

## **CNMC's CONTRIBUTION TO THE CMA INFORMAL REQUEST FOR INFORMATION ON THE MARKET STUDY INTO THE PROVISION OF LEGAL SERVICES**

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The Competition and Markets Authority (CMA) has carried out an informal request for information (RfI) on the provision of legal services, regarding these issues:

1. The role of information, since there is some evidence that competition is subdued, partly owing to the lack of information about prices online.
2. Consumer protection tools.
3. The potential for regulation to restrict competition in terms of barriers to entry, compliance costs and exclusive rights.
4. Remedies for the problems found in the previous three issues, specifically as far as legal education and regulatory requirements are concerned.

As the Spanish Competition and Markets Authority, the CNMC's advocacy role has addressed in depth issue 3, regarding some regulatory requirements which hinder competition in the provision of legal services. It has also examined issue 1 on price competition, although perhaps focusing more on regulatory constraints than on the lack of information. Thus, the CNMC has drawn up proposals and potential remedies consisting in tweaking or revamping the regulatory framework.

However, consumer protection is not directly under the scope of the CNMC. As a consequence, these comments will not address neither issue 2 nor the part of issue 4 concerning legal education.

Therefore, this contribution will be structured as follows. The first section will address barriers to entry, exclusivity rights and constraints on exercise, corresponding to issue 3 of the CMA's RfI. The second one will tackle the insufficient (price) competition in the provision of legal services, although in the case of Spain this is related not only to the lack of information but also to regulatory restraints (which can be interpreted as a barrier to exercise). Hence, some takeaways of the second

section may relate to issue 1 of the CMA's Rfl while others to issue 3. There is not a specific section on remedies as these will be explained in each of the two sections, linking the problem found to the solution proposed by the Spanish Competition Authority (the CNMC or its predecessor, the CNC).

From the standpoint of its advocacy role, CNMC's flagship products affecting legal services are the following:

- 2012- Report on "Professional Bodies" (*Colegios Profesionales*) after the transposition of the Services Directive ([link to the Spanish version](#)) (English version attached).
- 2009- Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives (Procuradores) ([link to the Spanish version](#)) (English version attached)
- 2008- Report on "Professional Services" (*Servicios Profesionales*) and "Professional Bodies" (*Colegios Profesionales*) ([link to the Spanish version](#)) (English version attached)

Other CNMC's advocacy products have examined specific regulatory initiatives in this matter:

- IPN/DP/0008/14 Report on the draft Organic Law of the judiciary ([link to the Spanish version](#))
- PRO/001/13 CNC's Opinion on the judicial procedure to appoint "Court Experts" (*Peritos Judiciales*) ([link to the Spanish version](#))
- IPN 110/13 Report on the draft Law on Professional Services and Bodies (*Servicios y Colegios Profesionales*) ([link to the Spanish version](#)) (this draft Law was not finally approved).
- IPN 096/13 Report on the draft Law modifying the Code of Civil Procedure ([link to the Spanish version](#))

- IPN 086/13 Report on the draft Statute of the Professional Body of Legal Representatives (Procuradores) ([link to the Spanish version](#))
- Posición de la CNC en relación con el Real Decreto 775/2011, de 3 de junio, por el que se aprueba el Reglamento de la Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de abogado y procurador de los tribunales, de junio de 2011 ([link to the Spanish version](#))

Many of these reports and studies deal with issues raised by the status of “Professional Bodies” (or “Professional Colleges”, *Colegios Profesionales*), which share features with professional associations but fall under the scope of Spanish public law and are endowed with some public functions, such as regulating the profession and protecting the interests of users of professional services. There are professional bodies for legal professions, such as lawyers (*abogados*) and legal representatives (*procuradores*).

This contribution aims at focusing on some problems found in these reports which are common to all Professional Bodies but which can have a higher impact on legal services. Furthermore, we will dig into specific restrictions on the abovementioned legal professions.

## **1. Barriers to entry, exclusivity rights and constraints on exercise**

### Mandatory membership

The most evident barrier to entry in some activities, legal services therein<sup>1</sup>, is **mandatory membership** in Professional Bodies<sup>2</sup> (besides, in those cases Professional Bodies have the exclusivity in representing the profession). Mandatory membership must be stipulated by a national law and it should pass the test of

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<sup>1</sup> See page 16 of [IPN 096/13](#) Report on the draft Law modifying the Code of Civil Procedure.

<sup>2</sup> See ¶133-145 of the 2012 Report on “Professional Bodies”.

necessity, proportionality and non-discrimination. Nevertheless, there is a transitory regime where, until the government passes a new Law on Professional Bodies, there are many professions with mandatory membership even if this requirement is not specified by any Law and despite the absence of justification in terms of good regulation (necessity, proportionality and non-discrimination).

The remedy to this problem would be passing a new Law on Professional Bodies, limiting mandatory membership to those cases where it is necessary and proportional (because there are 'overriding reasons relating to the public interest').

And, **even in those cases where there is not mandatory membership<sup>3</sup>, Professional Bodies still hold some prerogatives** which make membership almost compulsory in practice. Professional Bodies hold the function of fighting against "professional trespassing" (*intrusismo profesional*), with the potential to jeopardize non-members ability to compete. Members of a Professional Body sometimes enjoy the benefit of using a professional name in exclusivity and they are included in lists of "**court experts**" (*peritos judiciales*) to be called in judicial procedures, lists of "official receivers" (*administrador concursal*) in bankruptcy procedures and lists of "ex officio" lawyers. Some of these restrictions are equivalent to "exclusivity rights" and will be addressed in more detail below.

In any case, the remedy would be removing as well all those mechanisms which make membership almost mandatory in practice in order to access markets and compete effectively.

### Entry fees

If membership is mandatory *de iure* or *de facto*, the existence of entry fees in Professional Bodies<sup>4</sup> can act as an additional barrier. Although these fees should just

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<sup>3</sup> See ¶146-170 of the 2012 Report on "Professional Bodies".

<sup>4</sup> See ¶191-197 of the 2012 Report on "Professional Bodies".

cover costs of registration without funding other activities<sup>5</sup>, Statutes (*Estatutos*) of specific Bodies do not include these safeguards. Legal services suffer this problem. For instance, Statutes for Lawyers<sup>6</sup> stipulates that the Board of the Body sets fees in order to fund the Body's services<sup>7</sup>. As for legal representatives (*procuradores*), the amount of the entry fees in some Bodies might be excessive<sup>8</sup>, with an average fee of 4,600€ (ranging from 1,200€ to 6,000€).

The remedy<sup>9</sup> to this barrier is ensuring that Professional Bodies do not charge excessive entry fees which in the end fund activities other than the mere registration. Statutes (*Estatutos*) of each Professional Body should be adapted to this legal mandate<sup>10</sup>. Public Administration should oversight these charges, in order to enhance transparency and ensure that fees are linked to registration costs. Competition Authorities should be ready to act when these Bodies abuse their dominant or monopoly position by imposing excessive prices.

### Other charges

Beyond entry fees, there are many other charges applied by Professional Bodies<sup>11</sup>, hence affecting legal services. Statutes (*Estatutos*) of specific Bodies include burdens like the establishment of guarantees, which can act as a sunk cost. Furthermore, there are some obligations to contract some services with the Body.

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<sup>5</sup> See Article 3.2 of Law on Professional Bodies ([Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales](#)) after the transposition of the Services Directive.

<sup>6</sup> See [Article 77.f](#).

<sup>7</sup> See ¶197 of the 2012 Report on "Professional Bodies".

<sup>8</sup> See ¶196 of the 2012 Report on "Professional Bodies" and ¶93-97 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

<sup>9</sup> See ¶150-156 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

<sup>10</sup> Article 3.2 of Law on Professional Bodies ([Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales](#)).

<sup>11</sup> See ¶198-210 of the 2012 Report on "Professional Bodies".

This is the case of the Body of legal representatives (*procuradores*), which is entitled by Law<sup>12</sup> to organize the service of reception of official communications in courts<sup>13</sup>.

The remedy<sup>14</sup> to these obstacles to competition would be simply to remove all of them which are not justified according to better regulation principles (necessity, proportionality and non-discrimination).

### Access to the profession

Access to the professions of Lawyer and Legal Representative implies mandatory membership in a Professional Body. This membership, beyond entry fees and other charges, requires the fulfilment of some criteria<sup>15</sup>, mostly the Law degree together with a period of mandatory training (Master) plus a professional examination.

The remedy<sup>16</sup> would be reducing the prerequisites to the minimum needed to address market failures (like information asymmetries).

### Incompatibilities

Incompatibilities can be tagged both as a barrier to entry and as a constraint on exercise. One prominent example is the activity of legal representatives in courts<sup>17</sup>

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<sup>12</sup> See Article 28 of the Code of Civil Procedure ([Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil](#))

<sup>13</sup> See ¶199 of the 2012 Report on “Professional Bodies” and ¶41 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

<sup>14</sup> See ¶150-156 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

<sup>15</sup> See ¶81-92 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

<sup>16</sup> See page 8 of [IPN/DP/0008/14 Report on the draft Organic Law of the judiciary](#). See as well [Posición de la CNC en relación con el Real Decreto 775/2011, de 3 de junio, por el que se aprueba el Reglamento de la Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de abogado y procurador de los tribunales, de junio de 2011](#) and page 16 of [IPN 096/13](#) Report on the draft Law modifying the Code of Civil Procedure.

<sup>17</sup> See ¶186-190 of the 2012 Report on “Professional Bodies” and ¶77-80 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

(*procuradores*). The Code of Civil Procedure<sup>18</sup> states that the simultaneous exercise of the activities of Lawyer (*abogado*) and Legal Representative (*procurador*) is incompatible. This is also reflected in the Statute (*Estatuto*) of Legal Representatives<sup>19</sup>, which actually includes other incompatibilities without legal support but which are virtually annulled following the reform of the Law on Professional Bodies after the Services Directive.

The remedy<sup>20</sup> to this distortion is removing in the law all the incompatibilities which are not justified by principles of better regulation (necessity, proportionality, non-discrimination). Besides, Statutes (*Estatutos*) of Professional Bodies should comply with the law and should not add extra incompatibilities.

### Exclusivity rights

**Legal services are subject to exclusivity rights.** For instance, the Organic Law of the judiciary establishes<sup>21</sup> that Lawyers have the exclusivity in legal defense but also in legal advice, when the latter activity could be open to competition. The same piece of legislation states<sup>22</sup> that Legal Representatives (*procuradores*) have the exclusivity in parties' representation, a unique feature of Spain in comparison with other jurisdictions where parties can represent themselves. Parties can only skip these

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<sup>18</sup> See Article 23.3 of the Code of Civil Procedure ([Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil](#)).

<sup>19</sup> See Article 24 of the Statute of Legal Representatives ([Estatuto General de los Procuradores de los Tribunales de España](#)). See as well [IPN 086/13](#) Report on the draft Statute of the Professional Body of Legal Representatives and ¶102-128 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

<sup>20</sup> See page 10 of [IPN 096/13](#) Report on the draft Law modifying the Code of Civil Procedure.

<sup>21</sup> See Article 542 of [Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial](#).

<sup>22</sup> See Article 543 of [Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial](#). See pages 9-10 of [IPN 096/13](#) Report on the draft Law modifying the Code of Civil Procedure.

obligations (representing themselves or assisted by professionals) in very specific circumstances (small claims in civil procedures, small courts)<sup>23</sup>.

The remedy would be removing these restrictions and opening competition in the areas of legal advice and legal representation. There was a proposal of a draft reform of the Organic Law of the judiciary but it did not deal with this issue<sup>24</sup>. Indeed, some recent reforms of the Code of Civil Procedure have actually enhanced the role of Legal Representatives<sup>25</sup>.

Another legal service with patent restrictions to competition is the participation of “**court experts**” (*peritos judiciales*) in judicial procedures<sup>26</sup>. Professional Bodies are empowered with the capacity to propose lists of experts (*peritos*)<sup>27</sup> to courts and judges so that the latter can get the formers’ opinion on technical issues. Professional Bodies take advantage of this prerogative to favour members to the detriment of non-members (even if non-members have the needed qualifications and despite the fact that College membership is not mandatory to be a “court expert”). They can also set additional (sometimes unnecessary, disproportionate and discriminatory) requirements, like courses provided by the own Professional Body, years of experience or the incompatibility with presence on other lists of experts<sup>28</sup>.

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<sup>23</sup> See ¶39-45 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

<sup>24</sup> See pages 5-6 of [IPN/DP/0008/14 Report on the draft Organic Law of the judiciary](#).

<sup>25</sup> See pages 11-14 [IPN 096/13 Report on the draft Law modifying the Code of Civil Procedure](#).

<sup>26</sup> See ¶150-159 of the 2012 Report on “Professional Bodies”. This specific topic is developed in the PRO/001/13 CNC’s Opinion on the judicial procedure to appoint “Court Experts” (Peritos Judiciales).

<sup>27</sup> See Article 5.h of the Law on Professional Bodies ([Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales](#)). See as well Article 341 of the Code of Civil Procedure ([Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil](#))

<sup>28</sup> CNMC has recently examined the procedure to select “Architect court experts”. [INF/CNMC/005/15 Informe sobre la propuesta remitida por el consejo superior de los colegios de arquitectos de España para la fijación de criterios para la confección de las listas de peritos arquitectos](#).



Other legal services which endure similar restrictions are:

- Lists of *ex officio* assignments and free legal assistance by the Bodies of Lawyers<sup>29</sup>.
- Lists of “official receivers” (*administrador concursal*) in bankruptcy procedures by Bodies of Economists, Auditors, etc.<sup>30</sup>.

The remedy to this competition impairment would be the reform of these pieces of legislation<sup>31</sup> to ensure that Professional Bodies do not discriminate between members and non-members and include on these lists all professionals which have the needed qualifications (regardless of the membership or non-membership in the Body) and fulfil the (necessary and proportionate) requirements.

### Geographical restrictions

The Law on Professional Bodies<sup>32</sup> stipulates that belonging to the Body of one Spanish jurisdiction allows the exercise of the profession of the whole country. Yet, as far as lawyers are concerned, their Statute<sup>33</sup> still sets a regime of notification when moving to another jurisdiction<sup>34</sup>, creating an administrative burden which may distort competition. Legal Representatives (*procuradores*) face even more geographic restrictions, as they must have an office in any of the jurisdictions where they want to develop their activity<sup>35</sup>.

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<sup>29</sup> See Law on Free Legal Assistance ([Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita](#)).

<sup>30</sup> See Law on Bankruptcy Procedures ([Ley 22/2003, de 9 de julio, Concursal](#)).

<sup>31</sup> Law on Professional Bodies ([Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales](#)), Code of Civil Procedure ([Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil](#)), Law on Free Legal Assistance ([Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita](#)) and Law on Bankruptcy Procedures ([Ley 22/2003, de 9 de julio, Concursal](#)).

<sup>32</sup> See Article 3.3 of [Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales](#).

<sup>33</sup> See Article 17 of the Statute of Lawyers ([Estatuto General de la Abogacía española](#)).

<sup>34</sup> See ¶217-218 of the 2012 Report on “Professional Bodies”.

<sup>35</sup> See ¶185-199 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

The remedy would be eliminating all these geographical restrictions. At least, the draft version of the new Statute for Lawyers goes in that direction<sup>36</sup>.

Other barriers to exercise<sup>37</sup>

- Lawyers face many restrictions in terms of their corporate form, as their Professional Body's Statute (*Estatuto*) sets that lawyers can group only with the sole purpose of the professional practice of law and that both the capital and the financial and voting rights must be attributed exclusively to the member lawyers<sup>38</sup>. The remedy would be removing these unjustified restrictions, which hamper efficiency and competition.
- There are also restrictions to move from one professional to another, increasing switching costs and jeopardizing efficiency and competition. As for lawyers, when a client wants to move to another provider, pending payments must be cleared and the new lawyer must cooperate in that task<sup>39</sup> (disincentivising the change). As for legal representatives (*procuradores*) the new provider has to pay fees, rights and other expenses accrued before the substitution<sup>40</sup>. The remedy would be eliminating these charges so that a change of provider comes at a minimum cost. At least, the draft version of the new Statute of Lawyers goes in that direction<sup>41</sup>.

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<sup>36</sup> See Article 15 of the draft Statute of Lawyers ([Proyecto de Estatuto General de la Abogacía española](#))

<sup>37</sup> One further barrier to exercise in Professional Bodies is the issue and approval of project certifications (*visados colegiales*) which are mandatory in certain activities. However, these affect technical professions (engineers, architects, etc.) rather than legal services.

Project certifications

<sup>38</sup> See ¶306 of the 2012 Report on "Professional Bodies" and Articles 28 and 29 of the Lawyers' Statute ([Estatuto General de la Abogacía española](#))

<sup>39</sup> See ¶308 of the 2012 Report on "Professional Bodies" and Article 26 of the Lawyers' Statute ([Estatuto General de la Abogacía española](#))

<sup>40</sup> See ¶309 of the 2012 Report on "Professional Bodies" and Article 30.1 of the Statute of Legal Representatives ([Estatuto General de los Procuradores de los Tribunales de España](#))

<sup>41</sup> See Article 61 of the draft Statute of Lawyers ([Proyecto de Estatuto General de la Abogacía española](#))

## **2. Insufficient (price) competition in legal services**

### Price competition

“Professional Bodies” (*Colegios Profesionales*), were traditionally empowered with several functions, some of which very harmful to competition<sup>42</sup>. Originally, they could even dictate minimum fees, although a reform in 1996 transformed this role into the setting of mere guidelines. And the transposition of the Services Directive in 2009 removed these powers and actually forbade any orientation, recommendation, guideline, norm or rule on professional fees or indicative scales”. However, the only exception to that framework is the appraisal of judiciary costs, where Professional Bodies can set indicative criteria (Fourth additional provision of the Law on Professional Bodies<sup>43</sup>).

Furthermore, Notaries (*Notarios*), Property Registrars (*Registradores de la Propiedad*) and Legal Representatives (*Procuradores*) have their prices (*aranceles*) regulated by law<sup>44</sup>. In the case of Notaries and Property Registrars, there are more limitations beyond price regulation (chiefly a geographical limitation through *numerus clausus*) so price liberalization is not sufficient to drive competition *per se*. In the case of Legal Representatives, there is a complex system of prices (approved by the Government and monitored by the Professional Body) in the form of fixed fees, a percentage of the amount claimed or a mix of the two things. These can vary within a range of 12% and Legal Representatives can agree on a higher remuneration with their client.

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<sup>42</sup> See ¶37 of the 2012 Report on “Professional Bodies”.

<sup>43</sup> [Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales.](#)

<sup>44</sup> See ¶239-247 of the 2012 Report on “Professional Bodies” and ¶157-160 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives.

There are other subtler restrictions. Lawyers' Statutes<sup>45</sup> (Estatutos) still prohibit the practice of *cuota litis* by which lawyers receive a percentage of the amount claimed.

The remedy would be eliminating all these restrictions on price competition. At least, the draft Statute for Lawyers (still to be approved) removes the ban on *cuota litis*, paving the way for more freedom and fiercer price competition<sup>46</sup>. But there is still much room as far as Legal Representatives are concerned<sup>47</sup>.

### Other forms of competition

Competition has many dimensions other than pricing, but some Professional Bodies try to impede effective competition by passing Statutes (Estatutos) and Codes of Conduct (Códigos Deontológicos) with limitations on marketing, advertising and customer policies which go well beyond the unfair competition legislation and impede the differentiation of an undertaking with respect to its competitors. Lawyers<sup>48</sup> (abogados) and Legal Representatives<sup>49</sup> (procuradores) are good examples of that.

The remedy would be the removal of all these restriction to non-price competition, in order not to use fears of 'unfair competition' as a cover for the lack of an effective competition on the merits.

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<sup>45</sup> See Article 44.3 of the Statute of Lawyers ([Estatuto General de la Abogacía española](#))

<sup>46</sup> See Articles 26 and 27 of the draft Statute of Lawyers ([Proyecto de Estatuto General de la Abogacía española](#)).

<sup>47</sup> See pages 14-16 [IPN 096/13](#) Report on the draft Law modifying the Code of Civil Procedure.

<sup>48</sup> See ¶271 and ¶285 of the 2012 Report on "Professional Bodies" and Articles 7 and 8 of the [Lawyers' Code of Conduct](#).

<sup>49</sup> See ¶273 of the 2012 Report on "Professional Bodies", ¶161-163 of the 2009 Report on anti-competitive restrictions in the rules and regulations that govern the activity of Legal Representatives, Articles 66.d, 81.j, and 98.n of the Statute of Legal Representatives ([Estatuto General de los Procuradores de los Tribunales de España](#)) and Articles 4 and 5 of the [Regulation on Advertising by Procurators](#).