CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

REPORT ON ANTI-COMPETITIVE RESTRICTIONS IN THE RULES AND REGULATIONS THAT GOVERN THE ACTIVITY OF COURT PROCURATORS

May 2009

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In Spain, unlike other countries, the professional representation of the parties in legal proceedings is carried out exclusively by a Procurator, which prevents other professionals, such as Lawyers, from being able to undertake this activity. In addition to the fact that the activity is reserved exclusively to the Procurator, there are other restrictions that prevent free competition in the exercise of this activity, both in terms of prices and in terms of the territorial definition of the market. All these factors are analysed in this Report, which concludes with a series of recommendations aimed at introducing greater competition in terms of access and in terms of the professional exercise of this activity.

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Executive Summary

In Resolution S/0022/07, Procurador Madrid, the Council of the Spanish National Competition Commission (*Comisión Nacional de la Competencia,* hereinafter "the CNC") decided to sponsor the preparation of this Report in order to analyse whether the legislation regulating the activity of *Procuradores de los Tribunales* (representatives in court proceedings, hereinafter "Procurators") introduces anti-competitive restrictions and, if it does, whether those restrictions accord with the principles of necessity and proportionality, least distortion of competition, efficiency and transparency.

In this Report we therefore analyse the professional figure of the Procurator. It is hard to find a figure with similar characteristics in other countries. In the case of a similar figure in France, the *Avoué*, the French government has recently indicated its intention to introduce reforms.

In Spain the regulation of the activity of *procura* (representation in court proceedings) presents a series of peculiar features that are analysed in the course of the Report because they present competition problems and because they must be reviewed in the transposition of the Services Directive that is currently taking place in this country.

The first of these features is the requirement that a party has to be represented by a professional when appearing before the courts. This is an obligation that is established in general terms, although the procedural statutes themselves have introduced exceptions, allowing a party to represent himself. In the CNC's opinion this mandatory requirement which, when coupled with its effects on competitiveness, may have an effect on competition given the restrictions that exist, should be reviewed as a consequence of the introduction of telematic technologies in citizens' dealings with the Administration of Justice, and of other developments aimed at streamlining proceedings. It is very important therefore that the advances being made in this regard afford a neutral treatment to the various professionals and to the citizens themselves, preventing more favourable treatment being given to certain professionals, in this case Procurators, which could result in the legal requirement to be represented by a Procurator being replaced by a *de facto* requirement.

These safeguards must be taken into account in particular in relation to the advances that occur as a result of the introduction of telematic technologies

such as the Lexnet system, or in the design of the procedures in the proposed framework for the New Judicial Office.

The second feature that is peculiar to the activity of representation in court proceedings is that it is generally reserved by law to Procurators, coupled with the fact that the profession of Procurator is incompatible with that of Lawyer (*Abogado*), as well as with the professions of Employment Relations Specialist (*Graduado Social*) and Administrative Manager (*Gestor Administrativo*). As it has already had occasion to indicate in its "*Report on the professional services sector and professional associations*", the CNC takes the view that reserving activities to a particular group creates a clear competition problem because, all things considered, it represents restrictions on the freedom to practice a profession. Hence such reservations of activity must always be based on clear grounds of public interest.

However, in the case of the activity undertaken by Procurators, we cannot see any grounds to justify this reservation as against other professionals who could perform the same activity, as indeed they are already doing in certain types of proceedings. We therefore consider it necessary to review and eliminate the current reservation of activities to Procurators as far as possible, so that other professionals such as Lawyers may compete in this activity and thereby introduce improvements into the service both in terms of innovation and prices.

For the same reasons it is necessary to remove the incompatibility between the profession of Procurator and the professions of Lawyer, Employment Relations Specialist and Administrative Manager. Moreover this is something that has to be done as part of the transposition of the Services Directive into Spanish law.

The third main feature of this activity is the one relating to restrictions on the free practice of the profession, which basically manifest themselves in two areas: prices and territorial exercise.

In terms of prices, the system of a quasi-fixed scale of fees prevents prices being freely fixed in the market, so that price ceases to be a factor that influences competition there. The CNC, and its predecessor the Competition Tribunal, have already proposed on previous occasions that this fee scale system be removed; the proposal makes even more sense, when a more far-reaching reform of this professional activity is proposed, particularly the removal of the reservation of activity in such a way that other professionals, who fix their prices freely, may compete in the market.

We could make a similar point regarding territorial restrictions, as we cannot see any reasons for maintaining the market compartmentalisation that currently exists. It prevents professionals from competing throughout the country using modern telematic technologies.

The reforms proposed in all these areas, undertaken in the broader process of modernising the Administration of Justice and making it more flexible, must result in a benefit to citizens through the provision of competition-driven professional services that offer improvements in terms of innovation, quality and prices.

I. INTRODUCTION

1. Resolution "S/0022/07 Procurador Madrid" of 28 July 2008 of the CNC Council requests the CNC's Advocacy Directorate *to "analyse whether the current legislation that regulates the activity of Procurator, along with the proposed legislation to be introduced as part of the reform of the procedural legislation in order to introduce the New Judicial Office, introduces anti-competitive restrictions and, if it does, whether those restrictions accord with the principles of necessity and proportionality, least distortion of competition, effectiveness, predictability and transparency".* This Report has been prepared in response to that request.

2. The problems in terms of competition in undertaking the activity of representation in court proceedings (*procura*) have already been the subject of analysis by the CNC[1] on various occasions, both from the point of view of advocating competition and when investigating anti-competitive conduct in formal proceedings.

3. As regards the promotion of competition, a report entitled "*Recommendations to Public Administrations for more Efficient and Pro-competitive Market Regulation*", published by the CNC in June 2008, includes a recommendation to abolish the fee scale applied by Procurators or at the very least to liberalise the application of discounts so that the fee scale only lays down maximum prices. The recent CNC study entitled "*Report on the professional services sector and professional associations*" published in September 2008 mentions various aspects of the legislation that governs representation in court proceedings which might include restrictions on competition in terms of access to and practice of the profession.

4. In terms of formal proceedings, there have been four Resolutions in the last ten years involving the Procurators sector, three of them relating to the fee scale[2] and the fourth to the right of Procurators to form partnerships.[3]

5. Furthermore, the Bill on free access to and exercise of service activities,[4] has already been passed. It will incorporate Directive 2006/123/EC of the European Parliament and the Council of 12

[1] Previously by the Competition Tribunal (*Tribunal de Defensa de la Competencia*).
[2] Case 477/99, Procuradores; Case 603/05, Procuradores Ponteareas; Case S/0022/07, Procurador Madrid.
[3] Case R535/02, Procuradores Barcelona y Tarragona.
[4] Sent to Parliament for approval on 27 March 2009.

December 2006 on services in the internal market (known as the Services Directive) into Spanish law. The activity of representation in court proceedings comes within the Bill's scope and it is therefore necessary to analyse which aspects of the rules and regulations that currently regulate the profession conflict with the provisions of the Bill.

6. Similarly, the Bill to reform the procedural legislation for the introduction of the New Judicial Office[5] is going to mean new powers for Procurators and for their professional associations (*colegios* – hereinafter "colleges" or "professional colleges"). We shall therefore analyse this Bill as well.

7. The Report is structured in the following way. Section II gives a general overview of the sector in Spain, together with a brief review of figures similar to the Procurator in other countries. Section III sets out the anti-competitive restrictions that we have found in terms of representation in court proceedings. It starts by analysing the mandatory requirement for such representation and the reservations of activity that exist in the sector, as seen in issues such as exclusivity, incompatibilities between professions and access to the profession. It then goes on to analyse the restrictions that exist in terms of prices, which relate principally to the fee scale applied by Procurators. It continues with an analysis of the territorial restrictions on the exercise of the activity. Finally, in sections IV and V, it sets out a series of conclusions and recommendations.

8. This Report has been approved by the CNC Council in exercise of the consultation powers conferred on it by article 26(1) of Spanish Competition Act 15/2007 (*Ley de Defensa de Competencia*). The article establishes the duty of the CNC to promote the existence of effective competition in the markets by actions such as advocacy and studies and research in relation to competition, making proposals for liberalisation, deregulation or legislative change and preparing reports on situations that hinder the maintenance of effective competition in the markets as a result of the application of legislative provisions.

[5] Sent to Parliament for approval on 12 December 2008.

II. THE ACTIVITY OF LEGAL REPRESENTATION IN COURT PROCEEDINGS. COURT PROCURATORS

II.1 Basic legislation

9. The basic legislation that regulates the professional practice of representation in court proceedings is as follows:

- Organic Act of the Judiciary 6/1985 of 1 July 1985, (*Ley Orgánica del Poder Judicia*l) (hereinafter "the Judiciary Act").
- Spanish Civil Procedure Act 1/2000 of 7 January 2000 (*Ley de Enjuiciamiento Civil*).[6]
- Royal Decree 1281/2002 of 5 December 2002 approving the General Statute of Court Procurators in Spain (*Estatuto General de los Procuradores de Tribunales de España*) (hereinafter "the General Statute").[7]
- Royal Decree 1373/2003 of 7 December 2003 approving the fee scale applied by Procurators.

10. This legislation regulates basic aspects of the profession such as the mandatory requirement to use a Procurator, the freedom to choose a Procurator, the functions of the Procurator, the need for Procurators to be a member of a college in order to practice, the fee scale etc.

11. The need for parties in legal proceedings to be represented by a Procurator is established in article 543 of the Judiciary Act, which states that "*Procurators have the exclusive right to represent the parties in all types of proceedings, save where the law authorises otherwise".* The Judiciary Act therefore establishes this obligation in general terms, although it does provide that an Act may include exceptions. This has actually happened, as we shall go on to explain.

12. It is also the Judiciary Act that guarantees the freedom to choose a Procurator, establishing in article 545 that "*save where the law provides*

[6] The Civil Procedure Act is highlighted over and above other procedural statutes due to the fact that it is used to make good any deficiencies in other procedural statutes.

[7] Since it was promulgated the General Statute has been the subject of several judicial review applications which have resulted in the Supreme Court repealing various provisions of it. In particular the Judgment of 28 September 2005 of the Judicial Review Chamber of the Supreme Court analysed the General Statute from the perspective of the constitutional distribution of powers in relation to professional associations, recognising as a regional government power the possible creation of self-governing councils in addition to other aspects relating to the regulation of professional associations. The Supreme Court develops these arguments for each of the articles challenged, determining in each case whether the provision is null and void in law or is inapplicable to the autonomous communities with their own legislation on the subject.

otherwise, the parties shall be free to designate their representatives and defence counsel from the Procurators and Lawyers who meet the requirements laid down by statute". We must point out that this designation must be done through the grant of powers of attorney to the Procurator before a Notary Public or the Court Clerk.

13. In terms of the functions entrusted to the Procurator, the Judiciary Act only establishes the general function of *"representation of the parties in all types of proceedings*". It is the procedural rules and regulations that limit these functions. Thus, for example, article 153 of the Civil Procedure Act establishes that the functions of the Procurator include "*signing notifications, claims, summonses and demands of all kinds that have to be given to his principal in the course of the proceedings, including ones relating to Judgments and ones relating to some action which the principal must undertake personally".*

14. Article 1 of the General Statute also refers to the functions assigned to Procurators, although the references are fairly general:

- *"Representation in court proceedings, as the territorial practice of the profession of court Procurator, is a free, independent and self-regulated profession. Its main purpose is the expert representation of anyone who is a party in any type of proceedings.*

- *It is also the role of the Procurator to perform whatever functions and powers are conferred on him by the procedural statutes with a view to the proper administration of justice, the correct conduct of the proceedings and the effective enforcement of Judgments and other decisions handed down by the courts and tribunals […]"*.

15. In this regard we must highlight the fact, as we have already said, that the Bill to reform the procedural legislation for the introduction of the New Judicial Office includes the allocation of new functions to Procurator and to their professional colleges. It gives Procurators new functions in the following areas:

- Executing acts of communication (serving documents) only if the party whom the Procurator represents so requests and at the cost of that party.
- Participating in the investigation of debtors' assets (communicating procedural directions ordered by the Court Clerk to the person to whom they are addressed and obtaining his response).
- Receiving documents or information required by the Court Clerk in enforcement actions.
- Requests for certification of information regarding seized assets.

16. In terms of the functions attributed to the professional colleges, the Bill reinforces their powers in relation to deposits and the auction of goods that have been seized, expressly giving the professional colleges powers to locate and manage the goods seized, explicitly recognising their standing to be appointed as a specialist entity in the auction of assets and specifically excusing them from the duty to provide a bond in order to carry out this type of asset disposal (a duty that applies in the case of non-public entities).

17. In relation to access to the profession of Procurator, as we shall go on to explain Act 34/2006 of 30 October 2006 on access to the professions of Lawyer and Procurator was passed in 2006 and will come into force in 2011. The Act will make it much harder to gain access to both professions because additional training and an entrance examination will be required.

18. Furthermore, traditionally it has been necessary to become a member of a professional college in order to enter and practice the profession. This obligation is set out in article 544 of the Judiciary Act, which states that "*Lawyers and Procurators must be members of their professional associations in order to appear before the courts in the terms provided for in this Act and in the general legislation on professional associations, unless they are acting in the service of public administrations or public entities by reason of the fact that they are officers or employees of them"*.

19. Finally, in order to conclude this section on general aspects of the activity of representation in court proceedings, which will be considered in detail and analysed in due course, we have to point out that the fees charged by a Procurator are fixed prices, with a margin for increase/decrease of 12%, by virtue of a fee scale regulated by Royal Decree 1373/2003 of 7 November 2003 approving the fee scale applied by Court Procurators.

II.2 Some relevant data on the sector

20. Currently there are 9,240 Procurators in Spain who are members of their professional colleges,[8] split between 67 professional colleges. The number of Procurators per college varies between 1,527 in the Madrid college and 8 in the Yecla college. The average is 138 Procurator per college.

[8] According to figures that we have prepared from information on the website of the Council General of Procurators in Spain. Unión Profesional (2006) gives the number of Procurators who were members of their professional associations in Spain in 2005 as 9,103.

21. In terms of the distribution of Procurators by professional colleges, it should be noted that 33% of the colleges have less than 50 Procurators and 82% of them do not have more than 200 Procurators. The table below shows this distribution. It is particularly interesting given the territorial restrictions on practice, which prevent Procurators from practising anywhere other than in their own territorial demarcation.

Table 1: Distribution of Procurators by Colleges

Number of Procurators	Number of Associations	Percentage	Aggregate percentage
(0 - 50)	22	32.8%	32.8%
(50 - 100)	17	25.4%	58.2%
(100 - 150)	9	13.4%	71.6%
(150 - 200)	7	10.4%	82.1%
(200 - 250)	3	4.5%	86.6%
(250 - 300)	4	6.0%	92.5%
(300 - 600) [9]	4	6.0%	98.5%
Over 600[10]	1	1.5%	100.0%
TOTAL	**67**	**100.0%**	**100.0%**

Source: Prepared in house using data from the Council General of Procurators in Spain.

22. In terms of fees, which are based on a fee scale, according to the figures provided by the Council General of Procurators in Spain (*Consejo General de Procuradores de España*, hereinafter "the Council General"),[11] the average fee of a Procurator per case is 656 euros. Although this is the average amount estimated by the Council General, the fact is that its own figures show that this amount can vary greatly depending on the type of proceedings in question, running as high as 1,730 euros in the case of enforcement proceedings. The detailed information provided by the Council General is shown in the table below.

[9] The Barcelona, Málaga, Sevilla and Valencia colleges.
[10] The Madrid college.
[11] The Council General has indicated that the figures have been taken from a document entitled "*The indirect costs of justice; the professionals involved in the Administration of Justice*" (Talk on the course "*The Costs of Justice*", Fundación Universidad Rey Juan Carlos, 26-29 July 2005) and that the analysis is based on a representative and random sample of court proceedings.

Table 2. Table of fees on assessments of costs

Proceedings	Procurator
Appeal (*Apelación*) Claim for monetary sum (*Reclamación Cantidad*)	181.01
Appeal Provincial Appeal Court (Apelación Audiencia Provincial)	300.64
Appeal Provincial Appeal Court	361.68
Appeal Provincial Appeal Court	835.9
Appeal Provincial Appeal Court	657.41
Enforcement of Mortgaged Assets (*Ejecución Bienes Hipotecarios*)	1,458.94
Enforcement of Non-Judicial Instruments (*Ejecución Títulos no Judiciales*)	486.18
Enforcement (*Ejecución*)	1,729.57
Enforcement of Mortgage (*Ejecución Hipotecaria*)	937.08
Enforcement of Judgment (*Ejecución Sentencia*)	646.12
Debt proceedings involving negotiable instruments (*Juicio Cambiario*)	1,106.85
Enforcement Proceedings (*Juicio Ejecutivo*)	496.22
Enforcement Proceedings	1,199.00
Enforcement Proceedings	239.28
Ordinary Proceedings (*Juicio Ordinario*)	508.82
Ordinary Proceedings	174.35
Ordinary Proceedings	896.76
Ordinary Proceedings	382.90
Low Value Claims (*Menor Cuantía*)	1,144.63
Low Value Claims	200.37
Low Value Claims	306.01
Low Value Claims	782.57
Declaratory Proceedings Low Value Claims (*Declarativo Menor Cuantía*)	59.44

Source: Council General of Procurators in Spain.

II.3 The figure of Procurator in other countries

23. The profession of Procurator as we understand it in Spain is unique.[12]

24. The only possible comparison would be with the figure of the *Avoué* in France[13] or with the figure of the *Solicitador generalista* in Portugal.[14] The comparison with the figure of *Huissier* in other countries is not so close, given that the work of the *Huissier* centres on enforcements in civil proceedings, which is not the case with Procurators.

25. However, even in the cases of France and Portugal the figures are not totally comparable, as neither of them meets all the conditions that are

[12] Interview with the Chairman of the Council General in *La Tribuna del Derecho*, October 2007.
[13] http://www.chambre-nationale.avoues.fr (consulted on 16/03/09).
[14] http://www.solicitador.net (consulted on 23/03/09).

present in the case of Procurators in Spain: requirement for a law degree, obligation to use a Procurator, exclusivity in terms of professional activity, regulated prices, territorial restrictions etc.

26. In addition it is important to bear in mind not only the current position but also the evolution that is taking place in the case of comparable or similar figures in other countries or other areas. In this sense there is clear trend in the law that we have looked at towards the disappearance of the figure of Procurator as a separate profession.

27. First of all for example, the French Government has recently announced its intention to abolish the figure of the *Avoué* as the representative of the parties in court proceedings. The French executive has expressed its wish that parliament decides on this measure during 2010 and has justified its decision on the basis of various arguments:[15]

    - On the one hand in order to simplify court proceedings, moving towards a system in which Lawyers will in the future also do the tasks which up to now have been allocated to *Avoués*. It is hoped that justice will be cheaper and more flexible for litigants as a result.
    - Furthermore, the French government has also argued that the measure is necessary in order to comply with the requirements of the Services Directive and that it will be implemented in close collaboration with representatives of the *Avoués* with a view to making it easier for them to make the transition towards the new procedural scenario.
    - Finally, it has indicated that the introduction of telematic media in the Administration of Justice is another reason that has led it to consider the abolition of the figure of the *Avoué* as such.

28. Secondly, the figure of Procurator has already been abolished in Italy. This occurred in 1997 through Act 27/1997 of 24 February 1997 on the abolition of the register of Procurators and rules and regulations relating to professional practice (*Soppressione dell'albo dei Procuratori legali e norme in materia di esercizio della professione forense*), with the functions of counsel and representation being concentrated in the figure of the Lawyer.

[15] Information on the abolition of the figure of *Avoué* in France taken from the speech on this question given by the French Minister of Justice Madame Rachida Dati on 25 June 2008 entitled *"Celerité et qualité de la Justice devant la Cour d'appel"* (Speed and quality of Justice before the Court of Appeal).

29. Finally, it is also important to point out that in the Community context article 44(2) of the Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 required the designation of an address for service in Luxembourg (the seat of the Court). However, this article was amended in 2000[16] and the position was made more flexible, with it no longer being essential to have a local representative to deal with the Court. Indeed, the preamble to the new Rules (which also included other amendments) stated that the aim was to expedite proceedings before the Court.

[16] Amended by OJ L 322 19/12/2000 of 6 December 2000.

III. ANTI-COMPETITIVE RESTRICTIONS IN RELATION TO THE ACTIVITY OF REPRESENTATION IN COURT PROCEEDINGS

30. We shall now go on to analyse the various anti-competitive restrictions that can be observed in the regulation of the activity of representation in court proceedings in Spain. In carrying out this analysis we have opted to look at each of these restrictions individually so that we can identify them and evaluate them more precisely.

31. However, it is true that all of these restrictions are closely interconnected, and indeed the effects on competition of one of them depends on the continuation of others. This means that at the end of the day the analysis undertaken will have to be a global one. This is also true of the recommendations that we will make as a result of the analysis.

III.1 Mandatory requirement

III.1.1 Current situation

32. The first question that we have to analyse is the obligation to be represented by a professional in court proceedings.[17]

33. For the purposes of this Report, the mandatory requirement is taken to mean the obligation to appear before a court represented by a professional (a Procurator or some other professional), in contrast to the possibility of acting for oneself.

34. When considering the current rules and regulations governing this requirement to appear through a professional, we have to start by pointing out that there is no provision in the Constitution that makes reference to this activity, in contrast to the position with regard to assistance from a Lawyer.[18]

35. As we have already said, it is the Judiciary Act, specifically article 543, which establishes that "*Procurators have the exclusive right to*

[17] In the course of this Report we shall make reference to "the activity of representing parties in court proceedings" or "the activity of representation in court proceedings" as shorthand for referring to the activity principally carried out by Procurators, in the same way that the Judiciary Act or the General Statute does.

[18] Article 24(2) of the Constitution: *"Similarly all citizens have the right to the ordinary Judge predetermined by the law, the right to defend themselves and to have assistance from a Lawyer, the right to be informed of the charge against them, the right to have a public process without undue delays and with all the necessary safeguards, the right to use any forms of evidence that are relevant for their defence, the right not to incriminate themselves, the right not to admit their guilt and the right to the presumption of innocence".*

represent parties in all kinds of proceedings, save where the law authorises otherwise". This provision can be taken as the general requirement that a party must be represented by a professional in court proceedings, and by a Procurator in particular, without prejudice to the fact that a statutory provision may provide otherwise.

36. Various procedural statutes have developed this provision and on occasions have modified the general rule in order to remove the requirement to act through a professional. However, on occasions exceptions have also been made to this general rule in order to broaden the type of professionals who may undertake this activity beyond the Procurator alone; although this latter point does not affect our analysis of the mandatory requirement for representation but rather our analysis of its exclusivity, which is the subject of the next section, both questions are analysed together below in order to simplify the presentation, notwithstanding the fact that each of them is evaluated in the corresponding section.

37. The analysis of each of the procedural rules and of the casuistry existing in each of them could be overly complex for the matters with which this Report is concerned; we therefore give a short description of the most general features below.

38. As a general rule the requirement for the parties to appear through a Procurator in civil courts has been established for a long time. The Civil Procedure Act 1/2000 continued this trend and even accentuated it, as set out in its preamble, which indicates that "*the requirement to be represented by a Procurator and to have the mandatory assistance of a Lawyer are configured in this Act with no material change compared to the previous provisions. Experience, supported by unanimous reports on this point, ensures that this decision is correct. However (sic), this Act still responds to the needs for rationalisation: the requirement for powers of attorney to be accepted as sufficient is removed, because for some time it has no longer made any sense, and there is a complete unification of the material sphere in which representation by a Procurator and the assistance of a Lawyer are necessary. The responsibilities of the Procurator and Lawyer are accentuated in the new procedural system so that the justification for their respective functions is underlined".*

39. Thus article 23 of the Civil Procedure Act lays down the general rule that parties must appear through a professional – a Procurator – and the exceptions to this general rule in which the requirement to act through a professional is removed:

"1. Parties must appear in court proceedings through a Procurator, who must have a law degree[19] and must be legally authorised to appear in the court hearing the case.

2. Notwithstanding the provisions of the preceding subparagraph, litigants may appear in person:

(i) In declaratory proceedings (juicios verbales) with a value not exceeding 900 euros and for the initial petition in small debt proceedings (procedimientos monitorios) in accordance with the provisions of this Act.

(ii) In proceedings on behalf of all creditors (juicios universales), where the appearance is limited to the presentation of instruments evidencing debts or rights or in order to appear at general meetings.

(iii) In proceedings challenging decisions with regard to free legal assistance and where urgent measures are requested prior to the start of the proceedings".

40. For its part, article 32 of the Civil Procedure Act contemplates three situations where it is not mandatory for a Lawyer and Procurator to be involved: where a claimant represents himself and is defended by a Lawyer, or where a claimant is represented by a Procurator and presents his own defence, or where a claimant is assisted by both professionals. It follows from this that if someone wishes to appear in the civil courts through a professional in cases where this is not a mandatory requirement, the professional in question must be a Procurator.

41. We must highlight the fact that the Civil Procedure Act 1/2000 also introduced a series of new functions for Procurators, such as involvement in the service of pleadings exchanged between the parties or involvement in personal service of letters of request. The Act also gave professional colleges new procedural functions over and above the ones that they were given by the previous Civil Procedure Act of 1881. These functions included in particular providing the service of receiving communications, organised by the professional colleges. This service is located in all civil court buildings and will have a Court Clerk or authorised officer attached to it.

42. In terms of criminal courts, the mandatory requirement to be represented by a professional, in particular a Procurator, is laid down in

[19] Wording according to the amendment introduced by Act 16/2006 of 26 May 2006 which regulates the General Statute of the National Member of Eurojust and the relations with this European Union body. The only change compared with the original text is the introduction of the additional wording *"who must have a law degree".* Thus, the requirement for a law degree is now contained in a provision with the rank of an Act.

the Criminal Procedure Act, promulgated by Royal Decree of 14 September 1882, article 18 of which provides that interested parties who wish to exercise their right of defence must be represented by a Procurator and defended by a Lawyer.

43. In contrast, in employment courts there is no requirement that a party has to be represented by a professional. Thus the consolidated text of the Employment Procedure Act (*Ley de Procedimiento Laboral*) approved by Royal Legislative Decree 2/1995 of 7 April 1995, establishes in article 18 that the parties may represent themselves or may instruct a Procurator, Employment Relations Specialist or any person who is fully entitled to exercise his civil rights.

44. Finally, in judicial review courts article 23 of Act 29/1998 of 13 July 1998, which regulates the judicial review jurisdiction, removes the mandatory requirement to be represented by a professional in the case of public officials in certain cases. Otherwise it maintains the general rule that it is mandatory to be represented by a professional, although where cases are heard by a single judge, that professional can be a Lawyer as well as a Procurator. Literally, article 23 reads as follows:

"1. In actions before courts with a single judge, the parties may be represented by a Procurator and shall be assisted in any event by a Lawyer. If the parties instruct a Lawyer to act for them it shall be the Lawyer who receives any notices in the proceedings.
2. In proceedings before courts with more than one judge, the parties must instruct a Procurator to represent them and must be assisted by a Lawyer.
3. However, public officers acting in defence of their statutory rights may represent themselves where the proceedings relate to personnel questions that do not involve the removal of public employees who cannot be removed."

45. In summary, the situation with regard to the mandatory requirement to be represented by a professional varies according to the jurisdiction, with the employment courts being the most flexible as there is no mandatory requirement to be represented by a professional in any case; the civil legislation also contemplates the possibility of parties representing themselves in certain cases.

III.1.2 Evaluation

46. The fact that it is mandatory to appear through a professional might not be a problem in itself from the standpoint of competition, given that the mandatory requirement that the consumer has to use a service has nothing to do with the level of competition existing in the market in

which that service is provided. The market could have an unlimited number of people offering the service, with no entry barriers for new operators and with free competition between them. Obviously this is all without prejudice to the problems that the requirement could in fact have for competition in terms of the increase in the cost of access to justice.

47. However, the fact is we are not dealing with a market in which there is free competition. Instead there are clear barriers to entry and practice, such as the exclusivity enjoyed by Procurators, the incompatibility with other professions, the lack of freely fixed prices and the geographical restrictions.

48. All of this means that the mandatory requirement must be very much borne in mind when evaluating the restrictions preventing free competition in relation to this activity, given that this mandatory requirement ensures that professionals, in particular Procurators, have a permanent captive demand. This may result in a lack of incentive to compete on quality, innovation and prices.

49. It is therefore important that any legislation that imposes a requirement for parties to appear through a professional, as against the alternative whereby the parties can represent themselves, is always adequately justified, in particular through a thorough analysis of the effects on the settlement costs of the court proceedings. Moreover the analysis must take into account other possible alternatives.

50. This analysis of the mandatory requirement for representation in court proceedings, which should be undertaken by lawmakers in relation to both the proposed legislation and the current legislation, could easily fit within the process of modernising the Administration of Justice and within the objectives of making proceedings simpler and more flexible and reducing their cost.

51. The analysis should basically take into account two factors. Firstly, that there are already cases in which the mandatory requirement has been removed, leaving it up to the parties to decide whether to engage a professional. This has not adversely affected quality or safeguards for citizens. Secondly, that it is not only a question of removing a legal requirement but also of avoiding a situation where the regulation imposes a *de facto* requirement, for example through an inadequate treatment of the various operators.

52. In terms of the first factor, in addition to the clear example of the employment courts, in the civil courts too for example the law removes the mandatory requirement for the presence of the professional

(Procurator) in the case of low value claims. These cases evidence the fact that the alternative of not requiring the presence of a professional and instead leaving the decision to the discretion of the parties is a possible alternative that does not prejudice quality and safeguards.

53. A recent example which also shows that this change is possible is Royal Decree-Law 3/2009 of 27 March 2009 on urgent measures in relation to tax, finance and insolvency matters in the light of the economic situation. This amends, amongst others, the Spanish Insolvency Act 22/2203 of 9 July 2003 (*Ley Concursal*) by limiting the mandatory requirement to use a Procurator, with this very aim of making the procedural steps more flexible and reducing their cost. Specifically, it amends articles 23 and 24 of Act 22/2003 which originally provided that it was the Procurators acting for the insolvency petitioners who were responsible for dealing with the formalities in relation to official notices in order to send them to the appropriate media and for receiving the necessary orders to make the entries in the appropriate registers (publicity through the registers); the Royal Decree-Law amends this mandatory requirement and provides that both these procedures shall be done if possible using telematics, leaving the involvement of the Procurator limited to exceptional cases in which such telematics cannot be used.

54. In terms of the second factor, that is to say the need to take into account not only legal obligations but also obligations that are imposed *de facto* by other means, an example may illustrate this idea: the services for receiving communications. These services, as the Council General has explained, cannot be used by the parties if they appear without a Procurator as it is a system organised for the Procurators. This means that in cases where a party does not appear through a Procurator, communication with the parties takes place by post, telegram or any other technological method that enables a proper record of receipt to be placed on the case file. The Council General itself considers that these methods do not function efficiently, which means that at the end of the day the parties tend to instruct a Procurator to represent them in the proceedings even though it is not mandatory to do so.

55. In the CNC's opinion the fact that there is an alternative system which is efficient but it is limited to the Procurators may be acting as a disincentive to improving the common system of notifications and, as the Council General has said, on many occasions this is the driving force behind clients opting to be represented by Procurators even though this is not a mandatory requirement; in other words the elimination of the rule requiring parties to be represented by a

professional may have been cancelled out by what is actually happening in practice.

56. The same thing may be happening with the Bill to reform the procedural legislation for the introduction of the New Judicial Office. First of all, although, as we have seen, it is true that the new functions attributed to the Procurator are an option for clients (who will bear their cost), it is equally true that other factors deriving from the regulation, such as the notifications service that we have referred to, may in fact convert this optional use of the Procurator into a mandatory one.

57. These examples may also extend to the use of telematics, where their effects can clearly be seen to be wider. Indeed it is generally accepted that the use of telematic media may make a very significant contribution to greater flexibility and reduction of costs in the Administration of Justice and that the greater use of such resources may in the main occur precisely in the representation in court proceedings that is principally undertaken by Procurators.

58. It is therefore important that the measures adopted in this case should not introduce distortions that could result in a *de facto* mandatory requirement to act through a professional, and even through a particular professional, namely the Procurator. It is necessary to ensure that telematics are introduced in a way that is neutral for the operators, in other words there is no discrimination between the different forms of acting (representing oneself or acting through professionals of various kinds) when such discrimination is not clearly justified and evaluated as the best possible alternative from the point of view of social wellbeing.

59. This requirement for neutrality must be applied from when telematic improvements are first introduced; furthermore, one could say that it is precisely at the initial stages when it is most important to bear it in mind in order to avoid a situation where certain operators may be able to gain a competitive advantage over others, not because they are more efficient (which would be to the benefit of the public at large) but because of a regulatory provision.

60. The Civil Procedure Act[20] already contemplates the possibility of using telematics. Specifically article 135(5) provides that pleadings and documents in legal proceedings may be sent using telematic media

[20] Some of them existed in the Civil Procedure Act 2000 and others were introduced through Act 41/2007 which amended Act 2/1981 of 25 March 1981 on the Regulation of the Mortgage Market and other rules of the mortgage and financial system, on the regulation of reverse mortgages and on insurance for dependents and which established certain tax rules.

and article 162(1) allows for the use of such telematics for acts of communication.

61. The aforementioned articles expressly contemplate this possibility for the parties to the proceedings, provided that it is possible to guarantee security in two respects: authenticity both of the communication and of its content and a proper record of the sending and receipt of the document and the date on which it was sent and received. In the case of declaratory proceedings, article 274 of the Civil Procedure Act even expressly considers the case where the parties are not represented by a Procurator, giving them the option of using telematic media where the aforementioned safeguards are met.

62. The Administration of Justice is currently taking important steps with regard to the use of telematics, such as the introduction of the Lexnet system approved by Royal Degree 84/2007 of 26 January 2007, whose title clearly sets out its purpose and content: "*on the introduction into the Administration of Justice of the Lexnet computerised telecommunications system for the filing of pleadings and documents, the provision of copies and the service of communications in proceedings by telematics".*

63. The Lexnet system consists of an architecture based on secure e-mail which provides maximum security and reliability in communication via the use of any of the recognised electronic signatures that exist in Spain.

64. As the preamble to the Royal Degree explains (the underlining does not appear in the original): "*the participants in telematic communications in the sphere of the Administration of Justice are none other than the parties involved in court proceedings. On one side of the relationship we have the court clerks and the officials of the bodies at the service of the Administration of Justice who perform their functions in the court office and on the other side the people seeking judicial protection, the professionals that assist them and other people and institutions who also have dealings with the courts and tribunals. Hence this regulation does not contain any exclusion in this regard". (…) "However, in relation to the subjective scope of application, it must be made clear (…) that technological reasons and prudence make it advisable to introduce the system on the basis that initially only some of the participants in the Administration of Justice are allowed to be users, without prejudice to the fact that in the future other groups of users may be incorporated, given that the system is intended to be universal. Amongst the users of the Lexnet system, the special regime of use allocated to the professional colleges of Procurators is of particular note".*

65. We can clearly see from this preamble that the new system is intended to be of universal application and non-discriminatory, that is to say it is intended for use by all interested parties (an analogy would be the case of the Spanish tax authorities – *Agencia Tributaria*); however, its users will initially be limited to the professionals engaged in these activities, both Procurators and Lawyers. In addition a separate role is given to the colleges of Procurators (not to the colleges of Lawyers) who are obliged to introduce this system, provided that they have the necessary technological resources.[21]

66. Notwithstanding the fact that the attempt by the Administration of Justice to modernise the system must be seen as positive, as we have already said, the important thing is that these new procedures are regulated in such a way that they do not discriminate between operators. In other words that they do not afford certain operators a more preferential treatment so that their presence in the proceedings, even though not a mandatory legal requirement, become mandatory in practice, thereby limiting its beneficial effects in terms of flexibility and reduction of costs. A good example of a neutral use of telematics has been its application in the Spanish tax authorities.

67. It is, therefore, important to ensure from the outset that there is no discrimination between operators and that there is no discrimination against the general public so that, all things considered, the introduction of telematics is to the benefit of society in terms of time and costs savings. It is therefore very important that the steps taken are not taken from the perspective of maintaining the current procedures in all respects but rather from the perspective of reviewing those procedures, along with the actions traditionally performed by certain professionals.

68. In the CNC's opinion, the role assigned to the colleges of Procurators in the Lexnet system may be of particular concern from the point of view of competition and from the point of view of the conclusions and recommendations that are going to be taken from this Report.

III.2 Reservation of activity: exclusivity, incompatibility and access

III.2.1 Current situation

[21] Specifically article 4 of the Royal Decree provides that "*the use of the Lexnet system shall also be mandatory for professional colleges of Procurators that have the necessary technological resources".*

69. In the previous section we have analysed the obligation for a party to be represented in proceedings by a professional. We sought to show when it is mandatory to be represented by a professional and when a party can represent himself.

70. What we are now analysing is the reservation of activity, that is to say the requirements and conditions imposed on professionals in order to be able to undertake the activity of representation in court proceedings, both where such representation is mandatory and where it is voluntary.

71. For the purposes of this analysis it is important to distinguish between professional activity and the profession itself:[22] a professional activity may be representing the client, just as there is a professional activity consisting of defending a client; in turn the profession may be that of Procurator, just as there is another profession of Lawyer and another of Employment Relations Specialist.

Exclusivity

72. Exclusivity means the exclusive reservation of a particular professional activity – the representation of the parties in court proceedings – to a particular group – the group that satisfies certain requirements.

73. These requirements could be established, for example, by reference to a particular type of academic training (for example requiring the professionals to have a law degree) or to another type of requirement (for example, as in the case of the employment courts, the requirement that the representative must be fully entitled to exercise his civil rights). However the most usual way of establishing exclusivity is by making reference to a specific "profession", for example requiring the person to be a Procurator, Lawyer or Employment Relations Specialist.

74. In fact, as we can see from our analysis of the procedural rules in the previous section, in general terms Procurators have an activity that is reserved to them, that is to say they have full exclusivity when it comes to the professional representation of the parties in court proceedings, although there are notable exceptions to this.

75. Thus this exclusivity does not exist in the employment courts as the parties are allowed to be represented by an Employment Relations Specialist or by "*any person who is fully entitled to exercise his civil rights*". This means therefore that a professional who is an Employment

[22] This idea has already been set out in the CNC's "*Report on the professional services sector and professional associations*" of September 2008. It also noted that the definition of the professions is not normally set out clearly and precisely in the rules.

Relations Specialist, for example, or a professional who is a Lawyer, can also undertake representation.

76. In the judicial review jurisdiction, if the court is presided over by a single judge the professional activity of representation can also be undertaken by Lawyers, meaning that Procurators do not enjoy exclusivity; the activity is reserved in all cases just to Procurators and Lawyers, but the Procurators do not have full professional exclusivity.

Incompatibility

77. There are currently three professions whose practice is incompatible with the profession of Procurator:[23] Lawyer, Administrative Manager[24] and Employment Relations Specialist.

78. It should be noted that we are considering incompatibilities between professions and not between professional activities. This explains the fact that the profession of Procurator is incompatible with the profession of Lawyer, but, as we have already seen, a Lawyer can carry out activities involving the defence and representation of the parties at the same time, for example in the judicial review courts or in the employment courts.

79. The incompatibilities of the profession of Procurator are set out in the Royal Decree approving the General Statute.[25] In the case of the incompatibility with Lawyers, they are also set out in the General Statute of the Legal Profession.[26] In the case of Employment Relations Specialists and Administrative Managers, their Statutes do not refer to any incompatibility with Procurators.[27]

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[23] In addition to the incompatibility with the exercise of the judicial or prosecutorial function, with the performance of the role of Court Clerk and with every ancillary or secondary employment and function in the courts; together with the performance of offices, functions or public employment in the institutional bodies of the State, of the Administration of Justice and of the public administrations and the public bodies reporting to them.

[24] The General Statute also makes reference to Business Agents (*Agentes de Negocios*) but, as the Council General itself has indicated, this is a term that is no longer used in our legislation. It has been replaced by the term Administrative Manager (*Gestor Administrativo*). This is in fact a single profession which has been wrongly referred to by two names, the old one and the current one. The analysis will not therefore look at the profession of Business Agent.

[25] Article 24: "*The profession of Procurator is incompatible with: (…) b) the practice of the profession of Lawyer. c) The practice of the profession of Business Agent, Administrative Manager, Employment Relations Specialist and any other professions whose own rules and regulations so specify".*

[26] Royal Decree 658/2001 of 22 June 2001: "*The practice of the profession of Lawyer shall be totally incompatible with (…) the practice of the profession of Procurator*".

[27] Decree 424/1963 of 1 March 1963 approving the Organic Statute of the Profession of Administrative Manager and Royal Decree 1415/2006 of 1 December 2006, approving the General Statutes of the Official Colleges of Employment Relations Specialists.

80. However, in no case is there a rule with the rank of an Act in which these incompatibilities are set out.[28]

Access to the profession

81. Access to the profession of Procurator currently requires a law degree and an application for authorisation to practice to be made to the Ministry of Justice.[29]

82. The specific requirements to be able to practice the profession are regulated in article 8 of the General Statute:

a) "To be a Spanish national or a national of one of the Member States of the European Union or of the States that are parties to the Agreement on the European Economic Area, without prejudice to the provisions of any international treaties or conventions or save where there is a statutory exemption.
b) To be of full legal age and not to come within any of the grounds for disqualification.
c) …
d) To have obtained authorisation to practice as a Procurator, which shall be issued by the Ministry of Justice following proof that the requirements laid down in this General Statute have been met, in accordance with the law".

83. Article 8(c) of the General Statute is the provision that requires a law degree. However, it was repealed by a Judgment of the Supreme Court dated 17 June 2005, because the Court took the view that "*as no formal Act emanating from the legislative body requires a law degree in order to be able to practice as a Procurator, article 8(c) of the General Statute infringes the principle that the requirement must be contained in an Act, as it cannot impose a requirement that was not imposed by the Organic Act of the Judiciary that was in force*

[28] The establishment of incompatibilities in the analysis of a Statute of a professional association was questioned by the Council of State in its report on the proposed Royal Decree approving the General Statute of Procurators. Literally, the Council of State said "*it does not appear that the General Statute of these professionals is an instrument that can impose a requirement of its own accord autonomously to the effect that Procurators will be incompatible with the practice of other self-regulating professions".*

[29] The Ministry of Justice only requires:
- Identity document, passport or other document showing nationality.
- Birth certificate.
- In the case of foreign citizens who are not EU or EEA citizens, a certified photocopy of the nationality exemption requirement.
- Certificate evidencing no criminal record.
- Certificate evidencing law degree.

when it was published. This is reaffirmed by the fact that Organic Act 19/2003, when amending the Organic Act of the Judiciary after the introduction of Royal Degree 1281/2002 of 5 December 2002, which is the subject of challenge today, when regulating Procurators in article 543, did not include a requirement that Procurators must have a law degree either, in contrast to the case of Lawyers, who are regulated in article 542".

84. However, after that Judgment was handed down Act 34/2006 of 30 October 2006 on access to the professions of Lawyer and Procurator (*Ley sobre el acceso a las profesiones de Abogado y Procurador de Tribunales*) was passed. It includes in article 2 the requirement to have a law degree as an essential condition in order to be entitled to practice as a Procurator,[30] thereby giving statutory support to this requirement.[31]

85. But, as the current situation is the one that we have described, the relevant point is that Act 34/2006 of 30 October 2006 on access to the professions of Lawyer and Court Procurator was passed in 2006. It amends the access requirements, making them much harder, and will come into force in October 2011.

86. The new requirements that will apply to people wishing to practice as Lawyers and Procurators from when the Act comes into force in 2011 add to the requirement for a law degree and are as follows:

- a period of mandatory training (Masters) and
- a professional examination.

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[30] During the legal lacuna produced by this Judgment, various authorisations to practice as a Procurator were issued by the corresponding Ministerial Orders in response to requests from interested parties without a law degree. Faced with this situation the Council General filed applications for judicial review of these Ministerial Orders with the National Appeal Court (*Audiencia Nacional*). Recently the Supreme Court (*Tribunal Supremo*) has handed down a Judgment regarding one of these cases. The appeal by the Council General had been ruled inadmissible by the National Appeal Court because it was out of time; the Judgment of 19 February 2009 of the Judicial Review Chamber, Section 6, of the Supreme Court allowed the appeal that the Council General filed with it against the Judgment of the National Appeal Court, ruling that the application for judicial review filed by the Council General before the National Appeal Court was admissible and declaring that the Ministerial Order in question was null and void "*because that Order was made with total and absolute disregard for the established procedure, a ground for repealing it which prevents us from considering the other substantive questions raised in these proceedings".*

[31] The same legal requirement was also introduced by Act 16/2006 of 26 May 2006 which regulates the General Statute of the National Member of Eurojust and the relations with this European Union body.

87. As regards the period of mandatory training, Act 34/2006 establishes that this is regulated, official training which is to be acquired through undertaking training courses. It will include a period of practical training, accredited jointly by the Ministry of Justice and the Ministry of Education and Science[32] through a procedure to be determined by regulation. These training courses may be organised and given by public or private universities and by legal practice schools. The period of practical training, which under no circumstances will represent an employment or services relationship, will be undertaken under the guidance of a Lawyer or Procurator with a minimum of five years' experience.

88. However, we need to introduce a qualification on this point. What the Act sets out with regard to mandatory training is really applicable to Lawyers, that is to say the points made in the preceding paragraph really refer only to the case of Lawyers. In the case of Procurators, the Act states that "*the provisions of this article* [article 4 relating to training] *shall apply to training courses for access to the activity of representation in court proceedings in accordance with the specific regulations to be introduced in that regard".* The Act has not therefore treated Lawyers and Procurators in the same way. It does not regulate the characteristics of the training period for Procurators in detail and leaves this to be dealt with by a regulation, which has yet to be approved.

89. In terms of the professional examination that will be the culmination of the professional training process, the Act indicates that "*its purpose is to provide objective proof of the fact that the person has sufficient practical training to practice the profession of Lawyer or the profession of Procurator and that he has the knowledge of the respective ethical and professional rules".*

90. The Act provides that the official examinations will take place at least once a year and that no limit may be set on the number of places. It also determines that the contents of the assessment will be the same throughout Spain for each official examination.

91. There will be a single assessment committee for courses undertaken in the territory of a particular autonomous community. In the case of Procurators it will consist of representatives from the Ministry of Justice and the Ministry of Education and Science, members designated at the proposal of the respective autonomous communities and members designated at the proposal of the Council General.

[32] Now the Ministry of Education.

92. This means that from 2011 the first requirement for access to the profession of Procurator will be the “triple” training requirement: a law degree, specific (post-graduate) training and an examination.

Membership of Professional Colleges: Joining Fee

93. In addition to the training requirements, the Procurator is also required to join a professional college and must pay a mandatory joining fee.

94. This requirement to pay a joining fee, which is also a general requirement in the rest of the professional associations, is particularly significant in the case of Procurators due to the amount of the fee.

95. The amount of the joining fee varies according to the professional college in question, and even within a given professional college there are differences according to whether the Procurator practices in the capital or in the rest of the territorial demarcations. In the case of the capitals, the joining fees vary between 1,200 and 6,000 euros, with an average fee of 4,600 euros. In the case of the rest of the territorial demarcations, the fees vary between 1,350 and 6,000 euros and the average fee in this case is around 4,180 euros (see annex).

96. The joining fee is fixed by the professional colleges without any type of legislative requirements being imposed. As the Council General has indicated, each of the professional colleges determines the basis for membership contributions autonomously and independently.

97. Again according to information from the Council General, the revenue from membership fees (the initial joining fee and the regular fees) is used to pay expenses that are necessary for the performance of the aims of the college and to pay expenses deriving from “*the exercise of the public functions of collaborating with the Administration of Justice, offsetting the cost of technological innovations and human resources that are required to perform those functions which the procedural legislation demands […] and which replace the corresponding public expenditure that would be made by the Administration of Justice in the final instance if it were to assume direct responsibility for the performance of those services”.*

III.2.2 Evaluation

98. As indicated in the CNC's “*Report on the professional services sector and professional associations*” that we have already mentioned,

reservations of activity constitute an obvious competition problem because, in short, they are restrictions on the free practice of a profession through a definition of the operators who can act and compete in a given market or in a given activity.

99. Indeed, by making an activity exclusive to a particular group of professionals, the possibilities for competition by other operators are being limited, as are the benefits for consumers in terms of price and quality.

100. Any exceptions to the freedom of choice of profession that is proclaimed in the Constitution must therefore be clearly based on a ground of public interest that justifies them. In this case the requirement is all the greater, if that is possible, because the use of the service is mandatory if one wants access to such a basic right as justice.

101. We shall therefore go on to analyse the current situation with regard to this reservation of activity and its effects on competition in order to evaluate whether there is sufficient justification for it.

Incompatibilities

102. It is appropriate to start the analysis with an evaluation of the incompatibilities of the profession of Procurator, as in this case it is the necessary starting point for dealing with questions of exclusivity. Not only that, it is also appropriate because the incompatibilities of the profession of Procurator will have to be eliminated in the near future as a result of the application of the Services Directive.

103. Indeed, in applying the Services Directive, the Bill on free access to and exercise of service activities provides that any restrictions that may be imposed on multidisciplinary practice must be contained in rules with the rank of an Act. The same presumption is contained in the Bill to amend various laws in order to adapt them to Act …/… on free access to and exercise of service activities [33] as part of the changes contemplated in the legislation applicable to professional associations.

104. As we have seen, the incompatibility between the profession of Procurator and the professions of Lawyer, Employment Relations Specialist and Administrative Manager is not contained in any Act but rather in the Statute governing the profession. It must therefore be

[33] Version of 27 March 2009.

deemed to be automatically repealed once the Act transposing the Service Directives comes into force.

105. Nonetheless the CNC wishes to go further with its analysis, as we are not simply dealing with a problem regarding the rank of a particular rule (which is important but which could be "cured" by a regulation of a suitable rank), but with a problem for which, in the CNC's opinion, there are no arguments to justify the continuance of such an incompatibility.

106. Indeed the Bill on free access to and exercise of service activities, which transposes the Services Directive, itself indicates that in the case of the regulated professions this type of restriction may be imposed in a rule with the rank of an Act, provided that it is necessary "*in order to guarantee its independence and impartiality and to prevent conflicts of interest"*, to the extent that this is necessary in order to "*guarantee compliance with distinct and incompatible rules of professional ethics due to the specific nature of each profession, provided that they are justified in accordance with the principles established in article 5 of this Act"*, that is to say the principles of non-discrimination, necessity and proportionality.[34]

107. This is the approach we take in the analysis that follows. Our starting point is the fact that the incompatibility of the practice of the profession of Procurator with the practice of the professions of Lawyer, Administrative Manager and Employment Relations Specialist represents a restriction on free competition, because on the one hand it represents an entry barrier to undertaking of the activity and on the other hand prevents the offer of multi-professional services to consumers.

108. To that end it is necessary to start our analysis by indicating that it is practically impossible to find any justification in the current regulation

[34] Article 25 Multidisciplinary activities

1. Service providers cannot be obliged to undertake a single activity exclusively, either by being made subject to requirements which oblige them to undertake a specific activity exclusively or by the imposition of requirements that restrict the exercise of different activities jointly or in partnership.

2. However, in order to ensure their independence and impartiality and to prevent conflicts of interest, the following providers may be made subject by law to the requirements referred to in the preceding subparagraph:

a) the regulated professions, in so far as is necessary in order to guarantee compliance with rules of professional ethics and conduct that are distinct and incompatible due to the specific nature of each profession, provided that they are justified in accordance with the principles laid down in article 5 of this Act;

b) providers of certification, accreditation, technical monitoring, test or trial services.

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for the incompatibility of the profession of Procurator with the three professions referred to. Unfortunately one cannot normally access the supporting reports for Royal Decrees that have already been passed and we cannot therefore analyse the arguments used in this case for the introduction of the incompatibilities in question.

109. The CNC has therefore consulted the Council General about the reasons why, in its opinion, the existence of such an incompatibility could be justified. The question focuses largely on the incompatibility with the profession of Lawyer, because as far as the other two cases of incompatibility are concerned, namely incompatibility with Administrative Managers and Employment Relations Specialists, there is greater consensus regarding the fact that there are no grounds to justify the regulation continuing.

110. Indeed, in the light of their functions and the rules and regulations that regulate these professions of Administrative Manager and Employment Relations Specialist, our conclusion is that there is no ground deriving from them connected with the guarantee of independence and impartiality or with compliance with codes of professional ethics that makes it necessary to establish a regime of incompatibility between these professions. Such incompatibilities therefore infringe the principle of necessity and proportionality by imposing an entry barrier and a barrier to undertaking representation in court proceedings which lacks the necessary justification.

111. Turning therefore to the incompatibility with the profession of Lawyers, the Council General has basically put forward two reasons why in its view this incompatibility is justified.

112. Firstly, the impossibility of reconciling the requirements of proximity to and regular presence at the courts on which the function of representation in court proceedings is based, and by reference to which representation is geographically restricted, with the function of defending clients, which does not impose such a requirement; in the Council General's opinion acknowledging that the joint exercise of these functions is compatible would prevent the proper performance of the professional activity of the Procurator, which is based on the said principle of proximity to and regular presence at the courts.
113. Secondly, the impossibility of preserving the necessary impartiality in the functions of Procurators as collaborators with the Administration of Justice. The Council General considers that although Lawyers and Procurators share functions in terms of providing services to the parties in court proceedings, there is a clear difference between the interests that each of them defends or represents; thus the Lawyer defends the interest of his client, assuming a "partisan" stance in the

proceedings, whereas the Procurator, in the Council General's opinion, is not so focused on his client and is closer to the court than to the party.

114. The Council General also considers that the new functions that are given to Procurators by the Bill to reform the procedural legislation for the introduction of the New Judicial Office strengthen this argument, as these new functions make it "*unimaginable*" for the Lawyer to be able simultaneously to perform the functions of defending and advising his client and the functions of expert representation and collaboration with the Administration of Justice which will be given to the Procurator once the new procedural legislation comes into force.

115. Nevertheless, for the reasons set out below the CNC considers that both these arguments are not proportionate to the harm they generate for competition (the fact that it is impossible for other professionals such as Lawyers to perform the functions of lawyer and court representative at the same time, with the consequent advantages for consumers).

116. First of all, in terms of the need to preserve the necessary proximity to and regular presence at the courts that are part of the functions of a Procurator, the CNC takes the view that this is not a sufficient reason to establish an incompatibility. If that were the case, to take matters to the extreme, the incompatibility would have to be established with all types of professions, for example, with that of consultant as well. On the other hand, if there was really a need to regulate this requirement of proximity to and regular presence at the courts, the most efficient and least prejudicial way of regulating the position in terms of competition would simply be to impose that obligation and provide for the appropriate sanctions in the event of non-compliance, without requiring that in order to comply with the obligation one cannot exercise the profession of Procurator at the same time as three other professions in particular.

117. However, as we shall explain later, the CNC actually considers that these obligations of proximity to and regular presence at the courts (which are connected with geographical issues) ought to be reviewed as well, because what should be regulated, if applicable, is the type of obligations that have to be satisfied, without prejudice to the fact, for example, that telematic advances allow such obligations to be performed in very different ways.

118. In short, nothing new is being said over and above what is already contained in general terms in article 24(2) of the General Statute (but excluding the three professions cited for which the incompatibility is

established): "*In cases of simultaneous exercise with other professions or compatible activities, the principle of proximity to and presence in courts and tribunals during their opening hours shall be respected"*. That is to say it is not incompatibilities that are being established, but rather rules of professional conduct.

119. Secondly, in terms of the need to preserve the necessary impartiality in the functions of Procurators as collaborators with the Administration of Justice, again various arguments can serve to reach the conclusion that this is not an acceptable reason for maintaining the incompatibility.

120. First of all, the General Statute already contemplates incompatibility with those other activities for which, in principle, there could be a problem with preserving impartiality, although not so much on the part of the Procurator as on the part of the other activities. This is the situation set out in article 24(a) of the General Statute, which provides that the profession of Procurator is incompatible "*with the exercise of the judicial or prosecutorial function, with the performance of the role of court clerk and with every ancillary or secondary employment and function in the court*".

121. Secondly, there are already situations in which it is possible to perform the activities of defence and representation at the same time (they are compatible) and as far as we are aware this has not given rise to any problems from the point of view of impartiality and professional ethics. This is the case with Employment Relations Specialists, who can perform both activities at the same time, or Counsel for the State (*Abogados del Estado*) who, when defending the interests of the State, may also act as Procurators at the same time.[35]

122. Similarly, the compatibility of the two activities also occurs in the case of appearances before courts consisting of a single Judge in the judicial review jurisdiction, where the presence of a Procurator is not mandatory and the Lawyer can perform the tasks of representation.
123. Furthermore, there was another example of compatibility between the two tasks which is no longer current because it was challenged by the Council General of the Legal Profession and set aside by a Judgment of the Supreme Court, not on substantive grounds but because it did not have the necessary statutory support. This was the situation contemplated in the General Statute itself whereby Procurators could represent and defend themselves as parties at the

[35] As established by Act 52/1997 of 27 November 1997 on Judicial Assistance to the State and Public Institutions.

same time, and their spouses or relatives up to the second degree of blood relationship or affinity.[36]

124. Thirdly, the Council General itself has acknowledged that Procurators do not have a “procedural discretion” to side with the party whom they represent, so that there does not appear to be any significant risk of a loss of impartiality and independence in this sense.

125. Furthermore, given that the establishment of stable collaborative relationships between Lawyers and Procurators is common, as the Council General of the Legal Profession has itself indicated, in the event that there were such a serious risk of loss of independence and impartiality in the activity of representation in court proceedings, the current situation might not be the most suitable, yet that has not been shown to be the case. The same would apply with regard to the fact that the rules and regulations do not prohibit Procurators from receiving payments that are not based on the fee scale (in the opinion of the Council General this is a residual part compared with income based on the fee scale) so that if the Procurator’s independence from the party whom he represents were so essential or vulnerable, payments received outside the fee scale could also be a way of limiting such independence. Again, this has not been shown to be the case.

126. In short, after analysing the possible arguments for maintaining the incompatibility of the profession of Procurator with that of Lawyer, Employment Relations Specialist and Administrative Manager, the CNC takes the view, for the reasons already stated, that there are insufficient grounds to justify such incompatibility. In the CNC's opinion this means that the grounds of guaranteeing independence and impartiality and compliance with requirements of professional ethics which the Services Directive would demand in order for the prohibition on this joint exercise to continue do not exist.

127. For all the above reasons the CNC takes a view that there are clear and sufficient reasons, over and above the legal obligation that derives from the Services Directive, to remove the incompatibility between the profession of Procurator and the professions of Lawyer, Employment Relations Specialist and Administrative Manager.

[36] Judgment of 29 January 2004, Judicial Review Chamber section 6. The Judgment took the view that the article of the General Statute infringed the principle that the provision must be contained in an Act by giving the Procurator a function of defending the client that was not specified as being within the professional competence of Procurators according to the definition in the Judiciary Act.

128. Furthermore, in the CNC's opinion and contrary to what the Council General has said, any changes that may be introduced by the Bill to reform the procedural legislation for the introduction of the New Judicial Office in terms of the functions that Procurators may perform cannot be an argument for not proceeding with the opening up to competition that is proposed with the removal of the incompatibility between Procurator and Lawyers, Employment Relations Specialists and Administrative Managers.

Exclusivity

129. However, there is an additional problem that has to be resolved so that the effects of removing the incompatibility are not undermined, namely making it genuinely possible for other operators who are qualified to provide representation in court proceedings to be able to do so, in particular Lawyers.

130. Once the incompatibility between the two professions has been removed when the Bill transposing the Services Directive becomes law, people who are currently Lawyers will be able to apply to the Ministry of Justice for an authorisation to practice as a Procurator. This would be given to them directly as they satisfy the sole requirement, which is to have a law degree. They would therefore have the necessary title of Procurator to enable them to act, for example, in the civil courts where the activity of representation is reserved to Procurators, and they could exercise the right to defend the client (as a professional Lawyer) and represent him (as a professional Procurator) at the same time.

131. However, from 2011 when the Access Act comes into force, it will not be so easy for someone to obtain the two professional qualifications and there will be clear costs deterrents for doing so. After completing a law degree, an individual would have to do a post-graduate course and pass an examination in order to obtain qualify as a Lawyer and a further post-graduate course and another examination in order to qualify as a Procurator.

132. This means that in practice the only thing that removing the incompatibility would achieve is that a single company could provide both services, but it would be difficult for a single professional to offer both services jointly because the cost of obtaining both professional qualifications would act as a clear disincentive.

133. The removal of the incompatibility is not therefore enough in itself. It is necessary to do something about exclusivity, that is to say to widen the reservations of activity that currently exist so that the

134. The reasons that can be put forward in support of the removal of exclusivity for Procurators when it comes to representation in court proceedings and, in particular, for allowing that activity to be undertaken by Lawyers as well are very similar to some of the reasons that we have already referred to in the case of incompatibility.

135. First of all, as we have already seen, there are already situations in which the activity is not exclusively reserved to Procurators but can be undertaken by other professionals such as Employment Relations Specialists, Lawyers or "*any person who is fully entitled to exercise his civil rights*" (in addition to the situation where a party acts in person, that is to say without using a professional). In these cases there has been no suggestion that this undermines the quality of the services received or the safeguards for the consumers.

136. Likewise, there are other situations in which exclusivity is extended to cover Counsel for the State. They can also undertake representation tasks which in other cases are reserved exclusively to Procurators.

137. Secondly, and without wishing to take this argument to the extreme, the fact that the legislation allows Procurators to delegate certain activities to authorised officers[37] evidences the fact that at the very least there is room for manoeuvre in terms of reviewing exclusivity.

138. Thirdly, as we have seen, it is not possible to find a similar case in other countries where there is the exclusivity that is reserved to Procurators in Spain.

139. Finally, although there may be dissenting opinions, it is important to highlight the fact that a recent Judgment of the National Appeal Court of 20 January 2009 (in relation to the Ministerial Orders referred to above that had granted individuals without a law degree the right to practice as Procurators after the repeal of this requirement by the Supreme Court) indicated the following with regard to the requirements demanded, which, all things considered, are the ones that determine the reservation of activity: "*Furthermore, the*

[37] Article 543 of the Judiciary Act provides that "*When exercising their profession, Procurators may be replaced by another Procurator. They may also be replaced by an authorised officer for the acts and in the manner determined by regulation".* For its part article 29 of the General Statute states that *"Procurators may also be replaced, at hearings, investigations and procedures, by their authorised officers in the manner provided by regulation in accordance with the provisions of the Judiciary Act".*

requirement for a particular qualification is not "an inevitable condition for the effectiveness of the right to effective judicial protection" which guarantees the procedural rights of the parties represented and equal bargaining power in the proceedings. (…) This conclusion appears to be corroborated in the situation with which we concerned by what the General Council, the appellant in these proceedings, has said when acknowledging that there are Procurators who have been practising and are practising the profession without having a law degree, by virtue of the situations determined by the General Statute of Procurators of 19 December 1947 (…), without the mere fact that in our legal system there are proceedings in which the interested party does not have to be represented by a Procurator or assisted by a Lawyer, or that the representation and defence can be done by a Lawyer without any intervention by a Procurator, meaning that the rights of the litigants are infringed or that they are deprived of the right to effective judicial protection. That is even the case with respect to proceedings in the judicial review courts, in which an official may appear for himself in order to defend his rights and in which defendant administrations are represented and defended by highly specialised and competent professionals (Counsel for the State, in-house Lawyers from the autonomous communities or from local corporations, article 24 of the Act on the Legal Framework of Public Administrations and Common Administrative Procedure), without it meaning that there is inequality of bargaining power in the proceedings or an infringement of other rights or guarantees that govern the proceedings. That is the reason why we cannot share the view that the right to obtain judicial protection is threatened by the fact that the profession of Procurator is undertaken by people without a law degree, because, aside from the fact that this academic qualification may appear most appropriate for it, it is not possible to link the need for the requirement with the infringement of this fundamental right. That would be tantamount to saying that every change relating to the qualification required or to the education and training of these professionals would automatically impact on the right to obtain effective judicial protection and that it would cause serious and irreparable damage to it, an opinion which, when put in those terms, cannot be accepted by this Court".

140. For all these reasons the CNC takes the view that the exclusive reservation of activity for Procurators that exists in certain cases in terms of representation in court proceedings must be reformed, so that at the very least Lawyers are allowed to carry out this same activity.

141. Really, the more appropriate and correct thing to do would be for the reservation in question to be established on the basis of the

knowledge required of the operator, without making reference to specific qualifications or professions. This should be taken into account in the immediate future because, as the CNC has also already said, the reforms deriving from the Bologna Process should lead to a greater variety of qualifications and the regulation should not therefore be framed in such a way that qualifications which nonetheless offer valid or adequate training for a particular activity are excluded.

A mention of the Access Act

142. As we have just seen, the problems that are perhaps being unjustifiably caused from the competition perspective by the reservation of activity to Procurators could be dealt with through the elimination of the incompatibilities with the profession of Procurator and a review of the right of exclusivity, at the very least to allow Lawyers to undertake representation in court proceedings.

143. If that were done it would not be necessary to deal with the question of requirements for access to the profession,[38] although we do not want to pass up the opportunity to make the following comments.

144. First of all, even assuming that when the Access Act was passed in 2006 the appropriate competition assessment had been undertaken in order to assess whether the greater restriction on competition resulting from making the requirements for access to the profession more difficult was justified and proportionate, the fact is that the framework of university education has changed since the Access Act was passed as a result of the Bologna Process (a process that had already been started at that time but which had not yet been finally written into domestic legislation).

145. As that is the position, and bearing in mind that the Access Act has not yet come into force, it would perhaps be appropriate to review the rule in order to assess whether it is appropriate for the new university framework. Indeed, unlike the new general framework designed for university qualifications, in which a graduate qualification should, generally, entitle the person concerned to have access to the job market and to the professions, in the case of the profession of Procurator (and the profession of Lawyer) the graduate qualification (law degree) alone would not entitle the person to practice the

[38] If that were not the case it would be necessary to proceed in such a way that being qualified to practice as a Lawyer would also allow practically automatic access to the profession of Procurator, modifying the Access Act for this purpose or bearing it in mind in its implementing regulation.

profession. He would have to obtain a further post-graduate qualification, but that would not entitle him to practice either, given that it would always be necessary to pass a final examination. As we can see, this scheme does not follow the general provisions contained in the new strategy followed when adapting to the Bologna Process.

146. Secondly, and without prejudice to what we have already said, in the event that the Access Act is retained in its current form, bearing in mind that the appropriate enabling regulation has not yet been passed, the CNC takes the view that it is necessary for that regulation to take account of two particular issues at least.

147. First of all it is necessary to minimise the risk that the direct or indirect action of competitors in the process of assessing and selecting new professionals may unjustifiably restrict entry by new operators. This must be borne in mind in the case of the members of the assessment committee designated by the Council General and also in the actions of the Council General in determining the content of the assessment.

148. Furthermore, it is necessary to prevent the establishment of barriers to the free exercise of the profession throughout the country. The Access Act appears clear on this point, given that it establishes that the assessment will have the same content, even though it is to be undertaken by different assessment committees in each autonomous community. It ought therefore to be the case that once a person has passed the assessment process he may practice throughout the country. The problem arises from a possible incorrect interpretation of another point in the Act, which states that a regulation will be passed "*to regulate the programmes, which shall also contemplate matters relating to the law of the individual autonomous communities, and the assessment system ….".*

149. In the CNC's opinion, the reference in the Access Act to "programmes" is a reference to study programmes, but not to the content of the examination itself (which throughout the Act is referred to as an "assessment" and not as a "programme"). As we have already said, the content of the examination should be the same. That being the case, the implementing regulation must be clear in the sense that passing the assessment process in any autonomous community entitles the person concerned to practice throughout the country. Under no circumstances will it be possible to impose additional requirements or require special qualifications that could restrict the free movement of professionals by arguing, for example, that because they have been examined in another autonomous

community they must prove their knowledge of particular aspects of the new autonomous community in which they are going to practice. In the CNC's opinion this would be totally unacceptable and would be contrary to the Services Directive.

Membership Fee

150. Without looking specifically at the fact that membership of a professional association is a mandatory requirement, which is something on which the CNC has already given a general opinion in the Report of September 2008 to which we have already referred, we wish to comment on the question of the initial joining fee.

151. As we have already said, it is normal for professional associations to require payment of a joining fee. This joining fee is fixed by the associations unilaterally without any control whatsoever from the administration. This is very important if one bears in mind that membership of a professional association is a statutory requirement (meaning that the payment has to be made if a person wishes to practice the profession) and that the professional association has the monopoly on collecting this fee and is free to fix the amount.

152. There is therefore a risk that competition problems will arise. In the case of the colleges of Procurators this is particularly striking due to the high joining fees compared with other professional associations.

153. The Competition Tribunal has made reference to this issue, for example in its Resolution of 14.12.2000 in case 481/1999, Administradores de Fincas de Sevilla y Huelva, when it indicated that "*joining fees may not be fixed in such a way as to hinder the entry of new members or the entry of competitors belonging to associations from other regions. The decisions of the associations regarding the level of the joining fee must therefore always be based on objective considerations that relate to actual cost, because if that were not the case, the fee would constitute a barrier to the access of new competitors and would represent a breach of the Defence of Competition Act".*

154. As we have already indicated, the Council General takes the view that this income covers necessary expenditure, and on occasions replaces expenditure which the Administration of Justice would otherwise be required to make. In the CNC's opinion it is the regulator who should evaluate these expenses and the most efficient way of incurring them.

155. Therefore, in the CNC's opinion, it could be appropriate for the Administration that oversees the professional colleges to review the fees collected and the costs that may justify the amount of those fees.

156. In this sense we must point out that the aforementioned Bill to amend various laws in order to adapt them to Act …/… on free access to and exercise of service activities imposes an obligation on professional associations to publish annual reports, which should include information on the amount of their fees and how they are calculated and applied, amongst other things.

III.3 Prices: The fee scale applied by Procurators and advertising

III.3.1 Current Situation

The fee scale

157. There is a special legislative regime that applies with regard to the prices charged by Procurators. Their fees are fixed prices to which an increase or decrease of 12% can be applied by virtue of the fee scale regulated by Royal Decree 1373/2003, approving the fee scale applied by Procurators.

158. In addition, article 34(2) of the General Statute gives the governing bodies of the professional colleges the power to require their members to show that they have complied with the fee scale. This power allows them to require members to produce invoices showing disbursements and fees and their accounting records.

159. The fee scale approved by Royal Decree represents a complex price system which can be established as a percentage of the value of the claim, as a sum that varies by reference to different tranches of the sum claimed or as a fixed amount for each service. There are also mixed cases which mix these criteria.

160. In addition, as article 3 of Royal Decree 1373/2003 indicates, Procurators can also receive remuneration outside the fee scale if the Procurator so agrees with his client. The Council General takes the view that professional interventions where the fee scale does not apply have a residual role compared with professional actions governed by the fee scale.

Advertising

161. In addition, although it is a separate restriction, it is necessary to mention the regulation of advertising in relation to the activity of Procurator and, in particular, restrictions on advertising relating to prices.

162. Thus the 2003 Regulation on Advertising by Procurators, passed by the Full Council General on 15 December 2003, prohibits "*advertising of information relating to fees or the cost of professional services"* (article 5). It also includes other related prohibitions, such as the prohibition on "*advertising previous roles that the Procurator may have performed*" (article 4); "*including advertising contents that make comparisons with other professionals in the sector or self-praise*" (article 5); and "*using illuminated signs for exhibiting advertising"* (article 6).

163. According to information provided by the Council General, by decision of its Executive Committee adopted on 23 January 2009 the Council General has agreed to repeal the aforementioned advertising regulations as part of the process of adapting its rules and regulations to the Service Directive. However, the CNC has not been able to check this.

III.3.2 Evaluation

164. The CNC has taken the view that fee scales are elements that severely distort free competition, as has its predecessor the Competition Tribunal. It has therefore already proposed on previous occasions that the fee scale system should be eliminated or, alternatively, at the very least that the discounts should be liberalised in such a way that these fee scales or prices serve as maximum prices.

165. The first of these occasions was in Case 477/99, Procuradores, and the second was in the recent "*Report on Recommendations to Public Authorities for a more efficient regulation of the markets that is beneficial to competition*"*,* published by the CNC in June 2008.

166. In this Report the CNC maintains it arguments in relation to fee scales, although it now does so in a new context which provides even more support, if that is possible, for the proposal to reform the fee scale system: First of all, because this Report is prepared against the background of a proposal for broader regulatory reform where a quasi-fixed fee system would make very little sense; secondly, because the review of the fee scale system is now a requirement under the Services Directive.

167. Indeed, article 11 of the Bill on free access to and exercise of service activities provides that:

"1. The regulatory provisions on access to or exercise of a service activity must not make that access or exercise subject to: (…)
g) Restrictions on freedom of prices, such as minimum or maximum fees, or restrictions on discounts"".

168. The Bill only contemplates the possibility of exceptions to these provisions in very limited cases:

"2. However, exceptionally, access to or provision of a service may be made subject to the satisfaction of one of the requirements contained in the preceding subparagraph where, in accordance with article 5(1) they are not discriminatory, they are justified by an overriding reason of public interest and they are proportionate".

169. It is therefore necessary to review the fee scale system applied by Procurators in order to analyse whether it satisfies the requirements deriving from the Services Directive. If the analysis shows that these requirements are not being met, the fee scale system used by Procurators should be expressly repealed.

170. A system of fixed or quasi-fixed prices, such as the fee scale applied by Procurators, is justified on occasions as a mechanism that prevents "competition abuses" and "unfair competition" between professionals, enabling a high quality of services to be guaranteed.

171. It is normally also argued that fixing prices is an instrument to protect the public and to guarantee that a person involved in legal proceedings has a clear knowledge of the Procurator's charges, within the costs of bringing proceedings, based upon which he can decide whether it is worth starting proceedings.

172. However, in the CNC's opinion such arguments are not sufficient to mean that the fee scale is justified by an overriding reason of public interest and is proportionate, as the Services Directive requires.

173. Thus, as we have indicated on other occasions, such as in the aforementioned Case 477/99, a freely-fixed price is a basic institution of a market economy; provided that suitable conditions are present, that is to say a sufficient number of offerors and consumers with a sufficient knowledge of the alternatives, the freedom to fix prices is essential in order to obtain the benefits of competition between the various producers of goods or providers of services.

174. Similarly, the freedom to fix prices enables a better allocation of resources, growth and employment, at the same time as allowing the different operators who offer their services in the market to innovate and improve the services provided.

175. The same idea is set out in the Recommendations Report of 2008 that we have already mentioned. The main problem generated by fixed or quasi-fixed price regimes is that because they do not allow prices to be freely fixed in the market, price ceases to be a factor in terms of competition in the market. At the same time it cannot be an economically logical reflection of the service that the consumers obtain in return, nor of the quality or safeguards of that service. Likewise, if the aim is to guarantee the provision of services and their quality, this objective can be said to be met by the way in which the providers of such services access the profession. Greater restrictions on competition in the form of fixing the prices to the consumer are not necessary.

176. We should also reiterate what has been said on previous occasions by representatives of the Directorate General of Competition of the European Union when dealing with the fee scale system, in the sense that when the price is fixed one never knows whether the professional has or has not acted efficiently and in a way that is satisfactory to the client (who is the person paying the price), so one cannot argue that a fixed price safeguards the quality of the service.

177. Furthermore, whilst it is true that a system of fixed prices enables consumers to find out about the cost of the service in advance, it is equally true that this represents a very small benefit compared with the prejudice that price fixing carries with it; in reality the same aim could be achieved by introducing an obligation to provide a quote in advance and opening up the possibilities for publishing information on prices.

178. We have to say in this regard that article 22(2)(g) of the Bill on free access to and provision of services requires service providers to provide the intended recipient with readily accessible information on "*the price of the service, when the provider fixes a price in advance for a particular type of service".*

179. Based on everything that has been said, the CNC takes the view that the price restriction represented by the fee scale system used by Procurators is not justified by reasons of overriding public interest and is not proportionate, hence in the CNC's opinion the application of the Services Directive makes it necessary to repeal the current fee scale system used by Procurators. This repeal of the fixed or semi-

180. In the CNC's opinion it would be appropriate to make this repeal express, as we have observed certain problems in the past when it comes to putting advances in this field into practice: from the interpretation of the 1997 reform of the Professional Associations Act, which could create the impression that there was an intention to repeal the fee scale used by Procurators, to the problems encountered in practice in applying the 12% discount introduced in 2003.

181. Two examples suffice to illustrate this point. First of all, if a client wanted to obtain information on the applicable fee scale through the Council General's website, under the heading *document with full text of the new fee scale,* he would find the applicable fee scales, but no mention of the fact that the fees can be reduced (or increased) by 12%. Similarly, if he searched on the website of the Madrid college, the information on the fee scale would not be accessible to him because the information is reserved for members only.[39] Secondly, Case 603/05, Procuradores Ponteareas, highlighted the existence of an agreement between the Procurators in a judicial district not to apply the 12% discount.

182. We need to add a final question with regard to the issue of advertising we have discussed in this subsection. Logically the freedom to advertise (subject to the general rules that regulate advertising in Spain) arguably becomes even more important if one moves from a system of quasi-fixed prices to a system of free prices.

183. Not only that, the Bill on free access to and exercise of service activities specifically provides for commercial communications by the regulated professions (in article 24). After indicating that freedom of commercial communications in the regulated professions is guaranteed, the article states that "*total prohibitions on commercial communications in the regulated professions cannot be established. The restrictions that can be imposed may not be discriminatory, must always be justified by a pressing reason of general interest and shall be proportionate*".

184. In this case, and bearing in mind too what the Council General has said, it seems that there is no doubt whatsoever regarding the application of this provision to the restrictions on advertising by

[39] Consulted on 21 April 2009.

Procurators, so that they must be deemed to have been repealed. As we have already said, the Council General has indicated that it has already proceeded with this repeal (although the CNC has not been able to check this).

III.4 Territoriality in the activity of Procurators: Territorial demarcation, office and rights to form partnerships

III.4.1 Current situation[40]

Territorial demarcation

185. The practice of Procurators is territorial, as stated by article 1 of the General Statute, amongst others, which provides that representation in court proceedings is "*the territorial exercise of the profession of Procurator*". We must add that this territorial restriction is not directly regulated by a provision with the rank of an Act.

186. This territoriality is seen in various articles of the General Statute and means that Procurators may only be authorised to practice in a territorial demarcation that corresponds to their particular professional college.

[40] Certain aspects of the regulation of the territorial exercise of representation in court proceedings have been the subject of a major court action in recent years. Thus the Judgment of the Supreme Court of 21 February 2005 repealed articles 13 and 31 of Royal Decree 1281/2002 of 5 December 2002 which approved the General Statute. The Supreme Court took the view that both articles deprived certain Procurators of rights that were expressly and conclusively recognised by the previous legislation without a transitional provision having made provision to safeguard those rights. Subsequently the Judgment of the Supreme Court of 21 January 2009 repealed, due to procedural regularities, Royal Decree 351/2206 of 24 March 2006 which amended the General Statute in order to comply with the earlier Judgment of the Supreme Court. The Royal Decree that was repealed introduced new wording into articles 13 and 31 of the General Statute (which basically coincided with the earlier wording) and introduced a transitional provision two in order to safeguard the grandparented rights. In the Judgment of 21 February 2005 the Supreme Court emphasised that the fact that articles 13 and 31 had been set aside did not mean that there was any alteration, change or modification to the territorial nature of the profession of Procurator, nor did it call into question the principles that underpinned the major reform introduced by the General Statute. For its part the Judgment of 21 January 2009 underlined that the fact that Royal Degree 351/2006 was repealed due to procedural irregularities did not prejudice the substantive content of the Royal Decree in any way. Therefore, for the purposes of this Report and in order to study the regulation of the territorial practice of representation in court proceedings, we have also taken into consideration the successive wording of the provisions that have been repealed.
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187. These territorial demarcations are made up of one or more judicial districts. A professional college can cover one or more territorial demarcations.

188. Judicial district means the area made up of one or more municipalities within the same province in which the first instance civil and criminal courts exercise their jurisdiction.

189. Thus judicial districts are a geographical division that exists for reasons that are not connected with the function of procedural representation *per se*, but rather with the general judicial structure. Hence the territorial demarcations have been designed to fit with the judicial districts, with several judicial districts being aggregated in some cases. For their part, the professional colleges have been constituted by reference to the territorial demarcations, on occasions covering several demarcations.

190. A Procurator decides to belong to a particular territorial demarcation at the moment of choosing the professional college that he wishes to join. He is authorised to practice in that territorial demarcation as a result of joining the professional college.

191. Once the Procurator has started his professional practice he could switch to another territorial demarcation belonging to the same or another professional college. According to information provided by the Council General, such a switch is done in the following way: if the Procurator is switching to a territorial demarcation belonging to the same professional college, he has to apply to the college and the application has to be approved by the college's governing body. The switch is immediately communicated to the courts and tribunals located in the demarcation in question. In the case of a switch to a territorial demarcation of another professional college, the change is made by joining the college in question, which involves leaving the original college.

192. Furthermore, we must point out that article 13 of the General Statute also contemplates the possibility that the territorial scope of one or more judicial districts may be created or amended by legislation.

193. Thus it is possible that new demarcations established by reference to the new structure of judicial districts may mean that the demarcation in which a Procurator was practising is divided, with parts belonging to different demarcations. Logically such changes in the span of the territorial demarcations affect the territorial scope of the professional practice of the Procurators who were practising in the demarcations affected.

194. Indeed, the situation inherited by Procurators affected by past changes in demarcations was regulated by Royal Decree 351/2006 which amended the General Statute in order to establish that "*without prejudice to the provisions of articles 13 and 31 of this General Statute, Procurators who at 22 December 2002 were practising in more than one territorial demarcation may continue to practice in the same territory provided that they open a professional office in each of the demarcations in which they practice"*.

195. In other words, a situation may arise where a Procurator practices in more than one territorial demarcation at the same time if the demarcation in which he originally practised has been divided and has ended up being part of more than one demarcation. In such a case the Procurator must have an office open in each of the territorial demarcations in which he is authorised to practice.

Office

196. The form of establishment for the profession of Procurator is regulated in article 14 of the General Statute, according to which "*Procurators are obliged to have an office open in the territory of the territorial demarcation in which they are authorised to practice".*

Partnership rights

197. The partnership rights enjoyed by Procurators are also regulated in the General Statute. To be precise, article 31 contemplates the possibility of Procurators forming partnerships within the same territorial demarcation, stating that "*Procurators belonging to the same professional college and practising in the same territorial demarcation may form partnerships in order to practice in the manner and on the conditions that they see fit and must notify the professional college accordingly".*

198. In light of this right contained in the General Statute, one has to assume that the position is that a partnership in any other case is prohibited, particularly a partnership with Procurators practising in another territorial demarcation.

199. This very restriction was the subject of analysis in Case r535/02 Procuradores Barcelona y Tarragona. This was an appeal against the decision of the now defunct Competition Service to dismiss a complaint filed by a Procurator against the Barcelona and Tarragona professional colleges after they had refused to allow the complainant and another colleague (each of them belonging to one of the

aforementioned colleges) to form a partnership in order to share certain resources so that they could make economies of scale, whilst each practising alone in their respective judicial districts. The now defunct Competition Tribunal considered that the action of the erstwhile Competition Service was correct in law because it took the view that the communications of the professional colleges being analysed could not be viewed as collective decisions with the propensity to infringe free competition and that they were therefore outside the scope of the offence contemplated in article 1 of the Defence of Competition Act. However, the Competition Tribunal considered that the principle of territoriality that applies to Procurators was not incompatible with the partnership in question, given that it was not an agreement to act with a single office in two locations, but rather an agreement whereby each Procurator would continue to practice in his respective office whilst pooling certain resources.

III.4.2 Evaluation

200. Before we start to evaluate the territorial restrictions raised, it is appropriate to carry out a preliminary analysis in order to see whether the volume of work between the different demarcations in which Procurators practice is comparable.

201. There are no available figures broken down in this way to enable such a comparison to be made; however, we do have an indicator of the volume of activity at the level of individual colleges. The figures are contained in the "*Statistical Report on the volume of notifications and service of copies handled by the professional colleges*", published by the Council General in 2006.

202. This report, as its title indicates, contains a study of the geographical distribution of acts of communication handled by Spanish Procurators[41] and gives figures for individual colleges. Furthermore, a calculation has been done of the number of Procurators who are members of each of the professional colleges in Spain. The ratio between the two figures gives an approximate average volume of acts of communication by each member in each college.[42]

Table 3. Workload of professional colleges (measured by reference to acts of communication)

[41] Acts of communication means the sum of the notifications and service of copies handled.
[42] It must be noted that the number of members is a current figure (from 2008) whereas the figures for acts of communication come from 2005, as this is the only data available.

Professional college (*)	No. of members (2008)	Total acts of communication in 2005 (thousands)	Acts of communication by college and year (thousands)
ALAVA	42	197	4.7
ALBACETE	104	311	3.0
ALICANTE	258	1,010	3.9
ALMERIA	145	383	2.6
ANTEQUERA	18	38	2.1
AVILA	37	101	2.7
BALEARES	176	1,083	6.2
BARCELONA	501	3,255	6.5
BURGOS	74	356	4.8
CADIZ	117	305	2.6
CANTABRIA	174	433	2.5
CARTAGENA	39	229	5.9
CASTELLON	89	405	4.5
CEUTA	13	62	4.7
CIUDAD REAL	61	173	2.8
CUENCA	48	57	1.2
ELCHE	58	213	3.7
GERONA	78	15	0.2
GIJON	89	246	2.8
GRANADA	270	163	0.6
GUADALAJARA	32	73	2.3
GUIPUZCOA	107	501	4.7
HUESCA	43	180	4.2
JAEN	159	222	1.4
JEREZ DE LA FRONTERA	91	477	5.2
LA CORUÑA	186	534	2.9
LAS PALMAS DE G. CANARIA	250	942	3.8
LEON	127	357	2.8
LERIDA	64	62	1.0
LORCA	20	48	2.4
LUGO	96	110	1.1
MADRID	1527	5,090	3.3
MALAGA	354	2,068	5.8
MANRESA	30	272	9.1

MATARO	45	336	7.5
MELILLA	10	53	5.3
MURCIA	203	640	3.2
NAVARRA	92	206	2.2
ORENSE	81	164	2.0
OVIEDO	263	820	3.1
PALENCIA	42	118	2.8
PONTEVEDRA	92	200	2.2
SALAMANCA	89	158	1.8
SANTIAGO DE COMPOSTELA	94	306	3.3
SEGOVIA	37	106	2.9
SEVILLA	415	597	1.4
SORIA	18	56	3.1
TARRAGONA	44	373	8.5
TENERIFE	159	824	5.2
TERRASSA	36	239	6.6
TERUEL	18	64	3.5
TORTOSA	13	82	6.3
VALDEPEÑAS	50	22	0.4
VALENCIA	515	1,967	3.8
VALLADOLID	130	443	3.4
VIGO	125	392	3.1
VIZCAYA	214	727	3.4
YECLA	8	55	6.9
ZAMORA	42	117	2.8
ZARAGOZA	223	716	3.2

Source: Prepared in house from data provided by the Council General of Procurators in Spain.

(*) The information in the field “Total acts of communication in 2005” is only available for the 60 professional colleges shown in the table. No figures are available for the Badajoz, Cáceres, Córdoba, Huelva, La Rioja, Reus and Toledo colleges, which complete the total of 67 colleges that exist in Spain.

203. The analysis of the variable number of acts of communication per professional college and year means that we can say that there is a notable difference between colleges in terms of the level of acts of communication. The average figure is 3,600 acts of communication per Procurator per year, whereas the typical deviation gives a figure of 1,900 acts of communication. 53% of the colleges show a figure of between 2,000 and 4,000 acts of communication per year and 88% of them show figures of between 1,000 and 7,000 acts of communication.

204. The remaining 12% consists of four colleges with figures of less than 1,000 acts of communication: Gerona, Granada, Lérida and Valdepeñas, and three with figures of more than 7,000 acts of communication: Manresa, Mataró and Tarragona. The full distribution of the variable can be seen in the table below.

Table 4. Distribution of the "Average number of acts of communication by Procurators" by colleges

Average no. of communications per Procurator	**Nº of professional colleges**	**Percentage**	**Aggregate percentage**
(0 – 1,000)	4	6.7%	6.7%
(1,000 - 2,000)	5	8.3%	15.0%
(2,000 - 3,000)	18	30.0%	45.0%
(3,000 - 4,000)	14	23.3%	68.3%
(4,000 - 5,000)	6	10.0%	78.3%
(5,000 - 6,000)	5	8.3%	86.7%
(6,000 - 7,000)	5	8.3%	95.0%
More than 7,000	3	5.0%	100.0%
TOTAL	**60**	**100.0%**	**100.0%**

Source: Prepared in house from data provided by the Council General of Procurators in Spain.

205. The analysis of this variable shows that the volume of work per Procurator, measured by acts of communication as this is the only available indicator, differs markedly between the various colleges. Thus we have the situation where colleges that are relatively close in geographical terms have very different volumes of work per Procurator. The most pronounced illustration of this is found in the two most extreme values in the variable (Gerona and Manresa, with figures of around 200 and 9,100 acts of communication per Procurator per year respectively).

206. In the light of these figures we have to ask ourselves why there is not a greater drain of Procurators from the demarcations with a lower volume of work to the ones with a higher volume of work.

207. In the CNC's opinion there are various factors that cause this situation, that is to say it is a situation in which the economic operators do not adjust their offer to the demand that exists in the market, in this case in each "territorialised" market, as they would do if there were free competition. It is therefore a question not so much of looking at why they do not start their professional career in the place where the highest level of business can be found, but rather of why there is no subsequent mobility.

208. The first reason is the switching costs involved. We are not simply referring to the costs that every operator would face when changing location, but also to the additional costs deriving from the specific regulation of this activity.

209. Thus on the one hand we have the cost of the requirement to open a new office, given the requirement for the Procurator to have an office open in the territorial demarcation in which he operates. For example this prevents the possibility of exploring the market, operating in it from one's "old" office before making the investment in a new office.

210. Furthermore, there is also the cost of the fee to join the new professional college when a Procurator decides to switch territorial demarcation. Although we have not been able to check whether in practice there is any exception in this regard, the fact is, as the Council General has told us, in order to switch territorial demarcation and join another college a Procurator has to leave the first college and join the second; and the initial or joining fee that would have to be paid again, as we have already seen, can be around €6,000.

211. However, there is another factor that is particularly important: the cost that the General Statute imposes on offering services to a client who is already working with another Procurator. Article 30 of the General Statute deals with the substitution of professionals and provides that "*a Procurator who agrees to represent a client in a matter in which another colleague is acting or has acted before the same court is obliged to pay the disbursements and fees that have accrued at the time of the substitution. This does not restrict the client's right to change Procurators".*

212. This makes the substitution of Procurators and competition between them extremely difficult. For the purposes of the question that we are considering in this section, it means an entry cost for any Procurator who wishes to change his territorial demarcation because he is attracted by a potentially greater volume of business. However, in addition to that, it also significantly restricts the possibility of consumers exercising their right to choose a Procurator, as it imposes costs on such a change.

213. The Council of State, in its report on the General Statute, indicated that this provision of the Statute was "*excessive",* amongst other reasons because it shifted matters that belong to the relationship between the old Procurator and his client to the new Procurator.

214. In the CNC's opinion, this provision of the Statute represents a clear barrier to competition for which there is no justification. Moreover, so far as we are aware, it is not found in any other profession. It should

therefore be removed. It should be remembered in relation to this question that the 1997 amendment of the Professional Associations Act clearly removed the possibility of professional associations being able to demand a "*venia"* for the change or substitution of professionals. A "*venia"* was an authorisation that the first professional had to give to the second professional when the client decided to replace the first professional with the second professional; the problem was that on many occasions this authorisation became a real barrier, precisely because of the requirement for financial compensation of this kind.

215. The costs analysed so far are the switching costs that could prevent Procurators moving freely from one territorial demarcation to another in which the potential volume of business is higher. However, in addition to these costs, there is another type of barrier which makes such mobility particularly difficult.

216. The main barrier, as we have been able to analyse, is that the regulation of this sector severely reduces the possibilities of competing in it and winning new clients. In particular Procurators cannot undertake a pricing policy (the discount is restricted to 12%) or a communication policy (the content of their advertising is limited) in order to offer their services and win new clients. This is something that they would be able to do in an environment with greater competition.

217. In addition there are other disincentives to the switch, such as the procedures that have to be followed in order to change the powers of attorney executed before a Notary Public or before the Court Clerk or the so-called "apprenticeship costs" that the Lawyers must assume as it is usual for them to maintain stable relationships with a particular Procurator.

218. In short, from what we have been able to analyse so far, the position is that the territorialisation of the market for Procurators is also accompanied by clear difficulties in terms of mobility from one territory to another. This is a further argument to bear in mind in the analysis that follows, which seeks to show that there are no reasons to justify this mandatory territorialisation in view of the problems that it generates in terms of competition.

219. The territorial restrictions represent a barrier to the free practice of the profession of Procurator, given that they restrict such practice to a specific geographical territory, compartmentalising the offer into

geographical markets which are sometimes very narrow, with the consequent loss of competitive strength.[43]

220. Not only that, in the CNC's opinion the territorial restriction is not now compatible with the provisions of the Services Directive and should therefore be removed.

221. The Bill on free access to and exercise of service activities provides in article 4(2) that "*any provider established in Spain who legally performs a service may perform it throughout national territory, without prejudice to the provisions of article 7 in relation to the opening of a physical establishment".* The exceptions contemplated in article 7 are that "*a limit may be placed on the effectiveness of the authorisations, communications or declarations of compliance to a specific part of the territory when this is justified for reasons of public policy, public security, public health or environment protection, when it is proportionate and not discriminatory".* However, in the CNC's opinion this exception is not applicable to the exercise of representation in court proceedings.

222. The same thing applies in the case of the obligation to have an office open in the territory of the territorial demarcation in which a Procurator is authorised to practice. In this case, it would be a restriction of the kind prohibited by article 10 of the Bill, which includes amongst the prohibited requirements, without exception, "*restrictions on the liberty of the provider to choose between a main or secondary establishment and, in particular, the obligation that the provider has its main establishment in Spanish territory or restrictions on the freedom of choice between an establishment in the form of a branch or of a subsidiary".*

223. According to the Council General, the territoriality provision that applies to practice as a Procurator, together with the requirement to have an office in a specific territory and the territorial restrictions on partnership, are based on the principle of proximity to the court and ongoing presence in the courts. In this way, in the opinion of the Council General, it is possible to provide an adequate guarantee of a proper and effective defence and protection of the interests of the principal through the personal and direct action of the Procurator before the courts in which he acts on their behalf, and to guarantee

[43] We must point out that professional colleges can authorise a Procurator from one territorial demarcation to operate in another demarcation in isolated cases. However, as the Competition Tribunal said in Case 603/05, Procuradores Ponteareas, this form of authorisation tends to be very exceptional and, as it is configured, does not represent potential competition for the Procurators who are already in the market.

personal and direct contact with the clients or their authorised representatives.

224. Hence the argument that might be put forward in order to justify restricting the territorial area in which Procurators act would be the need to ensure that the professional can provide his services properly and, in particular, can go to the courts and tribunals when necessary.

225. The CNC takes the view that such an argument cannot be said to constitute a reason of public policy, public security, public health or environmental protection, which are the only cases allowed by the Services Directive. Not only that, in no event would it be a proportionate measure either (a requirement also laid down by the Directive) because in the CNC's opinion there are other alternatives to ensure that the service is provided correctly and the provision must not result in the restriction of competition to limited territorial areas. The alternatives include the discipline of the market itself.

226. The fact that some Procurators practice in more than one demarcation at the same time (those affected by the changes in judicial districts) shows that this is totally feasible and does not impair the quality of the service. In addition it should not be forgotten that other professionals such as Lawyers currently perform the functions of representation in court proceedings in certain cases and they are not subject to territorial restrictions.

227. What the CNC proposes in this Report is that Procurators should be allowed to operate in accordance with competition rules and under the competitive pressures that they represent, so that the market regulates the quality of the service, as it does with other groups such as Lawyers, without having to impose a requirement on the professional, for example that he may only act in a defined territorial area that allows him to fulfil his obligations towards his clients and the courts. This argument is even more important when what is being proposed is that Lawyers may undertake activities that to date have been reserved to Procurators.

228. In addition there is no doubt that telematic advances ought to allow greater innovation and differentiation in the services of representation in court proceedings. Similarly, if there were greater competition in this activity it could serve to stimulate greater uptake of telematic media.

229. In this regard, the Council General has indicated that in its view the introduction of telematic and electronic media is resulting in

230. However, the CNC takes the view that arguments of this kind would apply equally in other areas such as the case of the tax authorities which we have already mentioned, or some registries; however, it has been shown in these cases that it is possible to make progress with the introduction of technological improvements and with the reduction in procedural formalities, above all the requirement to attend in person.

231. In the CNC's opinion, therefore, the territorial restriction that prevents the activity of representation in court proceedings being undertaken in more than one territorial demarcation should be removed. This would also entail the elimination of the requirement to have an office open in a particular territory and the territorial restrictions on partnerships.

IV. CONCLUSIONS

One.

The CNC Council, in its Resolution S/0022/07, Procurador Madrid, of 28 July 2008, took the view that this Report should be prepared in order to *"analyse whether the current legislation that regulates the activity of Procurators, along with the proposed legislation to be introduced as part of the reform of the procedural legislation in order to introduce the New Judicial Office, introduces anti-competitive restrictions and, if it does, whether those restrictions accord with the principles of necessity and proportionality, least distortion of competition, effectiveness, predictability and transparency".*

Furthermore, the Bill on free access to and exercise of service activities has now been approved and will incorporate Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 relating to services in the internal market (the Services Directive) into Spanish law. The activity of representation in court proceedings is included within the sphere of application of the Bill and it is therefore also necessary to analyse which aspects of the current rules and regulations that apply to the profession conflict with the provisions of the Bill.

Two.

Other countries do not have the profession of Procurator as we do in Spain, and in the legal systems of other countries that we have looked at there is a tendency towards the disappearance of similar figures as separate professions.

Three.

Our analysis of the legislation applicable to the sector has shown that there are various regulatory restrictions which prevent the activity of representation in court proceedings being undertaken in an environment in which there is free competition.

In broad terms the problems lie in the mandatory requirement to use a Procurator and in the reservation of the activity of representation in court proceedings to Procurators, in the existence of a fee scale system that does not allow prices to be fixed freely and in the territorial compartmentalisation of the market.

Four.

In general terms there is an obligation to appear before the courts represented by a professional, although there are cases in which this requirement has been removed. From the standpoint of competition this mandatory requirement represents a problem from the time when we find ourselves in a market with barriers to entry and to practice, which is why we consider it necessary to review the legislation in this regard, taking into account two basic factors.

On the one hand there are already cases where this requirement no longer exists and it has not been shown that its removal has adversely affected the safeguards afforded to citizens. Furthermore, the aim is not only to remove the statutory requirements but also to prevent a *de facto* requirement being created, for example, by establishing mechanisms to make the proceedings more flexible, such as the use of telematics, that do not operate in a neutral way as between the professionals and the users themselves.

Five.

The professional activity of representation in court proceedings is, in general terms, reserved to Procurators. As the CNC has already indicated in its "*Report on the professional services sector and professional associations*", reservations of activity constitute a clear problem from the point of view of competition because, all things considered, they restrict the freedom to practice the professions. Such reservations of activity must always therefore be based on a clear ground of public interest.

In the CNC's opinion, however, there are no grounds in this case that would justify the restrictions that we have observed, that is to say exclusivity and incompatibility with the professions of Lawyer, Employment Relations Specialist and Administrative Manager. The reasons traditionally put forward for needing to maintain the restrictions, namely proximity to and presence in court or impartiality are not considered sufficient, *inter alia* because Lawyers already undertake representation in court proceedings in the judicial review courts and this has not led to any problems. In addition, the application of the Services Directive will mean that the incompatibilities referred to will have to be removed because they are not established in a rule with the rank of an Act.

The CNC therefore takes the view that such incompatibilities must be removed and, at the same time, the exclusivity of Procurators when it comes to representation in court proceedings must be

reviewed so that, at the very least, Lawyers are allowed to undertake the same activity.

In addition, in terms of the access requirements established in the new Access Act which was passed in 2006 and which will come into force in 2011, the CNC takes the view that they must be evaluated within the new framework of qualifications that has been designed in order to apply the Bologna Process. In any event the implementing regulation must minimise the risks resulting from the involvement of existing operators in the selection of new operators, along with the establishment of barriers or obstacles to the free provision of services throughout the country.

Finally, the joining fees of professional colleges are important in this case because of their amount. It is therefore considered necessary for them to be reviewed by the supervising Administration in order to assess the costs that may justify the amount of the fee.

Six.

The system of fixed prices set by the fee scale applied by Procurators is detrimental to competition because it prevents the free formation of prices in the market, so that price ceases to be a competitive factor in the market.

The Services Directive does not allow restrictions on the freedom to fix prices save where there are overriding public interest reasons to justify an exception and where such restrictions are proportionate. As we conclude in this Report, such conditions do not exist in this case, given that the quality of the service of representation in court proceedings can be guaranteed basically by the manner of access to the profession, so that it is not necessary to have further restrictions on competition in the form of fixing the prices to the consumer.

In the same way it is not acceptable to have unjustified restrictions on advertising either. This is something that the Council General itself has interpreted in applying the Services Directive and it has announced that the restrictions will be changed.

Seven.

The requirements that Procurators can only practice in a given territorial demarcation and must have an office open in that demarcation, together with the restrictions on Procurators forming partnerships with one another represent a barrier to the free practice of the profession of Procurator, that restricts the function

of representation in court proceedings to a geographical area and hinders competition.

In addition, territorial mobility is made more difficult by switching costs – the obligation to have an office open in the demarcation, the fees for joining the professional college, the payments that have to be made in the event that a Procurator is substituted – together with other factors deriving from the regulation of this activity, such as the restrictions on competition in prices and advertising or the existence of stable contractual relationships with Lawyers and the procedural steps necessary to obtain powers of attorney.

Furthermore, this territorial restriction is not compatible with the Services Directive either.

In addition, territoriality in terms of providing representation in court proceedings makes less and less sense with the gradual introduction of telematic media. The principle of least distortion is therefore infringed.

Eight.

In any event the CNC will continue to monitor any anti-competitive behaviour or practice that lacks statutory support in the sphere of the services offered by Procurators as it has done to date, whether by starting formal proceedings or by means of the new instrument conferred on it by article 12(3) of Act 15/2007, the right to challenge acts and dispositions which give rise to obstacles to the maintenance of effective competition where they rank below an Act.

V. RECOMMENDATIONS

Below we make a series of recommendations for reforming the regulation that governs the professional activity of providing representation in court proceedings on the understanding that these recommendations should be taken into account in the context of the broader process of reform of the Administration of Justice that is being pursued at the moment, in such places and at such times as are deemed most appropriate.

The aim must be to improve the services provided to consumers in their dealings with the Administration of Justice through the introduction of competition in the provision of representation in court proceedings, which this must result in higher quality services and better prices.

The recommendations made form a coherent whole which must be maintained intact. Dispensing with any of the recommendations made could render any other recommendation that is adopted meaningless (or have an undesired effect).

One.

To review and reduce as far as possible the requirement that parties must be represented in court proceedings by a professional, bearing in mind the examples where such a requirement has already been removed, along with the telematic advances in communications between the Administration of Justice and users.

As the other side of the same coin, to take up telematic advances in the Administration of Justice, along with any other action aimed at modernising and simplifying the procedures, in a way that is neutral as between operators so that it results in a reduction of procedural formalities and costs that benefits the end users.

In particular, these principles must be borne in mind when configuring the New Judicial Office and introducing the Lexnet system.

Two.

To remove the incompatibility between the profession of Procurator and the professions of Lawyer, Employment Relations Specialist and Administrative Manager.

Three.

To remove the general exclusivity of Procurators when it comes to representation in court proceedings, in particular so that Lawyers are also allowed to undertake activities that to date have been reserved for Procurators.

Four.

To review Act 34/2006 of 30 October 2006 on Access to the Professions of Lawyer and Procurator in order to analyse whether the more stringent access requirements imposed for entry to the profession are appropriate within the new framework of university qualifications designed on the basis of the Bologna Process.

Without prejudice to this review, to deal with the enabling regulation for the Access Act by preventing the risk of inappropriate action by existing operators in determining the new incoming operators (in the configuration of the content of the assessment and in the assessment itself) and the risk of introducing problems for professional mobility throughout the country.

Five.

To have the supervising administration review the actions of professional colleges in terms of the amounts of the joining fees in order to check whether they are justified by the costs that they may legitimately cover.

Six.

To remove the current system of a fee scale or quasi-fixed prices applied by Procurators, moving to a system where the prices are freely agreed by the parties. This must carry with it greater transparency for consumers as a result of the application of the Services Directive in matters such as costs estimates and the removal of unjustified restrictions on advertising.

Seven.

To remove the prohibition on practising in more than one territorial demarcation, moving to a system where professionals are free to practice throughout the country.

Following on from this, to remove any restrictions on professionals setting up in terms of the number of offices to be opened and any restrictions on "territorial" partnerships with other professionals.

Eight.

To remove the requirement in the Statutes of professional colleges to the effect that if a Procurator is substituted, the incoming or substitute Procurator must pay the disbursements and fees accrued at the time of the substitution.

ANNEX. Joining fees of the professional colleges

	Joining fees	
	Capital	Judicial districts
Álava	€ 4,000	€4,000
Albacete	€6,000	€6,000
Alicante	€3,005	€1,803
Almería	€6,000	€6,000
Antequera	€4,500	€4,500
Ávila	€2,464	€1,863
Badajoz	€1,803	€1,803
Baleares	€3,000	€3,000
Barcelona	€6,000	€3,000
Burgos	€4,500	€3,000
Cáceres	€6,000	€6,000
Cádiz	€6,000	€6,000
Cantabria	€3,005	€1,803
Cartagena		
Castellón	€4,000	€4,000
Ceuta	€1,803	€1,803
Ciudad Real	€4,000	€4,000
Córdoba	€4,000	€4,000
Cuenca	€5,000	€5,000
Elche	€6,000	€6,000
Gerona	€6,000	€6,000
Gijón	€6,000	€6,000
Granada	€3,005	€1,803
Guadalajara	€6,000	€6,000
Guipúzcoa	€3,005	€1,803
Huelva	€6,000	€6,000
Huesca	€4,000	€2,800
Jaén	€6,000	€6,000
Jerez de la Frontera	€6,000	€6,000
La Coruña	€4,000	€2,500
La Rioja	€6,000	€6,000
Las Palmas	€6,000	€6,000
León	€6,000	€4,500
Lérida	€6,000	€6,000
Lorca	€5,000	
Lugo	€1,803	€1,803
Madrid	€6,000	€6,000
Málaga	€3,800	€2,000
Manresa	€3,000	€3,000
Mataró	€6,000	€6,000
Melilla	€4,000	€4,000
Murcia	€3,000	€1,800
Navarra	€6,000	€6,000
Orense	€3,005	€1,803
Oviedo	€6,000	€6,000

	Joining fees	
	Capital	**Judicial districts**
Palencia	€6,000	€4,000
Pontevedra	3,225 €	€1,935
Reus	€6,000	€6,000
Salamanca	€5,000	€5,000
Santiago de Compostela	€3,005	Ribeira district: €1,803
Segovia	€6,000	€3,600
Sevilla	€6,000	€6,000
Soria	€5,000	€5,000
Tarragona	€6,000	€6,000
Tenerife	€6,000	€6,000, except for Valverde del Hierro: €571
Terrasa	€6,000	€6,000
Teruel	€3,000	€1,800
Toledo	€6,000	€6,000
Tortosa	€1,803	€1,803
Valdepeñas	€1,800	€1,800
Valencia	€6,010	€6,010
Valladolid	€6,000	€6,000
Vigo	€3,000	€3,000
Vizcaya	€6,000	€6,000
Yecla	€1,200	
Zamora	€5,000	€5,000
Zaragoza	€5,000	€1,352

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