[132] See S. MÄLZER, *Supra*, S. 147; S. DÖBBELT, *Supra*, S. 63; V. RÖMERMANN, in: HARTUNG/RÖMERMANN, BORA/FAO, § 6 BORA Rn. 73, 103.

[133] BVerfG NJW 2004, S. 3765, 3767 for the accountants; See also M. JÄNICH, *Wettbewerbsrecht der freien Berufe*, in: GLOY/LOSCHELDER/ERDMANN, *Handbuch des Wettbewerbsrechts*, 4. Aufl., München, 2010, § 67 Rn. 21.

[134] See A. STEINBECK, *Werbung von Rechtsanwälten im Internet*, NJW 2003, S. 1481 ff., S. 1487; OLG NAUMBURG GRUR-RR 2008, S. 173, 174.

[135] See BVerfG NJW 1996, S. 709, 710; BVerfG GRUR 2003, S. 965, 966.

[136] See E. LÖWE, *Werbung im künftigen Berufsrecht der Rechtsanwälte – Versuch praktischer Abgrenzungen*, AnwBl. 1998, S. 545 ff., S. 548.

[137] See W. E. FEUERICH, in: FEUERICH/WEYLAND, *Bundesrechtsanwaltsordnung Kommentar,* 8 Auflage, § 114 BRAO Rn. 2; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43 BRAO Rn. 24;

In sum, if the general public does not trust lawyer category anymore (because of the conducts carried out by some lawyers), consumers may therefore renounce to use lawyers' services in order to enforce their rights. This will lead to a decrease in the (quality of the) functioning of justice that, to work properly, surely needs the intermediation function carried out by lawyers.[138] In light of the above, part of the German literature considers the lawyers' interaction with the functioning and the administration of justice as a legitimate public interest which is able to justify (to some extent) advertising restrictions. In this view, the safeguard of the core of the lawyer profession is also justifiable in the light of the monopoly position enjoyed by lawyers in the area of legal advice and representation before courts. In other words, only if lawyers set and maintain high standard of professionalism, it will be still justifiable to foreclose the offer of legal services to other service providers.[139]

Nevertheless, the functioning of justice should not be used, without a detailed case by case reasoning, as a gateway to curb new general types or means of advertising or simply to legalize good taste and ethic in the advertisement sector. Thus, one could argue that, on the one hand, if the advertisement' content is completely exaggerated,[140] very

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W. HARTUNG, *Berufs- und Fachanwaltsordnung Kommentar,* 5 Auflage, München 2012, § 43 BRAO Rn. 15; See also, OLG NÜRNBERG NJW 2004, S. 2167, 2168 f.

[138] See M. RINGER, *Supra*, S. 80. See also in England the famous case *Bolton v. Law Society* (1994) 1 W.L.R. 512 (C.A.), 518 et seq. (Sir Bingham M.R.) in which it is said: "*it is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. That requirement applies as much to barristers as it does to solicitors. [...] If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. [...] A profession's most valuable asset is its collective reputation and the confidence which that inspires. [...] The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price*".

[139] See W. HARTUNG, *Berufs- und Fachanwaltsordnung Kommentar,* 5 Auflage, München 2012, § 43 BRAO Rn. 3.

[140] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 6

intrusive[141] or too much ostentatious (market-streaming),[142] the functioning of justice may be interpreted as a legitimate public interest in order to limit these kinds of messages (even if it should be taken into account that, for instance, an exaggerated form of advertising may be consider normal and legitimate in the near future because of the time-related changes);[143] on the other hand, in several other cases, the use of this public interest justification will not be so straightforward. In other words, where the boundaries between permissible and prohibited advertising messages have to be drawn, of course, each case requires a comprehensive examination of all the relevant circumstances to be carried out by the bar associations or the courts.[144]

To conclude, it can be said that, in addition to the protection of the rights of third parties (i.e. legal services' consumers), the proper functioning of the administration of justice – by its interaction with the core of the lawyer profession's image – can represent a legitimate concern for justifying to some extent advertising's restrictions in Germany.[145] Thus, according to part of the German literature, it should be possible to limit only these advertising messages which are able to harm the previous general public interest.[146] This theory seems to find a strong confirmation under article 24 Directive 2006/123/EC of 12 December 2006 on services in the internal market stating that: "*Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate*".

2. Lawyers' advertisement: history and regulations

[141] See BVerfG NJW 1996, S. 3067, 3070 for pharmacists.

[142] See BVerfG NJW 2001, S. 3324, 3325; OLG HAMM GRUR 2013, S. 746, 749; LG HAMBURG GRUR-RR 2012, S. 257, 258.

[143] See BVerfG NJW 1996, S. 3067, 3070; BVerfG NJW 2004, S. 3765, 3767.

[144] See BVerfG NJW 1995, S. 712, 712; BVerfG GRUR 2003, S. 965, 965 f.; BVerfG NJW 2004, S. 2656, 2658; BVerfG GRUR 2008, S. 352, 352; BVerfG GRUR 2008, S. 618, Rn. 12.

[145] M. RINGER, *Supra*, S. 84.

[146] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, Vor § 43b BRAO Rn. 10.

2.1. *Rechtsanwaltsordnung* (RAO) and *Reichsrechtsanwaltsordnung* (RRAO)

In Germany the first regulation for the lawyers' profession was issued in 1879 with the so called *Rechtsanwaltsordnung* (RAO). The RAO did not include any specific provision governing lawyers' advertising. Nevertheless, the RAO included a general paragraph (§ 28) which stated as follows: "*seine Berufstätigkeit gewissenhaft auszuüben und durch sein Verhalten in Ausübung des Berufs sowie außerhalb desselben sich der Achtung würdig zu zeigen, die sein Beruf erfordert*"[147] (which can be roughly translated as the means that a lawyer had to exercise his profession conscientiously and to behave, while exercising the legal profession as well as outside of it, in a way which is worthy of the high consideration that people have for his profession). At the time, the mentioned paragraph was the only provision to be taken into consideration when assessing the legitimacy of a lawyer's advertising message.

Later on, in 1883, interpreting the mentioned § 28 RAO, the German *Ehrengerichtshof* (the German lawyers disciplinary Court) held that any form of advertising carried out by a lawyer should have been considered incompatible with the dignity of the legal profession. Similarly, the *Ehrengerichtshof* upheld this restrictive approach in its following decisions.[148]

Moreover, in 1929 the lawyer's practices and customs of that time – together with the previous *Ehrengerichtshof*'s interpretations concerning the relationship between § 28 RAO and lawyers' advertising – were summarized by the *Ehrengerichte vom Deutschen* in a non-binding document called *Richtlinien für die Ausübung des Anwaltsberufs* (Guidelines on the exercise of the legal profession) also called *Vademekum* (Vademecum). For the first time in Germany, the *Vademekum*, among other factors, also provided detailed rules on the lawyers' advertising prohibition.

In 1936, with the rise of the German Third Reich, the *Reichsrechtsanwaltsordnung* (RRAO) replaced the previous RAO. However, even § 31 RRAO contained a general clause – very similar to the previous § 28 RAO – stating as follows: "*(1) Der Rechtsanwalt*

[147] See RGBl. 1878, Teil I, S. 177-198.

[148] See EGHE I, S. 28, 32; EGHE I, S. 202, 204; EGHE II, S. 91, 95; EGHE III, S. 299, 300.

hat seinem Beruf getreu seinem Eide gewissenhaft auszuüben. (2) Er hat sich auch außerhalb seiner Berufstätigkeit des Vertrauend und der Achtung würdig zu erweisen, die sein Beruf als Diener am Recht erfordert". In short, a lawyer has to faithfully exercise his/her profession according to his/her oath. He/she had also to be worthy of the trust and the respect which a lawyer must have while exercising his/her profession as well as outside of it. Moreover, it is worth noting that, two years before the RRAO was issued, precisely in 1934, the *Reichrechtsanwaltskammer* (the Lawyers' Chamber/Bar Association of the Third Reich) issued new Guidelines on the exercise of the legal profession, largely updating the previous general ban on lawyers' advertisement.

2.2. ***Bundesrechtsanwaltsordnung*** **(BRAO) – Federal lawyers' act – and** ***Richtlinien für die Ausübung des Rechtsanwaltsberufs*** **(Guidelines on the exercise of the lawyer's profession)**

After the collapse of the Third Reich, the RRAO provisions (among which the mentioned § 31 general provision) were no longer applied. In 1957, the *Bundesrechtsanwaltskammer* (Federal Bar Association) adopted new *Richtlinien für die Ausübung des Rechtsanwaltsberufs* (Guidelines on the exercise of the lawyer's profession) which at § 61 set up a very extensive advertising prohibition. However, only two years later, in 1959, the possibility for the *Bundesrechtsanwaltskammer* to adopt guidelines and directives was formally authorized by § 177 of the new *Bundesrechtsanwaltsordnung* (BRAO). Indeed, § 177 BRAO formally granted to the *Bundesrechtsanwaltskammer* the power to define, through Guidelines, the established view and interpretation over issues concerning the exercise of the legal profession.[149] In light of the above § 177's authorization, in the following years, the original version of the 1957 Guidelines were revised many times until the 1973's version which at § 2 contained an explicit advertising ban.[150]

[149] See BGBl. 1959, Teil I, S. 565-609.

[150] See § 2 which stated as follows: "*Werbeverbot (1) Der Rechtsanwalt handelt standeswidrig, wenn er um Praxis wirbt. Er darf eine ihm verbotene Werbung auch durch andere nicht dulden. (2) Bei seinem Auftreten vor Gericht und im Umgang mit Presse, Rundfunk und Fernsehen hat er den Anschein zu vermeiden, er wolle sich oder die von ihm bearbeitete Sache sensationell herausstellen*" which means that a lawyer acts against the professional discipline if he/she

Even the 1959's version of the BRAO (which is the Federal Lawyers' Act) included a paragraph (§ 43) that was a general provision similar to the previous § 28 RAO and § 31 RRAO stating as follows: "*Der Rechtsanwalt hat seinem Beruf getreu seinen Beruf gewissenhaft auszuüben. Er hat sich außerhalb seines Berufs der Achtung und des Vertrauens, welche die Stellung des Rechtsanwalts erfordert, würdig zu erweisen*". The previous provision means that a lawyer had to faithfully and consciously exercise his/her profession and he/she had also to be worthy of the trust and the respect which required the lawyer profession itself. After the BRAO was issued, the Guidelines on the exercise of the legal profession were still taken into consideration by the German jurisprudence for the concretization of the general § 43 BRAO. Although the Guidelines did not have the force of law, they were considered by the German jurisprudence as an essential source containing what corresponds, in every single case, to the opinion of the most respected and experienced lawyers (so-called *communis opinio*).

2.3. Criticisms concerning the Guidelines on the exercise of the legal professions

Nevertheless, in the following years, many criticisms arose especially in relation to the Guidelines on the exercise of the legal professions through which § 43 BRAO was interpreted by the German jurisprudence.

First of all, it was criticized the procedural way through which the Guidelines had been issued and amended. More precisely, part of the German literature disapproved the fact that each *Rechtsanwaltskammer* held one vote in the general meeting approving the Guidelines, regardless of the number of their members.[151] This clearly led to considerable imbalances in the individual member representation.[152]

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promotes around his/her services. A lawyer may not tolerate the banned advertising to be carried out by others. Moreover, when a lawyer appears before the courts and deals with the press, radio and television he/she has to avoid presenting himself/herself or the matter he/she is working on creating a sensational impression.

[151] See § 190 Abs. 1 BRAO 1959.

[152] See K. WOLF, *Anwaltliche Werbung - Zulässigkeit und Grenzen*, Baden-Baden, 2011, S. 42.

Second, the previous deficit of representation was further strengthen by the consideration that the »*allgemeine Auffassung*« (the general established view) of the legal profession had to be established through the Guidelines, without effectively representing the *communis opinio* of the majority of the single German lawyers.[153] Moreover, according to this strand of the literature, to take into consideration the opinion of the most respected and experienced lawyers was an utopian goal because lawyers were no longer a sufficiently homogeneous group for such a generally valid statement.[154]

Third, concerning the merit and the content of the Guidelines, the German literature started criticizing the excessively antiquated lawyers' professional image in force of which the lawyers' advertising restrictions were historically set out and justified by the Federal Bar association. In light of the above, these authors demanded much more advertising liberalization in order to provide consumers with the information they need to choose the most suitable lawyer in every case.[155]

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[153] See K. REDEKER, *Bürger und Anwalt im Spannungsfeld von Sozialstaat und Rechtsstaat*, AnwBl., 1973, S. 233; KIRCHHOF, BRAK-Mitt. 1984, S. 7; M. KLEINE-COSACK, *Antiquierte Standesrichtlinien,* AnwBl. 1986, S. 509; H. J. PAPIER, *Stimmrechtsverteilung in der Bundesrechtsanwaltskammer*, NJW 1987, S. 1312 et seq.; G. HARTSTANG, *Der deutsche Rechtsanwalt*, Heidelberg, 1986, S. 168; HAAS, BRAK-Mitt. 1984, S. 8.

[154] See M. KLEINE-COSACK, *Antiquierte Standesrichtlinien,* AnwBl. 1986, S. 507; KÜHN, *Rechtsanwaltswerbung*, S. 94 et seq.; K. REDEKER, *Anwaltliches Standesrecht zwischen heute und morgen*, NJW 1982, S. 2761; SUE, *Anwaltliches Standesrecht*, S. 163; F. OSTLER, *Neueste Entwicklungen in der Rechtsanwaltschaft*, NJW 1987, S. 289.

[155] See K. REDEKER, *Bürger und Anwalt im Spannungsfeld von Sozialstaat und Rechtsstaat*, AnwBl., 1973, S. 225 ff.; G. SCHARDEY, *Fachanwaltschaften – oder Spezialisierungshinweise anderer Art?*, AnwBl. 1978, S. 41 ff., S. 43 f.; R. PIETZKE, *Standesrechtliche Wettbewerbsverbote des Rechtsanwalts in den USA und in der Bundesrepublik Deutschland – Kartellrechtliche und verfassungsrechtliche Probleme*, GRUR Int. 1979, S. 147 ff., S. 159; R. ZUCK, *Anwaltsberuf und Bundesverfassungsgericht*, NJW 1979, S. 1121 ff., S. 1126; H. BRANGSCH, *Spezialisierung und Werbung im Bereich des Anwaltsberufs*, NJW 1980, S. 1817 ff., 1821; H. D. JARASS, *Die freien Berufe zwischen Standesrecht und Kommunikationsfreiheit,* NJW 1982, S. 1833 ff., S. 1839 f.; K. REDEKER, *Anwaltliches Standesrecht zwischen heute und morgen*, NJW 1982, S. 2761 ff., S. 2762; U. KORNBLUM, *Zum Werbeverbot für die rechts- und wirtschaftsberatenden akademischen freien Berufe*, BB 1985, S. 65 ff., S. 68 ff.; F. OSTLER, *Neueste Entwicklungen in der Rechtsanwaltschaft*, NJW 1987, S. 281 ff., S. 288 f.; K. REDEKER, *Freiheit der Advokatur – heute*, NJW 1987, S. 2610 ff., S. 2614; E. STEINDORFF, *Freie Berufe – Stiefkinder der Rechtsordnung?*, Köln,

Lastly, the developments and reforms concerning lawyers' advertisement in England and the famous and leading U.S. Supreme Court Case *Bates v. State Bar of Arizona* (which in 1977 stated that a general ban on lawyers' advertising had to be considered against the U.S. Constitution) were taken into great consideration in Germany and strengthened the already existing criticisms related to the restrictions on lawyers' advertising.[156]

2.4. *Bastille Case*, § 43b BRAO and BORA

In 1987, with the famous *Bastille* decision, the *Bundesverfassungsgericht* (BVerfG) – which is the German Federal Constitutional Court – had a different approach to the professional Guidelines.[157] Until then, indeed, the BVerfG had constantly considered the professional Guidelines as a useful tool (a *communis opinio*) for interpreting the general § 43 BRAO[158]. More specifically, the old approach was abandoned when the BVerfG asked for a legislative amendment in order to clarify the generic content of § 43 BRAO and to

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1980, S. 24; W. SCHIEFER, *Anwalt im Zeitalter der Dienstleistung – Herausforderung zum Wandel*, NJW 1987, S. 1969 ff., S. 1974; H. SCHÖNFELDER, *Rechtsanwälte in der Werbeklemme*, GRUR 1987, S. 500 ff., S. 501 ff.

[156] See W. G. HEMPFING, E. RÖHM, *Werbeverbot für Rechtsanwälte verstößt in den USA seit dem 27. Juni gegen Meinungsäußerungsfreiheit*, JZ 1977, S. 712; K. GRÜNDLER, *Werbebeschränkungen bei den freien Berufen und ihre Zulässigkeit nach amerikanischem Recht,* München, 1980, S. 196 ff.; J. WÖHLER, *Anwaltliche in den U.S.A. nach der neuesten Rechtsprechung des U.S. Supreme Court*, AnwBl. 1978, S. 342 ff.; R. PIETZKE, *Standesrechtliche Wettbewerbsverbote des Rechtsanwalts in den USA und in der Bundesrepublik Deutschland – Kartellrechtliche und verfassungsrechtliche Probleme,* GRUR Int. 1979, S. 147 ff., S. 159; J. W. MICHELFELDER, *Vom Werbeverbot zur Werbefreiheit: Die Werbung des englischen Solicitors*, Stuttgart, 1987, S. 238; LÖHR, *Anwaltswerbung in den Vereinigten Staaten,* WRP 1979, S. 698 f.; H. BRANGSCH, *Spezialisierung und Werbung im Bereich des Anwaltsberufs*, NJW 1980, S. 1822; OBERREIT/KNAPP, *Rechtsanwälte und Anwaltsfirmen in den Vereinigten Staaten,* AnwBl. 1980, S. 328 ff., S. 329; T. BODEWIG, *USA – Zweifelhafte Praktiken bei der Anwaltswerbung,* GRUR Int. 1981, S. 414; *Contra* see J. LINGENBERG, in: J. LINGENBERG/ F. HUMMEL, *Kommentar zu den Grundsätzen des anwaltlichen Standesrechts (Richtlinien gemäß § 177 Abs. 2 Nr. 2 BRAO*, 1. Auflage, Köln, 1981, § 2 Rn. 3.

[157] See BVerfG NJW 1988, S. 191 ff.; BVerfG NJW 1988, S. 194 ff.

[158] See BVerfG NJW 1974, S. 232, 233; BVerfG NJW 1981, S. 2239, 2239; BVerfG NJW 1984, S. 2341, 2342.

avoid uncertain and unclear jurisprudential interpretations of the previous paragraph through the professional Guidelines' principles. In other words, the Court invoked the creation of a proper lawyers' code of conduct which would have held the force of law and would have specifically regulated lawyers' advertising.

In the years between the *Bastille* case and the required BRAO amendment, when deciding on lawyers' advertisement limitations, the BVerfG reduced its area of intervention to what was – in its view – essential to maintain the proper functioning of justice[159]. The previous area of action surely included the ban on misleading advertising and other unfair advertisement conducts carried out by lawyers. Only in 1994, this transition period ended with the approval of a new BRAO version.

The so called transitional period ended with the 1994 reform. In this respect, § 43 BRAO general clause remained unchanged but a new crucial part (§ 43b BRAO) was added to that provision. § 43b BRAO – headlined "*Werbung*", which means advertising – has remained unchanged until today stating as follows: "*Werbung ist dem Rechtsanwalt nur erlaubt, soweit sie über die berufliche Tätigkeit in Form und Inhalt sachlich unterrichtet und nicht auf die Erteilung eines Auftrags im Einzelfall gerichtet ist*". The previous paragraph means that a lawyer is only permitted to advertise his/her services in as far as the advertisement in question provides matter-of-fact information concerning the form and the nature of the professional services and as long as it is not aimed at soliciting specific instructions or a specific brief.

Moreover, in light of the BVerfG explicit request, only in 1997, § 43b BRAO was supplemented by the adoption of the *Berufsordnung der Rechtsanwälte* (BORA) which is the German Lawyers' Professional Code of Conduct that was issued by the *Rechtsanwälte* and *Rechtsanwältinnen* of the Federal Republic of Germany, together with the other members of the Bars.

3. Lawyers' Advertisement and the German *Grundgesetz*

[159] See BVerfG NJW 1998, S. 191, 193; BVerfG NJW 1988, S. 194, 195.

The German Constitutional law (*Verfassungsrecht*) does not contain a specific fundamental right that regulates advertising explicitly. However, there are several fundamental rights in the *Grundgesetz* (German Constitution), which are implicitly related to the advertising field.

3.1. Article 12 GG: freedom of occupation

Article 12 *Grundgesetz* (GG) protects the freedom of occupation – that is the right to choose the occupation or profession. According to the BVerfG, article 12 GG includes in its protection every work-related activity and, therefore, the professionals' external presentation in the form of advertising[160]. In other words, in the BVerfG's view, the restrictions on the practice of the professions should be justifiable by the German Constitutional Court based on "*vernünftige Erwägungen des Gemeinwohls*"[161] which literally means a reasonable consideration of the common good.

In its latest decisions, the BVerfG stated that only misleading and particularly intrusive advertising methods through which lawyers' purely business and profit oriented behaviours are expressed may be legitimately limited.[162] More precisely, advertising's limitations have to be aimed at protecting the rights of third parties, at guaranteeing the proper functioning of the justice and at preserving a honest image of the legal profession avoiding the risk of a general public's loss of confidence in the individual lawyer and in the legal profession as a whole.

Furthermore, in the BVerfG's view, the advertisement restrictions based on the protection of a legitimate public interest (such as the proper functioning of the justice or

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[160] See BVerfG NJW 1974, S. 232, 232; BVerfG NJW 1981, S. 2239, 2239; BVerfG NJW 1992, S. 1614; BVerfG NJW 2004, S. 2656, 2658; BVerfG NJW 2009, S. 2587, 2587.

[161] See BVerfG NJW 1992, S. 1614; BVerfG NJW 1996, S. 3067, 3069; BVerfG NJW 2001, S. 2620, 2621.

[162] BVerfG GRUR 2008, S. 352, 353; BVerfG NJW 2004, S. 2656, 2657; BVerfG NJW 2000, S. 3195, 3195, where it is stated that: »*lediglich irreführende und insbesondere aufdringliche Werbemethoden, mit denen ein rein geschäftsmäßiges, ausschließlich an Gewinn orientiertes Verhalten zum Ausdruck kommt*«.

the protection of the rights of third parties) must be *geeignet* (appropriate/suitable), *erforderlich* (necessary) and *angemessen* (appropriate/proportionate).[163]

3.2. Article 5 GG: freedom of expression

Article 5 GG protects the freedom of expression; this could be seen as encompassing lawyers' advertising. Even in this case, however, advertising restrictions may be only justified using legitimate objectives like the protection of the rights of third parties or the proper functioning of justice.[164] Similarly, a case by case proportionality test must be carried out taking into consideration the requirements highlighted by the BVerfG within the article 12 GG.

Moreover, article 5 GG guarantees the freedom to provide information to potential clients. Indeed, according to article 5 GG, consumers have the right to get informed in an unhindered way through the generally accessible sources.[165] This means that article 5 GG's protection area seems to be restricted to the generally accessible information sources which are suitable and intended to provide information to an indeterminate group of people.[166] As a consequence, emails or messages addressed only to one individual are not covered and protected by the freedom of information under Article 5 GG.[167]

Article 5 GG also protects the freedom of information on press and media broadcasting. This protection guarantees lawyers as well as press companies. The latter

[163] See BVerfG NJW 1971, S. 1255, 1256; BVerfG NJW 1983, S. 1417, 1419; BVerfG NJW 1988, S. 194, 195; BVerfG NJW 1996, S. 3067, 3068; BVerfG NJW 2006, S. 1261, Rn. 116.

[164] See RINGER, *Supra*, S. 138.

[165] See BVerfG NJW 2003, S. 344, 345; BVerfG NJW 2004, S. 2656, 2659.

[166] See BVerfG NJW1970, S. 235, 237; BVerfG NJW 1986, S. 1243; BVerfG NJW 1994, S. 1147, 1147; BVerfG NJW 2001, S. 1633, 1634; BVerfG NJW-RR 2007, S. 1053, 1054.

[167] See C. STARCK, in: v. MANGOLDT/KLEIN/STARCK, GG, Art. 5 Rn. 49; R. WENDT, in: v. MÜNCH/KUNIG, GG, Art. 5 Rn. 25.

may invoke an indirect violation of the freedom of expression of the lawyer as well as a direct violation of their freedom of press.[168]

In conclusion, advertising restrictions constitute an interference with the freedoms protected by the German *Grundgesetz* (e.g. Article 12 and 5 GG), but they may be justified by reasonable considerations relating to public interests. It is worth bearing in mind that both under Article 12 and 5 GG the protection of the rights of third parties as well as the proper functioning of the legal administration seem to constitute reasonable justifications.

3.3. Article 24 Directive 2006/123/EC and German Constitutional law

Article 24 of Directive 2006/123/EC is not the sole evaluation criterion to justify rules restricting professional advertising.[169] In Germany, indeed, as we already said, advertising restrictions must also comply with the German constitutional law and primary laws.

In light of the above, apart from the total prohibitions on commercial communications by the regulated professions that are not justifiable and shall be removed, article 24 Directive 2006/123/EC justifies advertising restrictions that are necessary for an overriding reason relating to the public interest and must be proportionate. The German constitutional law, instead, requires an assessment based on a slightly different criterion, that is reasonable considerations relating to public interest.

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[168] See R. STREINZ, *Europäisches und deutsches Verfassungsrecht: Erfassung von geschäftlicher Werbung* ('Commercial Speech'), in: HILTY/HENNING-BODEWIG, *Corporate Social Responsablity*, Berlin, 2014, S. 105; BVerfG GRUR 2001, S. 170, 172; D. WIEDEMANN, *Die Notwendigkeit standesrechtlicher Informationsrestriktionen für Ärzte vor dem Hintergrund des allgemeinen Lauterkeitsrechts: Zugleich ein kritischer Beitrag zu den rechtlichen Möglichkeiten und Grenzen ärztlicher Werbung*, Baden-Baden, 2010, S. 37.

[169] See B. BÜRGLEN, *Neue Werbeformen im Rahmen der §§ 43b BRAO und 6 Abs. 3 BORA – Verbliebene Schranken der Direktwerbung*, in *Festschrift für Joachim Bornkamm zum 65. Geburtstag*, Beck, München, 2014, S. 324; H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 4 Rn. 11.84.

It is worth noting that, in spite of the formal difference (overriding/reasonable), there is no material difference between the two formulations.[170] In other words, although the wording of Article 24 Directive 2006/123/EC seems to be more stringent (overriding reasons), both at a European Union and German Constitutional law level, the proper functioning of justice and the protection of the rights of third parties seem to constitute legitimate objectives allowing to some extent advertising restrictions. Therefore, the different wordings (overriding reasons/reasonable considerations) do not entail effects when identifying the different goals and interests to be reached or protected and which allow advertising restrictions. However, the different terminologies may lead to differences in the evaluation of an actual individual case in the context of the application of the proportionality test on a restrictive measure.[171]

In light of the above, it is worth recalling that, in Germany, in order to assess whether in a specific case rules restricting lawyers' advertising are suitable, necessary and appropriate (that is necessary and proportionate according to the European Union wording) to achieve one of the above-mentioned objectives, Courts have to make a concrete evaluation – on a case by case basis – taking into account the German legal framework.

4. Relevant German legislation on lawyers' advertising

As stated before, after the *Bastille* decision, in 1994, the German legislator added the § 43b BRAO explicitly regulating, for the first time with a law, lawyers' advertisement in Germany. Furthermore, § 59b Abs. 1 BRAO also created a so-called rule-making competence. Indeed, according to § 59b Abs. 1, further details regarding professional

[170] See M. HENSSLER, *Die Internationale Entwicklung und die Situation der Anwaltschaft als freier Beruf*, AnwBl. 2009, S. 3; H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 4 Rn. 11.84.

[171] See W. SCHROEDER, *Zwingende Erfordernisse im Allgemeininteresse*, in: STREINZ, EUV/AEUV, Art. 36 AEUV Rn. 35; R. STREINZ, *Die Ausgestaltung der Dienstleistungs- und Niederlassungsfreiheit durch die Dienstleistungsrichtlinie – Anforderungen an das nationale Recht*, in: Leible, *Die Umsetzung der Dienstleistungsrichtlinie*, Jena, 2008, S. 118.

rights and duties shall be set out in the rules of a code of professional conduct. Within the framework of the provisions of the BRAO, the code of professional conduct may more closely regulate, among other activities, the specific professional duties in connection with advertising and details concerning self-defined fields of specialization.

Consequently, the required lawyers' code of conduct – BORA – entered into force in 1997. § 6 Abs. 1 BORA contains a general clause concerning lawyers' advertisement that is remained unchanged until now and states as follows: (i) a lawyer may give personal information and information about his/her services provided the information supplied is objective and related to his/her professional activities. (ii) Publicity as to success rates or turnover is not permitted. References to cases and clients may only be made provided the respective client explicitly given his/her consent. (iii) A lawyer shall not participate in an effort designed to make third parties conduct publicity for him which he himself is not permitted to conduct.[172]

4.1. *Berufsbezogenheit* (professionalism)

According to § 43b BRAO and § 6 Abs. 1 BORA, lawyers' advertisement has to be related to his/her professional activities. The phrase *professional activities* has to be interpreted in a very broad sense.[173] According to an unanimous view among the German literature and jurisprudence, advertising messages have to be considered as related to lawyers' professional activities if the information provided is to some extent useful for a potential clients, i.e. it plays a role on the basis of reasonable and relevant considerations in influencing the client choice of the most suitable lawyer.[174] In other words, *information*

[172] See https://www.brak.de/fuer-anwaelte/berufsrecht/ for the complete English translation of the BORA.

[173] See G. BÖHNLEIN, *Beruflicher Bezug*, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 12; K. VON LEWINSKI, *Werbung*, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA, Rn. 34.

[174] See BVerfG GRUR 2003, S. 965, 966; BGH GRUR 2002, S. 84, 85; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 16; G. BÖHNLEIN, *Beruflicher Bezug*, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 12; K. WOLF, *Anwaltliche Werbung - Zulässigkeit und*

related to his/her professional activities means not only direct information about the legal activities carried out by a lawyer but also information concerning other occupations carried at the same time by the lawyer,[175] knowledge of foreign languages,[176] sports success[177] (which, in this author view, are information absolutely not related to the lawyers professional activities or services offered and cannot be considered as useful information for the consumers in order to make a more informed choice), etc.

If any kind of link with the lawyer's professional activities is absent, according to the combined provisions of § 43b BRAO and § 6, para. 1 BORA, an advertising message should be considered inadmissible.[178] However, given this is a restriction of the lawyers' (constitutional) freedom to advertise, the *professionalism* (*Berufsbezogenheit*) criterion should satisfy the requirements set out in the previous pages (see *infra* Chapter II – Section I - para 3.3). This means that advertising restrictions based on the absence of the *Berufsbezogenheit* criterion have to be justifiable on the basis of a reasonable consideration relating to the public interests involved. These, in the BVerfG's view, are in particular (i) the protection of the rights of third parties; (ii) the guarantee of the proper functioning of justice as well as (iii) the preservation of the honest image of the legal profession in order to avoid the risk of the society loss of confidence in the individual lawyer and in the legal profession as a whole. Moreover, the advertisement restrictions based on the protection of a legitimate public interest must be also *geeignet* (appropriate/suitable), *erforderlich* (necessary) and *angemessen* (appropriate/adequate).

Grenzen, Baden-Baden, 2011, S. 49. Moreover, it is worth noting that the BORA expressly mentioned some professional information, including the following: references to cases and clients (§ 6 Abs. 2 Satz 2 BORA), individual professional practice areas (§ 7 BORA), the title of mediator's ownership (§ 7a BORA), declaration of joint professional practice and other forms of professional cooperation (§ 8 BORA).

[175] See BVerfG NJW 1990, S. 2122 et seq.

[176] See G. BÖHNLEIN, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 15.

[177] See BVerfG GRUR 2003, S. 965 et seq.

[178] See G. BÖHNLEIN, *Beruflicher Bezug*, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 13; K. POHLMANN, *Die Beschränkung anwaltlicher Werbung in Berufs- und Wettbewerbsrecht und deren Verhältnis zueinander*, Leipzig, 2002, S. 92; A. STEINBECK, *Werbung von Rechtsanwälten im Internet*, NJW 2003, S. 1482.

In this respect, part of the German literature believes that as long as a message is truthful, even if it does not have a purely professional nature or it does not contain information related to the lawyer professional activities or services – for instance, a message with a mere reference to the lawyer's famous spouse without any kind of connection to the lawyer's fields of activity; or a message with a reference to the clubs in which the lawyer usually spends his/her weekends –, it has to be deemed legitimate. According to this part of the literature, indeed, this type of message does not affect the functioning of justice or the rights of third parties and it does not damage the core image of the lawyer profession. In this view, such information is not likely to jeopardize the public confidence in the individual lawyer or in the legal profession as a whole.[179] The advertiser lawyer's ethic or good taste is concerned in the previous examples. However, ethic and good taste seem to be excluded from any kind of legal review in Germany.[180] Thus, the lawyers advertising limitations based on the lack of the requirement of professionalism according to § 43b BRAO and § 6, para. 1 BORA, seem to be unconstitutional [181] because they are not justifiable on the basis of a reasonable consideration related to public interests involved. However, even if the *Berufsbezogenheit* requirement is not held to be unlawful, it would be largely meaningless because of its very

[179] See S. DÖBBELT, *Supra*, S. 127 f.; K. VON LEWINSKI, *Werbung*, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 36; N. HÄRTING, *Anwaltliche Werbung im Internet*, AnwBl. 2000, S. 344 f.; D. HOß, *Berufs- und wettbewerbsrechtliche Grenzen der Anwaltswerbung im Internet*, AnwBl. 2002, S. 383; N. HÄRTING/ A. STEINBRECHER, *Kanzlei-Websites – Spiel ohne Grenzen?* AnwBl. 2005, S. 11 f.; B. GRUNEWALD, *Werbung von Rechtsanwaltskanzleien im Internet*, in: HOEREN/SIEBER/HOLZNAGEL, *Multimedia Recht*, 2014, Teil. 14.1 Rn. 4;

[180] See H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 17.

[181] See M. WASCHKAU, *EU-Dienstleistungsrichtlinie und Berufsanerkennungsrichtlinie: Analyse der Auswirkungen auf das Recht der freien Berufe in Deutschland unter besonderer Berücksichtigung der Rechtsanwälte, Steuerberater und Wirtschaftsprüfer*, Bonn, 2008, S. 190 et seq.; B. OBER, *Anwaltsberufsrecht zwischen Markt und Regulierung: eine Untersuchung der Deregulierung des deutschen Anwaltsberufsrechts unter besonderer Berücksichtigung des Kartellrechts der Union und der Richtlinie über Dienstleistungen im Binnenmarkt*, Hamburg, 2011, S. 393 et seq.

broad interpretation until now,[182] which allows German lawyers to advertise messages, which are not related (or strictly/directly related) to their professional activities.

4.2. *Sachlichkeit* (objectivity/dispassion)

The second requirement that lawyers' advertisement must hold, is the so-called *Sachlichkeit* (objectivity/dispassion). Unfortunately, so far, neither the German jurisprudence nor the German literature have succeeded in attributing a precise and certain definition to the vague concept of *Sachlichkeit*; in addition, § 43a Abs. 3 Satz 2 BRAO only contains an exemplifying list of unsuitable behaviours. More specifically, according to § 43a, a lawyer must not behave with lack of objectivity in professional practice. A conduct that lacks objectivity is particularly understood as one which involves the conscious dissemination of deceits; or making denigrating statements, when other parties involved, or the course of the proceedings have given no cause for such statements.

As a consequence, the Bar chambers (*Kammern*) and the courts (*Gerichte*) have to draw the line between admissible and inadmissible advertising messages on a case by case approach, taking into account all the relevant circumstances of the case. In this respect, the reason, the means, the aim/purpose and the surrounding circumstances of the advertising message seem to be decisive proxies in order to carry out the above mentioned juridical evaluation on the admissibility.[183]

Apart from the inconceivable case law on the *Sachlichkeit* requirement, the German literature and jurisprudence have elaborated the following general principles to be used when referring to the objectivity requirement. First of all, the advertising measure must always be evaluated taking into consideration the European Union principles, as well as the German Constitutional law. Second, as a general rule, the evaluation of a single

[182] See K. WOLF, *Anwaltliche Werbung - Zulässigkeit und Grenzen*, Baden-Baden, 2011, S. 51; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 34.

[183] See BVerfG NJW 2000, S. 3195, 3196.

expression has to be made considering the context of the entire advertising message.[184] Moreover, an evaluation of the final advertisement message's addressees must be carried out. In this regard, in the jurisprudence, the skills and preparation of an average informed, observant and reasonable addressee in understanding the advertising message must be taken into account.[185] Moreover, according to the German literature, due to the relevance and importance of lawyers' services, consumers will be much more attentive in the case of lawyers advertising compared to the advertising messages related to other goods or services.[186]

The previous considerations concerning the (average) addressee of the lawyers' advertising seem to be fully embraceable. In this respect, it is for the addressees to read a lawyer's advertising message with reasonable and observant care. In other words, considering the importance of the right to justice and the right of defence involved in the legal services promoted as well as the (usually) high cost of lawyers' services, the average addressee has to (and normally will) examine the lawyers' advertising messages with much more care compared to the advertising messages related to other goods or services which are not – as legal services – credence goods. Moreover, to take into consideration an average informed consumer seems to be the most suitable choice in the lawyers' market. However, the burden to be adequately informed should not lie solely on the addressee. Indeed, it is worth noting that, due to the strong information asymmetries between lawyers and (potential) clients, as well as to the impossibility for the client to adequately evaluate the quality of a legal service *ex ante* and even *ex post* (that is, after consumption), to require consumers to be adequately informed primarily depends on the *Sachlichkeit* (objectivity) of the information advertised by the lawyers. This leads the following

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[184] See BVerfG NJW 2001, S. 3324, 3325; BVerfG NJW 2003, S. 1307; BGH NJW 2005, S. 1644, 1644; BGH GRUR 2010, S. 349, Rn. 23; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 32.

[185] See BGH GRUR 2002, S. 902, 905; OLG NAUMBURG GRUR-RR 2008, S. 173, 174; BGH GRUR-RR 2011, S. 7, Rn. 5.

[186] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 23; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, § 6 BORA Rn. 30; Creutz, Anwaltswerbung, S. 7.

paradox in assessing the *Sachlichkeit* of a lawyer advertising measure: to ask consumers to hold a feature (to be adequately informed), which in turn depends on the objectivity of lawyers' advertising itself.

Lastly, it must be also taken into consideration that, as a result of the changes, innovations and modernizations in the advertising space means, advertisement is nowadays perceived differently by consumers[187]. In other words, advertisement means that were still perceived as new and innovative twenty years ago have become natural and common among the modern advertising methods. Hence, the question related to which advertising means have to be considered unsuitable (non-objective) seems to be strictly time-dependent.[188] Furthermore, the mere circumstance that lawyers will start advertising their services differently than they did so far, does not mean that their advertising measures have to be held inadmissible.[189] Nevertheless, to assess where the line between admissible and unlawful advertising messages has to be drawn, all the circumstances of the individual case must be thoroughly understood and taken into consideration on a case by case basis.

4.2.1. Material/Objective form and content

Concerning the form of lawyers' advertising, in Germany, it is now undisputed that a lawyer can advertise using in principle every means. Indeed, the BVerfG in the "*Apothekerbeschluss*" stated that regulated professionals could advertise using, in principle, any available means. Moreover, in the same decision, the BVerfG held that it is hardly possible to prohibit an advertising message attesting a common good harmfulness, taking only into consideration the advertising's means used by the regulated professional.[190]

Subsequently, the BVerfG held that if lawyers start advertising their services differently than they did so far, this does not mean that the advertising messages have to

[187] See BGH NJW 1996, S. 3067, 3070; BGH NJW 2005, S. 1644, 1645.

[188] See BVerfG NJW 1996, S. 3067, 3070; BVerfG NJW 2004, S. 3765, 3767.

[189] See BVerfG NJW 1997, S. 2510, 2511; See BVerfG NJW 2001, S. 3324, 3324.

[190] See BVerfG NJW 1996, S. 3067, 3068.

be judged inadmissible[191]. As a consequence, in the past few years, lawyers have been promoting and advertising their services using several different ways. Among these new advertisement methods, for instance, online platforms like Groupon.de[192] and Ebay[193] have been considered as a permissible way to advertise legal services in Germany.

Moreover, the freedom for regulated professionals to choose the form/means of their advertisement messages ("*Freiheit der Formenwahl*") is unanimously accepted in the German literature and it is amply recognized by the Bar chambers and the competition courts while assessing the admissibility of an individual advertising campaigns.[194] In this regard, while making the previous admissibility assessment, other circumstances such as the regularity/orderliness/accurateness of the advertising message[195], its size[196] or the economic investments and efforts borne in order to launch the advertising campaign[197] must not be considered suitable criteria in order to justify or not the admissibility of an advertising message.

Considering the advertising content, the objectivity requirement does not oblige lawyers to only advertise sober messages.[198] Conversely, for instance, a lawyer can use

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[191] See again BVerfG NJW 1997, S. 2510, 2511; BVerfG NJW 2001, S. 3324, 3324; BVerfG NJW 2004, S. 2656, 2658; BVerfG GRUR 2008, S. 618, Rn. 20

[192] See LG HAMBURG, GRUR-RR 2012, S. 257, 258, concerning eyes laser surgery from 999 Euros.

[193] See BVerfG GRUR 2008, 618, Rn. 16, concerning lawyers' services on Ebay.

[194] See K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, § 6 BORA Rn. 44; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b Rn. 31; G. BÖHNLEIN, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 24; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 6; H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 4, Rn. 11.88; S. DÖBBELT, *Supra*, S. 174.

[195] See H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b Rn. 38; LG HANNOVER DStRE 2010, S. 583, 584.

[196] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 10; BVerfG NJW 1996, S. 3067, 3069; BGH GRUR 2000, S. 822, 823; AnwGH HAMBURG NJW 2002, S. 3184, 3186.

[197] See OLG MÜNCHEN NJW 2000, S. 2824, 2825.

[198] See BVerfG NJW 2003, S. 3470, 3471; BGH NJW 2004, S. 440, 442; BVerfG DStR 2005, S. 890, 892; BGH NJW 2005, S. 1644, 1645; BGH GRUR 2010, S. 349, Rn. 22.

Imagewerbung (Advertisement with images) or *Sympathiewerbung* (campaigns for greater popularity), drawing his/her picture positively among the potential consumers.[199]

4.2.2. Value judgments

According to the objectivity requirement, when relating to the content of the advertising messages, pure value judgments may be still considered prohibited.[200] This kind of messages, indeed, carry the risk to be inflated. Moreover, pure value judgements are based on a subjective evaluation. Hence, the truthfulness of an advertising message cannot be easily used by the lawyer as a proof or as a counterargument against an inadmissibility assessment.[201] However, if the pure value judgements are contained in an advertising message (and this is frequently the case) together with a number of verifiable statements thanks to which the former judgment may be more closely documented, it might be in principle not inadmissible.[202] For instance, the BGH held that the reference to an "*optimale Vertretung*" (which means optimal professional representation) was permissible because of the wider context of the whole advertising statement.[203]

Contrarily, one may argue that, considering the information asymmetries between lawyers and clients characterizing the legal market and the difficulties in assessing lawyers' skills and abilities, value judgments may increase the risk that incorrect (or inflated) expectations arise among potential clients due to the non-verifiable (and subjective)

[199] See BVerfG GRUR 2003, S. 965, 966; BVerfG GRUR 2006, S. 425, 426.

[200] See G. BÖHNLEIN, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 27; K. WOLF, *Anwaltliche Werbung - Zulässigkeit und Grenzen*, Baden-Baden, 2011, S. 63; K. POHLMANN, *Die Beschränkung anwaltlicher Werbung in Berufs- und Wettbewerbsrecht und deren Verhältnis zueinander*, Leipzig, 2002, S. 99; C. MENEBRÖKER, *Anwaltswerbung – Was ist erlaubt?,* GRUR-Prax 2010, S.190; Steinbeck, NJW 2003, S. 1482; K. VON LEWINSKI, in: HARTUNG, BORA/FAO, § 6 BORA Rn. 33; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 15.

[201] See H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 12.

[202] See BGH NJW 2005, S. 1644, 1645; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 176; H. KÖHLER, *Grenzen zulässiger Steuerberaterwerbung*, DStR 2011, S. 430.

[203] See again BGH NJW 2005, S. 1644, 1645.

advertising statements.[204] According to the European Union and German constitutional law principles, a *per se* ban on pure value judgments may be legitimized only if this kind of messages would be able to jeopardize the rights of third parties or the proper functioning of the justice (that are reasonable considerations related to public interest). However, in the German literature view, this is not the case in the value judgements case.[205] Accordingly, in order to assess whether an advertising message containing pure value judgments will exceed the admissibility limits, being completely exaggerated and not *Sachlichkeit*, a case by case approach analysis seems to be required.[206]

Moreover, it has to be highlighted that the praise itself is not a sufficient element in order to assess the inadmissibility of an advertising message. It is worth noting, indeed, that each advertising message contains to some extent a certain form of self-praise; otherwise, the purpose of the advertisement would not be achieved by the addressee and the advertising campaign would therefore be economically meaningless.[207] Even behind the simple contact data's communication, ultimately, there is the lawyer's intention to stand out among the other competitors reaching out for a new mandate. Hence, pure value judgments such as "creative", "competent" or "dedicated" (lawyer) do not seem to be classifiable as harmful.[208] However, part of the German literature stressed a sort of general connection between pure value judgments and misleading ones.[209] In light of the above, whether an advertising message containing a pure value judgment brings whit it a

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[204] See BVerfG NJW 1988, S. 194, 195; BGH GRUR 1991, S. 917, 920; BGH GRUR 2002, S. 84, 85 et seq.

[205] See M. RINGER, *Supra*, S. 151; S. DÖBBELT, *Supra*, S. 151 et seq.

[206] See M. WASCHKAU, *EU-Dienstleistungsrichtlinie und Berufsanerkennungsrichtlinie*, Bonn, 2008, S. 190 et seq.; B. OBER, *Anwaltsberufsrecht zwischen Markt und Regulierung: eine Untersuchung der Deregulierung des deutschen Anwaltsberufsrechts unter besonderer Berücksichtigung des Kartellrechts der Union und der Richtlinie über Dienstleistungen im Binnenmarkt*, Hamburg, 2011, S. 193.

[207] See S. DÖBBELT, *Supra*, S. 146 et seq.

[208] See M. RINGER, *Supra*, S. 151; *Contra* see A. BARDENZ, *Anwaltliches Werberecht – Eine Übersicht möglicher Werbemittel*, MDR 2001, S. 248, which classifies messages using the previous adjectives as inadmissible.

[209] See K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 33.

risk to mislead consumers, seems to be something that has to be evaluated on a case by case basis.[210]

4.2.3. Misleading advertisement

The main objective of requiring the advertising message's content to be objective is to avoid misleading advertising measures. There are many jurisprudential decisions on the prohibition of the misleading advertising measures.[211] Already in the mentioned *Bastille* case[212] as well as in the "*Gesetzesmaterialien zur Einführung von*" (legal materials for the introduction of) § 43b BRAO,[213] the misleading advertising was considered as the main case of anti-professional (*berufswidrigem*) advertisement. Moreover, part of the German literature goes further until equating the objectivity requirement with the term "*nicht irreführend*" (non-misleading).[214]

4.2.4. Completely exaggerated, creepy advertising. The *Marktschreier case*

Beyond the misleading and harassing advertising, the non-objective advertising messages do not move very far. However, the category of the so called "*marktschreierischen*" or, *völlig übertriebenen* (which mean blatant or completely exaggerated advertisement) has to be cautiously examined.

In this respect, the so called *Marktschreier* case is a typical example of completely exaggerated, charlatan and noisy advertisement. First of all, it has to be said that this kind

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[210] See M. RINGER, *Supra*, S. 152.

[211] OLG KOBLENZ BRAK-Mitt. 2015, S. 48 et seq.; LG HAMBURG GRUR-RR 2015, S. 27 et seq.; AnwGH NORDRHEIN-WESTFALEN BeckRS 2014, 13284; BGH GRUR 2013, S. 409 et seq.; OLG KARLSRUHE GRUR-RR 2013, S. 171et seq.; BGH BRAK-Mitt. 2012, S. 79 et seq.; OLG KARLSRUHE BRAK-Mitt. 2012, S. 180 et seq.; LG BIELEFELD BRAK-Mitt. 2012, S. 284 et seq.; LG OSNABRÜCK NJW-RR 2011, S. 840 et seq.

[212] See again BGH NJW 1988, S. 194, 195.

[213] See BT-Drucks, 12/4993, S. 28.

[214] See V. RÖMERMANN, *Außensozietät und Werbung von Falkenhausen: Beratung der AG*, AnwBl. 2012, S. 888.

of messages have been so far extremely rare in Germany. However, in the mentioned case, the German *Bundesgerichtshof* (BGH) – which is the Federal Court of Justice – and *Bundesverfassungsgericht* (BVerfG) were concerned with the planned advertising campaign of two lawyers who wanted to distribute cups on which the image of a weeping woman sitting on a bed with both the hands holding up a gun under her chin was printed. In addition to this image, there was the sentence '*Nicht verzagen, R. fragen*' (which means "Do not despair, ask R.") and the contacts of the two lawyers.[215] The BGH judged the described advertising campaign as a violation of the objectivity rule which would be able to damage the legal profession considered as an honourable category of defenders and advocates of the clients' interests.[216] Moreover, the BVerfG did not admit the subsequent lawyers' complaint concerning the non-admission decision held by the BGH because there was not a violation of the lawyers' fundamental rights.[217] The BVerfG, furthermore, in that occasion, held that lawyers, being an organ of the administration of justice, have to be subjected to special advertising's restrictions under § 43b BRAO.[218]

According to the BGH and BVerfG, the described promotional activity seems to go beyond mere matters of taste and to be able to negatively affect the public confidence in the individual lawyers, as well as in the entire legal profession, especially if such messages or advertisement campaigns will become a common practice among lawyers in Germany. These kind of shocking advertising messages (even the lawyers involved in the *Marktschreier* case used the definition "*Schockwerbung*")[219] are likely to distort the honourable image of the lawyer and may generate a decrease in the clients' demand of legal services, severely endangering the proper functioning of the justice.[220] It is evident, therefore, that this kind of messages may loosen or damage the fiduciary relationship between lawyer and client due to the lawyers' inappropriate promotion of legal services.

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[215] See AnwGH NORDRHEIN-WESTFALEN BeckRS 2013, 16345.

[216] See BGH NJW 2015, S. 72, Rn. 14.

[217] BVerfG GRUR 2015, S. 507, Rn. 18.

[218] BVerfG GRUR 2015, S. 507, Rn. 31.

[219] See again AnwGH NORDRHEIN-WESTFALEN BeckRS 2013, 16345.

[220] See AnwGH NORDRHEIN-WESTFALEN BeckRS 2015, 11106, concerning advertising on the robe; LG HANNOVER DStRE 2010, S. 583, 584, concerning tax consultant.

As a consequence, the unethical conducts carried out by single lawyers, may negatively influence consumers' perception of the lawyer's category. In turn, this could induce clients not to demand legal advice, when they would actually need it. This could therefore severely affect the proper functioning of justice, which is undoubtedly an overriding public interest to be protected.

To conclude on this, it is also undisputable that in Germany, in addition to misleading advertising messages, the objectivity requirement set out by § 43 BRAO, can also legitimately catch and prohibit other advertising measures and campaigns. Even if to draw a clear and straight line among lawful and unlawful advertising messages is anything but easy, completely exaggerated (*völlig übertrieben*), clumsy invasive (*plump aufdringlich*) and blatant (*marktschreierisch*) messages can be roughly included in the legitimately prohibited advertising measure. However, where the boundaries among lawful and unlawful messages have to be drawn is a procedure which needs, once again, a careful case by case approach instead of a blanket rule based on the fundamental constitutional right of freedom of expression as well as on time related changes' considerations.[221]

4.2.5. Selected individual cases

In light of the need to adopt most of the time a case by case approach in order to draw a line between legitimate and illegitimate advertising campaigns, we should now start analysing the German case law in order to try categorizing other cases of unlawful/inadmissible advertising messages. It is worth recalling that the lack of the substantive objectivity *criterion* has to be detected in both the misleading advertising and other completely exaggerated and intrusive kind of messages. In general, the substantive objectivity requirement is something hard to categorize also because it is strictly time related. However, there are other two groups of cases that should be investigated further: price advertising and comparative advertising.[222]

[221] See M. RINGER, *Supra*, S. 155.

[222] See M. RINGER, *Supra*, S. 155 et seq.

4.2.5.1. Price advertising in Germany

In the past, in Germany, price advertising was perceived as one of the typical examples of prohibited lawyers' advertisement.[223] This interpretation became outdated long time ago. Already in the legal material (*Gesetzesmaterialien*) for the BRAO 1994's amendment, indeed, it was recognized that potential clients hold a strong interest in finding out the selected lawyer's advice or legal services.[224]

Contrarily, the German legislator in the legal material for the BRAO 1994's amendment also stated that a price competition between lawyers in order to obtain new mandates and clients has to be prevented.[225] However, it has to be highlighted that the German legislator has never expressed or pursued the previous objective anymore and that the *Gebührenrecht* (which is the law regulating lawyers' fees in Germany) was, to some extent, deregulated and this led to more price competition and new advertising chances for the German lawyers.[226]

In relation to the German lawyers' remuneration, § 49b BRAO still states that it is not permissible to agree on or to bill for lower fees and disbursements than those provided in the Federal Scale of Lawyers' Fees (*Bundesgebührenordnung für Rechtsanwälte*) in as far as nothing to the contrary is set out therein. In the individual case, nevertheless, a lawyer may give consideration to the client's personal circumstances – particularly the client's impecuniousness – by lowering his/her fees or by waiving fees or disbursements after bringing the case to a conclusion.

A different approach instead is taken in § 4 *Rechtsanwaltsvergütungsgesetz* (RVG) – which is the German lawyers' remuneration act – that states that in the case of out-of-court (extrajudicial) matters, a fee that is lower than the statutory one may be agreed. It

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[223] M. KILIAN, *Vergütung*, in: HENSSLER/PRÜTTING *Bundesrechtsanwaltsordnung: BRAO*, § 49b BRAO Rn. 1.

[224] See BT-Drucks. 12/4993, S. 28; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 115; S. DÖBBELT, *Supra*, S. 167; G. BÖHNLEIN, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 31.

[225] See BT-Drucks. 12/4993, S. 31.

[226] See M. RINGER, *Supra*, S. 156.

must be nevertheless proportionate to the performance, the responsibility and liability of the lawyer. Moreover, if the prerequisites to grant the legal assistance are met, a lawyer can completely waive remuneration. It has to be noted that, in 2006, the statutory fees for an extrajudicial consultation were also omitted.[227]

In light of the above, in Germany, in relation to the extrajudicial sector, the sale of legal services on the internet platforms such as Ebay.de[228] and the mere online advertising of these services using so-called off-prices (*ab-Preisen*) [229] and flat-rate prices (*Pauschalpreisen*)[230] are now allowed. However, if the advertising message is not limited to the promotion of a mere initial consultation but is also comprehensive of a legal representation part (which requires a fee pursuant to No. 2300 VV RVG), it must be borne in mind that the price has to be proportionate to the performance, the responsibility and liability of the lawyer.

From the above remarks, it follows that to advertise a single fixed rate (flat-rate) is something highly problematic in Germany because of the variety of cases and legal scenarios to which a legal advice may be given and the same fixed price could be applied, especially when representation before a court may be needed later on by the client.[231] In this respect, for instance, the advertising message *»Für einen monatlichen Beitrag von 10€ zzgl. MwSt. vertreten wir Sie außergerichtlich und im Falle eines gerichtlichen Verfahrens in L Instanz, ohne weitere Gebühren Ihnen gegenüber zu erheben.«* (which means that for a monthly contribution of 10 Euros plus VAT, we will represent you out of the court and in the hypothesis of litigation before the courts, without charging any additional fees) has been classified inadmissible.[232]

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[227] See OLG STUTTGART NJW 2007, S. 924.

[228] BVerfG GRUR 2008, S. 618, Rn. 23.

[229] OLG NAUMBURG GRUR-RR 2008, S. 173, 175.

[230] BGH BRAK-Mitt. 2008, S. 38, Rn. et seq.; OLG DÜSSELDORF DStRE 2008, S. 261, 263; OLG STUTTGART NJW 2007, S. 924, 924 et seq.

[231] See M. KILIAN, *Vergütung*, in: HENSSLER/PRÜTTING *Bundesrechtsanwaltsordnung: BRAO*, § 49b BRAO Rn. 36.

[232] OLG HAMM MMR 2012, S. 602, 603.

In a nutshell, in the field of mere initial consultancy, advertising may be carried out promoting flat-rate prices (estimated prices). Even if deplorable, this also allows lawyers to advertise in the initial consultation's sector using dumping prices (*Dumpingpreisen*). It is furthermore possible to advertise an initial consultation for free (*kostenloser Erstberatung*).[233] In Germany, nevertheless, a flat-rate advertising message with a "no win, no fee" clause is prohibited since this can only be agreed among a lawyer and a client in individual cases.[234]

4.2.5.2. Comparative advertising in Germany

Although the German legislator had opposed the comparative advertising in 1994, when the BRAO was adopted,[235] the objectivity requirement does not seem to preclude this advertisement's method.[236] Lawyers' comparative advertisement is not directly envisaged neither in the BRAO nor in the BORA. However, according to the German Constitutional law's freedom of expression and to Article 4 Directive 2006/114/EC – which states that comparative advertising shall, as far as the comparison is concerned, be permitted when the (a) to (h) requirements mentioned there are met[237] – comparative advertisement should be, in principle, allowed to lawyers in Germany.

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[233] See J. TEUBEL, K. WINKLER, *Beratung, Gutachten und Mediation - Anhang: Erfolgreiche (Vergütungs-)Verhandlungen*, in MAYER/KROISS, RVG, § 34 RVG Rn. 53; V. BULLA/ H. SCHÄFER, *Rechtsrat zum Nulltarif durch Anwälte nun allgemein zulässig? – Zugleich Anmerkung zu AnwGH Berlin*, NJOZ 2008, S. 1916 et seq.; OLG STUTTGART NJW 2007, S. 924, 924 et seq.; AnwG MÜNCHEN BRAK-Mitt. 2010, S. 274; LG ESSEN MMR 2014, S. 184, 184 et seq.; AnwGH NORDRHEIN-WESTFALEN BecksRS 2014, 13284;

[234] In this respect see K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 116.

[235] See again BT-Drucks. 12/4993, S. 28.

[236] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 44; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 196 et seq.; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 54; S. DÖBBELT, *Supra*, S. 164 et seq.

[237] See Article 4 Directive 2006/114/EC stating as follows: "*Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met: (a) it is not misleading within the meaning of*

Moreover, in relation to the Directive 2006/114/EC, it is worth noting that Article 8(4) states as follows: "*Nothing in this Directive shall prevent Member States, in compliance with the provisions of the Treaty, from maintaining or introducing bans or limitations on the use of comparisons in the advertising of professional services, whether imposed directly or by a body or organisation responsible, under the law of the Member States, for regulating the exercise of a professional activity*". Nevertheless, the *Satzungsversammlung* [238] has never adopted any limitations or bans concerning comparative advertisement carried out by lawyers so far.

Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive'); (b) it compares goods or services meeting the same needs or intended for the same purpose; (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price; (d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor; (e) for products with designation of origin, it relates in each case to products with the same designation; (f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products; (g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name; (h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor".

[238] Professional regulation of lawyers in Germany is partly laid down in Federal and Regional State laws and partly in self-regulatory measures (See §§ 18 et seq., 43 et seq., 59b and 191a et seq. BRAO). The self-regulatory part is adopted within the federal lawyer association BRAK (*Bundesrechtsanwaltskammer*). A special assembly (*Satzungsversammlung*) rather than the general assembly of BRAK is charged with the competence to adopt professional regulations (§§ 191 et seq. BRAO). The latter statutory provisions and the specialized self-regulatory body have been introduced as a result of two decisions of the BVerfG (BVerfG 1987, 76, 171; BVerfG 1987, 76, 196) in which the German Constitutional Court found the previous pattern of self-regulatory rule-making by the lawyers profession to infringe the Constitution. The member of the *Satzungsversammlung* are all elected from amongst the members of the profession. The public authorities do not interfere in the nominations for this body (or any other governing bodies), and no public interest criteria are specified in the law that should be taken into account in the adoption of professional regulations. § 59b BRAO merely defines the subject matters that the professional self-regulation should cover. The BRAO is based on the idea that the Federal and Regional lawyers associations represent the interests of the professionals and the profession only (See also §§ 73 and 89 BRAO). The BRAK therefore qualifies as an association of undertakings within the meaning of EU

Comparative advertising is also addressed by the *Gesetz gegen den unlauteren Wettbewerb* (UWG) – which is the law against unfair competition. More precisely, § 6 Abs. 2 UWG states that unfairness shall have occurred where a person conducting comparative advertising uses a comparison that: (i) does not relate to goods or services meeting the same needs or intended for the same purpose; (ii) does not objectively relate to one or more material, relevant, verifiable and representative features of the goods concerned, or to the price of those goods or services; (iii) leads in the course of trade to a risk of confusion between the advertiser and a competitor, or between the goods or services offered, or the distinguishing marks used, by them; (iv) takes unfair advantage of, or impairs, the reputation of a distinguishing mark used by a competitor; (v) discredits or denigrates the goods, services, activities or personal or business circumstances of a competitor; (vi) or presents goods or services as imitations or replicas of goods or services sold under a protected distinguishing mark. The previous provision can be used to implement Art. 4 Directive 2006/114/EC.

As a consequence, it is worth noting that a valid and objective comparison may be only carried out within very narrow limits because of the highly customised and intangible nature of the lawyers' performances and services, which are consequently very hard to compare.[239] For instance, the two following forms of advertising have been both held inadmissible in Germany because there was not an objective comparability: »*eine Anwaltskanzlei, wenn sie sich mit all[en] Rechtsgebieten abgibt, allenfalls nur durchschnittliches Wissen anbieten kann*«[240] (which means that if a law firm offers services in every kind of practice areas, this means that it can only guarantee an average quality knowledge) and »*einigen anderen auf diesem Gebiet tätigen Anwälten/innen [...] der Sachvortrag häufig sehr dürftig ist und keine Vertretung in der mündlichen Verhandlung erfolgt*« [241] (which means that taking into

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competition law (in this respect see I. E. WENDT, *EU Competition law and Liberal Professions: an Uneasy Relationship?*, Brill, 2012, p. 234).

[239] See K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, Vor § 6 BORA Rn. 196; S. DÖBBELT, *Supra*, S. 165;

[240] See OLG JENA NJW 2005, S. 2089, 2090; OLG BRAUNSCHWEIG NJW-RR 2003, S. 686, 687 f.

[241] See OLG FRANKFURT a.M. NJW 2005, S. 1283, 1283 f.

consideration some other lawyers operating in this field […] their defences are often very poor and there is no representation at the hearing).

Contrarily, a valid form of comparative advertisement is the one concerning, for instance, the comparison of the different fees applied for an initial consultation in relation to very standardized legal services (such as formal notices).[242]

4.2.6. Individual advertisement (*Einzelfallwerbung*): lawyers' advertisement shall not be aimed at soliciting specific instructions or a specific brief

§ 43b BRAO also prohibits lawyers' advertisement that is aimed at soliciting specific instructions or a specific brief. In this respect, the BGH's approach has been changing in the past few decades. At the beginning, in light of the BVerfG's leading case *Bastille*, the BGH in the judgment *Anwaltswerbung I* evaluated as an "*unzulässige gezielte Werbung um Praxis*" (which literally means unauthorized targeted advertisement for practice) an unasked invitation to a lecture with a dinner sent by a lawyer to non-(already)clients.[243] Later on, contrarily, in the so called *Anwaltswerbung II*, which was issued after the enactment of the new § 43b BRAO, the BGH held that an invitation to an information event with a free lunch-break, which was also sent to non-(already)clients, had to be interpreted as permissible advertising.[244] In other words, in the BGH's view, the inadmissibility should result from the circumstance that the advertising is »*oft als aufdringlich empfundenen Weise auszunutzen versucht, dass sich der Umworbene beispielsweise in einer Lage befindet, in der er auf Hilfe angewiesen ist und sich möglicherweise nicht frei für einen Anwalt entscheiden kann*«. This means that lawyers' advertisement should not be admitted when it is used in an intrusive way trying to take advantage of the client's need to legal assistance, advice and representation and when the client, because of these compelling necessities, may not be completely free to choose a lawyer.[245] Hence, the BGH held on the

[242] See H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 54; see also LG BREMEN GRUR-RR 2004, S. 332 f.

[243] See BGH GRUR 1991, S. 917, 919 et seq.

[244] See BGH GRUR 2002, S. 84, 86.; see also BGH GRUR 2002, S. 902, 904.

[245] See again BGH GRUR 2002, S. 84, 86.

inadmissibility of an individual case advertisement when a client needs for advice or representation and the lawyer knew that. The latest BGH's interpretation was embraced by part of the later German jurisprudence and literature.[246]

Later on, at the end of 2013, in the famous case »*Kommanditistenbrief*«, the BGH changed again its approach.[247] According to article 24 of the Directive 2006/123/EC, in the BGH view's, the mere fact that a potential client is addressed in the light of his/her specific need for advice is not sufficient in order to prohibit the lawyer's conduct.[248] More specifically, according to the BGH, the *Einzelfallwerbung* will not be prohibited if, on the one hand, the addressee is »*in einer Situation befindet, in der er auf Rechtsrat angewiesen ist und ihm eine an seinem Bedarf ausgerichtete sachliche Werbung Nutzen bringen kann*« (which means in a situation in which he/she is dependent on legal services to be carried out and he/she is able to benefit from an objective advertising message which is aligned with his/her

[246] In this respect in the jurisprudence see, OLG MÜNCHEN NJW 2002, S. 760, 761; OLG HAMBURG NJW 2004, S. 1668, 1669 et seq.; OLG HAMBURG NJW 2005, S. 2783, 2785; OLG MÜNCHEN NJW 2006, S. 517, 518; OLG SAARBRÜKEN BRAK-Mitt., 2007, S.278, 281; OLG MÜNCHEN GRUR-RR 2012, S. 163, 164; LG BERLIN BRAK-Mitt. 2007, S. 92; LG HAMBURG BeckRS 2009, 28231; LG KÖLN BeckRS 2014, 00066; AnwG MÜNCHEN BRAK-Mitt. 2008, S. 225, 226; AG WEILHEIM NJW 2013, S. 243, 244.

In this respect in the literature see, G. BÖHNLEIN, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 31; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 39; W. HARTUNG, MDR 2003, S. 488 et seq.; K. WOLF, *Anwaltliche Werbung - Zulässigkeit und Grenzen*, Baden-Baden, 2011, S. 64 et seq.; C. MENEBRÖCKER, *Anwaltswerbung – Was ist erlaubt?*, GRUR-Prax 2010, S. 191; RING, DStR 2011, S. 1636.

On the contrary see, instead, OLG NAUMBURG NJW-RR 2008, S. 445, 446; KG GRUR-RR 2010, S. 437, 439; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 24 et seq.; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, 43b BRAO, Rn. 31; S. DÖBBELT, *Supra*, S. 188 et seq.; M. KLEINE-COSACK, *Werbung um Einzelmandat*, AnwBl. 2004, S. 155; C. DAHNS, *Neue Entwicklungen bei der Einzelfallwerbung,* NJW-Spezial 2010, S. 703; M. W. HUFF, *Die zielgruppenorientierte Werbung von Rechtsanwälten - ein zulässiges Werbeinstrument*, NJW 2003, S. 3527; OLG KÖLN BRAK-Mitt. 2012, S. 281, 283.

[247] See BGH GRUR 2014, S. 86 et seq.

[248] See BGH GRUR 2014, S. 86, Rn. 18.

needs); while, on the other hand, the advertisement's addressee is not harassed/molested, neither coerced, nor taken by surprise/shocked.[249]

Like every other limitation of the freedom to advertise legal services, the restrictions to the *Alternative Einzelfallwerbung* (alternative case by case solicitation) need to be justified using legitimate/overriding reasons relating to public interests.[250] Moreover, also in this occasion, restrictions have to be proportionate. It is worth noting that the restrictions to lawyers' advertisement set out by § 43b BRAO are aimed at protecting the addressees from being coerced, taken by surprise or shocked by the advertising message's content or means, and at guaranteeing the free development of the clients informed opinion.[251] In this respect, the already mentioned protection of the rights of third parties can legitimately justify lawyers' advertisement limitations. However, an impairment of the rights of third parties cannot be inferred solely on the basis of a concrete need of legal advice or consultation and representation of the advertising addressee. Indeed, it is worth noting that often people with a specific need for legal advice have simultaneously an increased need for receiving appropriate information and advertisement concerning the legal advices he/she needs.[252] Moreover, in part of the literature view's, such an advertisement (*Einzelfallwerbung*) may also be not compatible with the core of the legal profession and may consequently impair the proper functioning of the administration of justice.[253]

In summary, the inadmissibility of an advertising measure cannot arise only from the lawyer's knowledge of the advertising's addressee compelling and concrete need for

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[249] See BGH GRUR 2014, S. 86, Rn. 21.

[250] See C. DAHNS, *Neue Entwicklungen bei der Einzelfallwerbung,* NJW-Spezial 2010, S. 703; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 22 et seq.; M. W. HUFF, *Die zielgruppenorientierte Werbung von Rechtsanwälten - ein zulässiges Werbeinstrument*, NJW 2003, S. 3527.

[251] See K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, 43b BRAO, Rn. 12; S. DÖBBELT, *Supra*, S. 189 et seq.; OLG KÖLN BRAK-Mitt. 2012, S. 281, 283.

[252] See S. DÖBBELT, *Supra*, S. 192; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 49.

[253] See M. RINGER, *Supra*, S. 161.

legal advice. This is true even if the lawyer's adverting message reaches a person with specific consulting requirements.[254] More specifically, it is also possible that the addressee would become aware of a specific need for action and/or advice only on the basis of the information or details contained in the lawyer's advertising message.[255] This may be read as a useful way to increase the clients understanding of the breadth of their right of defence and justice.

It is also worth reminding that, in Germany, lawyers advertising is surely permitted if it is not aimed at reaching a specific person or group of persons, but it is targeted to the general public (e.g. Television advertising).[256] Moreover, in the already mentioned *Ebay* judgment, the BVerfG held on the admissibility of lawyers services being advertised and sold on the internet platform Ebay.de because lawyers have no knowledge in advance of the last bidder and his/her specific need for legal consultation. Therefore, this kind of promotional activity cannot be interpreted as an unauthorized *Einzelfallwerbung*.[257]

Moreover, the client himself/herself may want to be contacted by one or more law firms. This is clearly admissible. For instance, in the so-called beauty contest or beauty parades, many law firms and lawyers introduce themselves – advertising the quality and price of their legal services – and the client afterwards will decide whether or not to give his/her mandate to one of the applicants. In such a case, there are no forms of harassment or pressure on the addressee, since he/she asked for the law firms to introduce themselves and advertise their services.[258]

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[254] OLG JENA GRUR 2006, S. 606, 607 et seq.

[255] See BGH NJW 2001, S. 2886, 2888; G. BÖHNLEIN, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO Rn. 31.

[256] See S. DÖBBELT, *Supra*, S. 185.

[257] See BVerfG GRUR 2008, S. 618, Rn. 18.

[258] See H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 44; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, 43b BRAO Rn. 34.

4.2.6.1. Potential or actual danger? How to assess the inadmissibility of an Einzelfallwerbung

It is worth noting that, in Germany, the mere protection of legitimate public interests against potential (rather than actual) dangers may be sufficient in order to justify lawyers advertisement restrictions.[259] For instance, in the field of the German lawyers' admission to the legal profession, according to § 7 No. 9 BRAO, an application for admission shall be rejected if the applicant's finances are in a state of deterioration (this shall be suspected to be the case if insolvency proceedings have been instituted against the applicant or if the applicant is entered in the register to be kept by the Insolvency Court or the Enforcement Court). Hence, the previous example seems to demonstrate that a mere potential risk of insolvency seems to be sufficient in order to reject a lawyer's application for admission to the legal profession.[260]

The previous approach seems to be extendible to the advertisement restrictions cases. More precisely, looking at the ECJ case law there are no doubts on the admissibility of restrictions and limitations based on only potential dangers.[261] According to article 24 of the Directive 2006/123/EC, there seems to be no need for an actual threat in order to restrict lawyers' advertisement. Moreover, the fact that advertising restrictions have to be examined taking into account all the relevant circumstances of the individual case and (following a case by case approach) and that the restrictions pursuant to article 24(2) must be proportionate does not call for an actual threat.[262]

Even in the case of limitations concerning unconscionable pestering advertising, according to § 7 UWG, no positive proof of an actual perceived annoyance of the

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[259] BVerfG NJW 1958, S. 1035, 1038; BVerfG NJW 2010, S. 1740, Rn. 23; BVerfG NJW 1993, S. 1969, 1970; OLG MÜNCHEN GRUR-RR 2012, S. 163, 165; H. J. AHRENS, in: *Gesetz gegen den unlauteren Wettbewerb* HARTE/HENNING, UWG, Einl G Rn. 98; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 14; G. MANSENN, in: VON MANGOLDT/KLEIN/STARCK, *Kommentar zum Grundgesetz: GG*, Art. 12 Rn. 167.

[260] See BGH NJW 2005, S. 1944, 1945; BVerfG NJW 2003, S. 2520, 2522.

[261] See OLG HAMBURG GRUR-RR 2010, S. 74, 77 et seq.

[262] See BGH GRUR 2014, S. 86, Rn. 14, 19.

addressee has to be demonstrated.[263] Moreover, the limitations set out by § 43b BRAO has been recently considered by the OLG München as being legitimately justifiable only on a potential threat basis. Hence, embracing this view, in order to assess the inadmissibility of an *Einzelfallwerbung*, a potential threat to the public interest seems to be sufficient. In the OLG München's view, indeed, in order to justify an *Einzelfallwerbung*'s restriction there is no need for further circumstances, such as an unintended harassment of the addresses or an actual restriction of their resolution liberty.[264]

In light of the above, the question concerning when such a potential threat is given, naturally emerge. In this respect, additional evidences on the existence of a potential danger have to be provided. A typical recommended approach consists into analysing the advertising measure in light of the European Union and German Constitutional Law requirements on the basis of all the circumstances of the individual case.[265] The previous standard/test will not lead to a demonstration of an actual threat because the positive evidence of an actual impairment suffered by the addresses is not going to be necessary. It seems moreover appropriate to carry out this typical approach taking into consideration the relationship between the intensity of the addressee's specific need for advice or consultation, on the on hand, and the intensity of the advertising

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[263] § 7(2) UWG states that a commercial practice unconscionably pestering a market participant shall be illegal and shall always be assumed in the case of advertising using a medium of commercial communication not listed under numbers 2 and 3 which is suited to distance marketing and through which a consumer is persistently solicited although it appears that does not want this; advertising by means of a telephone call, made to a consumer without his prior express consent, or made to another market participant without at least the latter's presumed consent; …

It is worth noting that advertising through telephone or email is not permitted without the consumers' consent (H. KÖHLER, in KÖHLER/BORNKAMM, UWG, § 7 Rn. 103 et seq.). On the other hand, advertisement via sending letter, flyers or brochures is generally permitted and the consumers because can easily protect themselves by putting on their mailboxes a sign stating, for instance, "Please no advertising".

[264] OLG MÜNCHEN GRUR-RR 2012, S. 163, 165.

[265] K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, 43b BRAO, Rn. 26, 30; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 48.

measure, on the other hand.[266] Moreover, part of the German literature believes it is appropriate to consider also whether the advertising measure' addresses are person with business experience who are less likely to be surprised/shocked by the lawyer's advertising measure under examination.[267]

Concerning the assessment of the "intensity" of an advertising measure, the general criteria developed by the BGH in the *Kommanditistenbrief* case must be fulfilled.[268] Accordingly, first of all, a specific person or a group of persons must be addressed by the *Einzelfallwerbung*; in addition to that, the *Einzelfallwerbung* must directly or indirectly take reference to the consumer's consulting need; lastly, the lawyer must be aware of the need for consultation of the addressee.[269]

Inadmissible advertising measures are surely the ones carrying out unacceptable harassment (*Unzumutbare Belästigungen*) according to § 7 UWG.[270] They are linked solely to the way in which the advertising message is promoted and not to the content of it.[271] The purpose of § 7 UWG is to protect market participants against undue prejudice to their private or business spheres.[272] Besides that, it is worth noting that the permissible intensity of the lawyer's advertising measure is strongly and strictly related and dependent on the intensity of the addressee's need for consultation; as a consequence, there is a clear

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[266] See OLG NAUMBURG NJW 2003, S. 3566, 3567; OLG NAUMBURG NJW-RR 2008, S. 445, 446; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 48; H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 40; BGH GRUR 2014, S. 86, Rn. 12 et seq.

[267] See S. DÖBBELT, *Supra*, S. 203; K. VON LEWINSKI, in: HARTUNG, *Berufs- und Fachanwaltsordnung: BORA/FAO*, Beck, München, 2012, 43b BRAO, Rn. 33.

[268] See again BGH GRUR 2014, S. 86, Rn. 12 et seq.

[269] See G. BÖHNLEIN, in: FEUERICH/WEYLAND, BRAO, § 43b BRAO, Rn. 31.

[270] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 45.

[271] See K. SCHÖLER, in: Harte/Henning, UWG, § 7 Rn. 15; H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 7 Rn. 34.

[272] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 7, Rn. 2.

interaction between these two criteria.[273] In general, one must consider that a potential client seeking for an advice or for legal representation, holding a specific and actual legal need, may be experiencing a period of uncertainty due to his/her legal issues (and this factor should not be overlooked). Hence, on the one hand, this status of uncertainty should not be abused or still be complicated by importunate advertising; while, on the other hand, it has to be taken into account that, if someone needs to some extent for a legal advice, he/she will be grateful to obtain appropriate information related to the compelling legal issue he/she will need to solve through a lawyer advice or legal representation.[274]

Another crucial consideration concerns whether the advertising addressee who need a concrete legal advice, after receiving the lawyer's advertisement, is still free to choose a different lawyer or another law firm without any kind of time-related pressure or other kind of compulsions.[275] Moreover, the stronger is the urgency of the legal issue of the potential client, the more cautiously and reluctantly a lawyer will have to act when advertising his/her services.[276] Therefore, in certain situations such as the death of a loved one or other serious events, the lawyer may be obliged to largely restrict his/her advertising campaign until the complete ban to carry out any kind of promotional activity.[277] In the latter case, indeed, the emotional exceptional status of the surviving relatives has to be taken into account by the lawyer which should at least wait some time before contacting these potential clients.[278] In this respect, moreover, the physical presence of the lawyer during the first contact with the potential client will be seen as a critical factor especially in the accidents cases since the anonymity will be immediately

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[273] In this respect see M RINGER, *Supra*, 167.

[274] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 23 et seq.

[275] OLG MÜNCHEN BRAK-Mitt. 2008, S. 225, 227.

[276] See M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 48.

[277] See M. KLEINE-COSACK, *Werbung um Einzelmandat*, AnwBl. 2004, S. 155 et seq.; S. DÖBBELT, *Supra*, S. 197 et seq.; BGH GRUR 2010, S. 1113, Rn. 17 et seq.

[278] See K. SCHÖLER, in: Harte/Henning, UWG, § 7 Rn. 127 et seq.

abolished and this may constitute an embarrassing moment for the addressee, restricting his/her freedom of resolution.[279]

4.2.6.2. Ambulance chasing case and distribution of flyers

A clear example of unacceptable *Einzelfallwerbung* is the so-called ambulance chasing case. More precisely, a lawyer cannot chase an ambulance in order to give his/her business cards to the victims or to their relatives.[280]

Furthermore, the OLG München held on the inadmissibility of the distribution of advertising flyers before the conference room of a shareholders meeting to the participants (in this case the law firm contracted some promoters to hand out flyers).[281] However, since the OLG München decision does not contain any further details on the factual scenario, it is not easy to understand and decide whether or not the previous judgment has to be upheld. In this respect, the mere distribution of flyers cannot be judged as inadmissible according to the general competition law principles. It is worth noting, indeed, that the mere distribution of advertising material (e.g. flyers), which is different from the targeted individual contact with the public, is fundamentally unobjectionable.[282] Lastly, the addressees seem to be free to accept the distributed flyers or not;[283] in particular, they can simply refuse the lawyer's offer without much effort through a dismissive gesture.[284]

Harassing advertising seems to be legitimately restricted only if additional circumstances are going to be assessed. Sometimes these additional factors may be also

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[279] See OLG STUTTGART NJW-RR 1995, S. 1269, 1270; OLG NAUMBURG NJW 2003, S. 3566, 3567; OLG NAUMBURG NJW-RR 2008, S. 445, 446.

[280] See EGH CELLE BRAK-Mitt. 1991, S. 168; H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 7 Rn. 73.

[281] OLG MÜNCHEN GRUR-RR 2006, S. 201 et seq.

[282] See BGH GRUR 1994, S. 639, 640.

[283] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 7 Rn. 75.

[284] See BGH GRUR 2005, S. 443, 445.

related to the content of the advertising message (for instance if the flyers' distribution is verbally obtrusive).[285] Moreover, one could not assume that a potential client will feel morally obliged to take up to the lawyer's promoted services simply by accepting an advertising flyer, particularly because legal services are usually very expensive and so the client will usually take a not impulsive and reasoned choice.[286]

Furthermore, in most of the cases, there is not the lawyer's physical presence when the first (advertisement) contact with the potential client is established. In this respect, in order to judge the advertising campaign as inadmissible more (negative) factors and requirements should be met. More precisely, indeed, without the lawyer physical presence, the addressees can more easily refuse the flyer offer and make a choice without being under pressure. The admissibility's limits can, however, be exceeded by simply putting the addressee under unnecessary pressure, for instance by the urgent reference to rising damages and or imminent prescription, even if actually the limitation period is relatively far away.[287]

4.3. *Gesetz zur Bekämpfung des unlauteren Wettbewerbs* (UWG) - act against unfair competition

Nowadays, in Germany, lawyers' advertising has not only to deal with the lawyers' professional law set out in the BRAO and BORA, but also with the *Lauterkeitsrechts* (which is the fair trade law). In Germany, especially after the leading BVerfG's case *Bastille*, the right of fairness has become a requirement on which the assessment on the admissibility of a lawyers' advertising measure has to be strictly evaluated.[288]

The *Gesetz zur Bekämpfung des unlauteren Wettbewerbs* (UWG) – which is the act against unfair competition – is aimed at protecting competitors, consumers and other

[285] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 7 Rn. 75; BGH GRUR 2005, S. 443, 445; M. KLEINE-COSACK, *Bundesrechtsanwaltsordnung: BRAO Kommentar*, 6. Auflage, § 43b BRAO Rn. 46.

[286] See BGH GRUR 1994, S. 639, 640.

[287] See OLG HAMBURG NJW 2005, S. 2783 et seq.; LG KÖLN BeckRS 2014, 00066.

[288] See H. PRÜTTING, in: HENSSLER/ PRÜTTING, BRAO, §43b BRAO Rn. 52.

market participants against unfair commercial practices and is neither tailored only to lawyers, nor contains any explicit rule for lawyers. However, there are some standards in the UWG that can be relevant and applicable to lawyers' advertising.[289]

4.3.1. History of the law

In Germany, the right of fairness is based on a long tradition. It has been legally codified since the first version of the *Gesetz zur Bekämpfung des unlauteren Wettbewerbs* was issued in 1896. The act constituted a reaction to the negative effects of the freedom to trade, which increasingly led to unfair competition, that could not have been appropriately dealt without a legislative act.[290] However, the 1896 version of the UWG did not contain a comprehensive protection against anticompetitive behaviours but it only regulated individual unfair competition's cases.[291]

In 1909, the UWG was amended with a second act against unfair competition that contained a general clause (§ 1) thanks to which every case of unfair competition could be caught and that remained unchanged until 2004. § 1 UWG 1909 stated that any person who acts in the course of the trade for the purpose of competition in a way which is contrary to good moral, may be called upon to cease his/her conducts and to pay damages.

In the following years, several prompt legislative amendments and Court judgments gradually developed the UWG content as well as its interpretation. [292] Moreover, in 2004, the UWG was largely reformed and, in the new version of the act, the case law developed by the German Courts in the previous years were included into an illustrative catalogue. This catalogue, together with the other unfair conducts, exemplified the newly created § 3 UWG 2004 which stated as follows: (1) Unfair commercial practices shall be illegal if they are suited to tangible impairment of the interests of competitors,

[289] See M. RINGER, *Supra*, S. 247.

[290] See E. KELLER, *Gesetz gegen den unlauteren Wettbewerb*, in: Harte/Henning, UWG, Einl A Rn. 1.

[291] See E. KELLER, *Gesetz gegen den unlauteren Wettbewerb* in: Harte/Henning, UWG, Einl A Rn. 1.; H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, Einl Rn. 2.2.

[292] See E. KELLER, *Gesetz gegen den unlauteren Wettbewerb* in: Harte/Henning, UWG, Einl A Rn. 8 et seq.

consumers or other market participants. (2) Commercial practices towards consumers shall be illegal in any case where they do not conform to the professional diligence required of the entrepreneur concerned and are suited to tangible impairment of the consumer's ability to make an information-based decision, thus inducing him to make a transactional decision which he would not otherwise have made. Here reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Reference shall be made to the perspective of the average member of a group of consumers who are particularly vulnerable and clearly identifiable because of their mental or physical infirmity, age or credulity, if it is foreseeable for the entrepreneur that his commercial practice will affect the latter group only. (3) The commercial practices towards consumers, listed in the Annex to this Act, shall always be illegal.[293]

Finally, the Directive 2005/29/EC on unfair commercial practices called for more reforms[294] and consequently, in 2008, the UWG was amended again even if its structure was mainly preserved.[295]

4.3.2. Structure of the UWG

Concerning the structure and the content of the UWG (as amended in 2008), in the first chapter (§§ 1-7 UWG), the purpose of the Act (§ 1) as well as some general definitions (§ 2) are given. In the same chapter, §§ 3-4 and the UWG's Annex provide the definition of the prohibited and inadmissible unfair commercial practices creating also an illustrative catalogue. Moreover, misleading commercial practices, comparative advertising and unacceptable harassing advertising are defined and treated respectively at §§ 5-6-7. The second chapter (§§ 8-11 UWG) regulates the legal consequences of unacceptable commercial acts; while the third chapter (§§ 12-15 UWG) includes procedural provisions

[293] See BGBl. 2004, Teil I, S. 1414-1421; E. KELLER, *Gesetz gegen den unlauteren Wettbewerb* in: Harte/Henning, UWG, Einl A Rn. 15.

[294] See F. HENNING-BODEWIG, *Der Schutzzweck des UWG und die Richtlinie über unlautere Geschäftspraktiken*, GRUR 2013, S. 238.

[295] See BGBl. 2008, Teil I, S. 2949 et seq.

and chapter four (§§ 16-20) provides for criminal law provisions as well as provisions on regulatory offences.

Concerning the purpose of the act, § 1 states that the UWG shall serve the purpose of protecting competitors, consumers and other market participants against unfair commercial practices. At the same time, it shall also protect the interests of the public in undistorted competition.

First of all, concerning the competitors' safeguard, competitors need in particular the protection of their competitive freedom of activity and development to be adequately protected.[296] On the other hand, the competitors' interests to the preservation of their actual existing costumers' relationships as well as to avoid fair and factual comments concerning their enterprises are not protected by the UWG.[297]

Second, consumers' safeguard in the UWG seems to be aimed at protecting clients' freedom of decision making (in order to avoid that an unfair advertising message may induce them to make a transactional decision which they would not otherwise have made) as well as other rights, like the consumers' right of personality.[298] Nevertheless, the entrepreneur is not prohibited from exerting any (fair) influence on one or more consumers. The UWG sets limits only when the advertising may endanger the consumers' freedom to make informed and rational decisions.[299] According to § 3(2), consumers' protection need to be set using as a standard the so-called average consumer that, in the BGH's view, means averagely informed, attentive and judicious/rational.[300] The word "average" does not mean that a cross-section of the entire population should be taken

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[296] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 10.

[297] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 11.

[298] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 16; O. SOSNITZA, *Gesetz gegen den unlauteren Wettbewerb: UWG*, in: OHLY/SONITZA, UWG, § 1 Rn. 20 et seq.

[299] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 17.

[300] See BGH GRUR 2013, S. 644, Rn. 25; BGH GRUR 2012, S. 943, Rn. 13;

into account. Rather, one should focus on the respective target group. When the commercial practice is directed towards a particular group of consumers, reference shall be made to the average member of that particular group.[301] It is worth noting that the consumers' level of information, attention and understanding, varies according to the context and, in particular, to the product or service offered.[302] The previous assumption is particularly true in the legal service's field where there are strong information asymmetries between consumers and adverting lawyers which are offering on the market credence goods.

Concerning the protection of the general interest, it is worth noting that public interests are not protected by the UWG if they are not related to the general interest in an unadulterated competition. This consideration is true and valid also for the interest in the proper administration of justice. Hence, the UWG protection is applicable only if the market participants or competition on the market are affected as such.[303] Moreover, competition is not unfairly distorted if it is not hinder by unfair commercial actions but can freely unfold.[304]

In light of the above explanation, the question concerning to what extent lawyers' advertising may affect the three UWG protection areas needs to be addressed. Preliminarily, the issue whether lawyers should be subject to the scope of the UWG need to be analysed. According to § 1 UWG, competitors, consumers and other market participants need to be protected against unfair commercial practices. Moreover, § 2(1) UWG, defined a "commercial practice" as any conduct for the benefit of the person's or a third party's business – before, during, or after, the conclusion of a business transaction – which is objectively connected with promoting the sale or the procurement of goods or

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[301] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 32.

[302] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 34-35.

[303] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 41.

[304] See H. KÖHLER, *Gesetz gegen den unlauteren Wettbewerb*, in KÖHLER/BORNKAMM, UWG, § 1 Rn. 43.

services, or with the conclusion or the performance of a contract concerning goods or services. Commercial practices are carried out by entrepreneurs which means any natural or legal person engaging in commercial practices within the framework of his/her or its trade, business, craft or profession and anyone acting in the name of, or on behalf of, such person. The definition of entrepreneur is to be understood using a pure economic (and functional) approach. In this view, it is only necessary to carry out an independent economic activity for a certain period of time and which is aimed at distributing or selling goods or services in exchange for remuneration.[305] According to the previous economic approach, the German jurisprudence included the lawyers into the entrepreneur's definition in order to apply the UWG to the (economic) activities carried out by lawyers.[306] Moreover, advertising has surely to be considered as a commercial practice. Indeed, Art. 2(d) Directive 2005/29/EC states that the phrase "commercial practices" means any act, omission, course of conduct or representation, commercial communication including advertising and marketing. In light of the above, lawyers' advertising has to be considered as a commercial practice within the application of the UWG.

4.3.3. Misleading commercial practices

According to § 5 UWG, a commercial practice shall be deemed to be misleading if it contains untruthful information or other information suited to be deceptive according to the circumstances illustrated in § 5(1) No. 1-7.

Whereas in the past the misleading advertising's prohibition was primarily aimed at directly protecting competitors and only indirectly consumers; nowadays, it is aimed at protecting all market players as well as the interest of the general public in genuine competition in the market.[307] Moreover, as already mentioned, in order to assess whether

[305] See BGH GRUR 2009, S. 871, Rn. 33.

[306] See BGH GRUR 2013, S. 950 et seq.; BGH GRUR 2012, S. 215 et seq.; BGH GRUR 2013, S. 945 et seq.

[307] See J. BORNKAMM, *Gesetz gegen den unlauteren Wettbewerb*, in: KÖHLER/BORNKAMM, UWG, § 5 Rn. 1.5. et seq.

an advertising message is misleading, the advertising measure must be analysed with the eyes of an average informed addressee who will devote to the advertising messages a different level of attention depending on the context and the service offered.[308]

According to § 5 UWG, an information is a statement of an entrepreneur whose content must be verifiable.[309] Moreover, valuations may also be subject to the misleading control if they are based on facts whose (un)correctness is therefore objectively verifiable.[310]

Lastly, there must be no actual deception of the consumers for a breach of the prohibition on misleading commercial practices. The mere suitability to be deceptive (potential danger) is sufficient for and advertising message to be caught by § 5 UWG. Moreover, an advertising message can be objectively true and correct but still inadmissible if, according to the subjective understanding of an average addressee, it is suitable for evoking inaccurate ideas.[311]

4.3.4. Advertisement on the admission of the lawyers to the exercise of the legal profession

In Germany, the jurisprudence has been always and repeatedly approaching the issue concerning the promotion and disclosure of information related to the admission of the lawyers to the exercise of the legal profession. In this respect, since 2007, German lawyers are no longer admitted only to a particular Court because with the admission to the *Rechtsanwaltskammer* (German Bar association) they can, in principle, represent client before every German District Court or Higher Regional Court (OLG). No further

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[308] See BGH GRUR 2012, S. 1053, Rn. 19; BGH GRUR 2007, S. 981, Rn. 20.

[309] See J. BORNKAMM, *Gesetz gegen den unlauteren Wettbewerb*, in: KÖHLER/BORNKAMM, UWG, § 5 Rn. 2.37.

[310] See J. BORNKAMM, *Gesetz gegen den unlauteren Wettbewerb*, in: KÖHLER/BORNKAMM, UWG, § 5 Rn. 2.37; O. SOSNITZA, *Gesetz gegen den unlauteren Wettbewerb: UWG*, in: OHLY/SONITZA, UWG, § 5 Rn. 2.51.

[311] See J. BORNKAMM, *Gesetz gegen den unlauteren Wettbewerb*, in: KÖHLER/BORNKAMM, UWG, § 5 Rn. 2.67; BGH GRUR 2013, S. 409, Rn. 29.

separate authorizations are required anymore.[312] In other words, lawyers' entitlement to act representing client before courts is valid before every German court; the only exception occurs when lawyers wish to represent their client in a civil case before the Federal Court of Justice (BGH), where specific admission's prerequisites are still required.

Recently, the first civil division of the BGH (which is competent in particular for competition law cases) held that a lawyer advertising message stating »*Rechtsanwalt auch zugelassen am OLG Frankfurt a.M.*« which literally means "lawyer also admitted to the OLG Frankfurt a.M." does not represent misleading advertising.[313] The BGH justified its decision explaining that consumers could not know that German lawyers currently have the right of audience in every Higher Regional Courts (OLG). Moreover, in the BGH's view, consumers would not have the impression that to have the right of audience not only before administrative and district courts but also before the OLG Frankfurt a.M. requires lawyers to hold any kind of special requisite. In the BGH's view, the previous advertising message instead plays an important role to guarantee the consumers' interest in receiving (useful) information.

The previous judgment cannot be upheld. Indeed, as the BGH correctly acknowledges, it may be true that an average consumer is not aware of the comprehensive ability of the German lawyers to have the right of audience before every German courts. However, part of the German literature argued that this will lead consumers to interpret an advertising message stating »*Rechtsanwalt auch zugelassen am OLG Frankfurt a.M.*« as a particular quality which distinguishes the advertiser lawyer from the other lawyers.[314] This consideration is nevertheless incorrect since every German lawyer can represent clients before every Higher Regional Courts. As we already highlighted, the BGH held that this information may be useful for the consumers because it clarifies that the advertiser lawyer in question could also represent them in a possible appeal case before the OLG

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[312] See C. DAHNS, *Die kleine BRAO-Reform – Änderungen durch das Gesetz zur Stärkung der Selbstverwaltung der Rechtsanwaltschaft*, NJW 2007, S. 1554 et seq.

[313] See BGH GRUR 2013, S. 950 et seq.

[314] See See J. BORNKAMM, *Gesetz gegen den unlauteren Wettbewerb*, in: KÖHLER/BORNKAMM, UWG, § 5 Rn. 2.115; C. MENEBRÖCKER, *KG: Zulässige Briefkopf-Angabe zur Zulassung des Anwalts* BeckRS 2013, 12033, GRUR-Prax 2013, S. 366.

Frankfurt.[315] However, in this way, the possibility for a consumer to take an informed decision is just being eliminated since he/she may indirectly and wrongly assume that other lawyers/competitors can only represent him/she in the first instance and not in an appeal case or not before the OLG Frankfurt in particular. In light of the above, part of the German literature stated that the mentioned advertising message does not guarantee an informed consumers' choice; instead it boosts their disinformation.[316] In this view, advertising messages that emphasize the German lawyers' comprehensive right of audience as a special feature of the advertiser lawyer, may be considered misleading. Accordingly, the following advertising messages have been held inadmissible, being misleading: »*Rechtsanwalt bei dem Landgericht und dem Oberlandesgericht*«[317] (Lawyer at the District court and at the Higher Regional Court); »*Zugelassen bei allen Amts-, Land- und Oberlandesgerichten*«[318] (Admitted to all administrative, District and Higher Regional Courts); »*Zugelassen auch bei allen Oberlandesgerichten*«[319] (Admitted to all Higher Regional Courts); »*Zulassung OLG, LG, AG Bremen*«[320] (Admitted to OLG, LG, AG Bremen).

4.3.4.1 Spitzenstellungswerbung

Another typical example of misleading advertising is the *Spitzenstellungswerbung*. This refers to messages by which a lawyer claims to have a certain advantage or feature compared to other competitors.[321] This kind of advertising is generally admitted in the

[315] See BGH GRUR 2013, S. 950, Rn. 19.

[316] See M. RINGER, *Supra*, S. 269.

[317] BGH BRAK-Mitt. 2012, S. 79, Rn. 8.

[318] AnwG TÜBINGEN BRAK-Mitt. 2009, S. 189.

[319] AnwG HAMM, BRAK-Mitt. 2009, S. 189

[320] OLG BREMEN GRUR-RR 2013, S. 333, 333 et seq.

[321] See H. HELM, in: Gloy/Loschelder/Erdmann, *Wettbewerbsrecht*, § 59 Rn. 205; S. WEIDERT, *Gesetz gegen den unlauteren Wettbewerb (UWG)*, in: HARTE/HENNING, UWG, § 5E Rn. 100.

legal services fields provided that the information advertises is factually correct, objective and verifiable.[322]

SECTION II – ITALY

1. Regulated professionals' advertisement in Italy

In the Italian legal framework, among the behavioural measures enacted to safeguard the regulated professionals (among which lawyers), there are those regulating and limiting professional advertisement. Regulated professional advertisement's limitations essentially come from deontological provisions, which are set out by the professional representative bodies.[323] Furthermore, advertisement restrictions are based on the consideration that the regulated professional should be treated differently compared to the entrepreneurs because the former would be characterized by greater dignity and decorum compared to the latter.[324]

Historically, regulated professional advertisement was banned entirely. In the pre-capitalistic corporations' era, advertisement was generally considered as a way to promote services and goods on the market primarily used for frauds and consequently incompatible with the professional corporations' decorum and dignity.[325] The Italian

[322] See J. BORNKAMM, *Gesetz gegen den unlauteren Wettbewerb*, in: KÖHLER/BORNKAMM, UWG, § 5 Rn. 2.126 et seq.

[323] The Italian *Corte di Cassazione* held that the provisions of the Italian *Codice Deontologico Forense* issued by the Italian *Consiglio Nazionale Forense* have to be qualified as mandatory rules of law which are based on the principles expressed in the professional law governing regulated professionals (see, CORTE DI CASSAZIONE, Sezioni Unite, *Judgement of the 6 June 2002, n. 8225*, in *Giust. Civ.*, 2002, I, p. 2441 et seq.).

[324] See V. MELI*, La pubblicità degli avvocati*, in *Analisi giur. econ.*, 2005, p. 61.

[325] See CONSIGLIO NAZIONE FORENSE, *Judgement 23 April 1991, n. 56*, available at https://www.codicedeontologico-cnf.it/?cat=5&paged=832, in which it is stated as follows: "*il ripudio dei mezzi pubblicitari di ogni genere costituisce tradizione e vanto dell'Avvocatura italiana, che nel corso di decenni ha sempre confermato il rifiuto di forme di emulazione diverse da una dignitosa gara di meriti dimostrati attraverso le opere e lo studio*" which means that the advertisement rejection in every forms is a tradition and a pride for the Italian

regulated professionals strongly defended the general advertisement ban until the liberalization reform occurred in 2006 with the so called "Legge Bersani" (law 4 August 2006, n. 248).[326]

1.1. Regulated professionals' advertisement within the Italian Constitution

So far, the Italian *Corte di Cassazione* and part of the Italian literature have been expressing views against an inclusion of the regulated professional advertisement into the area of article 21 of the Italian Constitution, which states that all persons have the right to express freely their ideas by word, in writing and by all other means of communication. The nature of the mentioned constitutional article on the freedom of expression would not admit restrictions with the exception of those provided by article 21(6) itself, stating as follows: printed publications, public performances and events contrary to public morality are forbidden.[327]

Regulated professionals' advertisement should rather be included in the area of article 41 of the Italian Constitution, which states as follows: private sector economic initiative shall be freely exercised. In this view, regulated professionals' advertisement constitutes an expression of the private sector economic activity which, according to the following article 41(2), cannot be conducted in conflict with social usefulness or in such manner that could damage safety, liberty and human dignity. Moreover, according to article 41(3), the Italian legislator may limit the regulated professionals' advertisement for social purposes.

1.2. Preliminary considerations: How consumers choose regulated professionals in Italy

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lawyers category which in the past decades has always confirmed the refusal to compete using different ways further than a dignified competition based on work and research.

[326] In this respect see M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259, which correctly pointed out that before the "legge Bersani" was issued, health professions could promote their services although by observing several restrictions.

[327] In this respect, see G. D'IPPOLITO, *Controllare la pubblicità*, Milano, 1988, p. 16, nt. 7

Generally, in Italy, reputation is still the crucial criterion used by consumers in order to choose among the large number of professionals the one who seems to be the most suitable one.[328] It is worth noting that in Italy, in 2009, the *Centro Studi Investimenti Sociali* (Censis) – which is a leading Italian research institution – launched a market study (that was published by the *Consiglio Nazionale Forense*) concerning the different ways by which consumers choose the most suitable lawyer.[329] In accordance with the previous research's results, the majority of consumers (68%) choose a lawyer following friends' and relatives' tips; while lawyers or law firms social notoriety was ranked second, with approximately the 12% of consumers basing their choices on this factor.

In this respect, part of the Italian literature has considered regulated professionals' advertisement as a reputation's surrogate or a way to create artificial reputation.[330] In light of the regulated professionals advertisement's importance, it seems to be crucial to assure the presence of a stricter liability for regulated professionals when coming to advertisement together with the creation of reasonable and proportionate limitations in the regulated professionals' advertisement sector within the limit of article 24 of the Directive 2006/123/EC.[331]

1.3. The Italian Legal Framework

Concerning the Italian legal framework, in the past few years, the legislation in the field of regulated professionals' advertisement has been sharply increasing. Nowadays,

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[328] In this respect see G. C. HAZARD, A. DONDI, *Etiche della professione legale*, Bologna, 2005, p. 200.

[329] See CONSIGLIO NAZIONALE FORENSE, *Il ruolo sociale dell'avvocato e la sua immagine nei media*, Antezza, Matera, 2009, 25 et seq.

[330] See again G. C. HAZARD, A. DONDI, *Etiche della professione legale*, Bologna, 2005, p. 203.

[331] See D. CERRI, *Deontologia, comunicazione e pubblicità forense*, paper presented at the *Seminario di deontologia: il codice etico dell'Avvocato,* available at https://dokodoc.com/seminario-di-deontologia-il-codice-etico-dell-avvocato.html, 28 novembre 2009.

beyond article 2(1)(b) law 4 August 2006, n. 248[332] which has radically innovated and liberalized the regulated professionals' advertisement matter, there are many other provisions that have followed the Legge Bersani's innovative path: article 34 legislative decree 26 March 2010, n. 59 (which transposed in the Italian legal framework the content of the Directive 2006/123 EC) which is the mirror of article 24 of the Directive 2006/123 EC; article 3(5) decree law 13 August 2011, n. 138, converted with law 14 September 2011, n. 148, which confirmed, in the abstract, the lawfulness of regulated professionals' advertisement, underlining the compelling need to issue a specific regulation in order to preserve the truthfulness and transparency of the advertising messages.

Currently, in Italy, the crucial and most updated regulation is article 4 D.P.R. 7 August 2012, n. 137[333] which has to be read together with the provisions of the the professional codes of conduct (among which the lawyers' one is going to be deeply examined).

1.3.1. Article 4 D.P.R. 7 August 2012, n. 137

First of all, it has to be highlighted that article 4 D.P.R. 7 August 2012, n. 137 has to be interpreted in light of article 34 legislative decree 26 March 2010, n. 59. This means that, from a general perspective, regulated professionals' advertising can be freely carried

[332] Art. 2(1)(b) law 4 August 2006, n. 248 has repealed all the Italian existing legislation and regulations which, in relation to the regulated professionals' activities provided a ban (even if partial) to carry out informative advertisement concerning the professional qualifications and specializations, the characteristics of the services offered as well as the prices and costs of the services in accordance to the transparency and truthfulness criteria whose observance is verified by the professional associations.

[333] Art. 4 D.P.R. 7 August 2012, n. 137 provides that informative advertisement, concerning the regulated professionals' activity, the specialization, the professional qualifications, the structure of the professional office and the fees required, is admitted and can be carried out with every means. Moreover, the informative advertisement shall be fit for purpose, truthful and correct, must not violate the obligation of professional secrecy and must not be equivocal, misleading or disparages. The violation of the previous paragraphs constitutes a disciplinary offence as well as a breach of legislative decree 6 September 2005, n. 206 and of legislative decree 2 August 2007, n. 145's provisions.

out. However, exceptions to this general principle are admitted if justifiable on the basis of overriding reasons related to the public interest.

Furthermore, it is worth noting that article 17 of the Italian *Codice Deontologico Forense* approved by the *Consiglio Nazionale Forense* contains the word "information"[334] instead of the word "informative advertisement" as article 4 D.P.R. 7 August 2012, n. 137 does. This terminological distinction might have meant the CNF's intent to exclude that lawyers' advertisement could be transmitted via mass media consequently admitting lawyers' advertisement only in the form of information addressed to a single, specific and potential client instead of the general public (via postal messages, emails, *dépliants* or internet websites).[335]

Moreover, article 4 D.P.R. 7 August 2012, n. 137 states that informative advertisement, concerning the regulated professionals' activity, has to be admitted by using every means. As a consequence, according to article 4 D.P.R., regulated professionals may advertise their services also using mass media and the regulated professionals' Codes of conducts should not be able to refer to the decorum criterion in order to ban, *a priori*, the possibility to advertise via one or more specific channels.[336]

However, article 4 D.P.R. states that only the "informative" advertising messages may be transmitted using every means. This clear specification may be interpreted in two

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[334] See article 17 of the Italian *Codice Deontologio Forense* (official English translation) – 'Information on the practice of the professional activity' – which states as follows:

1. A lawyer is allowed, for the protection of the community reliance, to inform people about his professional activity, the organization and structure of his law office, and about any achieved specializations and scientific qualifications.

2. Disclosure in public by any means, including computer, shall be transparent, truthful, correct, unambiguous, non-misleading, non-denigrating or suggestive, and not comparative.

3. In any case, the information provided shall refer to the nature and extent of the professional obligation.

[335] In this respect see M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 et seq., which nevertheless believes that article 17 of the Italian *Codice Deontologio Forense* prohibiting denigrating, suggestive and comparative advertising, would have implicitly confirmed the possibility to use others advertisement's means and forms.

[336] In this respect, see M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 et seq..

different ways. One might embrace a pure literal interpretation: this implies that only informative advertisement seems to be admissible. Part of the literature, instead, has interpreted article 4 D.P.R. as follows: an advertising message has to be "also informative". This means that, in the latter view, regulated professionals can also introduce, within the content of their advertising messages, suggestive and commercial elements, although non-predominant.[337] The latter interpretation seems to be confirmed by article 4(2) D.P.R. Article 4(2), indeed, states that informative advertisement must not be disparaging. From the existence of the disparaging advertising messages' express ban, one can implicitly deduct that regulated professionals' advertising messages may normally exceed the barrier of the purely informative content without denigrating other competitors.[338] In sum, regulated professionals' advertisement must have an informative content and cannot be therefore only or mainly suggestive.

Furthermore, article 4 D.P.R. does not provide for a minimum informative content of the advertising messages. This means that the regulated professionals' codes of conduct may further clarify the previous aspect without imposing unreasonable and disproportionate limitations. [339] Hence, according to part of the Italian literature, suggestive and commercial elements cannot be absolutely prohibited. However, National professional associations might be able to limit this kind of advertising contents if the restrictions are justifiable on the basis of overriding reasons related to public interest. The

[337] See M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 et seq., which prefers the latter interpretation because, in his view, one of the main characteristic of the advertising messages consists into having a promotional significance. In other words, if advertisement is an instrument through which increase competition among regulated professional, its content cannot be purely informative. In relation to the characteristic professionals' advertisement should have, see also AGCM, *IC 15 on the professional associations' field* (1997), available at www.agcm.it; D. POSCA, *Pubblicità per professionisti: adesso è possibile*, in *Il Denaro.it*, 2011.

[338] In this respect see again M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 et seq., which argues that advertising messages using absolute superlative adjectives seems to be prohibited because implicitly denigrating competitors. See also G. GHIDINI, V. FALCE, *Riserve e concorrenza nell'esercizio delle libere professioni:* adelante, con judicio, in *Dir. ind.*, 2005, n. 4, p. 390, which believe that advertising messages criticizing competitors should not be admissible.

[339] See M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 et seq.

issue whether professional associations should intervene in order to protect values like dignity and decorum (introducing further limitations to regulated professionals' advertisement) – which exceed the truthfulness and correctness (expressly required by Article 4(2) D.P.R. 7 August 2012, n. 137) – is still much debated in the literature and in the recent case law (see *infra* Chapter I, 3.1.).[340]

Article 4 D.P.R. 7 August 2012, n. 137 also states that informative advertisement by regulated professionals' is admissible if its content concerns the regulated professionals' activity, the specializations, the professional qualifications, the structure of the professional office and the fees required. There are two different ways to interpret the topics expressly included in the previous list. According to a first restrictive interpretation, the list set out by article 4 D.P.R. has to be considered as exhaustive. In this view, topics which are not expressly included into art. 4 D.P.R.'s list will not fall into the category of the admissible informative advertisement. According to a second interpretation, the list

[340] It is worth noting that the *Corte di Cassazione* recently held as follows: "*E' vero infatti, che il D.L. n. 223 del 2006, art. 2, conv. con L. n. 248 del 2006, ha abrogato le disposizioni legislative che prevedevano, per le attività libero-professionali, divieti anche parziali di svolgere pubblicità informativa. [...] Sennonché diversa questione dal diritto a poter fare pubblicità informativa della propria attività professionale è quella che le modalità ed il contenuto di tale pubblicità non possono ledere la dignità e il decoro professionale, in quanto i fatti lesivi di tali valori integrano l'illecito disciplinare di cui al R.D.L. n. 1578 del 1933, art. 38, comma 1. Lo stesso art. 17 del regolamento deontologico forense dispone che sussiste la libertà di informazione da parte dell'avvocato sulla propria attività professionale, ma che tale informazione, quanto alla forma ed alle modalità deve rispettare la dignità ed il decoro della professione e non deve assumere i connotati della pubblicità ingannevole, elogiativa, comparativa*" (In this respect, see CORTE DI CASSAZIONE, Sezioni Unite, *Judgement of the 18 November 2010, n. 23287*, cit.; CORTE DI CASSAZIONE, Sezioni Unite, *Judgement of the 13 November 2012, n. 19705*, cit.). This means that it is true that art. 2 D.L. n. 223/2006 (converted by the L. n. 248/2006) repealed all the Italian existing legislation and regulations which, in relation to the regulated professionals' activities provided for a ban (even if partial) to carry out informative advertisement […] However, even if the lawyers may legitimately carry out informative advertising concerning their professional activity, nevertheless the forms and the contents of lawyers' advertisement must comply with the professional dignity and decorum and any conduct carried out in violations of these criteria integrates a disciplinary offence according to article 38(1) R.D.L. n. 1578/1933. Moreover, article 17 Lawyers' Code of Conduct (previous version) states that a lawyer is allowed to inform the general public about his/her professional activity. However, it also states that the disclosure's forms and contents must comply with the professional dignity and decorum and shall not be misleading, laudatory and comparative.

set out by article 4 D.P.R. as to be interpreted as non-exhaustive. In this view, nevertheless, while typical advertising topics (the ones expressly included into article 4 D.P.R.'s list) cannot be legitimately limited or excluded by codes of conduct's provisions; atypical advertising topics (the ones which are not expressly included into article 4 D.P.R.'s list) seem to be legitimately prohibited and limited by codes of conduct's provisions.[341]

In light of the latter interpretation, for instance, comparative advertisement should be included between the atypical topics. This means that, in this view, comparative advertising cannot be prohibited *a priori* but only by reasoned and proportionate rules set out by national professional associations. Embracing a much more restrictive interpretation, comparative advertisement should be declared admissible only if related and limited to the comparison of the prices of the services offered. In this latter view, since informative advertisement (in general) and comparative advertising (in particular) shall be fit for purpose, if comparative advertising is related to atypical topics it would become equivocal and deceptive.[342]

Article 4(3) D.P.R. 7 August 2012, n. 137 states that an article 4(2)'s violation constitutes cumulatively a disciplinary offence as well as a breach of legislative decree 6 September 2005, n. 206 and legislative decree 2 August 2007, n. 145's provisions (which are respectively the Italian Consumer Code and the Italian legislative decree on misleading advertising). Recently, the Italian *Consiglio di Stato* (the highest administrative Court in Italy) argued that the use of the speciality criterion should not be applicable between a disciplinary provision and a law.[343] As a consequence, Article 4(3) D.P.R. 7 August 2012, n. 137 would not infringe the speciality principle. More precisely, in the *Consiglio di Stato*'s view, the deontological provisions set out by the professional codes of conduct are aimed at protecting legal interests (such as the independence, the dignity and the integrity of the profession as well as professional secrecy) which are different from the consumers'

[341] See M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 ss.

[342] See U. PERFETTI, *Regolamenti e parametri cosa cambia per l'avvocato*, available at *www.ordineavvocati.catanzaro.it,* 2012

[343] See CONSIGLIO DI STATO, Ad. Plen., *Judgment 11 May 2012, n. 13*, available at www.giustizia-amministrativa.it.

freedom to choose the most suitable regulated professionals.[344] In conclusion, in this view, article 4(3)'s provision on the cumulative enforcement competences among the Italian Competition Authority and the Italian professional associations has to be positively evaluated. In this way, indeed, the Italian Competition Authority together with the Italian professional associations will be able to catch both the conducts infringing deontological provision and the measures against the Italian Consumer Code.[345]

1.4. Italian Regulated Professionals' advertisement: the current scenario

Undoubtedly in Italy, in the past few years, regulated professionals have been promoting their services mainly on the internet and using advertorials. Only a few Italian regulated professionals still promote their services on local newspapers, while they increasingly do so on the internet.

In 2011, Italian regulated professionals invested only 10 million Euros on advertising campaigns, while the sector annual total turnover was approximately 9 billion Euros.[346] Furthermore, it is worth noting that the personal relationship between clients and regulated professionals has never allowed mass media advertisement to play a crucial role in this space.[347] This is why, for instance, lawyers and law firms tend to favour sophisticated and selective media enabling them to reach certain pockets of consumers.

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[344] See M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 et seq.

[345] *Contra* see AGCM, *IC 34 on the professional associations' field* (2009), available at www.agcm.it, 80, where the Italian competition authority stated that an interventions' duplication in the field of regulated professionals' advertisement is useless and, moreover, it risks to create confusion among the general public as well as the issue concerning the likelihood of conflicting judgments. See also G. BERTOLOTTI, *Esercizio in forma societaria delle professioni intellettuali e impresa*, Torino, 2012, p. 134, which believes that in relation to lawyers and small law firms the sanctioning power of the Italian Competition Authority is inappropriate and represents a cost to the community which is socially inacceptable.

[346] In this respect, see D. POSCA, *Pubblicità per professionisti: adesso è possibile*, in *Il Denaro.it*, 2011.

[347] See N. F. ENGSTROM, *Legal access and attorney advertising*, in *19 Journal of gender, social policy & law*, 2011, 1083 et seq., which noted that in the US the so-called "settlement mills" (which offer standardize services to clients seeking to obtain small compensatory damages) usually advertise their services using television advertisement.

Often advertorials, specialized newspapers, reviews, guides, and websites report the regulated professional's contacts, and information; or display ranking lists and award prizes regarding the best lawyer or the best law firm in specific practice areas. It is worth noting that these newspapers, and reviews must be completely independent from the awarded or ranked professionals or from the professionals advertising their services on it. In Italy, nevertheless, in the legal sector for instance, it sometimes happens that the mentioned specialized reviews and professional guides take financial inducements from some lawyers and law firms which are not only interested in being mentioned in the guides, but also into obtaining greater visibility through the payment of additional kickbacks.[348]

Online advertisement warrants a different treatment from other more invasive and intrusive advertising means, such as radio or television. More specifically, it is worth noting that potential clients will engage with a regulated professional's online ads only after having accomplished a two-step process. First, consumers will need to search for a specific regulated professional's website or a website that is to some extent related, for instance, to the name of a lawyer or a law firm. Secondly, consumers will need to click on that link deciding to access and see the website's contents. In this respect, considering the process by which consumers engage with internet ads, an internet advertising's absolute ban seems to be not admissible or justifiable. As a consequence, even self-praise

[348] In this respect see AGCM, *Decision n. 22510-PB586*, *15 June 2011*, available at www.agcm.it, in which the Italian Competition Authority sanctioned a company which allowed doctors to insert their contacts on an online database (called "Registro Italiano dei medici") apparently free of charge but actually by paying money. Due to the scarce transparency of the costs of the service offered the company was sanctioned for the promotion of misleading advertising which in the AGCM's view could have mislead doctors who wanted to insert their contacts on the Registro Italiano dei medici.

See also G. FLORIDIA, *Gli orientamenti delle authorities in tema di pubblicità nelle libere professioni*, Milano, 2000, which believes that professional guides, if absolutely independent, might be very helpful in order to strength consumers' freedom to choose the most suitable professional.

advertising messages and the use of superlative adjectives seem to be both admissible or at least have to be evaluated more softly when related to this (new) advertising channel.[349]

The Italian literature seems to be unanimous in claiming that professional associations should pay much more attention on the content of internet advertising messages.[350] First of all, the use of comparative adjectives should be caught and sanctioned when the primacy of a professional among others is not objectively justified or is not based on the rating of an independent third party. Secondly, the keyword stuffing practice (see *infra* chapter III, 3.3.) should be sanctioned when a regulated professional will obtain a position of undeserved primacy in relation to the others as well as when the acquired keywords correspond to a competitor's denomination. Moreover, advertising messages with misleading, unlawful or substantially denigrating and defamatory contents should be detected by the professional associations and promptly removed by the professional. Lastly, the advertising messages promoted by several Italian law firms offering to potential clients the chance to seek for an advice on the internet (by submitting some personal information) without specifying whether the legal advice will be offered free of charge or after payment and whether the advice will be exhaustive or a mere generic guidance, have to be condemned.[351]

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[349] See M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, in *Riv. dir. ind.*, 6, 2012, p. 259 et seq. In this author view, the previous assumption is not valid in the case of internet advertisement carried out through banners that may be viewed by internet users without clicking on a chosen link or internet content.

[350] See D. CERRI, *Deontologia, comunicazione e pubblicità forense*, relazione presentata in occasione del *Seminario di deontologia: il codice etico dell'Avvocato,* available at https://dokodoc.com/seminario-di-deontologia-il-codice-etico-dell-avvocato.html, 28 November 2009, who is concerned by the wide presence of promotional contents on the lawyers and law firms' websites.

[351] In this respect see, CORTE DI CASSAZIONE, Sezioni Unite, *Judgement of the 18 November 2010, n. 23287*, available at www.altalex.com, in which the *Corte di Cassazione* upheld a sanction against some lawyers which had promoted an advertising message stating "Prima consulenza gratuita" (which means first consultancy free of charge). In the Court view, the previous message has to be held ambiguous because it did not specify whether the lawyers were offering an exhaustive advice or a generic classification of the legal issue at stake (the latter being always free of charge in Italy).

2. Lawyers' advertisement in Italy

Article 24 of the Italian Constitution protects the right of defence stating as follows: all persons are entitled to take judicial actions to protect their individual rights and legitimate interests. The right of defence is inviolable at every stage and level of the proceedings. In this regard, lawyers carry out activities which are aimed at guaranteeing the right of defence and justice that are expressly provided and protected by the Italian Constitution. In light of the protection of the constitutional right of defence, the apposition of reasonable and proportionate limitations to the exercise of the legal profession (which, as already said, is an expression of the private-sector economic initiative protected by article 41(1) of the Italian Constitution) seems to be to some extent acceptable.

The different consideration between lawyers and other regulated professionals appears to be demonstrated by the circumstances. That is, the former do not have to comply with the general D.P.R. 7 August 2012, n. 137 anymore, but with a specific law on the lawyer profession (i.e. Law 31 December 2012, n. 247). According to article 2 Law 31 December 2012, n. 247, Italian lawyers are sole practitioners (and not entrepreneurs) and the exercise of the legal profession has to be aimed at guaranteeing to the citizens the effectiveness of the protection of their rights. In order to ensure the achievement of such a general interest function, the Law 31 December 2012, n. 247 lies down several values, which are most of the time aimed at restricting the free exercise of the legal profession. In the Italian legislator view, only in this way consumers would benefit from high quality services carried out by (on average) experienced and professionally creditable lawyers.

From a coordinated reading of articles 3, 6 and 8 Law 31 December 2012, n. 247, lawyers have to comply with the duty of professional secrecy and a public and solemn declaration of commitment as well as the principles of independency, loyalty, probity, dignity, decorum, diligence and competence. Moreover, when exercising their professional activity, lawyers need to take into consideration the social relevance of the right of defence as well as the principle of fair competition on the market. In light of the above, one could argue that, in the lawyers' market, free competition is one of the principles characterizing lawyers' activity which, nevertheless, has to peacefully cohabit

with all the other principles and values set out by the Italian legislator and aimed at guaranteeing the protection of the rights of consumers. In other words, compared to the other regulated professionals' market, in the lawyers' market, the free competition principle seems to be subject *a priori* to further restrictions justified on the consideration that lawyers carry out a general interest's profession which is ultimately aimed at guaranteeing the constitutional right of defence.[352]

Lastly, in the CNF's view, to comply with the decorum and dignity principles when advertising is much more important if compared to the single lawyer's interest to gain new clients.[353] In this respect, the CNF sanctioned, for instance, a lawyer for uploading on his website pictures of his wife with revealing clothing aimed at attracting customers, being an indecorous advertising message.[354]

2.1. Article 10 Law 31 December 2012, n. 247

In relation to the advertisement field, article 10 Law 31 December 2012, n. 247 provides for stricter restrictions rather than article 4 D.P.R. 7 August 2012, n. 137 which is instead applicable to regulated professionals different from lawyers. More specifically, article 10 Law 31 December 2012, n. 247 which has the title "*Informazioni sull'esercizio della professione*" (that is information on the professional activity) states as follows: A lawyer is allowed to inform people about his/her professional activity,[355] the organization and the

[352] In this respect, see G. SCARSELLI, *La legge professionale forense tra passato e futuro*, in *Riv. trim. di dir. e proc. civ.*, 2012, p. 182

[353] See CONSIGLIO NAZIONALE FORENSE, *Judgement 29 November 2012, n. 170*, www.codicedeontologico-cnf.it.

[354] See CONSIGLIO NAZIONALE FORENSE, *Judgement 10 December 2007, n. 211*, www.codicedeontologico-cnf.it.

[355] In this respect, see CONSIGLIO NAZIONALE FORENSE, *Opinion 21 September 2011, n. 88 - COA of Verona's query*, www.codicedeontologico-cnf.it, where it is stated that the Ombudsman's title may be mentioned in a lawyer's advertising message because this title adds a *quid pluris* to the lawyer's professional competences and it is strictly linked with his/her professional activity. This will enable consumers to make their choices having a new useful and not deceptive element to take into account especially if their case involved a preliminary and binding mediation procedure.

structure of his/her law office, and about any achieved specializations and scientific and professional qualifications. Disclosure in public by any means, including internet, shall be transparent, truthful, correct and not comparative with other professionals, ambiguous, misleading, denigrating or suggestive. In any case, the information provided shall refer to the nature and extent of the professional obligation. The violation of the provisions provided in this article constitutes a disciplinary offence.

First of all, the Italian Competition Authority pointed out that the Italian legislator's choice of the word "information" instead of the word "advertisement" is open to challenge because the former would be an improper, limitative and misleading word.[356] In the AGCM's view, indeed, the possibility for lawyers to use advertisement in order to promote their services has not been expressed with due clarity using the word "information". Contrarily, the CNF highlighted that the word "advertisement" is not used at all even at a European level, in the context of article 24 Directive 2006/123 EC where, instead, the notion of "Commercial communications by the regulated professions" has been selected.[357] In other words, in the CNF's view, if the European legislator did not use the word advertisement there are no valid justifications in order to impose to the Italian legislator to use such a word instead of "information". Moreover, the CNF recently pointed out that the Directive 2006/123 EC also clearly distinguished the paraphrase "Commercial communications by the regulated professions" from the strictly commercial advertising. It is worth noting, indeed, that the Whereas (96) of the Directive states as follows: "the obligation to make available certain information in the provider's information documents, which present his services in detail should not cover commercial communications of a general nature, such as advertising, but rather documents giving a

[356] See AGCM, *AS602*, *18 September 2009*, *Riforma della professione forense*, available at www.agcm.it; AGCM, *AS974, 9 August 2012*, *Nuova disciplina dell'ordinamento della professione forense*, available at www.agcm.it.

[357] See CONSIGLIO NAZIONALE FORENSE, *Osservazioni sulla segnalazione AGCM del 21 settembre 2009 in ordine al ddl di riforma della professione forense*, approved by the CNF on 25 September 2009, available at www.consiglionazionaleforense.it.

detailed description of the services proposed, including documents on a website".[358] In this respect, in the legal sector, it would not be possible to indiscriminately carry out advertising campaigns (which are for instance suggestive, comparative or not compliant with the dignity and decorum principles); it is nevertheless allowed the disclosure of information related to the lawyer's activity, the fees applied, the contents and the terms and conditions of a legal service offered in order to rationally orientate the consumers' demand.[359]

Secondly, while article 4 D.P.R. 7 August 2012, n. 137 expressly states that informative advertisement, concerning the regulated professionals' fees, is allowed with every means; article 10 Law 31 December 2012, n. 247 does not. This means that even if article 10 Law 31 December 2012, n. 247 were interpreted as a non-exhaustive list, atypical advertising topics (which are not expressly included into article 10's list), such as the applicable fees, may be legitimately prohibited and excluded by the *Codice Deontologico Forense*'s provisions. In the case of lawyers' fees, nevertheless, article 10 omission, would not entail a ban for lawyers to advertise their fees because the *Codice Deontologico Forense* has not expressly prohibited lawyers from doing that so far.

Article 10 Law 31 December 2012, n. 247 expressly states that disclosure in public by any means shall be not comparative with other professionals. This means that, in Italy, comparative advertisement is forbidden in the lawyers' market. Considering the comparative advertisement issue, the *Consiglio Nazionale Forense* has always considered that the legal services tend to be highly complex, and are not completely and easily comparable, as opposed to other services characterised by greater understanding from the side of the consumer, commonly understood, and where objective comparison metrics

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[358] See CONSIGLIO NAZIONALE FORENSE, Ufficio Studi*, La pubblicità dell'avvocato*, Rome 22 October 2013, availalble at http://www.viewnetlegal.com/index.php/codice-etico/14-articoli/14-cnf-la-pubblicita-dell-avvocato.

[359] See CONSIGLIO NAZIONALE FORENSE, *Decision 28 December 2012*, *n. 204*; *Decision 15 October 2012*, *n. 152*; *Decision 22 September 2012*, *n. 121*; *Decision 2 March 2012*, *n. 34*, all available at www.codicedeontologico-cnf.it, where the CNF held that lawyer's advertising campaigns have to be held inadmissible when they are strictly and purely commercial in nature because of the excessively ostentatious competition on price and because of the differences in the size of the typefaces used in the message.

exist. For further consideration on lawyers' comparative advertising see *infra* Chapter I 5.2. where it is stated that in the legal services sector, comparative advertisement should not be banned if absolutely objective.

Furthermore, it has to be said that, according to article 10 Law 31 December 2012, n. 247 and to article 17 of the *Codice Deontologico Forense*, disclosure in public by any means shall not be suggestive. In this regard, the *Consiglio Nazionale Forense* recently upheld the decision of an Italian Local Bar Assocation (although reducing the sanction) concerning the excessive self-praise of a lawyers' interview on newspapers and reviews.[360] More specifically, the sanctioned lawyer in 2009 (when the previous and more restrictive *Codice Deontologico Forense* was still in force) accepted to grant an interview in a periodical, strongly emphasizing his professional abilities. The following expressions were held to be inadmissible by the CNF being laudatory and not complying with the balance, moderation, discretion and confidentiality criteria: "*La sua grande soddisfazione è quella di aver fondato uno studio che, oltre ad essere diventato un punto di riferimento per i suoi clienti, è una fucina di professionisti*" (which literally means that his great satisfaction is that he has founded a law firm, which besides becoming a go-to law firm for his clients, is a professionals forge); "*io sono sempre in giro per il mondo, passo da un consiglio di amministrazione all'altro, da un collegio sindacale all'altro, mi muovo in continuazione, mi informo e mi documento su ogni cosa, sono curioso di tutto e tengo la mente in perenne ebollizione*" (which literally means that I always travel around the world, I sit in different boards, I seek further information and get information about every matter, I am curious about everything and I keep my mind active); "*Potrei scrivere un libro per tutte le cose che ho fatto. Ad esempio, 21 anni fa, salvai un signore che era rovinato dagli strozzini*" (which literally means I could write a book about all the things that I have done in my entire life. For instance, 21 years ago, I saved a gentleman who was besieged by the loan sharks); "*E poi la stima e il rispetto che si rispecchia in questo studio associato che non è mai stato*

[360] See CONSIGLIO NAZIONALE FORENSE, *Judgement 11 November 2015*, *n. 163*, available at https://www.codicedeontologico-cnf.it/GM/2015-163.pdf. See also CONSIGLIO NAZIONALE FORENSE, *Judgement 22 December 2007*, *n. 242*, www.codicedeontologico-cnf.it, where it was held inadmissible a lawyer's use of the qualification "Giudice di Pace" in his letterhead because it was aimed at legitimating the lawyer as a previous judiciary's member in a self-laudatory way creating among potential consumers false expectations which is not permitted according to the dignity and decorum principles.

e non sarà mai un condominio di avvocati, ma una fucina di professionisti dove ognuno da il meglio di se stesso" (which literally means that in my law firm there are mutual esteem and respect and this is why it is not a lawyers' condominium, but rather a professionals' forge where everyone gives his/her best).[361]

As already pointed out, in the CNF's view, the previous statements have to be held as an unlawful form of self-praise advertisement. Moreover, the lawyer's self-praise interview seems to illegitimately suggest that other competitors do not adequately seek or get information or that they usually practice in law firms, which are basically comparable to lawyers' condominiums. Hence, indirectly, consumers will understand from the interview that the other law firms could not meet the high standard of authority and professional competence that the interviewed lawyer and his law firm are able to offer in the market. In light of the above, one could argue that the lawyer's interview will not meet the comparative advertisement requirements, being also prohibited according to article 10 Law 31 December 2012, n. 247 and to the (new version of the) *Codice Deontologico Forense*. In other words, even in the context of the new *Codice Deontologico Forense* (where self-praise information is no more directly banned) the prohibition on comparative and suggestive advertisement messages are fully able to catch self-praise messages which for these reasons may not be compliant with the dignity and decorum principles.

Moreover, article 10 Law 31 December 2012, n. 247 also states that the violations of the provisions provided in this article constitute disciplinary offences. However, while Article 4(3) D.P.R. 7 August 2012, n. 137 states that an article 4(2)'s violation constitutes

[361] In relation to lawyers granting interviews in newspapers or periodicals, see also CORTE DI CASSAZIONE, Sez. Un., *Judgement 3 May 2013*, n. 10304, available at www.expartecreditoris.it where it is interpreted as a form of hidden advertising the interview granted by a lawyers on a periodical because, considering the type of publication, its title, its form and its content, readers would not have been able to understand with immediacy that the interview integrated a form of lawyer's advertising message; see also CONSIGLIO NAZIONALE FORENSE, *Decision 15 March 2013*, *n. 40*, www.codicedeontologico-cnf.it where it is stated that the lawyer's intention to promote his/her services through grating an interview in violation of deontological rules has to be proven; similarly see CONSIGLIO NAZIONALE FORENSE, *Decision 2 March 2012*, *n. 48*, www.codicedeontologico-cnf.it.

cumulatively a disciplinary offence as well as a breach of the Consumer Code and of the misleading advertisement law; article 10 does not include the latter violations.

Lastly, it is worth noting that lawyers' advertising on the internet is now explicitly allowed by article 10 Law 31 December 2012, n. 247 which states that disclosure in public is permissible by any means, including computers. However, recently, the *Consiglio Nazionale Forense* was sanctioned by the Italian Competition Authority for having adopted an opinion on the canvassing practice sanctioned by article 19 (previous version) of the *Codice Deontologico Forense*. More specifically, paying a monthly rate, lawyers started advertising and selling their legal services at a discount price on an online platform managed by a third party. Moreover, consumers, buying a card by the third party (the owner of the website) could access the online platform, search the lawyers' offer, and eventually directly buy the discounted legal services contacting the lawyers. In this respect, the *Consiglio Nazionale Forense* issued the opinion n. 48/2012 on 11 July 2012 restrictively interpreting the previous version of article 19(1) and (3) of the *Codice Deontologico Forense* (in force at that time) which stated that: (i) Italian lawyers were not allowed to carry out conducts aimed at attracting consumers by means of agencies or brokers or ways which do not comply with the fairness and decorum; (ii) lawyers were not allowed to offer, either directly or through a third party, their professional services at the clients' domiciles and in work places, rest places, leisure place and generally in public places or places open to the public.[362] In light of the above opinion, Italian lawyers immediately terminated their

[362] More specifically, the *Consiglio dell'Ordine di Verbania* sought for an Opinion of the *Consiglio Nazionale Forense* in relation to the compatibility with article 19 *Codice Deontologico Forense* of the conducts adopted by lawyers and consisting in the offer of discounted legal services on an internet website owned and managed by a third party. In this respect, the *Consiglio Nazionale Forense* held that the nature of the website at stake (in which the discounted legal services' offer can promiscuously appear together with other goods and services' offers completely different among one another and homogenised by the feature of the economic convenience) leads, *in re ipsa*, to the vilification of the professional services to only price related considerations. Moreover, in the *Consiglio Nazionale Forense*'s view, the lawyers' use (sometimes invasive) of the internet in order to promote their legal services represents an evolving trend of which one must to take note and that has to comply with the principles and ethical values which characterize the lawyer profession. In a nutshell, in the CNF's view, the third party managing the platform is an entity which is interposed, against payment of a monthly rate, between lawyers and potential clients in order to enable the

contracts stipulated with the third party managing the internet platform in order to avoid to be sanctioned by the CNF.

After the third party managing the internet platform's notification, the Italian Competition Authority launched an investigation concerning the case at stake. In the Italian Competition Authority's view, the CNF's opinion n. 48/2012 unlawfully limited the Italian lawyers' use of the internet as a new way to attract a relevant number of consumers. This would have made impossible to lawyers to use the internet in order to promote their services and to compete in order to attract new potential consumers. Moreover, the CNF's opinion would not have permitted competition and comparison between the services offered by geographically dispersed lawyers and law firms. In light of the above investigation, the Italian Competition Authority sanctioned the CNF with a monetary penalty of about 1 million Euros (also but not only) for having adopted the opinion n. 48/2012 against the internet websites which offer to the affiliated consumers discounts on professional services, based on the assumption that such a practice would conflict with the canvassing prohibition sanctioned by the previous version of article 19 of the *Codice Deontologico Forense.*[363] According to the Italian Competition Authority,

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former to attract new consumers. In this view, lawyers advertising messages on the online platform were not only aimed at promoting lawyers' services but also at concretely attracting new clients in violation of the previous version of article 19(1) of the *Codice Deontologico Forense*. Lastly, in the CNF's view, the method of spreading of the advertising messages constitutes a violation of article 19(3) of the *Codice Deontologico Forense* which has to be extensively interpreted to encompass the ban to offer legal services to the potential consumers profiting of consumers' access to the internet.

[363] According to the new version of the *Codice Deontologico Forense* the mentioned conducts would have been nevertheless caught under article 37 which states as follows: "*1. A lawyer is forbidden to obtain relations with clients through agents or wheeler - dealers or any other means not in compliance with honesty and decorum.*

2. A lawyer shall not offer or pay commissions or any other remuneration to another lawyer or any other person as compensation for the introduction of a client or for obtaining professional assignments.

3. A lawyer violates the disciplinary rules if he offers gifts or services to third parties, or if he makes payments or promises advantages in order to obtain legal assignments.

4. A lawyer is forbidden to offer, both directly and through a third person, his professional performances at a consumer's house, in places for work, rest, leisure and, in general, in public places or places open to public.

actually, the CNF's intervention was aimed at limiting competition among lawyers on the price and economic terms of professional services.[364]

For recent developments concerning lawyers' advertisement on the internet in Italy see *infra* Chapter III, 4.

2.2. Article 35 of the new Italian Lawyers Code of Conduct

Before concluding on the lawyers' advertisement restrictions within the Italian legal framework, one has certainly to mention article 35 of the new *Codice Deontologico Forense* which titles "Duty to provide correct information" and states as follows: "*1. A lawyer who provides information on his professional activity shall respect the duties of truth, integrity, openness, secrecy and confidentiality, anyway referring to the nature and limits of the professional obligation. 2. A lawyer shall provide neither comparative information about other professionals nor ambiguous, misleading, denigrating, evocative, otherwise containing reference to qualifications, roles or jobs not concerning his professional activity. 8. In giving information to the public, a lawyer shall not indicate the names of his clients or assisted parties also in case the clients should agree with the publication. 9. Forms and methods of providing information shall anyway respect the principles of dignity and decorum of the profession*".

The content of the article is self-explanatory and there is no need to comment on it apart from the consideration that it goes hand in hand and does not differ from article 10 Law 31 December 2012, n. 247. However, there are two aspects one might want to briefly examine. The first one is that, while in Germany, according to § 43b BRAO and § 6 Abs. 1 BORA, lawyers' advertisement has to be related to the lawyers' professional activities and the phrase *professional activities* has to be interpreted in a very broad sense (see *infra* Chapter II, Section I, 4.1); in Italy, according to article 35 *Codice Deontologico Forense*, a lawyer cannot advertise information containing reference to qualifications, roles or jobs not concerning his/her professional activity. This means that, in Italy, only direct

5. A lawyer is also forbidden to offer, without any request, a tailored performance, that is to say a performance addressed to a specific person for a specific business.

6. The breach of duties under previous sub-sections entails the enforcement of censure as disciplinary sanction".

[364] See AGCM, *Decision n. 25154*, *22 October 2014*, available at www.agcm.it

information about the legal activities carried out by a lawyer can be legitimately advertised. Contrarily, information concerning other occupations carried out at the same time by a lawyer, knowledge of foreign languages, sports success, etc. cannot be legitimately advertise. This is because, this kind of information, being not directly related to the lawyers' professional activities or services offered, cannot be considered as useful one for the consumers in order to make a more informed choice.

The second point one might want to mention concerns paragraph 8 of article 35 of the new *Codice Deontologico Forense* which provides that, when providing information to the public, a lawyer shall not indicate the names of his/her clients or assisted parties also if the clients agree with the publication. More specifically, while in Germany (see *infra* Chapter II, Section I, 4) § 6 Abs. 1 BORA states that references to cases and clients may only be made provided that the respective client explicitly given his/her consent; this cannot be done in Italy. Recently, in this respect, the Italian *Corte di Cassazione*[365] upheld a *Consiglio Nazionale Forense*'s decision on the legitimacy of such restriction. Most importantly, in doing so, the *Corte di Cassazione* also highlighted that, when assessing the legitimacy of the much broader restrictions provided in the case of lawyers' advertisement if compared to the entrepreneurs' ones, one has to take into consideration the peculiarities of the lawyer profession. In the Court view, lawyers are not only sole practitioners, but also those who made possible the widespread access and correct exercise of the jurisdictional role. To support it, no trial can be celebrated in Italy (apart from the civil lawsuits with a very limited economic value) without a lawyer being involved.

In the Court view, due to the strong public law nature ("*valenza pubblicistica*") of the lawyers' activities, the relationship between clients and lawyers should not be influenced by the will, the personal assessment or the economic evaluation of the parties. This is why the client's consent with the publication cannot be sufficient in order to discard the lawyers' ban to indicate the names of his/her clients or assisted parties. In other words, in the Court view, the relationship between a lawyer and a client is more than a private

[365] See CORTE DI CASSAZIONE, Sez. Un., *Judgment 19 April 2017*, *n. 986*, available at www.cortedicassazione.it

relationship and cannot simply be reconciled into a pure market logic. More specifically, according to the Court, the Italian legislator has not deemed as decisive the will of the parties neither at the establishment neither at the termination of a client-lawyer relationship: (i) in the criminal proceedings, a lawyer enrolled in the list of the defending counsels nominated by the court is imposed to the party who does not have his/her own lawyer and, once appointed, the lawyer cannot refuse to provide representation or interrupt it without justification; in the civil proceedings, when a lawyer is replaced during a proceeding being discharged, the lawyer is not *per se* deprived by his/her power and obligation arising from the legal regulations.

To conclude, in the Court view, restrictions of lawyers' advertisement (such the one provided by paragraph 8 of article 35 of the new *Codice Deontologico Forense*) are justifiable thanks to the strict interconnection between the two souls of the lawyer profession: to be a sole practitioner, on the one hand, and to be a necessary middleman for the proper exercise of the jurisdictional role, on the other hand. The latter role, to be properly carried out in the interest of the Italian consumers, might require to the Italian lawyers to comply with much stricter restrictions if compared to the entrepreneurs when coming to advertisement.

3. Preliminary findings

In Italy and Germany, despite the wind of liberalisation and the numerous and relevant amendments in the domestic legislations that have occurred in the last few years, lawyers still face and have to deal with several restrictions when advertising their services. These limitations concern (i) the object of the legal services a lawyer might legitimately advertise, (ii) the means a lawyer might use for promoting his/her advertising messages and (iii) the insistence and the language used when promoting them.

In these two countries, the *querelle* regarding to what extent some reasonable rules restricting lawyers' conducts in the field of advertisement might be legitimate and fall outside the scope of Article 101(1) when they are (i) objectively necessary to achieve some overriding purposes or objectives and (ii) proportionate is still open and unsolved. On the one hand, the European Commission and the National Competition Authorities tend to

maintain their positions that the legal services advertisement area should be only regulated by the general rules on deceptive advertisement as the entrepreneurs advertisement area is; on the other hand, the European, the German and Italian rules still maintain a high level of speciality in the field of the lawyers' advertisement, providing and justifying much more restrictions for lawyers, when compared to entrepreneurs. Moreover, the latter position is strengthened and strongly supported by the National bar associations and by the lawyers Code of conducts set out by these professional organizations in which much stricter restrictions are provided and their enforcement is required directly to the National Bar associations.

In this scenario, there seems to be no black or white solutions and therefore the approach one might decide to embrace is to examine the limitations and restrictions in force in a specific country in order to assess their legitimacy on a case by case basis. This has been done in the previous sections by describing and analysing the restrictions set out by the German and Italian current legislations and code of conducts (also the ones concerning and/or based on the dignity and the decorum of the legal profession). It is worth noting that, due to the restrictions in force, the search of information concerning legal services might become more complex in these two countries. However, some of the restrictions, both the ones concerning the content and the ones related to the way in which the advertising messages are promoted (even the deontological one), might be necessary and proportionate to protect consumers by information overload. As already explained in detail in chapter one, indeed, it might be very hard for consumers to distinguish the truthful and useful information from the worthless and deceptive one. This is evidently the case for those messages that include indecorous or undignified contents being purely emotional, suggestive and fascinating or for those aggressive, incessant and intrusive messages being indecorous or undignified the ways in which the messages are promoted or the means and the mechanisms with which they are carried out.

To conclude, within the German and Italian legal frameworks, the limitations (even if based on the decorum and dignity) set out by the law or the lawyers code of conducts might be justifiable when connected with both the need to defend the lawyers'

reputation – that is strictly related to the quality of the legal services offered to the ultimate consumer, and the need to allow clients to knowingly choose a good quality lawyer, with the right degree of integrity and experience in order to guarantee the consumer's constitutional right of defence.

CHAPTER III – LAWYERS' ADVERTISEMENT ON THE INTERNET

1. Introduction: purpose and structure of this chapter

"*How much protection legal advertising will receive in cyberspace is an even more unsettled issue, especially since the Internet is a new technology and all advertising on it, including attorney advertising, is still in its infancy*".[366] The statement above refers to the latest century scenario, when the internet was still in its first phase. Nowadays, the internet is instead a technology which is accessible worldwide and is used by a massive and increasing number of people all around the globe.[367]

In this respect, the slide below shows that, in August 2017, the 51% of the total population was using the internet.[368] This means that every day approximately 3.819 billion people may use the internet to access social networks, sending and receiving emails, shopping online, etc. In doing so, these internet users are unintentionally flooded by a huge amount of advertising messages, among which law firms and lawyers' ones.

[366] See J. RAPPAPORT, *Attorney Advertising on the Internet*, 1996, available at www.law.miami.edu.

[367] See https://wearesocial.com/it/blog/2017/01/digital-in-2017-in-italia-e-nel-mondo, where the data on the number of the internet users collected in August 2017 shows a growth among the internet users of 0,2% since April 2017 (which means an increase of approximately 8 Million people using the internet).

[368] To access the whole presentation, see https://www.slideshare.net/wearesocialsg/global-digital-statshot-q3-2017.

In light of the above scenario, this chapter will try to analyse the fast development of lawyers' advertisement on the internet, providing an analysis of the current regulation and limitations concerning lawyers' advertising using this new tool (especially focusing on the U.S. legal framework, which is at the forefront) and trying to answer the question concerning how to possibly address the new emerging issues deriving from the fresh tools the digital era has been shaping for lawyers to promote their legal services.

Furthermore, chapter three will try to analyse and tackle the issue concerning how to harmonize the different regulations and legislations about lawyers' advertisement on the internet that are in force in different countries or in different U.S. states and EU member states. This chapter will also address the issue related to the Bar Associations and/or National competition authorities' monitoring and enforcement of a massive number of cheap and potentially having a widespread visibility advertising messages carried out by lawyers all around the globe when using the internet.

To conclude, this chapter will examine the new advertising conducts lawyers have been carrying out in the last few years when using the new internet tools in order to promote their legal services. Among these new advertising practices, this chapter will especially focus on lawyers and law firms' websites, keyword advertising, spamming and direct email solicitations, blogs and discussion forum, social networks (e.g. Facebook, LinkedIn, Twitter), and defensive domain names. In doing so, the current regulations and

restrictions in force in relation to the new conducts listed above (especially within the U.S. legal framework) – if any – will be analysed and an evaluation on to what extent some of those new advertising conducts will need to be regulated or restricted will be provided.

2. The rapid development of lawyers' advertisement on the internet

In recent years, the ongoing rapid technological developments have been changing the way in which lawyers promote their legal services. First of all, these developments have affected the media being used: lawyers do not use television or radio anymore; on the contrary, they are now massively using the internet. More specifically, the internet rapid development is mainly the result of the lower costs to be endured when carrying out an advertising campaign which make much easier and cheaper for lawyers to advertise their services. However, the use of the internet might also remove lawyers' controls over the messages advertised either in relation to their contents, either in relation to their style and language. By way of example, in the US, the American Bar Association (ABA) reported that law firms are finding they might have an associate or a non-attorney with a blog or a Twitter account posting and uploading both personal information and information related to the law firm. That associate or non-attorney may become the most visible person at the law firm while the law firm may not have any control over what that person posts.[369] This is only an example of the new issues that might arise when lawyers advertise on the internet and that will be examined more in depth in the rest of the chapter.

As already said, the internet surely represents the most fundamental change in the modern world way to advertise legal services.[370] The impressive expansion of internet

[369] See AMERICAN BAR ASSOCIATION, *The Ethics of Online Advertising*, March 2013, available at http://abaforlawstudents.com/2013/03/03/ethics-online-advertising/ quoting Michael Downey (a litigation partner at Armstrong Teasdale LLP in St. Louis and Member of the ABA Section of Litigation's Ethics and Professionalism Committee).

[370] See M. G. MERCER, *Lawyer Advertising on the Internet: Why the ABA's Proposed Revision to the Advertising Rules Replace the Flat Tire With a Square Wheel*, in 39 *Brandeis L.J. 713*, 2001, p. 727; M. T. ROLLINS, *Examination of the Model Rules of Professional Conduct Pertaining to the Marketing of Legal Services in Cyberspace*, in

advertising seems to be mainly linked to three factors: (i) the cheapness, ease, and speed of the promotion of informative and commercial messages via internet; (ii) the absence of barriers to a widespread geographic circulation of the advertising messages via internet;[371] and (iii), the anonymity of the internet, consisting in the possibility to create, modify or even delete advertising messages on websites quickly, inexpensively and (possibly) without leaving a trace.[372]

The rapid and sharp development of the legal services advertisement via the internet (e.g. by using emails, websites, banners, social networks, etc.) has entailed new advertisement issues related to the widespread use of this new technology – continuously evolving – which neither the modern European nor US set of rules have been able to address in depth in most of the cases. The reason being that technology is so quickly changing the way in which lawyers interact and promote their services that there are always more and more grey areas in which legal and ethical rules may not have caught up yet with the strength and speed needed. This has left lawyers unsure about the extent to which they might legitimately advertise their services via the internet.[373] To give a real-life example, it may happen that lawyers who do not want to advertise and who would never consider advertising may find themselves carrying out advertising practices regulated by the advertisement rules when using, for instance, social networks like Facebook and Twitter. More and more of the messages and communications lawyers and law firms post on social media, indeed, are being characterized as advertising. Practically, almost anything that is self-promotional may be eventually seen and treated as advertising.

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22 *Marshall J. Computer & Info L. 113*, 2003, p. 830 et seq.; J. T. WESTERMEIER, *Ethics and the Internet*, in 17 *Geo. J. Legal Ethics 267*, 2004, p. 269 et seq.

[371] See J. H. SWEET, *Attorney Advertising on the Information Superhighway: A Crash Course in Ethics*, in 24 *J. Legal Prof. 201*, 2000.

[372] See C. HURLD, *Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules*, in 17 *Geo. J. Legal Ethics 827*, 2004, p. 836 et seq.; S. GILLERS, *Regulation of Lawyers*, 2002, Aspen Law & Business, p. 986.

[373]See AMERICAN BAR ASSOCIATION, *The Ethics of Online Advertising*, March 2013, avilable at http://abaforlawstudents.com/2013/03/03/ethics-online-advertising/.

2.1. A review of the current regulation concerning lawyers' advertising on the internet and how to possibly address new emerging issues.

Nowadays, most of the law firms have a web site that contains information concerning practice areas, people working in the practice, law firm's locations as well as legal news, publications and at least some form of testimonials. Moreover, lawyers actively use social networks like Twitter, Facebook and LinkedIn not only to keep them posted on the juridical news, daily reading the most updated case law, but also to post news and comments as well as to upload information and engage with other internet users – among which there might be potential clients.[374] Furthermore, some lawyers might run high-profile blogs with rich and high-quality contents which could play an important role in influencing the potential clients' choices as well as the choice made by other countries lawyers dealing, for instance, with multijurisdictional transactions to hire as local counsel that particular law firm or lawyer in order to be supported in a specific jurisdiction.[375]

In this new cyber-world setting, as already pointed out, internet messages and advertisement could potentially reach people worldwide without geographical limitations. However, internet advertisement's regulations and restrictions might vary from jurisdiction to jurisdiction and even between different US States or different EU Member States. Thus, a lawyer which advertises on the internet should be well aware of all the jurisdictions' regulations and laws that might potentially affect internet advertisement.[376] Accordingly, taking into consideration the US scenario, already in 2004, the American Bar

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[374] See *2013 in-House Counsel New Media Engagement Survey*, available at www. jdsupra.com, in which it is nevertheless stated that the data shows that the so called "*invisible phenomenon*" is growing stronger. The previous means that the portion of lawyers who actively post information to new media networks still in 2013 was significantly lower than those who pull information from them. Moreover, the survey shows that the percentage of lawyers who used social media in listen-only mode rose from 68% in 2012 to 74% in 2013.

[375] See again *2013 in-House Counsel New Media Engagement Survey*, available at www. jdsupra.com.

[376] See S. CORTS HILL, *Living in a Virtual World: Ethical Consideration for Attorneys Recruiting New Clients in Online Virtual Communities*, in 21 *Geo. J. Legal Ethics*, p. 753; D. BACKER, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, in 70 *Fordham L. Rev. 2409*, p. 2418.

Association provided the following advice to lawyers and law firms that were advertising their services on the internet: "*to be on the safe side, a firm should design its web pages to meet the advertising requirements of each jurisdiction in which it has an office and in which its lawyers are licensed to practice, as well as any other jurisdictions in which it provides or offers to provide legal services*".[377] In addition, to make things even more complicated, there are some jurisdictions' regulations and laws that do not address clearly which kinds of advertisement practices on the internet are acceptable and lawful. In a nutshell, how disciplinary bodies and national competition authorities handle ethical issues regarding online advertising depends on the lawyers or law firms' particular jurisdiction: some jurisdictions have not had a single opinion on it while others have had multiple.[378]

On a related note, in the U.S., the American Bar Association has recently set out some guidelines to help young attorneys avoiding troubles when advertising, regardless of their specific jurisdictions. First of all, in the ABA's view, one has to bear in mind that online activity is possibly going to count as advertising. Therefore, attorneys can avoid carrying out unintentional advertising by limiting their online activities to tasks unrelated to the law or, for instance, to the lawsuits a lawyer has been working on. Contrarily, if the lawyers online activities are to some extent related to the their professional activity, they have to comply with their jurisdictions rules. Secondly, in the ABA's view, to be on a safe side, US attorneys' activities should comply with their State's Bar rules as well as the American Bar Association's Model Rules of Professional Conduct 7.1, 7.2 and 7.3 (which serves as a model for the ethics rules of most of the US States).[379] Moreover, to avoid any

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[377] See AMERICAN BAR ASSOCIATION/BNA, *Internet*, *Lawyers Manual on Professional Conduct*, ß 81: 551, 2004, available at https://www.americanbar.org/groups/professional_responsibility/publications/aba_bna_lawyers_manual_on_professional_conduct.html.

[378] See AMERICAN BAR ASSOCIATION, *The Ethics of Online Advertising*, March 2013, available at http://abaforlawstudents.com/2013/03/03/ethics-online-advertising/ quoting Stuart Teicher (who teaches professional responsibility at Rutgers School of Law of Camden, New Jersey and serves as an ethic investigator and prosecutor for the New Jersey District Ethics Committee).

[379] See Rule 7.1 entitled "*Communications concerning a lawyer's services*" stating as follows: "*A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading*

potential risk, advertisement must be always be truthful and transparent. Contrarily, the ABA noted that US attorneys' online activities in many cases have an informal and pseudo-anonymous nature and this can lead attorneys, for instance, to write phony

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if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading"; rule 7.2 entitled "*Advertising*" stating as follows: *"(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.*
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
(3) pay for a law practice in accordance with Rule 1.17; and
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
(i) the reciprocal referral agreement is not exclusive, and
(ii) the client is informed of the existence and nature of the agreement.
(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content"; rule 7.3 entitled "*Solicitation of client*" stating as follows: "*(a) A lawyer shall not by inperson, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:*
(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.
(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by inperson, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses inperson or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan."

reviews for their professional activities, to misrepresent themselves on their websites or to be not fully transparent.[380]

Furthermore, attorneys have to be cautious that anybody who works on their behalf follows the same rules. Attorneys are indeed responsible for everything third parties – like websites developers and marketing managers – post online on their behalf. For instance, if a website creator uploads a profile of a person on a law firm's website that suggested he/she is a lawyer while he/she only graduated from law school without taking his/her law license, the law firm will be responsible for that erroneous and misleading information.

Attorneys should also be aware of what can turn their activities into advertising. From a general perspective, under the U.S. rules of Professional Conduct, an advertisement is a public or private communication made by, or in behalf of, a lawyer or a law firm, about that lawyer or law firm's professional services. The main purpose of the advertising messages is the retention of the lawyer or law firm. Communications to current clients or other lawyers are not advertisement. A lawyer may write for publication on legal topics or speak publicly without affecting the right to accept employment (which means that a lawyer may ethically obtain business by giving speeches and writing articles about law) as long as the lawyer does not undertake to give individual advice.[381]

In light of the above principles, the vast majority of the US States consider a website to be advertisement. However, a lot of uses of social media are not considered to be advertising themselves. By way of example, in Texas, blogs, Facebook posts or LinkedIn profiles are not *per se* advertisements if the lawyers only post their office

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[380] See AMERICAN BAR ASSOCIATION, *The Ethics of Online Advertising*, March 2013, available at http://abaforlawstudents.com/2013/03/03/ethics-online-advertising/ quoting Josh King (general counsel and vice president of the lawyer rating and review website Avvo in Seattle) which stated that "*there has been a big debate in the blogosphere recently about whether lawyers should leave off their date of admission to the bar, which is a temptation for many new lawyers*" while, in King's view, the best strategy for young attorneys would consist into being honest and turning their young age into a competitive hedge, stating they will have more time for clients, they will charge less and be more responsive and available.

[381] NYSBA, *Attorney Advertising, Solicitation, and Professional Notices*, available at http://docplayer.net/902734-Attorney-advertising-solicitation-and-professional-notices.html.

location, phone number and descriptions of the cases they take. In this respect, it is worth noting that while in Europe (*e.g.* in Italy and Germany) the previous information, if advertised by a lawyer or a law firm, constitutes a form of (informative) advertisement;[382] in some of the US State they do not represent advertisement at all. However, also in the US States some things attorneys can say or post may turn the previous activities into advertising. More specifically, client testimonials, information about past results, claims of a specialty or the attorney's ability to get unusual results would definitely raise the attention of the vast majority of the U.S. Bar authorities.

2.2. Regulations' harmonization and enforcement

In the described scenario, a deep and fast harmonization of the different existing regulations – between the European and the US legal frameworks, and, between the different Member States and US States – seems to be absolutely necessary. It is worth noting that a more homogenous set of rules may guarantee a more easily understandable, accessible and acceptable level of regulation all over the European Union and the US and may avoid any form of unfair competition between law firms and/or lawyers offering the same legal services in different Member States or in different U.S. States but, at the same time, all operating and competing in the European Union market and/or in the US

[382] Being a form of informative advertisement, when advertising the mentioned information lawyers have to comply with the limitations to lawyers' advertisement in force. By way of example, in Italy, before the *Codice Deontologico Forense* was amended in 2016, the previous version of article 35, paragraph 9, stated as follows: "*A lawyer may only use, for information purposes, websites on his own domain without URL redirecting, provided that they are directly connected to him, the law firm or corporations of lawyers which he belongs to, after having given notice of the form and the content to the Bar Council of which he is member*". This means that until 2016, in Italy, a lawyer who wanted to advertise on his/her website his/her office location, phone number and descriptions of the cases he/she takes had to previously notify the form and the contents of the informative message to be uploaded on the website to the Local Bar Council of which he/she was a member.

Federal arena[383]. More specifically, taking into account the different level of regulations concerning lawyers' advertisement between Member States, one could argue that these disparities might create a kind of "dumping" among lawyers and/or law firms operating in different Member States. This means that lawyers and law firms which are based and operate in the most liberalized European member states (please refer to Chapter I, footnote number 1) – absent any kind of (legitimate) restriction in term of object and means of the legal adverting messages – might gain an (unfair) advantage and visibility over other lawyers and law firms based and operating in more conservative member states.

Likewise, by way of example, in the US, lawyers are subject to the State rules of professional conduct governing solicitations, and, potentially to the US States' statutes governing spam in general. Thus, lawyers who practice in multi-State firms have the obligation to comply with the rules of the States in which they seek and represent clients. Moreover, if the statutes apply, lawyers are also obligated to comply with these provisions. As a consequence, lawyers providing personal legal services will be better able to seek clients through unsolicited email compared to those serving the corporate marketplace, which are usually part of multi-State law firms. It is worth noting that rather than protecting unsophisticated consumers against the possibility of overreaching, the result is the elimination of messages to corporate entities which are better able to assimilate the information because they are usually not one-shotters.[384]

Furthermore, in relation to the enforcement of the unlawful lawyers' advertising messages, legal advertisement on the internet has become so pervasive and widespread that even if the National Bar associations (or the State regulatory agencies and National competition authorities) want to try to evaluate and (if necessary) discipline every

[383] In relation to the need of uniformity in the laws that govern Internet advertising, see N. M. MONROE, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, in 18 Geo. J. Legal Ethics 1005, 2005.

[384] See, W. E. HORNSBY jr., *Spamming for Legal Services: A Constitutional Right Within a Regulatory Quagmir*, 22 *J. Marshall J. Computer & Info. L. 97*, 2003, p. 110.

disseminated advertising message, they evidently do not have the resources to do so.[385] In other words, State Bars have insufficient resources to monitor every lawyer advertising messages and maintain consistent enforcement either before and/or after a message has been advertised. The recent spur of social media, professional networking services and mobile technology has made the regulation of lawyer advertising by National Bar associations, state regulatory agencies and National competition authorities ineffective.[386]

3. Lawyers' advertising practices on the internet

3.1. Whether and how to regulate lawyers' advertising on the internet

The use of the internet as a new media to advertise lawyers' services all around the globe is something increasingly popular and, to some extent, it can be beneficial to clients as it can provide consumers with useful information related to the legal services offered in the market in a readily accessible and inexpensive manner. Thus, an outright ban on lawyers' advertising seems to be disproportionate. Nevertheless, to study in depth each advertisement method lawyers might use on the internet to promote their legal services on the market is crucial in order to pin down the potential issues related to the use of this new media and to understand where and to what extent it is necessary to limit or to regulate the new internet advertisement's tools in order to protect the end customers of legal services.

In this respect, it is worth noting that the vast majority of the existing rules regarding lawyers advertisement relate back to out-dated methods of communication and have become increasingly unworkable in the age of electronic and digital media

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[385] See F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, 2005, available at www.ssrn.com, p. 9.

[386] AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *For Comment: Issues Paper Concerning Lawyers' Use Of Internet Based Client Development Tools* (Sept. 10, 2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientconfidentiality_issuespaper.authcheckdam.pdf.

advertising.[387] Moreover, it is worth noting that the U.S. and European regulators may have been approaching these new issues linked to lawyers' advertisement on the internet in different ways by: (i) approving new *ad hoc* regulations; (ii) amending and updating the existing regulations considering the advent of the electronic and digital era; or (iii) applying the existing rules to the new type of advertisement.

So far, only in the U.S. a number of States have been trying to apply existing rules to new methods of electronic advertisement.[388] For instance, Maryland Rule 7.2(b) requires that "*a copy or recording of an advertisement or such other communication shall be kept for at least three years after its last dissemination along with a record of when and where it was used*". However, to comply with the previous rule may be very challenging for a lawyer using websites, blogs and social media, because the content of the mentioned media is not static (like an advertisement message on a magazine was) but continuously changing and evolving.[389] As a consequence, lawyers, law firms and bar regulators frequently raise legitimate questions about whether or how to apply pre-electronic era standards and rules to continuously evolving technologies.[390]

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[387] In this respect, see M. L. TUFT, *Rethinking Lawyer Advertising Rules*, in *Professional Lawyer Volume 23*, Number 3, 1.

[388] See ASSOCIATION OF PROFESSIONAL RESPONSABILITY LAWYERS, *2015 Report of the regulation of lawyer advertising committee*, June 22, 2015, available at www.aprl.net, p. 21, where it is said that some States single out electronic media for special treatment or significantly restrict advertising in electronic media. See, among others, NYSBA, *Social Media Ethics Guidelines*, March 18, 2014, available at www.nysba.org.

[389] See again ASSOCIATION OF PROFESSIONAL RESPONSABILITY LAWYERS, *2015 Report of the regulation of lawyer advertising committee*, June 22, 2015, available at www.aprl.net, p. 21

[390] A number of States have found that advertising rules apply to an attorney's activity on the Internet, including law firm websites. See, among others, CALIFORNIA STATE BAR, *Formal Op. 2001-155*, 2001, http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2001-155.htm; NYSBA, *Formal Op. 709*, 1998, https://www.nysba.org/CustomTemplates/Content.aspx?id=5550; ALABAMA STATE BAR, *Formal Op. 1996-07*, 1996, https://www.alabar.org/resources/office-of-general-counsel/formal-opinions/1996-07/; NORTH CAROLINA ETHICS COMM., RPC 239, https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-239/.

Despite the latter approach does not seem to be the most efficient, the U.S. and European regulations have not been radically amended so far and new forms of regulation in line with the time have not been issued. The flip side is that there are some forms of online advertisement that consumers clearly need to be protected from, hence advertisement on the internet and white and black list of advertising conducts on the internet need to be set out in order to allow lawyers to understand *ex ante*, with a margin of legal certainty, which conducts have to be avoided and which practices may be legitimately carried out.

In the following sections, I will look at some of the U.S. States regulations and ethics rules concerning lawyers' advertisement on the internet because these are the most updated set of rules at this stage. Moreover, these rules regulate practices which sometimes have not been taken into consideration yet by the European legislator, regulators, Bar associations or National competition authorities.

3.2. What is a computer-accessed communications?

In order to examine the most important ways in which lawyers may advertise their services on the internet and to assess whether to some extent regulation is necessary for the benefit of consumers, it is first of all necessary to look at the so-called omni comprehensive area of the computer-accessed communications. In this respect, Rule 1.0(c) of the New York Rules of Professional Conduct (NYPRC) defines "*computer-accessed communication*" as any communication made by or on behalf of a lawyer or law firm that is disseminated through "*the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto*". Moreover, Rule 7.1(k) of the NYRPC provides that all advertisements "*shall be pre-approved by the lawyer or law firm*". It also provides that a copy of an advertisement "*shall be retained for a period of not less than three years following its initial dissemination*", but specifies an alternative one-year retention period for advertisements contained in a computer-accessed communication and specifies another retention scheme for websites. Thus, social media posts that are deemed as advertisements, are computer-

accessed communications, and their retention is required only for one year. For the issues related to the retention of the internet advertising messages and communications see *infra* Chapter III, 3.1. and 3.8.1.

3.3. Law firms and lawyers' websites

In the recent years, almost every lawyer or law firm operating all around the world have had a website which contains information concerning expertise, the firm's lawyers, as well as their backgrounds, their practice areas, the law firm's locations, the lawyers' contact numbers and emails but also some self-laudatory components which do not constitute purely informative but commercial advertisement, designed to attract consumers. Web sites are inexpensive and easy to disseminate. For these reasons, consumers expect to find them and may even discard lawyers or law firms as potential representatives because there is no web site related to them or the information on the web site is insufficient for them in order to evaluate that lawyer or law firm.

Many lawyers and law firms do not consider their websites as advertisement tools but rather as mere sources of information.[391] In this respect, it is worth bearing in mind that, according to the U.S. rules, electronic materials like summaries or articles written by a lawyer are not *per se* advertisement but may become advertising communications once they are published on the lawyer or law firm web site. From that moment on, indeed, the article itself or the posts and comments related to it may have the purpose and effect of attracting consumers.[392]

Lawyers websites can be as simple as a single webpage that contains lawyer's contact information, or can be as sophisticated as a secure portal (a so called virtual law office) through which lawyers daily conduct their entire activities, including actively interacting with (potential) clients, sharing documents and offering legal services. Typically, however, lawyers use websites to disseminate information about their practices

[391] See J. C. ATHEY, *The Ethics of Attorney Websites: Updating the Model Rules to Better Deal with Emerging Technologies*, 13 *Geo. J. Legal Ethics 499*, 505, 2000.

[392] See F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, 2005, available at www.ssrn.com, p. 19.

and to educate prospective clients about their legal options.[393] Hence, websites can serve a valuable informative function but they can also give rise to several (ethical) concerns, including: (i) the possibility that they might contain information that is either inaccurate or misleading; (ii) the creation of an inadvertent lawyer-client relationship; (iii) the possibility to give legal advice; and (iv) to reveal confidential information about current and former clients and/or about current or past legal matters.[394]

In order to address this four concerns, it is worth noting that, according to the ABA Formal Opinion 10-457, any of the information posts in a lawyer or a law firm's website (*e.g.* biographical information, educational background, area of practice, contact information, current clients, clients' identities, matters handled, result obtained, etc.) constitutes a communication about the lawyer or the lawyer's services and is therefore subject to the requirements of Model Rule 7.1 as well as the prohibitions against the false and misleading statements in Rules 8.4(c) [395] and 4.1(a). [396] Thus, no website communication may be false or misleading or may omit facts such that the resulting statement or communication is materially misleading. Moreover, to avoid misleading readers, information should be updated on a regular basis.[397]

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[393] See AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, 8.

[394] See AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, 8 et seq.

[395] See Model Rule 8.4(c) stating as follows: "*it is a professional misconduct for a lawyer to: […] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation*".

[396] See Model Rule 4.1(a) stating as follows: "*In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person*".

[397] See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *Formal Opinion 10-457 on Lawyer Websites*, 2010, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_457.authcheckdam.pdf, 1 et seq.

Secondly, the ABA Formal Opinion 10-457 also addressed the possibility that, by enabling communications between prospective clients and lawyers, websites could produce inadvertent lawyer-client relationships. The opinion also examined the related concern that website-based communications could trigger a lawyer's duties to prospective clients under Model Rule 1.18.[398] According to the opinion, a number of factors determine whether these obligations arise, such as whether the website invites prospective clients to submit information through the website and whether the website contains properly placed and appropriately worded disclaimers regarding the effect of sending information through the website.[399]

Moreover, the ABA Formal Opinion 10-457 concluded that, when lawyers post information about the law on their websites, they must ensure that the information does not mislead the public about the meaning of the law or leave the public with the

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[398] See Model Rule 1.18 stating as follows: "(*a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.*

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client".

[399] See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *Formal Opinion 10-457 on Lawyer Websites*, (Aug. 5, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_457.authcheckdam.pdf, 4 et seq.

impression that the information can substitute for legal advice. For instance, if lawyers post information about a specific legal doctrine or jurisprudence, they must ensure that the information remains updated and includes appropriate disclaimers, such as the extent to which the information applies to particular jurisdictions and that it should not be understood to substitute for legal advice from a lawyer after considering the facts of a particular legal matter.[400]

The latter issue concerns information that appears on lawyers or law firms websites about current or past legal matters or the identity of current or past clients. The ABA Formal Opinion 10-457 explained that, ordinarily, lawyers must obtain client's consent before posting such information on their websites: "*Specific information that identifies current or former clients or the scope of their matters also may be disclosed, as long as the client or former clients give informed consent, as required by Rules 1.6 (current clients) and 1.9 (former clients). Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm*".[401] However, it is worth noting that not all the US States have adopted this approach. For example, Minnesota's version of Rule 1.6 ordinarily permits a lawyer to disclose this type of information on a website (For an analysis of this issue in Germany and Italy see *infra* Chapter II, Section I, 4; and Chapter II, Section II, 2.2.).[402] This example clearly shows that, as previously mentioned, there is an immediate need of uniformity and homogeneity

[400] See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *Formal Opinion 10-457 on Lawyer Websites*, (Aug. 5, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_457.authcheckdam.pdf, 1 et seq.

[401] See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *Formal Opinion 10-457 on Lawyer Websites*, (Aug. 5, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_457.authcheckdam.pdf, 2.

[402] See Minn. R. Prof. C. 1.6(b)(2) permitting disclosure of information if it is "*not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client*".

in order to guarantee to the US lawyers (but of course the same logic applies in relation to the European lawyers operating in different EU member states) that the same set of rules and level of regulation would be applicable and any form of unfair competition between law firms and/or lawyers offering the same legal services in different US States would be avoided.

3.4. Keyword stuffing

One of the issues related to lawyers' internet advertising consists in the increasing practice of tagging, also known as, "keyword stuffing".[403] This practice catches internet users approaching an internet browser to search a specific website directing them to a specific law firm or lawyer's website when particularly common used search words are included in the search.[404] It is worth noting that to direct prospective clients into the website of the law firm or the lawyer which used keyword stuffing rather than into the electronic offices of other lawyers whose web sites should have been identified by the consumer's intended search, may represent an unfair competition practice which the US and European regulators have not directly addressed in detail so far.[405] Moreover, such a conduct may also be misleading from the perspective of the consumers because it could illegitimately persuade them that the lawyer website to which they are directed represents, for some reasons, the best among the other web sites that could potentially fit the consumers' search parameters.[406]

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[403] See C. HURLD, *Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules*, 17 *Geo. J. Legal Ethics 827*, 2004, p. 836 s.

[404] See M. G. MERCER, *Lawyer Advertising on the Internet: Why the ABA's Proposed Revision to the Advertising Rules Replace the Flat Tire With a Square Wheel*, 39 *Brandeis L.J. 713*, 2001, p. 724 s.; F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, 2005, available at www.ssrn.com, p. 18.

[405] F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, 2005, available at www.ssrn.com, p. 18.

[406] See F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, 2005, available at www.ssrn.com, p. 18

3.4.1 Pay-per-click, pay-per-lead advertisement and Keyword advertising

Nowadays, the internet most famous browsers (e.g. Google) offer services like "*Google my Business*" which allow law firms to create a webpage which can be found on Google's local search. By ensuring that very basic information is up-to-date and providing additional details, business owners can stand out on the map to attract more potential customers. Once a law firm is on the internet, it may then start advertising in several different ways.[407] First of all, a law firm may use the pay-per-click advertising method through which its advertisement will be hosted on a website or Google Search Engine Results page and the law firm will pay the host for every click its advertising message will receive. In other words, pay-per-click advertising is a service by which a lawyer pays a fee to a third-party each time an internet user clicks on an advertisement that directs the user to the lawyer's website. Then, there are two basic ways for determining the rate the lawyers have to pay for each click: (i) flat-rate and (ii) bid-based. In the former case, the lawyer/law firm and the host will agree upon a set amount to be paid for every click. Hosts will often set rates based on the advertisement's visibility so that a more prominently placed advertisement will cost more than another one placed at the foot of the page. However, the top three pay-per-click network operators (*i.e.* Google AdWords, Yahoo! Search Marketing, and Bing Ads) use the latter payment system (*i.e.* the bid-based). In this model, advertisers compete with one another for the best ad placement. Each advertiser will bid the amount he/she is willing to pay for each click, and the highest bidders get the top spots. The more popular the topic, the more expensive the ad will be.[408]

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[407] See www.hg.org/adwords-campaign.html.

[408] Briefly, with bid-based pay-per-click, the advertisers sign a contract that allows them to compete against other advertisers in an advertising network such as Google AdWords. Each advertiser sets the maximum amount that he/she is willing to pay in an auction for a given ad spot based on a keyword. Then the auction proceeds automatically by a visitor clicking on the ad spot that the search engine results page displays. All the bids for the keyword that target the searcher's geo-location, the day and time of search, are then compared and the winner determined (for a more clear and complete description of this

On a related note, some other companies provide a more sophisticated service that is specifically designed to generate leads for lawyers. These arrangements require the lawyer to pay a fee for each "*lead*" (for instance, every time an internet user shows a real interest in the services offered by filling a registration form) that the third party generates (so called pay-per-lead advertising). In the ABA Commission on Ethics' view, because the fee is paid regardless of whether a lawyer-client relationship is formed, these fees do not constitute an impermissible sharing of fees with non-lawyers. Under the US law, it is, nevertheless, unclear whether these fees constitute an impermissible payment for "*recommending*" the lawyer's services under Model Rule 7.2(b).[409]

Under the Italian legal framework, one should assess whether a service by which a lawyer (i) pays a fee to a third-party each time a potential client clicks on an advertisement message that directs the internet user to the lawyer's website (*i.e.* pay-per-click advertising) or (ii) pay a fee for each lead that the third party generates might be considered to some extent an unlawful conduct or a practice against the Italian Code of conducts for lawyers. According to the current version of article 37 of the new Italian *Codice Deontologico Forense* for lawyers (which titles "*Prohibition against the solicitation of clients*"),[410] indeed, these

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mechanism see http://www.sitepronews.com/2011/07/22/the-difference-between-flat-rate-and-bid-based-ppc-campaigns/)

[409] See AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, 8.

[410] See article 37 of the Italian *Codice Deontologico Forense* stating as follows: "*1. A lawyer is forbidden to obtain relations with clients through agents or wheeler - dealers or any other means not in compliance with honesty and decorum.*

2. A lawyer shall not offer or pay commissions or any other remuneration to another lawyer or any other person as compensation for the introduction of a client or for obtaining professional assignments.

3. A lawyer violates the disciplinary rules if he offers gifts or services to third parties, or if he makes payments or promises advantages in order to obtain legal assignments.

4. A lawyer is forbidden to offer, both directly and through a third person, his professional performances at a consumer's house, in places for work, rest, leisure and, in general, in public places or places open to public.

activities (especially the latter one) might be seen as forbidden mechanisms to obtain relations with clients through agents or wheeler-dealers or any other means not in compliance with honesty and decorum. In other words, under the Italian law, a lawyer shall not offer or pay commissions or any other remuneration to another lawyer or any other person as compensation for the introduction of a client or for obtaining professional assignments.

Most of the law firms in the US have been using to some extent Google AdWords. The ads on Google's search engine results page reach over 80% of the US Internet users. One of the benefits of using pay-per-click systems is that a law firm can set up as many campaigns as it likes without any economic risk since the law firm will only incur costs when and if people will visit its website. Thus, a campaign that brings in no traffic will cost the law firm nothing and, in any event, in return to the costs borne by the law firm, between the web users clicking on the law firm's advertisement there might be some future clients.

Another thing a law firm might want to do is to access one of AdWords' most useful features: the so-called keyword tool. This tool allows the law firm to search for the terms its customers may be using when searching for a lawyer or a law firm on the internet. AdWords will then provide the law firm with a list of similar terms, each with detailed information on how many searches per month include those words, and how high the competition is from other advertisers. The strategy law firms and lawyers will embrace when selecting the terms from the list consists into finding words that strike a balance between a high search rate and an accessible level of competition between advertisers. The keywords a law firm chooses will ultimately depend on its budget and on its willingness to pay. Attaching its advertisement to highly popular keywords could be very expensive, but can generate a higher rate of traffic. Then, when an internet user types the selected keywords into Google's search engine, the lawyer's advertisement will appear in a list of sponsored links on the top of the first result page.

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5. A lawyer is also forbidden to offer, without any request, a tailored performance, that is to say a performance addressed to a specific person for a specific business.

6. The breach of duties under previous sub-sections entails the enforcement of censure as disciplinary sanction".

In light of the above, one might want to assess the potential (negative) effects the increased use of keywords in the lawyers' market might have. In this market, indeed, the quality of the legal services is a factor that consumers usually want to evaluate but they are not able to correctly and completely assess due to the intrinsic information asymmetries among lawyers and clients as well as due to the nature of the services offered (*i.e.* credence goods). In this scenario, keyword tools' systems, may enable lawyers to be listed at the top of the search engine result page, without having evaluated in any way their quality and experiences but only for their ability to pay for those keywords. One might argue that this could increase the information asymmetries between lawyers and potential clients. More precisely, on the one hand, keywords represent new and advantageous instruments for lawyers who are prepared and willing to invest money on advertising campaigns or that are much more internet friendly to gain market shares competing on the legal market and reaching new prospective clients; on the other hand, the (negative) impact keywords might have on the information asymmetries should be analysed in more depth.

To see the effectiveness of the keyword tools, a crude exercise is to search for terms such as "*Miglior avvocato Roma*" or "*Miglior studio legale Roma*" (which respectively means "best lawyer in Rome" and "best law firm in Rome") and, then, take a look at those ads at the top of the page. Even if a law firm's web page does not have enough organic traffic to be at the head of the search results yet, thanks to keyword tools the law firm's business listing can be visible right there at the top. Typing those search words (among which "best"), the results at the top of the search engine page will direct consumers to a list of lawyers and law firms which does not seem to reflect how renowned and experienced the lawyers or the law firms are. Embracing a pro-liberalizations view, one could argue that the previous clients' reviews – which are linked to the law firms or lawyers which are shown at the top of the search engine results page – may be enough to give to the potential consumers all the information they need in order to choose the most suitable lawyer or law firm. However, in most of the cases, the reviews related to the lawyers or the law firms at the top of the webpage, – if available –

are numerically insufficient and poor in contents in order to deal with the previous informative purpose.

In a nutshell, independently from its organic internet traffic and from any kind of expertise's assessment carried out by the hosting internet browser, a law firm's advertisement and or website can be visible at the head of the search engine results page when consumers typed superlative adjectives like "Best". The need to find a balance between the legitimate interest of some law firms and/or lawyers in adopting these kind of advertisement strategies in order to reach new consumers and to enlarge their clients portfolio, on the one hand, and the need to protect consumers from being mislead by this kind of advertising mechanisms – for instance when related to search words like "Best lawyers in town", on the other hand, appears to be crucial for consumers to be adequately protected. An outright ban is likely to be disproportionate; however, it should be noted that, being a credence good, legal services are intrinsically complex to assess. A more balanced approach might be to forbid lawyers to select, among the keywords they buy, terms such as superlative adjectives (e.g. "best").[411]

3.4.2. Competitive Keyword advertising

In the US, over the past few years, lawyers have increasingly used keyword advertising as an important source of potential clients.[412] As already explained, keyword

[411] See M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, *Riv. dir. ind.*, 2012, p. 259, in which the author also raises the question concerning whether the use of keywords in order to achieve an undeserved primacy has to be considered in any case as an unfair competition conduct (and a disciplinary offence) in order to catch and punish every form of non-transparent advertising message; or, contrarily, if only the use as a keyword of the name/trademark of a competing law firm has to be considered as an unlawful conduct (so-called competitive keyword advertising practices, see *infra* Chapter II, Section II, 1.4). In Libertini's view, the former and more stricter approach should be preferable.

[412] In this respect, see A. FRANKEL, *Plaintiffs' Lawyers Spend Millions in Online Ads. Should We Care?*, 2012, available at http://blogs.reuters.com/alison-frankel/2012/03/01/plaintiffs-lawyers-spend- millions-in-online-ads-should-we-care/; A. GOLDFARB, C. TUCKER, *Search Engine Advertising: Channel Substitution When Pricing Ads to Context*, 57 MGMT. SCI. 458, 2011, available at http://dspace. mit.edu/openaccess-disseminate/1721.1/65335.

advertising can offer a cost-effective way for lawyers to reach prospective clients at the right time (*i.e.* when they might be seeking legal help).[413] More precisely, lawyers select keyword advertising over other advertising practices for a number of reasons: (i) many consumers rely on search engines to find lawyers and/or law firms,[414] probably because they do not adequately take into account that the way in which lawyers and law firms are listed on a search engine does not necessarily reflect the quality of the service. Similarly, lawyers want to be visible where and when potential clients are looking[415] (in contrast advertising on newspapers and on Yellow pages, for instance, could only possibly be used as information resources by prospective clients);[416] (ii) keyword advertising can be precisely targeted. Rather than having their advertising messages exposed in a specific section of a newspaper or a general Yellow Pages category like "lawyers" or "law firms", lawyers can infer keyword searchers' moves and pay for advertising messages targeted to

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[413] C. MULLIN, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835, 838, 2007, stating that "*[A]dvertising on Google is a superior alternative that may be better received by the user. This is because, given the way AdWords works, the user is the one who initiates the process by seeking information related to the legal advertisements that appear*".

[414] See A. GESENHUES, *Study: Organic Search Drives 51% of Traffic, Social Only 5%*, SEARCH ENGINE LAND, 2014, available at http://searchengineland.com/study-organic-search-drives-51-traffic- social-5-202063, stating that "*[O]rganic search traffic accounted for 73 percent of all traffic to business services sites*"; W. SCOTT, *The Verdict Is In: Internet Searches Gaining Traction In Legal Referrals*, SEARCH ENGINE LAND, 2015, available at http://searchengineland.com/verdict-internet-searches-gaining-traction- legal-referrals-230533; see also N. SAFRAN, *Update: Organic Search Is Actually Responsible for 64% of Your Web Traffic*, CONDUCTOR BLOG, 2014, available at http://www.conductor.com/blog/2014/ 07/update-organic-search-actually-responsible-64-web-traffic/.

[415] These remarks are taken from E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, 105 et seq.

[416] AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, *Perspectives on Finding Personal Legal Services: The Results of a Public Opinion Poll*, 2011, available at http://www. americanbar.org/content/dam/aba/administrative/delivery_legal_services/20110228_aba_harris_survey _report.authcheckdam.pdf, in which it is stated that "*Use of print directories, such as the Yellow Pages, as the primary way to find a lawyer for a personal legal matter appears to be eroding*".

that intent;[417] (iii) lawyers most of the time pay for their keyword advertising only when consumers click on the advertising messages and access the website (so-called pay-per-click advertising, see *infra* Chapter III, 3.4.1.). In contrast, print and broadcast advertising messages typically charge advertisers based on the purported number of consumers reached,[418] irrespective of the actual level of consumer interest or material response to the advertising message; (iv) keyword advertising allows search engine and lawyers easily track which keywords are much profitable and lawyers can quickly drop or stop advertisement campaigns based on unprofitable keywords.[419]

By way of example, in the US, for many years one of the top priced keyword for lawyers advertising has surprisingly been the word "mesothelioma",[420] which has been bidden up in search engine advertising auctions by lawyers who were willing and prepared for bringing lucrative lawsuits for mesothelioma victims.[421] For advertising messages triggered by keyword searches including the word "mesothelioma", advertisers in the US have sometimes paid over $100 for each consumer's click on their ads.[422]

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[417] See E. GOLDMAN, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 2005, 521 et seq.

[418] See R. TUSHNET, E. GOLDMAN, *Advertising & Marketing Law: Cases & Materials*, Georgetown law, ch. 16, 2014.

[419] See J. BAADSGAARD, *5 Mistakes Law Firms Make When Advertising Online*, DISRUPTIVE ADVERTISING, 2015, available at http://www.disruptiveadvertising.com/adwords/5-mistakes-law-firms- make-when-advertising-online/.

[420] In this respect, see C. BIALIK, *Lawyers Bid Up Value Of Web-Search Ads*, WALL ST. J., 2004, available at http:// www.wsj.com/articles/SB108137355250477123; B. SCHWARTZ, *Some Of Google's Most Expensive Keywords*, SEARCH ENGINE WATCH, 2006, available at http://searchenginewatch.com/sew/news/2059 302/some-of-googles-most-expensive-keywords.

[421] See B. BERKOWITZ, *The Long, Lethal Shadow of Asbestos*, 2012, available at http:// www.reuters.com/article/2012/05/11/us-usa-asbestos-lawsuits-idUSBRE84A0J920120511.

[422] For instance, in 2012, "mesothelioma settlement" had an average cost per click of $142.67. In this respect, see B. SCHWARTZ, *Mesothelioma, Asbestos, Annuity: Google's Most Expensive Keywords*, SEARCH ENGINE LAND, 2012, available at http://searchengineland.com/mesothelioma-asbestos-annuity-googles- most-expensive-keywords-139295.

In the described scenario, competitive keyword advertising practices – which happen when a company purchases a competitor's trademark as the trigger for its keyword advertising – have been recently analysed by the US literature.[423] Thanks to this tool, when a consumer searches for the competitor's trademark, the advertising message of the advertiser lawyer displays at the top of the search results page. In the US most recent literature's view, competitive keyword advertising can reduce barriers to entry in the legal industry, especially helping new entrants challenge incumbent players in the saturated legal market. In this view, some law firms are better known than others and when consumers search for those law firms' names through a search engine, it creates an opportunity for competing lawyers to make themselves known to those consumers.[424] In a nutshell, in the US literature's view, competitive keyword advertising helps lawyers to cost-effectively compete with each other. This should produce the benefits one might expect from enhanced competition, including higher quality legal services at lower prices to prospective clients.[425] Hence, in this view, competitive keyword advertising by lawyers seems to be a win for consumers.

However, one should assess whether it is legitimate for lawyers to purchase such advertising tool, using a competitor's trademark as the trigger for his/her keyword advertising messages. In the US, competitive keyword advertising may implicate both

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[423] See E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, p. 106.

[424] See E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, 107. *Contra*, in the Italian literature, see M. LIBERTINI, *Pubblicità, concorrenza e deontologia forense*, *Riv. dir. ind.*, 2012, 259 which read this practice as a form of free riding.

[425] See D. S. EVANS, E. MARISCAL, *The Role of Keyword Advertising in Competition Among Rival Brands*, 13 Inst. for Law and Econ. Working Paper No. 619, 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142692, stating as follows: "*[K]eyword advertising likely benefits consumers because it: offers consumers more information, reduces their search costs and gives them ready access to competitive alternatives; lowers the cost to firms of reaching their customers and thereby lowers the cost of doing business, making it easier to enter and challenge existing brands; and, intensifies competition between name brands and their rivals and thereby likely lowers prices and improves quality*".

trademark and publicity rights law.[426] It has, however, become increasingly clear that competitive keyword advertising violates neither the former nor the latter.[427] Initially, trademarks owners used to sue search engines (*e.g.* Google) for selling competitive keyword advertising. However, search engines won or settled every case.[428] Hence, trademarks owners started suing also advertisers for buying competitive keyword

[426] At a European level, the EUROPEAN COMMISSION, *Final report on the E-commerce Sector Inquiry*, COM (2017) 229 final, 10 May 2017, paras 631-632, stated as follows: "*Another type of restriction encountered in the sector inquiry relates to the use of trademarks/brand names for online advertising. Some contractual clauses limit the ability of (authorised) retailers to use the manufacturers' (trademark protected) brand names for online marketing or optimization activities irrespective of whether such usage could amount to a trademark violation and even insofar as such usage would be allowed under trademark rules.*

The results of the sector inquiry suggest that some retailers are limited in their ability to use or bid on the trademarks of certain manufacturers in order to get a preferential listing on the search engines paid referencing service (such as Google Adwords) or are only allowed to bid on certain positions. Such restrictions typically aim at preventing retailer's websites from appearing (prominently) in the case of usage of specific keywords. This may be in the interest of the manufacturer in order to allow its own retail activities to benefit from a top listing and/or keep bidding prices down. Given the importance of search engines for attracting customers to the retailers' website and improving the findability of their online offer, such restrictions could however raise concerns under Article 101 TFEU, should they restrict the effective use of the internet as a sales channel by limiting the ability of retailers to direct customers to their website. Conversely, restrictions on the ability of retailers to use the trademark/brand name of the manufacturer in the retailer's own domain name rather help avoiding confusion with the manufacturer's website".

[427] See E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, 108.

[428] See E. GOLDMAN, *With Rosetta Stone Settlement, Google Gets Closer to Legitimizing Billions of AdWords Revenue*, Forbes, 2012, available at http://www.forbes.com/sites/ericgoldman/ 2012/11/01/with-rosetta-stone-settlement-google-gets-closer-to-legitimizing-billions-of-adwords-revenue/; E. GOLDMAN, *Google And Yahoo Defeat Last Remaining Lawsuit Over Competitive Key- word Advertising*, TECH. & MARKETING L. BLOG, 2015, available at http://blog.ericgoldman.org/archives/2015/06/google-and-yahoo-defeat-last-remaining-lawsuit-over-competitive-keyword-advertising-forbes-cross-post.htm.
Moreover, one case of particular note is *Stratton Faxon v. Google, Inc.*, which involved a law firm suing Google for selling competitive keyword advertising. That case was quietly dismissed: See Case Detail – *NNH-CV09-5031219-S*, STATE OF CONN. JUD. BRANCH, CIV. AND FAM. INQUIRY (Mar. 11, 2010), http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx? DocketNo=NNHCV09503121S.

advertising triggered by their trademarks.[429] However, those lawsuits did not succeed anymore[430] because trademarks do not provide their owners with an absolute right to preclude other people to referencing the trademark. On the contrary, trademark rights principally protect against consumer confusion about the source of goods and services. This means that if consumers do not experience confusion about the relationship of law firms in the marketplace, the trademark owner has not been harmed.[431] More specifically, in the U.S. literature's view, there are at least two reasons to believe consumers do not experience any confusion when competitive keyword advertising is used.[432] First, in three competitive keyword adverting cases that have reached a jury trial, three different panels of ordinary consumers from three different parts of the US have stated that competitive keyword advertising did not confuse them.[433] Second, when consumers use a trademark as a search term, many of them do not intend to find only search results associated with the trademark owner.[434] Hence, when prospective clients use a law firm's name as their

[429] See E. GOLDMAN, *Confusion from Competitive Keyword Advertising? Fuhgeddaboudit*, TECH & MARKETING L. BLOG (July 8, 2015), http://blog.ericgoldman.org/archives/2015/07/ confusion-from-competitive-keyword-advertising-fuhgeddaboudit.htm

[430] See E. GOLDMAN, *Suing Over Keyword Advertising Is A Bad Business Decision For Trademark Owners*, Forbes, 2013, available at http://www.forbes.com/sites/ericgoldman/2013/05/14/suing-over-keyword-advertising-is-a-badbusiness-decision-for-trademark-owners/; see also E. GOLDMAN, *More Defendants Win Keyword Advertising Lawsuits*, TECH. & MARKETING L. BLOG, 2015, available at http://blog. ericgoldman.org/archives/2015/02/more-defendants-win-keyword-advertising-lawsuits.htm.

[431] See E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, p. 109.

[432] See again E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, p. 109 et seq.

[433] See Coll. Network, Inc. v. Moore Educ. Publishers, Inc., 378 Fed. App'x 403 (5th Cir. 2010); Consumerinfo.com, Inc. v. One Techs., LP, No. CV-09-3783-VBF (MANx) (C.D. Cal. Jan. 12, 2011); Fair Isaac Corp. v. Experian Info. Solutions Inc., Civil No. 06–4112 ADM/JSM, 2009 WL 4263699 (D. Minn. 2009).

[434] See D. J. FRANKLYN & D. A. HYMAN, *Trademarks As Search Engine Keywords: Much Ado About Something?*, 26 HARV. J. L. & TECH. 481, 2013, p. 517.

search term, many of them are expecting (or even want) to discover other law firms competing in the same market on the search results page.

Moreover, publicity rights law restricts the commercialization of a person's name, [435] including lawyers' names. Using a person's name when advertising is a paradigmatic publicity rights violation.[436] In the US, however, there has been only one publicity rights case involving competitive keyword advertising. It involved two personal injury law firms in Wisconsin, Habush & Rottier and Cannon & Dunphy. Cannon & Dunphy bought keyword advertising on names such as "Habush". As a consequence, the plaintiff (Habush & Rottier) alleged that purchasing their last names as keywords for competitive advertising messages violated Wisconsin's publicity rights law.[437] However, the Wisconsin appellate court held that buying keyword advertising on another lawyer's name, without displaying the name in the advertising copy, did not constitute a statutory "use" of the name.[438]

To sum up, in the US literature and jurisprudence views', consumers are not confused by competitive keyword advertising messages, and purchasing a rivals' name does not mean to use their name for publicity rights purposes. So long as courts will continue to accept these assumptions, lawyers will not win future intellectual property lawsuits over competitive keyword advertising.[439]

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[435] See D. S. WELKOWITZ, T. T. OCHOA, *Celebrity Rights: Rights Of Publicity And Related Rights In The United States And Abroad*, Durham, 2010.

[436] See R. TUSHNET, E. GOLDMAN, *Advertising & Marketing Law: Cases & Materials*, 2014, ch. 13.

[437] See Complaint, *Habush v. Cannon*, No. 09CV018149, 2011 WL 2477236 (Milwaukee Cir. Ct. June 8, 2009), available at https://www.scribd.com/doc/23670849/Habush-Habush-Rottier-v-Cannon- Dunphy-Complaint.

[438] See *Habush v. Cannon*, 828 N.W.2d 876 (Wis. Ct. App. 2013). In the Court's view, "[*T]he strategy used by Cannon & Dunphy here is akin to locating a new Cannon & Dunphy branch office next to an established Habush & Rottier office when the readily apparent purpose […] is to take advantage of the flow of people seeking out Habush & Rottier because of the value associated with the names Habush and Rottier*". See also E. GOLDMAN, *Brand Spillovers*, 22 HARV. J. L. & TECH., 2009, p. 381.

[439] See E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, p. 112.

In light of the above, it is worth noting that, even though intellectual property does not restrict competitive keyword advertising, professional responsibility rules may nevertheless apply. In the US literature view's, however, competitive keyword advertising by lawyers seems not to violate the Model Rules of Professional Conduct provisions because it does not communicate anything false or misleading to consumers.[440] Despite the inapplicability of the Model Rules of Professional Conduct, North Carolina, for instance, banned competitive keyword advertising by lawyers. In particular, the North Carolina Bar adopted an ethic opinion stating that: "*the intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward*".[441] To conclude, in the US literature's view, without any support from existing US intellectual property rules or protecting consumer from deception, restrictions on lawyers' use of competitive keyword advertising seems vulnerable to First Amendment challenges.[442]

3.5. Spamming and direct email solicitation

[440] See E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, p. 112 et seq.

[441] See NORTH CAROLINA STATE BAR, *Formal Ethics Op. 14*, 2012, available at http://www.ncbar.com/ethics/ethics.asp?page=2&keywords=engine, where it is stated as follows: "*It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Dishonest conduct includes conduct that shows a lack of fairness or straightforwardness* […] *The intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward. Therefore, it is a violation of Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising*". The North Carolina State Bar has enforced this opinion in the following case: GRIEVANCE COMM. OF THE NORTH CAROLINA STATE BAR, *In re* David J. Turlington, III, Censure No. 13G0121 (2013), available at http://www.ncbar.com/orders/turlington,%20iii%20david%2013g0121.pdf.

[442] See E. GOLDMAN, A. REYES, *Regulation of lawyers' use of competitive keyword advertising*, available at https://illinoislawreview.org/wp-content/ilr-content/articles/2016/1/Goldman.pdf, 2015, p. 114.

In April 1993, at the outset of the digital era, the Phoenix-based law firm Canter & Siegel posted a very evocative advertising message[443] offering legal representation services for potential immigrants to hundreds of thousands of internet newsgroups (so-called spamming). [444] The advertising message reached people all around the world from Germany to Denmark, to South Africa to Australia.[445] Immediately after the law firm sent the mentioned advertising message, it was overloaded by thousands of messages by angry internet users who felt that the law firm had broken the rules of so called *netiquette* which is (or used to be) the conventions and guidelines that internet users followed when using mailing lists, email, and other internet tools. The spamming techniques used by Canter & Siegel forced many unwilling internet users to receive and read the law firm's advertising message. Nevertheless, in a letter to the American Bar Association Journal, Martha Siegel of Canter & Siegel claimed that the firm received over 20,000 positive responses to the mentioned advertising message, about 1,000 of whom became paying clients.[446]

Another similar form of internet advertisement consists in sending emails directly to prospective clients (so-called direct email solicitation). In *Shapero*,[447] the Supreme Court held that a Kentucky Supreme Court Rule, prohibiting targeted, direct email solicitation by U.S. attorneys for profit, violated the First Amendment. In the Supreme Court's view, indeed, a U.S. State may not completely prohibit lawyers from soliciting clients for pecuniary gain by sending truthful and non-deceptive letters or emails to people known to face particular legal issues. In the mentioned case, the Supreme Court stated that the crucial issue is to asses "*whether the mode of communication poses a serious danger that lawyer will*

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[443] The content of the advertisement was the following: "*Do you want to get a green card for permanent residence in the United States? THE TIME TO START IS NOW!!*".

[444] In relation to this case see B. G. GILPIN, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. Marshall J. Computer & Info. L. 697, 1995, p. 697.

[445] See J. BURGESS, *Who'll Make "The Net" Gain? Global Community Wrestles With Issue of Advertising*, Washington Post. April 26, 1994.

[446] M. SIEGEL, *Letter from Martha S. Siegel to the American Bar Association Journal*, A.B.A. J., September 1994, 13.

[447] See U.S. SUPREME COURT, *Shapero v Kentucky Bar Association*, 486 U.S. 466 (1988).

exploit (a potential client's) susceptibility".[448] Part of the U.S. literature immediately flagged how email communications pose a danger when lawyers exploit a potential client's susceptibility to undue influence.[449] For instance, an attorney who learns about an airplane crash on a newspaper or on a newscast could immediately send an email offering representation to the victims' families. The internet, compared to the offline world, would also allow the message to be transmitted in a very timely way, enhancing its effectiveness. The plane crash victims' family members in their emotional state are of course much more vulnerable to undue influence immediately after learning of the accident than they would be several days later it has occurred (see *infra* Chapter II, Section I, 4.2.6.1).[450]

For the reasons set out above, the Supreme Court in *Ohralik v Ohio State Bar Association*,[451] held that a U.S. State may regulate the solicitation of clients using direct email. In the Courts' view, first of all, a U.S. State may prohibit attorneys from soliciting using email where the possibility of undue influence and coercion exists because of the promptitude of the message; and, second of all, U.S. States could require attorneys to file copies of any advertisement sent via email with the State Bar in order to allow the Bar Associations to review the communications.[452] For an analysis of the issue of the direct email solicitation to relatives of a person injured or died in an accident within the German legal framework see *infra* Chapter II, Section I, 4.2.6.1, where the ambulance chasing case is analysed in depth.

The conclusion that might be drawn from the cases illustrated in this section, is that the most respectful and ethical way for providing information to the public is to create lawyer or law firm's web sites for interested users to access. Only after the website

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[448] U.S. SUPREME COURT, *Shapero v Kentucky Bar Association*, at 475 (1988).

[449] See B. G. GILPIN, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. Marshall J. Computer & Info. L. 697, 1995, p. 720.

[450] By way of example, U.S. attorneys used the internet to advertise their services to families of victims of mass disasters such as the Staten Island Ferry crash in New York: see *Ferry Victim Ad Raises Ire,* Newsday.com (Oct. 25, 2003).

[451] See U.S. SUPREME COURT, *Ohralik v Ohio State Bar Association*, 436 U.S. 447 (1978).

[452] See B. G. GILPIN, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. Marshall J. Computer & Info. L. 697, 1995, p. 722.

users contact the attorney or the law firm should the solicitation be made by the lawyers.[453] As a general rule, in the U.S., the constitutional right of a lawyer to send uninvited commercial emails that are truthful and non-deceptive is substantial but it may be restricted. More precisely, any rule or law that limits the former right in the U.S. must pass the so called *Central Hudson* test[454] (see *infra*, Chapter I, 3.1., footnote 27). This means that a State must identify a substantial interest to protect: if emailing is invasive enough to create a demonstrable negative effect on the administration of justice, the rule or law is likely to create a constitutionally acceptable limitation on truthful and non-deceptive speech.[455] Under the *Central Hudson* test, regulation of taste, dignity and professionalism seems to be outside the permissive scope of regulation. Nevertheless, many US States regulations (to some extent legitimately) continue to prohibit tasteless and unseemly contents (and means) in the name of misleading or potentially misleading advertisement.

More specifically, for instance, in the U.S., Model Rule 7.3 limits electronic communications in three ways. First, if a lawyer sends a communication to someone "*known to be in need of legal services in a particular matter*", the email must be labelled or, in any

[453] See B. G. GILPIN, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. Marshall J. Computer & Info. L. 697, 1995, p. 726.

[454] See U.S. SUPREME COURT, *Central Hudson Gas & Electric Corp. V Public Service Commission of New York*, 447 U.S. 557, 566 (1980), in which the Supreme Court stated: "*In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advanced the government interest asserted, and whether it is not more extensive than necessary to serve that interest.*".

[455] See, W. E. HORNSBY, *Spamming for Legal Services: A Constitutional Right Within a Regulatory Quagmir*, 22 J. Marshall J. Computer & Info. L. 97, 2003, p. 101. In *The Florida Bar v Went for it, Inc.* the Court let stand an ethics rule banning lawyers from sending letters seeking personal injury or wrongful death representation within thirty days of the date giving rise to the need for the representation. Applying the *Central Hudson* test, the Court found that the state interest was to protect "*the privacy and tranquillity of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers*" (see, U.S. SUPREME COURT, *The Florida Bar v Went for it, Inc.*, 515 U.S. 618 (1995)). This met the Bar's objective to limit activities that "*negatively affected the administration of justice*" and can create an adverse perception of the system of justice.

case, shall include the words "*advertising material*" at the beginning and ending of the communication.[456] Allowing lawyers to send emails to those known to be in need of the lawyer's services undoubtedly generates more business for them. However, this conduct also increases the risk that the consumer, who for any reason is in need of legal services, will be alarmed to receive an email from a lawyer. As a consequence, Model Rule 7.3 was created for the purpose to alert the recipient *ex ante* that the email is nothing more than an advertising message.[457]

Second, under Model Rule 7.3(b) a lawyer must not solicit in a way that involves "*coercion, duress or harassment*". The explanation comment to the previous Rule states that if "*after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)".* [458] Nevertheless, part of the U.S. literature pointed out that a lawyer could reasonably defend against allegations of harassment when multiple emails to a potential client are limited and inadvertent by giving the recipient an opt-out option within the email.[459]

Lastly, Model Rule 7.3 also states that a lawyer must not send communication to prospective client who has made known that he/she does not wish to receive the communication. In light of the above, in the U.S., if an attorney sends an electronic advertisement (which is not false or misleading) through a purchased mailing list,

[456] See ABA Model Rule of Professional Conduct 7.3

[457] See, W. E. HORNSBY, *Spamming for Legal Services: A Constitutional Right Within a Regulatory Quagmir*, 22 J. Marshall J. Computer & Info. L. 97, 2003, p. 104, where the author noticed that the Model Rule 7.3's provision is of little consequence with email because the lawyer has no economic advantage to limit the mailing to only those who are in need of legal services. This is why the obligation to label the communication will not typically apply in the email spamming case.

[458] See ABA Model Rule of Professional Conduct 7.3(b) comment.

[459] See, W. E. HORNSBY, *Spamming for Legal Services: A Constitutional Right Within a Regulatory Quagmir*, 22 J. Marshall J. Computer & Info. L. 97, 2003, p. 104.

permitting the clients to opt out of future messages, this conduct (commonly called spamming) will not violate the solicitation rules.[460]

3.6. Defensive domain names

Domain names are used to identify one or more internet protocol addresses. More specifically, domain names are used in Uniform Resource Locators (URLs) to identify particular web pages. For example, in the URL http://edition.cnn.com/ the domain name is edition.cnn.com. Moreover, every domain name has a suffix that indicates to which top level domain it belongs to. There are only limited number of such top level domains. For instance, ".com" (commercial businesses); ".org" (organization – non-profit); ".net" (network organizations); ".edu" (educational institutions); ".it" (Italy); ".de" (Germany).

Apparently, no legal limit exists on the amount of internet domain names that a law firm may buy and utilize. However, one might try to understand what would happen if a law firm copyrights every domain name that use the possible search words for lawyers or law firms in a particular field of practice. For instance, an intellectual property lawyer might select the following domain names: "intellectualproperty.com", "intellectualpropertylaw.com", "intellectualpropertylawyer.com" and then repeat the same for words like "patent", "copyright", "trademark", "licence", "royalty", as well as add domains modifying all the terms with the pertinent geographical location.

In the U.S. literature, the described conduct has been described as unfairly limiting the client access to other competent firms, preventing consumers from identifying competitors in a specific legal field.[461] Moreover, it is our view that, other than being clearly detrimental for consumers, the previous mentioned conduct could also constitute a form of unfair market foreclosure at the expense of lawyers and law firms competing in the same practice area. To copyright every domain name in a specific field of practice,

[460] See F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, 2005, available at www.ssrn.com, p. 16.

[461] See F. C. ZACHARIAS, *What Direction Should Legal Advertising Take?*, 2005, available at www.ssrn.com, p. 21.

indeed, seems to represent an unlawful and disproportionate defensive strategy which might allow one or more lawyers or law firms to create a barrier to entry the legal services market that nowadays is more and more digitalized.

3.7. Blogs and discussion Forum

A blog is an internet forum that offers opinions or information, sometimes on a particular issue, such as, for instance, intellectual property law or competition law matters. The material on the blog may include the blogger's opinions about a specific case, links to matters that relate to the blog's topic and comments from the blog's readers. Lawyers frequently use blogs to develop or enhance their profile as expert professionals in a specific area through blog posts that relate to a specific legal topic.[462] While most of the law firms' web sites are rarely updated, one of the advantages of having a blog consists into sharing up-to-date contents and into establishing a more personal relationship between lawyer and the blog users (among which potential clients). This means that when providing daily, weekly or monthly content on its blog, a law firm may surely create a new and dynamic form of interaction with colleagues and potential clients.

One might identify different categories of blogs. At one extreme, there are purely personal blogs that may contain lawyer's thoughts about issues that are completely unrelated with the lawyer's practice or with the law in general and contain no information about the lawyer's professional background. The former category of blog does not serve any advertising or marketing function, so they typically would not trigger the American Bar Association's Model Rules of Professional Conduct rule 7. At the other extreme, there are blogs that reside on a lawyer's or law firm's website and that are clearly designed for raising the firm's profile for marketing purposes. Within the US legal framework, such blogs would almost certainly have to comply with the relevant US State rules of

[462] See ABA COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, p. 5.

professional conduct to the same extent as the lawyer's websites on which those blogs appear.[463]

In the ABA Commission on Ethics' view, one central question concerns the extent to which lawyer-operated blogs are subject to the same ethical considerations as other forms of lawyers advertisement. In this respect, it is worth noting that through a blog a lawyer may legitimately provide general answers to legal questions. However, a lawyer should not provide specific legal advices on social media network or on a blog because, on the one hand, lawyer's responsive communications may be found to have created an attorney-client relationship; while, on the other hand, legal advices also may impermissibly disclose information protected by the attorney-client privilege.[464] In other words, an attorney-client relationship may knowingly be entered into by a lawyer and a potential client and informal communications over a social media could unintentionally result in the client believing that such a formal client-lawyer relationship exists. If such a relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

Other issues arise out of lawyer-operated discussion forums and discussion boards. For instance, a lawyer might create a forum where the public can discuss a particular legal issue, a remedy, or the effects of a specific remedy. The lawyer might then respond to

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[463] See ABA COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, p. 5, in which it is stated that there are many blogs that fall somewhere between these two extremes. For instance, some blogs are designed to create a forum for discussing particular types of legal issues with other lawyers who are knowledgeable about the same subject, but these blogs are not specifically designed for advertising purposes or to attract prospective clients. In the ABA's view, the content on these blogs would likely receive stronger First Amendment protection than blogs that are used primarily for advertising or marketing a lawyer's practice. However, to the extent that prospective clients use the blog, the lawyer might need to take into account how to avoid the creation of inadvertent lawyer-client relationships, such as whether to include the kinds of disclaimers that are often required when setting up a law firm's website.

[464] See NYSBA, *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Assocation*, June 9, 2015, available at http://www.nysba.org/socialmediaguidelines/, p. 10.

comments on the forum or encourage readers to visit the lawyer's website to learn more information. The question here is whether lawyers can build up such legal-oriented discussion forum without clearly disclosing that the discussion boards were created by lawyers who provide services related to the matter at stake or without disclosing the marketing-related function of that conversation. Similarly, lawyers (either the lawyers who created the discussion forum either other lawyers who are not among the creators or are not directly affiliated to the website) might post comments to legal questions and provide a link to their own websites. One could argue that these comments might trigger a variety of ethics rules including Model Rules 1.18, 5.5[465] and several Article 7 Rules.[466]

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[465] See Model Rule 5.5 stating as follows: "*a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.*

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or

On a related note, another recent opinion (held by the New York State Bar Association - "NYSBA") advised that lawyers may respond to an individual who posts about a specific legal issue on Twitter or Reddit[467] via the same media. However, if the lawyer (which of course in such a case is not the creator of the discussion forum) describes his/her capabilities or experience rather than merely discussing the individual's legal issue without mentioning his/her services, his/her response would be subject to the advertising rules requiring, among other things, that the response has to be labelled as "*advertising*" and has to include at least the law office address and phone number as well as the response to be retained for one year.[468]

3.8. Social and professional networking services

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of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction]".

[466] See ABA COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, p. 6.

[467] Reddit is a social news aggregation, web content rating and discussion website. Reddit's registered community members can submit contents such as text posts or direct links. Registered users can then vote submissions up or down to organize the posts and determine their position on the site's pages. The submissions with the most positive votes appear on the front page or the top of a category. Content entries are organized by areas of interest called "subreddits". The subreddit topics include news, science, gaming, movies, music, books, fitness, food, and image-sharing, among many others. The site's terms of use prohibit behaviours such as harassment, and moderating and limiting harassment has taken substantial resources.

[468] In this respect, see NYSBA, *Formal Opinion 1049*, 2015, available at http://www.nysba.org/CustomTemplates/Content.aspx?id=55624.

Social media networks such as Facebook, Twitter and LinkedIn have become indispensable tools used by legal professionals as well as the general public (among which of course potential clients). Particularly, in conjunction with the increased use of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers and law firms communicate with clients and general public. As the use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so do the ethical issues lawyers are facing and need to take into account when using social networks. [469] Since social media communications are often not just directed at a single person but at a larger group of people, or even the entire Internet community, lawyers advertising rules and other ethical rules must be considered when a lawyer uses social media.

One of the key aspect one might take into account when analysing the use lawyers do of social networks is that lawyers frequently use websites and social media services for both personal and professional reasons. It is worth noting how legal ethics issues in this case are much more complicated than they have been for more traditional client development tools.[470] Furthermore, in the ABA Commission on Ethics' view, networking websites (such as LinkedIn) could produce an unintentional lawyer-client relationship because lawyers who use networking websites may not be able to control the flow the information from prospective clients.[471]

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[469] In this respect, see NYSBA, *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*, June 9, 2015, available at http://www.nysba.org/socialmediaguidelines/, p. 1.

[470] See ABA COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, p. 2, where it is provided the example of a lawyer creating a Facebook profile that is accessible to families and prospective clients at the same time. The lawyer might then post professional announcements that are shared with all of those people, raising the question whether such announcements are subject to the usual ethical restrictions on lawyer advertising and solicitation.

[471] See again ABA COMMISSION ON ETHICS 20/20, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*, available at https://www.legalethicstexas.com/getattachment/237b47e5-

In light of the issues a lawyer might face when using social networks, the NYSBA drafted a set of Guidelines a New York lawyer should comply with in order to avoid committing prohibited conducts. First of all, according to the NYSBA Guideline No. 1 lawyers have the duty to understand the benefits and risks as well as the ethical implications associated with social media, including its use as a mode of communication, an advertising tool and as means to research and investigate matters. More specifically, as the American Bar Association has recently stated, it is important for a lawyer to be current with technology. By way of example, a lawyer who uses an electronic social media network in his/her practice should carefully review the terms and conditions, including privacy features – which change frequently – prior to using such a social network.[472]

Moreover, according to the NYSBA Guideline No. 2.A, a lawyer's social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile a lawyer primarily uses for the purpose of the retention of the lawyer or his/her law firm is subject to such rules.[473] Hybrid accounts may need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm. It is worth noting that it is not always straightforward to draw a line among the personal and professional use of a lawyer social network profile as well as to determine whether the former or the latter use is the predominant one.

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dc7a-4f02-af7b-dc55d711e3aa/ABA-Suggestions-and-Guidelines-for-Social-Media-Us.aspx, p. 3, in which it is stated that lawyers may not be able to include disclaimers and other protections against receiving the kind of information that could trigger ethical obligations under Model Rule 1.18.

[472] AMERICAN BAR ASS'N COMM. ON ETHICS & PROF'L RESPONSIBILITY, *Formal Op. 14-466*, 2014, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf, in which it is also stated that lawyers' competence may require understanding the often lengthy and unclear "terms of service" of a social media platform and whether the platform's features raise ethical issues.

[473] See also VIRGINIA STATE BAR, *Quick Facts about Legal Ethics and Social Networking*, 2011, available at http://www.vsb.org/site/regulation/facts-ethics-social-networking; CALIFORNIA STATE BAR, *Formal Op. No. 2012-186*, 2012, available at http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Opinions.

According to the NYSBA Guideline No. 2.B lawyers shall not advertise areas of practice under headings in social media platforms that include the term "*specialist*," unless the lawyer is certified by the appropriate accrediting body in a particular area of practice.[474] Although LinkedIn's headings no longer include the term "*Specialties*," lawyers still need to be aware of the prohibition on claiming to be a "*specialist*" when creating a social media profile. To avoid posting prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and impartial language to convey information about his/her professional experience. Examples of such objective information include the number of years spent in private practice and the number of cases handled in a particular legal field or practice area.[475]

Moreover, according to the NYSBA Guideline No. 2.C, a lawyer that maintains social media profiles must be mindful of the ethical restrictions relating to solicitation by her/him and the recommendations of her/him by others, especially when inviting others to view her/his social media network, account, blog or profile. A lawyer is also responsible for all the contents posted on her/his social media website or profile.[476] A lawyer therefore has a duty to periodically monitor her/his social media profile(s) or blog(s) covering all the comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. For instance, if a person who is not an agent of the lawyer unilaterally posts contents to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such contents if such

[474] See also NYSBA, *Op. 972*, 2013, available at http://lawyerist.com/lawyerist/wp-content/uploads/2013/09/2013-06-26-NYSBA-Opinion-re-Specialist-on-LinkedIn.pdf.

[475] See also PHILADELPIA BAR ASS'N PROF'L GUIDANCE COMM., *Op. 2012-8*, 2012, citing Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 85-170 (1985), available at http://www.philadelphiabar.org/PBAReadOnly/Opinion2012-8.

[476] See also FLORIDA BAR STANDING COMM. ON ADVERTISING, *Guidelines for Networking Sites* (revised Apr. 16, 2013, available at http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/a502e8b302def7a5852576e3004fc685!OpenDocument

removal is within the lawyer's control and, if not, she/he must promptly ask that person to remove them.[477]

Lastly, according to the NYSBA Guideline No. 2.D, a lawyer must ensure the accuracy of third-parties' legal endorsements, recommendations, or online reviews posted on his/her social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties. In other words, although lawyers are not responsible for contents that third-parties and non-agents of the lawyer post on social media, lawyers must, as noted above, monitor and verify that contents posted on profile(s) the lawyer controls are accurate. By way of example, lawyers should periodically monitor their LinkedIn pages at reasonable interval to ensure that third parties are not endorsing them as specialists (and to confirm the accuracy of any endorsements or recommendations as well as be aware of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers.

3.8.1. Facebook

Between the new social media phenomenon, the most interesting platforms which law firms and lawyers use in their everyday life are: Facebook, Twitter, LinkedIn.

Facebook is used by many international law firms and also by the leading Italian law firms in order to present the firm itself, interact with the clients on a more personal and informal level, add subscribers to the law firms' newsletter, collect reviews and comments concerning the law firms and post blog type contents. The State Bar of California Standing Committee on Professional Responsibility and Conduct have recently

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[477] See NYCLA, *Formal Op. 748*, available at http://www.nycla.org/NYCLA/Lawyers/Ethics_Opinions.aspx?WebsiteKey=80d9b981-d8fc-4862-bcde-1e1972943637&hkey=4438416d-2f4b-4a92-b232-9a1315c781c3&Ethics_Hotline=1. See also PHILADELPIA BAR ASSN. PROF'L GUIDANCE COMM., *Op. 2012-8*, 2012, available at http://www.philadelphiabar.org/PBAReadOnly/Opinion2012-8; VIRGINIA STATE BAR, *Quick Facts about Legal Ethics and Social Networking*, 2011, available at http://www.vsb.org/site/regulation/facts-ethics-social-networking.

issued the formal opinion No. 2012-186 seeking to asses under which circumstances an attorney's postings on social media websites would be subject to professional responsibility rules and standards governing attorney advertising. It is worth noting that many US attorneys have a personal profile page on a social media website. They regularly post comments about both their personal life and professional practices on their personal profile page. As is widely known, only individuals who can access the attorneys personal Facebook page may view these contents (in Facebook jargon, whom they have "friended"). On average, in the US, attorneys have about 500 approved contacts or "friends", who are mix of personal and professional acquaintances, including some persons whom does not even know.

The State Bar of California Standing Committee on Professional Responsibility and Conduct in its mentioned opinion noticed as, in the past few years, attorneys posted on their profile pages the following remarks which are visible to all of their "*friends*", "*connections*", or "*followers*" although not to the general public at large: (1) "*Case finally over. Unanimous verdict! Celebrating tonight*"; (2) "*Another great victory in court today! My client is delighted. Who wants to be the next?*"; (3) "*Won a million-dollar verdict. Tell your friends and check out my website*"; (4) "*Won another personal injury case. Call me for a free consultation*"; (5) "*Just published an article on wage and hour breaks. Let me know if you would like a copy*".[478] In the State Bar of California Standing Committee on Professional Responsibility and Conduct's view, material posted by an attorney on social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a "*communication*" within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California which in rule 1-400(A) defines "*communications*" as: "*any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client* …". Thus, the relevant question for determining whether a Facebook post constitutes a "*communication*" under rule 1-400(A) is whether it concerns

[478] See CALIFORNIA STATE BAR, *Formal Op. 2012-186*, 2012, https://www.calbar.ca.gov/.../Opinions/CAL%202016-196%20.

the availability for professional employment of the attorney.[479] If a Facebook post is found to be a communication subjects to rule 1-400, the result is that the post must comply with the mandates of Rule 1-400(D) which set out a detailed list of prohibited communications or solicitations.[480]

It is worth noting that, in the five examples mentioned in the opinion No. 2012-186, attorneys post two types of professional information: (a) general legal information, such as recommendations of good articles; and (b) information about their legal practices, such as complaints he/she has filed and victories in court. With respect to the first type of information (*e.g.* example (5) above) the State Bar of California Standing Committee on Professional Responsibility and Conduct concluded that this does not constitute information concerning availability for employment. When attorneys post information about their practice, however, rule 1-400 may apply.

More precisely, considering example (1) above, in the Committee's opinion, this statement - standing alone - is not a communication under rule 1-400(A) because it is not a message or offer "*concerning the availability for professional employment*". Attorney's status postings simply announcing recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication.

Similarly, when examining example (2), the statement "*Another great victory in court today!*" standing alone is not a communication under rule 1-400(A) because it is not a

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[479] The State Bar of California Standing Committee on Professional Responsibility and Conduct's Opinion 2012-186 did not address whether the initial "*friend*" or "*connection*" request, if motivated primarily by business development purposes, can itself constitute a communication subject to rule 1-400.

[480] See Rules of Professional Conduct of the State Bar of California, rule 1-400(D) stating as follows: "*A communication or a solicitation (as defined herein) shall not: (1) Contain any untrue statement; or (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct. (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification*".

message or offer "*concerning the availability for professional employment*". However, the addition of the text, "*Who wants to be next?*" meets the definition of a "*communication*" because it suggests availability for professional employment. Since example (2)'s posting is a communication, it violates the prohibition on client testimonials according to which an attorney cannot disseminate "*communications*" that contain testimonials about or endorsements of a member unless the communication also contains an express disclaimer.[481] Similarly, the post may be presumed to violate rule 1-400 because it includes "*guarantees, warranties, or predictions regarding the result of the representation*."[482] In other words, the post expressly relates to a "*victory*," and could be interpreted as asking who wants to be the next victorious client. The Committee further concludes that "*Who wants to be next?*" can be viewed as a way of seeking professional employment for pecuniary gain. Accordingly, Attorney's post runs afoul of rule 1-400(E), Standard 5, because it does not bear the word "*Advertisement*," "*Newsletter*," or words to that effect. Attorneys may argue that including this wording for each "*communication*" posting would be overly burdensome, and destroy the conversational and impromptu nature of a social media status posting. However, the Committee is of the view that an attorney has an obligation to advertise in a manner that complies with applicable ethical rules. If compliance makes the advertisement seems awkward, the solution is to change the form of advertisement so that compliance is still possible.[483] Finally, the Committee notes that a true and correct copy of any "*communication*" must be retained by Attorney for two years. Rule 1-400(F) expressly extends this requirement to communications made by "*electronic media*".[484] If

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[481] See Rules Prof. Conduct, rule 1-400(E), Standard 2; see also SUPREME COURT OF CALIFORNIA, *Belli v. State Bar* (1974) 10 Cal.3d 824 [112 Cal.Rptr. 527] holding that clients are "*dazzled by the services they have received from the attorney*" and consequently an attorney "*cannot advertise that he has performed his services so well that his clients consequently praise him*".

[482] See Rules Prof. Conduct, rule 1-400(E), Standard 1.

[483] For instance, Facebook offers businesses the opportunity of creating a "Fan Page," on which statements of "Advertisement" or "Newsletter" might be considered less awkward.

[484] See Rules Prof. Conduct, rule 1-400(F) stating as follows: "*A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall*

Attorney discovers that a social media website does not archive postings automatically, then Attorney will need to employ a manual method of preservation, such as printing or saving a copy of the screen.

In relation to the example (3)'s posting, it appears that the attorney is asking the reader to tell others to look at her/his website so that they may consider hiring her/him. This language therefore is subject to the adverse presumption in rule 1-400(E), Standard 5 (*e.g.*, it must contain the word "*Advertisement*" or a similar word) and the preservation requirement in rule 1-400(F).

As regards the example (4)'s posting, given that rule 1-400(A) does not require that all communications are for pecuniary gain, the Committee concluded that an offer to perform a professional service for free can constitute a communication. An offer of a free consultation is a step toward securing potential employment, and the offer of a free consultation indicates that the lawyer is available to be hired.

Lastly, in relation to the example (5)'s posting, the Committee believed the statement does not concern "*availability for professional employment*" because the attorney was merely relaying information regarding an article that he/she had published, and was offering to provide copies.[485]

3.8.2. LinkedIn and Twitter

LinkedIn is the most professional and business-oriented social networking site. It is mostly used to write and get recommendations of colleagues, to join groups in related

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make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication".

[485] See SUPREME COURT OF CALIFORNIA, *Belli v. State Bar* (1974) 10 Cal.3d 824 [112 Cal.Rptr. 527] holding that "*Exposition of an attorney's accomplishments in an effort to interest persons*" in an event involving an attorney did not violate restrictions on attorney advertising; see also LOS ANGELES COUNTY BAR ASSN., *Formal Op. 494*, 1998, available at https://www.lacba.org/resources/tools-documents/ethics-opinions, stating that "*Communications or solicitations solely relating to the availability of seminars or educational programs, or the mailing of bulletins or briefs where there is no solicitation of business, are also constitutionally protected under the State Constitution and First Amendment as non-commercial speech.*").

law fields, to post the lawyers' resume in order to get reviews, new job opportunities and to reach new potential clients. Law firms and lawyers use of LinkedIn in their everyday life, is an example where U.S. states regulations conflict, and created difficulty of application. The nature of the information posted on law firm or lawyer's LinkedIn profile may require that the profile be deemed "*attorney advertising*". In general terms, a profile that contains basic biographical information, such as education and a list of current and past employment, does not constitute attorney advertising.[486] Contrarily, according to NYCLA, Formal Opinion 748, a lawyer's LinkedIn profile that includes subjective statements regarding his/her skills, areas of practice, endorsements, or testimonials from clients or colleagues is likely to be deemed advertising.[487]

When using LinkedIn, users can list their skills and areas of practice in a designated section entitled "*Specialties*" or "*Skills and Expertise*" and they probably should do so to enhance their professional profile and develop business opportunities. However, according to some ethics opinions, this conduct constitutes potentially misleading advertisement in violation of some U.S. States rules.

In Florida, for instance, Rule 4-7.14 provides that a "*lawyer may not engage in potentially misleading advertising*" and this means that he/she may not state to be "*board*

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[486] See NYCLA, *Formal Op. 748*, 2015, available at https://www.nycla.org/siteFiles/.../Publications1748_0.pdf, in which it is stated as follows: "[*i*]*f an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. See RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." See RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills - even where those skills are chosen from fields created by LinkedIn - constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d)*".

[487] See NYCLA, *Formal Op. 748*, 2015, available at https://www.nycla.org/siteFiles/.../Publications1748_0.pdf.

certified, a specialist, an expert, or other violations of those terms" because this could be potentially misleading to prospective clients.[488] As a consequence, in Florida, Rule 4-7.12 has made attorney participation on LinkedIn unduly difficult.[489] On a related note, in September 2013, the Florida State Bar held an advisory opinion stating that a lawyer may not list his/her practice area under the LinkedIn "*Skills and Expertise*" sector unless he/she is board certified in that practice area.[490] Along the same lines, the New York State Bar Association advised that a lawyer or a law firm may not use the LinkedIn "*specialties*" sector to describe their areas or practices because such activity would inappropriately allow that lawyer or law firm to claim recognition as a "*specialist*" without certification.[491] Furthermore, the New York State Bar Association in its Social Media Ethics Guidelines discussed the "*prohibited use of specialists on social media*" stating in the Comment that "*if the social media network, such as LinkedIn, does not permit otherwise ethically prohibited pre-defined headings, such as specialist, to be modified, the lawyer shall not identify herself under such heading unless appropriately certified*[492]".

To avoid a drop in users and traffic, LinkedIn agreed on changing its website form and headings. Thus, in early 2014, the "*Skills and Expertise*" heading was substitute by

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[488] See R. REGULATING FLA. BAR 4-7.14(a)(4), available at https://www.floridabar.org/rules/rrtfb/. The comments add that "*a lawyer can only state or imply that the lawyer is "certified", a "specialist", or an "expert" in the actual area(s) of practice in which the lawyer is certified*". See also NYSBA, *Op. 972*, 2013, available at http://www.nysba.org/CustomTemplates/Content.aspx?id=28101; NYSBA, *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*, June 9, 2015, available at http://www.nysba.org/socialmediaguidelines/, p. 7.

[489] See ASSOCIATION OF PROFESSIONAL RESPONSABILITY LAWYERS, *2015 Report of the regulation of lawyer advertising committee*, June 22, 2015, available at www.aprl.net, p. 23.

[490] See NYSBA, *Formal Op. 2013-972*, 2013, available at http://www.nysba.org/CustomTemplates/Content.aspx?id=28101.

[491] See NYSBA, *Formal Op. 2013-972*, 2013, available at http://www.nysba.org/CustomTemplates/Content.aspx?id=28101.

[492] NYSBA, *Social Media Ethics Guidelines*, March 18, 2014, available at www.nysba.org; See also PENNSYLVANIA BAR ASSOCIATION, *Formal Opinion*, 2014-300, available at www.pabar.org/.../Ethics%20Opinions/formal/f2014-300.pdf.

"*Skills and Endorsements*" and then by "*Skills*".[493] On the one hand, the new LinkedIn heading "*Skills*" does not contain controversial words like "*Expertise*" and "*Specialties*" any longer; nevertheless, on the other hand, some authors showed that LinkedIn has simply taken the problem putting it in another place and format. LinkedIn indeed still asks the user the problematic question "*do you have any of these skills or areas of expertise?*" and, moreover, this social network permits endorsements and recommendations but does not allow for the addition of disclaimers to statements that many State Bars would no doubt consider testimonials.[494]

As already mentioned, a lawyer has also the duty to periodically monitor his/her social media profiles or blogs for comments, endorsements and recommendations to ensure that third-party posts do not violate ethics rules. In other words, if a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyers' control and, if not within the lawyer's control, he/she must ask that person to remove it.[495] Moreover, if a post cannot be removed, consideration must be given as to whether a curative post needs to be made.[496] Similarly, even if a lawyer is not responsible for the content that third-parties and non-agents of the lawyer

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[493] See THE FLORIDA BAR, *Update: Complying with Bar Rules on LinkedIn May be Easier Than Thought*, Fla. Bar News, 2014, available at www.floridabar.org.

[494] See again NYSBA, *Social Media Ethics Guidelines*, March 18, 2014, available at www.nysba.org; See also PENNSYLVANIA BAR ASSOCIATION, *Formal Opinion*, 2014-300, available at www.pabar.org/.../Ethics%20Opinions/formal/f2014-300.pdf.

[495] See NEW YORK COUNTY LAWYERS' ASSOCIATION, *Formal opinion 748*, 2015, available at http://www.nycla.org/NYCLA/Lawyers/Ethics_Opinions.aspx?WebsiteKey=80d9b981-d8fc-4862-bcde-1e1972943637&hkey=4438416d-2f4b-4a92-b232-9a1315c781c3&Ethics_Hotline=1; See also PHILADELPIA BAR ASSN. PROFESSIONAL GUIDANCE COMM., *Op. 2012-8*, 2012, available at http://www.philadelphiabar.org/PBAReadOnly/Opinion2012-8; VIRIGINIA STATE BAR, *Quick Facts about Legal Ethics and Social Networking*, available at http://www.vsb.org/site/regulation/facts-ethics-social-networking.

[496] See NEW YORK STATE BAR ASSOCIATION, *Social Media Ethics Guideline of the Commercial and Federal Litigation Section of the NewYork State Bar Association*, 2015, comment to Guideline No. 2.C, available at https://www.nysba.org/socialmediaguidelines17.

post on social media, he/she must, as noted above, monitor and verify that posts about her/him, made to profiles the lawyer controls, are accurate.[497] This means that lawyers should periodically monitor their LinkedIn profile page to ensure that others are not incorrectly endorsing them as specialists and to confirm the accuracy of any endorsements or recommendation.[498]

Furthermore, in many U.S. States, lawyers are not allowed to publicise testimonials. However, on LinkedIn, people can recommend lawyers and law firms. If lawyers and law firms accept a recommendation, they could be subject to their States' ethical rules. In this respect, in Texas, it is allowed to have testimonials, but a lawyer cannot make statements that compare her/him to other lawyers or law firms based on unverifiable data, like "*She is the best lawyer in Dallas*".[499]

Lastly, one could argue that consumers need and want more useful and factual information in order to choose a lawyer. In this regard, the data collected in the 1997 by a Task Force convened by the Florida State Bar showed that consumers were clearly interested in attorney qualification, experience and competence and professional record (*i.e.* wins/losses). However, it is worth noting that the purpose of some of the US States regulations are not aimed at limiting the information available to the consumers but to protect them from misleading information such as, for instance, the one concerning a lawyer promoting herself/himself as a divorcing expert without having any kind of certified skills in that related field. In the previous case, the average consumer may be

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[497] See NEW YORK STATE BAR ASSOCIATION, *Social Media Ethics Guideline of the Commercial and Federal Litigation Section of the NewYork State Bar Association*, 2015, comment to Guideline No. 2.D, available at https://www.nysba.org/socialmediaguidelines17.

[498] See NEW YORK COUNTY LAWYERS' ASSOCIATION, *Formal opinion 748*, 2015, available at http://www.nycla.org/NYCLA/Lawyers/Ethics_Opinions.aspx?WebsiteKey=80d9b981-d8fc-4862-bcde-1e1972943637&hkey=4438416d-2f4b-4a92-b232-9a1315c781c3&Ethics_Hotline=1, where it is stated that LinkedIn allows users to approve endorsements, thereby providing lawyers with a mechanism to promptly review and then reject or approve endorsements. Furthermore, a lawyer may also hide or delete endorsements which may obviate the ethical obligation to periodically monitor and review such posts.

[499] See AMERICAN BAR ASSOCIATION, *The Ethics of Online Advertising*, March 2013, available at http://abaforlawstudents.com/2013/03/03/ethics-online-advertising/.

positively fascinated by the unprepared and unspecialized lawyer's advertising and consequently might choose her/him as representative. This choice could cause issues to the client in the future due to the advertising lawyer lacking the specific competence in the field. On top of that, the jurisdictional differences between U.S. States may unfairly inhibit the spread of information creating the so called "dumping effect" between U.S. lawyers registered in different Bar associations.[500]

Twitter is used by lawyers and law firms to keep up real-time with the developments in the legal world. As already pointed out, in Florida, Rule 4-7.12 required that, among other things, all advertisement for legal employment must include the lawyer's or law firm's full name and office location.[501] This rule makes a lawyer's or a law firm's use of Twitter practically impossible because originally there was a limit of 144 (currently 280) characters for every "tweet", which is a status update.[502] Similarly, lawyers

[500] For instance, Arkansas, Nevada, Pennsylvania, South Carolina and Wyoming have prohibitions against the use of testimonials and endorsement; California, Florida, Georgia, Louisiana, Missouri, Montana New York, Rhode Island, South Dakota and Wisconsin allow the use of testimonials and endorsements with appropriate disclaimers; while still other U.S. States have rules containing no provision governing endorsement and testimonials at all. See AMERICAN BAR ASSOCIATION, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, 2014, available at www.americanbarassocation.org.

[501] See R. Regulating Fla. Bar 4-7.12(a)

[502] See D. L. HUDSON Jr., *Firm challenges Florida State Bar Over Website Ad Limits*, ABA Journal, 2014, available at www.abajournal.com; D. L. HUDSON Jr., *You Cannot Be Serious*, *Law Firms Tell Florida Bar*, Courthouse News Service, 2013, available at www.courthousenews.com; see also NYSBA, *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*, June 9, 2015, available at http://www.nysba.org/socialmediaguidelines/, p. 18, in which it is stated that an attorney's ethical obligation apply to all forms of covered communications, including social media. If a post on Twitter is deemed as attorney advertising, the rules require that a lawyer must include disclaimer. Given the Twitter's character limit, utilizing the disclaimers may be impractical or not possible. Yet, in the NYSBA's view, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising.

or law firms could not use Twitter to announce a specific case outcome in US States that require a disclaimer to accompany the statement.[503]

4. Italian specificity

In Italy, the lawyers' use of the internet to advertise informative messages is expressly recognized and legitimized by both Articles 10 of the Law 31 December 2012, n. 247 and 35 of the new *Codice Deontologico Forense* as amended by the 22 January 2016's resolution of the *Consiglio Nazionale Forense*.[504]

Before article 35 *Codice Deontologico Forense*'s amendment, Paragraphs 9 and 10 of the previous version stated that the lawyers may only use, for informative purposes, websites with their own domain name without redirection and in any case directly ascribable to them or to their law firm. Moreover, under the previous version of article 35, paragraph 10, the lawyers were responsible for the contents and the security of their websites which could not have contained any commercial or advertising references either through the direct indication or through links to other external websites. Furthermore, under article 35 previous version, a lawyer could not use the websites' or web portals' spaces of third parties if there were advertisings or any kind of pop-ups into them. Moreover, in the CNF's view, the lawyers' surreptitiously use of different nature and

[503] See Va. R. of Professional Conduct 7.1(b): "*A communication violates this rule if it advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a contest that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication on the case results. When the communication is in writing, the disclaimer shall be in bold face and uppercase letters in a front size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same colour and against the same coloured background as the text used to advertise the specific or cumulative case results*".

[504] See article 10, paragraph 2, of the Law 31 December 2012, n. 247 stating as follows: A lawyer is allowed to inform people about his/her professional activity, the organization and the structure of his/her law office, and about any achieved specializations and scientific and professional qualifications. Disclosure in public by any means, including internet, shall be transparent, truthful, correct and not comparative with other professionals, ambiguous, misleading, denigrating or suggestive. In any case, the information provided shall refer to the nature and extent of the professional obligation. The violation of the provisions provided for in this article constitutes a disciplinary offence. See also the new version of article 35, paragraph 1, of the Italian *Codice Deontologico Forense*.

contents' website (e.g. websites providing information to general public or consumers) in order to promote their activity has to be prohibited.[505] According to the CNF, many Italian Local Bar Associations have restrictively interpreted lawyers advertising on the web.[506]

Applying the content of an old version of the Italian *Codice Deontologico Forense*, the *Consiglio dell'Ordine degli avvocati di Firenze*, in January 2012, urged lawyers not to promote their professional services through Groupon's online vouchers.[507] Along the same lines, the Italian *Consiglio Nazionale Forense* published on its website the CNF's Opinion 11 July 2012 under which the conducts carried out by lawyers and consisting into the promotion or the offer of their legal services through a third person online or through digital

[505] See CONSIGLIO NAZIONALE FORENSE, Ufficio Studi*, La pubblicità dell'avvocato*, Rome 22 October 2013, availalble at http://www.viewnetlegal.com/index.php/codice-etico/14-articoli/14-cnf-la-pubblicita-dell-avvocato.

[506] See for instance, CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI PISTOIA, *Decision 28 November 2003*, available at https://www.avvocatipistoia.it/home?p_p_id=3&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_3_struts_action=%2Fsearch%2Fsearch&_3_redirect=%2F&_3_keywords=2003&_3_groupId=1158911; CONSIGLIO NAZIONALE FORENSE, *Opinion 21 November 2001*, available at https://www.codicedeontologico-cnf.it/?cat=6&paged=90, prohibiting lawyers' legal advices via web when given using third parties web sites; C.O.A. ROMA, *Opinion 16 June 2005*, available at https://www.ordineavvocatiroma.it/, prohibiting the promotion of a law firm on a public entity website; CONSIGLIO NAZIONALE FORENSE, *Opinion 27 April 2005*, n. 35, available at https://www.codicedeontologico-cnf.it/?cat=6&paged=56; CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI ROMA, *Opinion 30 November 2006*, available at https://www.ordineavvocatiroma.it/, sanctioning the exploitation of the lawyer's webmaster quality of a current juridical matters' website in order to promote his legal services there.

[507] See CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI FIRENZE, *Decision 9 November 2011*, available at www.ordineavvocatifirenze.eu/wp-content/uploads/2012/.../Verbale-09.11.2011.pdf, where it is stated that to advertise and offer discounted legal services through the sale of coupons or vouchers purchasable on a third party website (like www.groupon.it) represent, among others things, a violation of article 17 *bis*, paragraph 4, (previous version) *Codice Deontologico Forense* (that was the mirror of the mentioned previous version of article 35, paragraph 9) because lawyers could not promote their services through a website with a domain name that is not directly ascribable to them or to their law firm.

platforms could be punishable according to the past version of the Italian *Codice Deontologico Forense*. Indeed, in the CNF's view, to guarantee the consumer protection, it was crucial to assure that the first meeting between a lawyer and a client would be a direct and personal one instead of one which will take place thanks to the intermediation carried out by third parties who earn money from this activity.[508]

In contrast, the Italian *Autorità Garante della Concorrenza e del Mercato* (AGCM) on July 2013 opened an investigation concerning the mentioned CNF Opinion to assess whether it represented a decision of association of undertakings restricting competition in the lawyers' market.[509] The investigation ended up with the adoption of a severe pecuniary sanction against the CNF because the publication on the CNF's website of the Opinion n. 48/2012 11 July 2012 was considered as an infringement of article 101 TFEU, limiting the lawyers' (legitimate) use of digital and online platforms owned by third parties in order to promote the economic convenience and to sell at a discounted price their legal services on the Italian market.[510]

Moreover, with this decision the AGCM also imposed on the CNF not to adopt in the future conducts or decisions which will be identical or similar to the one already sanctioned. Conversely, the CNF, in January 2014, amended the Italian *Codice Deontologico Forense* including in Article 35 the already mentioned paragraphs 9 and 10 concerning the right for lawyers to only use website with their domain name in order to promote their legal services on the market and to provide consumers with the necessary information concerning the legal services carried out by the lawyer or the law firm. The AGCM assessed that this amendment of the Italian *Codice Deontologico Forense*, looking specifically at the content of article 35 paragraph 9, represented an illegitimate repetition in term of contents of the previous contested and sanctioned CNF's Opinion 11 July 2012. Consequently, the AGCM adopted a new punitive measure against the CNF because, in the Italian authority's view, the CNF repeated the same violation of article 101 TFEU

[508] See CONSIGLIO NAZIONALE FORENSE, *Opinion 11 July 2012*, available at www.consiglionazionaleforense.it.

[509] See AGCM, *I748*, *16 July 2013*, *condotte restrittive del CNF*, available at www.agcm.it.

[510] See AGCM, *I748*, *Decision 22 October 2014*, *n. 25154*, *condotte restrittive del CNF* available at www.agcm.it.

which had already been sanctioned by the AGCM with the mentioned Decision n. 25154 of the 22nd of October 2014.[511]

In compliance with the new AGCM decision, on the 22nd of January 2016, the CNF decided to amend again the wording of article 35 Codice Deontologico Forense fully eliminating the disputed paragraphs 9 and 10. Thus, at the end of the story, nowadays in Italy, it seems to be fully reasonable for lawyers to promote their legal services on digital platforms or internet website owned by third companies and intermediaries specialized in the offer of any kind of services for a discounted price. In other words, in Italy lawyers might start using social networks (Facebook, LinkedIn, Twitter, Google+) and directories in order to promote their services as well online platforms such as Groupon and Amazon in order to advertise their discounted legal services. However, the dignity and decorum criteria – which are still in force – should be always taken into consideration by lawyers while advertising their messages or promoting their services online.

[511] See AGCM, *I748B*, *Decision 27 May 2015*, *n. 25487*, *condotte restrittive del CNF - Inottemperanza*, available at www.agcm.it.

CONCLUSION

The third chapter has shown that the rise of new technologies has been increasingly affecting the way in which lawyers advertise their services. New advertising practices have been taken up by lawyers and one might expect that in the near future, thanks to the fast technological developments, new media or new ways to advertise will emerge.

More precisely, the new technologies and media have been changing the way to advertise legal services, being day after day less expensive and much quicker to carry out advertising campaigns potentially accessible worldwide. One should therefore expect a sharp increase in the number of advertising messages that will be conveyed using new media and technologies in the next few years and, as a consequence, an equally relevant increase in the number of lawyers commercial messages that might be potentially detrimental for consumers, because they include indecorous or undignified contents (being purely emotional, suggestive and fascinating) or because the ways in which they are promoted or the means and the mechanisms with which they are carried out are indecorous or undignified (being aggressive, incessant, and intrusive).

Among the main issues deriving from the relationship between lawyers advertisement, on the one hand, and continuous technological developments, on the other hand, one should certainly take into account the following three: (i) it might be very challenging for regulators and legislators to keep up with the speed of technological changes; (ii) lawyers might want to have a certain level of legal certainty in order to set the boundaries between legitimate and illegitimate advertising conducts when using new technologies and new media; and (iii) enforcers do not have the resources to try to evaluate and (if necessary) regulate every disseminated advertising message (either *ex ante* or *ex post*). These three issues, which are connected, might lead to the paradox whereby some lawyers who want to advertise their services using new media or technologies might not be incentivized to do so because of the absence of legal certainty on whether their advertising practices would be eventually deemed as unlawful conducts; while some

others might decide to carry out an advertising campaign, even being aware of its (potential) unlawfulness, given the low risk of being caught and sanctioned.

In this new and fast-changing scenario, when addressing new potential issues and advertising campaigns, the new, dynamic and evolutionary concept of competition law, described in the first chapter, should be taken into account in order to model and adapt the regulations and limitations in force to the new advertising practices. More specifically, the approach one should follow in order to understand whether new potential advertising conducts would need a certain degree of regulation consists ultimately on evaluating if they might undermine the prospective clients' chance to consciously choose a good quality lawyer having the right degree of integrity and experience in order to guarantee the consumers' proper access to justice.

As we have already seen in chapter two in relation to the Italian and German legal frameworks, consumers proper access to justice should also assume a key role both when evaluating *ex ante* the need to limit a new potential advertising conduct and when assessing *ex post* the legitimacy of a limitation to a newly created advertising practice. On the one hand, indeed, in the digital era, it is much easier, cheaper and faster for the average consumers to gather information in relation to the legal services they might need to purchase and to apparently make a much more informed and rational choice. On the other hand, however, since legal services are credence goods, consumers would only be able to appreciate informative advertising (e.g. information on office location, practice areas, lawyers' expertise) while they could not asses the reliability of purely commercial information on the legal services offered.

The points made above apply even more in the digital era, where lawyers might much easily overload prospective clients with purely commercial, suggestive, emotional, aggressive and incessant advertising messages, adversely affecting the consumers' choice of the most suitable lawyer, being very complicated for them to distinguish truthful and useful information from the worthless and deceptive one. In this scenario, dignity and decorum might still play a crucial role in order to guarantee consumers proper access to justice especially when they proportionately restrict advertising messages that are not misleading (and hence do not fall within the scope of Directive 2006/114/EC) but can

still undermine consumers' choice (e.g. an indecorous and suggestive advertising message might illegitimately direct consumer's choice without providing him/her any new useful information but only exploiting consumer's fears or state of need).

In conclusion, even in the digital era, in addition to the ban on misleading advertising, proportionate advertisement restrictions – also when based on the decorum and dignity – should still fall outside the scope of Article 101(1) TFUE when they are objectively necessary to allow clients to knowingly choose a good quality lawyer in order to guarantee the consumer's constitutional right of defence and to protect the lawyer reputation, that is strictly related to the quality of the legal services offered to the ultimate consumer.

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