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REPORT ON PROFESSIONAL COLLEGES AFTER THE TRANSPOSITION OF THE SERVICES DIRECTIVE

CONTENTS

REPORT ON PROFESSIONAL COLLEGES AFTER THE TRANSPOSITION OF THE SERVICES DIRECTIVE

EXECUTIVE SUMMARY

- The liberalisation of professional services in Spain has gained significant momentum since the approval of the Services Directive in 2006 and its transposition into Spanish law via the Umbrella Law and the Omnibus Law of 2009. These reforms have established a modern regulatory framework for professional services consistent with the principles of free enterprise and the free market that competition law strives to safeguard.
- Nevertheless, these reforms have not yet been fully embraced by all operators and institutions involved in the provision of professional services, so that important constraints on effective competition in this market remain in place. This report analyses the actual situation of professional activities in Spain at the present time, with the aim of encouraging a quick and coherent adaptation of the day-to-day reality of professional activities to the new national regulatory framework.
- The report conducts an in-depth analysis of the recent reforms and the current state of national and regional laws and regulations on the professional associations known as *Colegios Profesionales* (which will hereinafter be referred to as “Professional Colleges” or “Colleges”), and, after finding that only a small part of these collegial bodies have been expressly adapted to those reforms, goes on to identify the main constraints on effective competition that originate in the Colleges, illustrated by numerous real examples. In view of the situation analysed, the report makes several recommendations for improvement.
- First, it discusses the persistence of numerous barriers to taking up and exercising professional activities which prevent or hinder the free provision of professional services. The report recommends that the Professional Colleges immediately review their internal rules to avoid such restrictions and that they embrace this goal in the most transparent manner possible.
- Second, the report detects a failure to carry out an express adaptation of regional regulations on Professional Colleges to the basic national laws, thereby increasing the geographical compartmentalisation of the national market and reducing the potential for interregional competition. The Autonomous Communities (regional governments) are expressly recommended to review their laws and regulations to ensure consistency with the new national framework.
- Third, the report recommends the national Government to culminate the reform of the overall framework for professional services with a clear definition of the reservations of activity and of the professions that should

remain subject to the exceptional regime on mandatory collegial membership. In this process, the Government is urged to take into account that mandatory membership is an important restriction of competition, so that in each case where that obligation is deemed necessary a reasoned justification must be given of the necessity, the proportionality and the absence of discrimination in that measure.

- Lastly, the report notes that the present regulatory framework allows Professional Colleges to be maintained in professions where membership is not mandatory. Both the national and the regional governments are recommended, in those cases where membership is voluntary, not to attribute responsibilities and authorities to Professional Colleges that can give rise to distortions of competition.

I. INTRODUCTION

1. Liberalisation of professional services in Spain and in the rest of the European Union (EU) has come late in comparison with other sectors of the economy.

2. The first push for liberalisation of professional activities in Spain came in 1996, followed by further efforts in subsequent years. In recent years we have seen a new and significant advance in liberalising professional activities, driven by the European Union with the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market) in 2006 and its transposition into Spanish internal law via the Umbrella law (Act 17/2009 of 23 November 2009 on free access to and exercise of service activities) and the Omnibus Law (Act 25/2009 of 22 December 2009 amending diverse Laws to adapt them to the Act on free access to and exercise of service activities).

3. These are highly regarded reforms insofar as they have finally established a modern regulatory framework for professional services that is consistent with the principles of free enterprise and the free market that competition policy strives to safeguard. The next and indispensable step is that this basic horizontal general framework be incorporated diligently and correctly into all other regulations and, most especially, into the day-to-day activity of professionals and their Colleges. And there is another pending task which needs to be taken up: establishing a single national definition of the professions for which the mandatory College membership regime may be justified as an exception.

4. The National Competition Commission (CNC) and its predecessor, the former Spanish Competition Tribunal (TDC) have played a key role in the successive liberalising reforms of the professional services sector, acting as a leading instigator and driving force for those reforms.[1] Carrying on

[1] In 1992 the TDC published the "*Report on the free exercise of professions. Proposal to adapt the provisions on self-regulated professions to the rules of free competition prevailing in Spain*", which already warned of the gravity of the situation ("*unlike what has happened in other sectors of Spanish society, which have been subjected to sweeping reform and liberalisation since 1975, the economic rules applicable to professionals have remained absolutely untouched in the last eighteen years*") and raised the need to "*adapt the rules on the provision of professional services to those one that already apply to most activities of the country: the system of free competition that is proper to a market economy*". In 1995, in its comprehensive report "*Competition in Spain. Current state and new proposals*" the TDC returned to the problems detected in the previous report and urged the elimination of the constraints on competition spawned by the power of collegial bodies to fix professional fees. The experience of those early reports, as was recalled a decade later in the "*Report on the professional services sector and professional associations*", published by the then newly formed CNC in 2008, was positive and had enormous influence on subsequent legislation, inspiring the reform of the LCP of 1997. Act 7/1997 of 14 April 1997 on Liberalising Measures on Land and Professional Colleges expressly provided that the resolutions, decisions and recommendations with economic implications made by Professional Colleges

with this advocacy work, the purpose of this report, upon the successful transposition of Services Directive, is to promote a complete adaptation of regional regulations, of the bylaws and other rules governing Professional Colleges to the applicable basic national laws and regulations, which will work to the benefit of consumers and users of the services and of the professionals themselves. Towards that end, this report brings its focus onto three main areas of interest.

5. The first, which is taken up in chapter II, consists of the recent reforms on the national laws of a horizontal nature on Professional Colleges (Act 2/1974 of 13 February 1974 on Professional Colleges; hereinafter, the LCP). This analysis concludes that the reform of the overall framework must culminate in the approval of a law that determines on a unified basis for all of Spain the professions which will by way of exception be subject to mandatory membership in the competent Professional College. Given that a mandatory membership requirement sets up an important entry barrier and thus restricts competition, it can only be imposed in those professional activities provided it is sufficiently justified and, at the same time, that more pro-competition alternatives are not available.[2] This justification must go beyond the mere requirement of a qualifying title to exercise the profession, given that it is an additional imposition. It must be demonstrated in each concrete case that compulsory membership in the relevant professional association is the ideal and least disruptive instrument for improving the quality of the services provided and for helping to maintain conducts by the professionals that are favourable to the customers. In addition, the titles or types of titles required for admission into the association must follow the principle of technical qualification conferred upon the professionals by the titles so as not to produce an unnecessary and harmful compartmentalisation of the market.

6. The second focus of interest, and also taken up in chapter II, is to explore how the Autonomous Communities have adapted their horizontal regulation of Professional Colleges to the basic national laws that

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would be subject to the Competition Act and that exercise of self-regulated professions would be done in free competition subject, as regards the offering and pricing of services, to the Competition Act and to the Unfair Competition Act. Nevertheless, the 2008 report contained a reflection on these measures and on the huge number of infringement proceedings spawned by the activity of Professional Colleges, concluding that "…*the reforms undertaken of the legislation governing Professional Colleges since 1996, aimed at establishing free competition in the practice of self-regulated professions, have not solved some of the problems of the sector, which continues to be marked by situations contrary to free competition between professionals*".

[2] In this regard, it should be recalled that the Fourth Additional Provision of the Omnibus Law provides for mandatory College membership for those "…*cases and professions in which it is shown to be an efficient instrument for controlling the exercise of the profession for the better protection of the recipients of the services and in those activities in which there may be a serious and direct effect on matters of special public interest, such as the protection of health and of the physical wellbeing or of the personal safety or legal security of natural persons*".

transposed the Services Directive with the Umbrella and Omnibus laws. The examination of regional regulations shows that many regional laws on Professional Colleges have not yet been expressly adapted to the new basic national framework, and that some of the regulations which have been adapted maintain provisions that stray from the national framework and can affect market competition and unity, so that their rapid review and revision is in order. It should be noted in this regard, that the Fourth final provision of the Umbrella Law implements a mechanism for making the culpable Administration bear financial liability if a sanction is imposed on the Kingdom of Spain for breach of that Law or of the applicable EU law, with a system of setoffs of debts where such liability exists for breach in the part attributable to each Administration.

7. The third major area of the report, which takes up all of chapter III, is the analysis of the internal norms by which the different professions are governed: bylaws, deontological codes, internal rules, etc. The internal regulations of professional associations may give rise to constraints on competition that clash with the liberalising objective of the Services Directive as transposed by the Umbrella and Omnibus laws. The present situation reveals the existence in the internal regulations of Professional Colleges of numerous barriers to taking up and exercising professions that hinder or impede the free provision of professional services. The entry barriers involve exclusivity arrangements in certain professional groups for carrying on determined activities as a result of compulsory membership requirements, difficulties for acquiring membership and geographical restrictions, and the barriers to exercise limit the capacity to compete freely for the professionals already in the market in relation to pricing, advertising, corporate form, location, official certifications of projects (visados), and others.

8. The analysis carried out allows the report to conclude with a set of recommendations for fostering pursuit of professional activities in a manner more compatible with a truly competitive environment, as a key determinant for the quality and price of the services received by their users and for the competitiveness of the Spanish economy as a whole.

9. This report has been prepared with the collaboration of regional competition authorities and other public administrations, and with the participation of diverse economic agents, including professional associations and organisations and members of those bodies.

10. This report has been approved by the Council of the National Competition Commission (Comisión Nacional de la Competencia — CNC) at its meeting of 18 April 2012, pursuant to the consultative powers attributed to it under article 26.1 of the Spanish Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia — LDC). That precept lays down the duty of the CNC to promote the existence of effective competition in markets through advocacy work and by conducting studies and research

on competition matters, making proposals for liberalisation, deregulation or regulatory amendment, and issuing reports on situations that hinder the maintenance of effective competition in markets as a result of the application of legal provisions.

II. REGULATION. PRESENT SITUATION

II.1. THE NATURE AND REGULATION OF PROFESSIONAL COLLEGES

11. Under Spanish law, Professional Colleges are recognised by article 36 of the Spanish Constitution,[3] which, by making specific reference to them and stating that they must be explicitly regulated by law, singles them out and differentiates them from professional associations. This singular nature of Professional Colleges is also set out in their regulatory framework. Act 2/1974 of 13 February 1974 on Professional Colleges (LCP) confers upon them legal status as corporations under public law and attributes to them certain eminently public purposes, such as regulating the profession and protecting the interests of the users of professional services.[4] The creation of a Professional College must be established by a national or regional law, according to article 4 LCP, and its scope of action is circumscribed to a given geographical demarcation. Thus, within the territorial scope assigned to each College no other College can be formed for the same profession; and where there are several Colleges for the same profession of a subnational scope, a General Council (Consejo General)[5] must be set up with its own status and functions. Lastly, their bylaws must be approved by a royal decree in the case of national Colleges or of General Councils of Colleges of the same profession.

12. Together with these characteristics, Professional Colleges share many common traits with professional associations, so that they may be said to have a dual nature. Thus, their aims as recognised in the LCP include some objectives of a clearly private nature, such as defending the interests of the College members.

13. This dual nature may also be observed having regard to the professional activity for which Professional Colleges exist. A distinction may be made between: (i) unregulated professions, which have no specific access requirements; (ii) regulated professions, for which some type of administrative title or fulfilment of a previous condition is required, such as possession of certain basic resources or being entered in a registry; (iii)

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[3] Article 36 of the Spanish Constitution: *"The law shall regulate the peculiarities of the legal rules governing Professional Colleges and the exercise of qualified professions. The internal structure and functioning of the Colleges must be democratic."*

[4] Article 1: "*Professional Colleges are corporations under public law, provided for by law, with their own legal personality and full capacity for pursuit of their purposes*". Article 2: *"The essential purposes of these corporations are the regulation of the pursuit of the professions, the exclusive institutional representation thereof where those professions are subject to mandatory membership, the defence of the professional interests of the members and the protection of the interests of the consumers who use the services of the members, all without prejudice to the powers that rest with the Public Administration by reason of civil servant relationships*".

[5] In certain professions these are called Higher Councils (Consejos Superiores).

qualified professions, exercise of which is subject to holding a specific academic degree; and, lastly, (iv) the self-regulated professions, which may only be exercised by professionals who are on record as members of the competent Professional College.

14. In principle, the self-regulated professions, by their very nature, have their own Professional College. But there are also Professional Colleges for qualified professions in which membership is not a mandatory requirement. The fact that there are professional activities without a membership obligation may raise questions as to the public nature of their Professional Colleges, because in those cases their purposes are practically the same as those of a professional association. In any event, this leads to a situation in which in the current legal framework the concept of self-regulated profession (*profesión colegiada*) winds up being broader, also including activities with a Professional College but with no mandatory membership obligation.

15. It must not be overlooked that Professional Colleges are composed of professionals who must compete against each other in the market where they offer their services and that their actions are undoubtedly subject to competition law. Article 2.1 of the LCP clarifies that "*The exercise of self-regulated professions will be subject to free competition and, in the offering of services and setting prices, to the Competition Act and the Unfair Competition Act*"; and article 2.4 provides that: "*The resolutions, decisions and recommendations of the Colleges will respect the limits of the Competition Act of 15/2007 of 3 July 2007*".

16. In Spain the regulation of Professional Colleges has undergone a profound review in recent years after the approval of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive), possibly one of the most silent and sweeping structural reforms of the European Union in the culmination of the internal market.

17. The Services Directive was written into Spanish law via Act 17/2009 of 23 November 2009 on free access to and exercise of service activities (Umbrella Law). The Umbrella Law establishes a general framework of free access to service activities and their free exercise in all of Spain, and regulates as exceptional those cases in which restrictions may be imposed on those activities. To achieve this objective, it provides a regulatory model characterised by the elimination of unnecessary, disproportionate or discriminatory barriers. Specifically, it considers that authorisation schemes, such as compulsory membership in a Professional College, represent a restriction on the freedom of establishment and, consequently, must necessarily meet the test of necessity, proportionality and non-discrimination. Furthermore, according to article 3.12 of the Umbrella Law,

Professional Colleges are considered "competent authorities",[6] thereby recognising their influence in the organisation and exercise of professional activities.

18. Act 25/2009 of 22 December 2009 amending diverse Laws to adapt them to the Act on free access to and exercise of service activities (Omnibus Law) adapted the national legal framework to the Umbrella Law, modifying 47 national laws on different matters. With respect to Professional Colleges, article 5 of the Omnibus Law amended the LCP and Act 2/2007 of 15 March 2007 on Professional Companies (Sociedades Profesionales), generally removing the restrictions on access to and exercise of professions. But the Omnibus Law left pending the reform of reservations of activity and of mandatory membership requirements. According to its Fourth transitional provision, within a maximum of twelve months, the national Government, upon prior consultation with the Autonomous Communities, was to send to the Spanish Parliament a bill for a law determining the professions whose exercise would require membership in the relevant Professional College. This obligation has not yet been fulfilled.

19. Similarly, the regional regulation of Professional Colleges must be adapted to the new provisions set out in the Umbrella and Omnibus laws which transposed the Services Directive. In this regard, it bears recalling that the Fourth final provision of the Umbrella Law provides that Public Administrations which in the exercise of their competences commit a breach of that Law or of the relevant provision of EU law such as gives rise to the Kingdom of Spain being sanctioned by EU institutions, will bear their part of the consequent liability for the breach.

20. The reforms discussed above have propelled a gradual adaptation of the regulations on the activity of Professional Colleges to the requirements of competition law, such that certain conducts which, though restrictive of competition, enjoyed a legal exemption under article 4 of the Competition Act 15/2007 of 3 July 2007 (LDC), are now fully subject to the prohibitions set out in articles 1 to 3 of the LDC.

[6] The Umbrella Law defines competent authority as any body or entity that carries on the regulation, planning or oversight of service activities, or whose actions affect access to or exercise of a service activity.

II.2. BASIC NATIONAL REGULATION

II.2.1 Description of regulatory reform of the basic national horizontal regulation on Professional Colleges

21. The Umbrella Law establishes a general framework of unregulated access to service activities and their free exercise in all of Spain, and regulates as exceptional those cases in which restrictions may be imposed on those activities. To achieve this objective it provides for a regulatory model characterised by the elimination of barriers. Specifically, it considers authorisation schemes to be a restriction on freedom of establishment and, consequently, only permits them if they meet the test of necessity, proportionality and non-discrimination.

22. With regard to Professional Colleges, the Umbrella Law expressly establishes that mandatory membership requirements are considered to constitute an authorisation scheme,[7] which implies that membership may only be made obligatory if there is met the triple condition of non-discrimination, necessity and proportionality. In addition, the Umbrella Law provides that Professional Colleges are considered a competent authority.[8]

23. The adaption of the Umbrella Law to the regulations governing the General State Administration was effected through the Omnibus Law, which amended 47 national laws regulating different areas.

24. With respect to Professional Colleges, article 5 of the latter law amended the LCP and Act 2/2007 of 15 March 2007 on Professional Companies, doing away, on a general basis, with restrictions on the take-up and pursuit of professional activities. The main reforms enacted by the Omnibus Law in the LCP are seen in the following areas:

a) *Greater control of **mandatory membership***

25. After the reform, the LCP restricts the application of mandatory membership as precondition for exercising a professional activity, by requiring that such obligation must necessarily be determined by a national law.[9]

26. The Omnibus Law, however, does not determine which professions should be subject to mandatory membership requirements, although it does

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[7] Article 3.10 of the Umbrella Law: "*Authorisation scheme: any system provided for in the legal system or in the rules of Professional Colleges that contains the procedure, the requirements and authorisations needed for taking up or pursuing a service activity.*"

[8] Article 3.12 of the Umbrella Law: "*Competent authority: any body or entity that carries on the regulation, planning or oversight of service activities, or whose actions affect access to or exercise of a service activity, and, in particular, the national, regional or local administrative authorities and Professional Colleges and, where applicable, general and regional councils of Professional Colleges.*"

[9] Article 3.2 LCP: "*An indispensable requirement for exercise of the professions will be membership in the competent Professional College where so stipulated by a national law*…".

stipulate a time limit for the Government to determine this issue and restricts the possible existence of binding membership for those *"cases and professions in which it is shown to be an efficient instrument for controlling the exercise of the profession for the better protection of the recipients of the services and in those activities in which there may be a serious and direct effect on matters of special public interest, such as the protection of health and of the physical wellbeing or of the personal safety or legal security of natural persons*".[10]

27. Lastly, until the new Professional Services Act is approved, the Omnibus Law maintains the mandatory membership requirements that were in force as at its effective date. This situation has been maintained until now.

b) *Greater control of incompatibilities and restrictions on* ***combined exercise of more than one profession***

28. The LCP increases the requirements for being able to establish obligations involving exclusive dedication to a profession, so that now those obligations must be expressly set out in a law and not in legal provisions of lower ranking such as the bylaws or resolutions of a Professional College.[11]

c) *The reduction of obstacles to the* ***free movement of College members***

29. The new LCP reinforces the principle of single College membership, so that in order to qualify to exercise a profession in the entire country it will be sufficient to meet the requirements in the home territory where the professional's sole or principal domicile is located. No communication to the Professional College of host territory is required, nor authorisation by the latter; nor may the professional be required to pay any economic consideration other than the one which the College of the host territory

[10] Fourth transitional provision of the Omnibus Law.

"*Within a maximum of twelve months after the entry into force of this law, the Government, upon prior consultation with the Autonomous Communities, will send to the Parliament a Bill for a law determining the professions whose exercise requires membership in the relevant Professional College.*

That Bill must provide for continuance of the membership obligation in those cases and professions in which it is shown to be an efficient instrument for controlling the exercise of the profession for the better protection of the recipients of the services and in those activities in which there may be a serious and direct effect on matters of special public interest, such as the protection of health and of the physical wellbeing or of the personal safety or legal security of natural persons.

Until the entry into force of said law, the current mandatory membership obligations will remain in place".

[11] Article 2.5 LCP: "*In any event, the only requirements requiring exclusive dedication to a profession or limiting the combined exercise of one or more professions will be those established by law…*"

customarily demands of its members for providing them with services that are not covered by the College dues.[12]

30. This marks a substantive change with respect to the LCP as it stood prior to the 2009 reform, because the principle of single College membership, though it already existed, was subject to certain limitations. First, it did not envision that the same professionals could be required to join a Professional College in one territory and not in another, so that professionals in an area with no mandatory membership requirement could face diverse barriers when they seek to practice the profession in another territory. The LCP seeks to resolve these problems by establishing a kind of mutual recognition principle, which already exists with respect to European Union professionals in the national territory, whereby professionals with residence in Spain can ultimately exercise the profession in the entire country by merely complying with the requirements of their home territory. Second, subsequent to the reform, the LCP permitted that professionals be obliged to notify the College for a territory that they were practicing in that territory, a right of the Colleges that constituted an unnecessary barrier that was removed by the reform. And third, the LCP made an exception to the general principle of single College membership for situations in which "*the Colleges are geographically organised having regard to the necessary imposition of a residency duty in order to provide the services*". This exception, too, disappeared in the 2009 reform.

d) Elimination of the function of ***exclusive institutional representation of the profession*** *for Colleges in professions that do not have mandatory membership*

31. Prior to the reform, the LCP provided that one of the essential aims of Professional Colleges was the exclusive representation of the profession. After the reform, article 1.3 of the LCP establishes exclusive institutional representation of the profession as an essential aim of Professional

[12] Article 3.2 LCP:

"…*When a profession is organised by geographical colleges, in order to exercise the profession throughout all of Spain, it will be sufficient for the professional to join only one of those colleges, namely, the one competent for the sole or principal place of business. For these purposes, when a profession only has Professional Colleges in some Autonomous Communities, the professionals will be governed by the legislation of the location of their sole or principal place of business, which will be sufficient for exercising the profession in all of Spain.*

The Colleges cannot require of the professionals who exercise in a different territory than the territory of their membership any notification or authorisation whatsoever, nor the payment of economic consideration other than that normally required of their members for receiving services not covered by the college dues…"

Colleges only when the profession in question is subject to mandatory membership.[13]

e) *Stronger submission* ***of the acts of Professional Colleges to the limits of the LDC***

32. The LCP already stipulated, as from its 1997 reform, that the resolutions, decisions and recommendations of Professional Colleges were subject to the limits laid down in the LDC, but only in those cases where said acts had "economic implications", and with an exception for the agreements adopted between Professional Colleges of medical doctors and insurers to determine the fees for certain services. The Omnibus Law reform did away with both exceptions, and the law now prevailing contains a general obligation that the activity of Professional Colleges must be fully compliant with the provisions of the LDC.[14]

f) *Limits on* ***College dues***

33. Prior to the reform, the LCP established no limit whatsoever on College dues. After its reform, the LCP expressly stipulates that the initial membership charge must be capped at a maximum of the costs associated with the registrations. The reform also streamlines the member registration process by requiring that the Colleges arrange the necessary telematic resources for processing membership applications.[15]

g) *Regulation of* ***College certifications of projects (visados)***

34. The reform of the LCP has expressly regulated the system of certifications of project approval known as "*visados*" to limit their discretionary nature. The general principle is that of voluntary certification, so that the Professional College can issue certifications approving the work of professionals within their area of competence "*only when expressly requested by the customers, including government bodies when they act as customers*" (article 13.1 LCP). The lone exception to this rule is that the Government may issue a Royal Decree mandating the existence of mandatory certifications in accordance with a number of criteria specifically stated in the LCP itself: that such certification is necessary because there is a direct causal link between the professional work and the physical integrity and safety of persons and it is the most proportionate instrument. Royal Decree 1000/2010 of 5 August 2010 on mandatory

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[13] Article 1.3 LCP: "*The essential aims of these corporations include … exclusive institutional representation thereof where those professions are subject to mandatory membership*…"

[14] Article 2.4 LCP: "*The resolutions, decisions and recommendations of the Colleges will respect the limits of the Competition Act of 15/2007 of 3 July 2007.*"

[15] Article 3.2 LCP: "…*The registration or initial membership charge may in no event be in excess of the costs associated with the registration. Professional Colleges will arrange the necessary resources so that applicants may process their membership electronically, according to what is provided in article 10 hereof*".

Professional College project certifications established the list of mandatory "*visados*", which it reduced to nine specific cases.

35. The LCP has also clearly delimited the purpose of these certifications. According to article 13.2, they have a dual nature: a subjective element, which involves verifying the identity of the professional who signs off on the work and said professional's qualifications and enabling title; and a formal one, consisting in certification of the formal integrity and correctness of the documentation. Consequently, these certifications "*will not include technical control of the facultative elements of the professional work*". The LCP also establishes that the College must bear "*subsidiary liability for damages originating from defects that should have been noted by the College when certifying the professional work and which have a direct relation with the elements certified in that specific work*" (article 13.3).

36. Lastly, the new LCP **limits the cost of mandatory certifications**, stipulating that their cost must be reasonable, not abusive, non-discriminatory and public (article 13.4). On this issue, Royal Decree 1000/2010, in addition to establishing the mandatory certifications, concretised and regulated more specifically the content and scope of the certifications.

h) *The express prohibition of scales of **professional fees***

37. Until 1996 the LCP provided, to the great detriment of competition, that one of the functions of Professional Colleges was to "*Regulate the minimum fees of professions, when those fees do not accrue in the form of official duties, tariffs or rates*". After the reform of 1996, this function was changed to "*Establishing fee scales, merely by way of guidelines*". The 2009 reform of the LCP continued to work to adapt professional activity to antitrust law, not just by eliminating this function, but by adding an express prohibition on Colleges establishing "*indicative scales or any other orientation, recommendation, guideline, norm or rule on professional fees*" (article 14 LCP). The only nuance to this general provision is the assessment of costs and the swearing of accounts of lawyers, in relation to which Colleges are allowed to draw up indicative criteria (Fourth additional provision).

i) *Limitations on **commercial communications** of professionals.*

38. The new LCP eliminates the capacity of Professional Colleges to introduce limitations not contemplated by law into the commercial communications of their member professionals. Consequently, the provisions on advertising that the Colleges may establish in their internal rules, for example, to

safeguard the independence and integrity of the profession, can only and exclusively require that the members comply with the law.[16]

j) *Strengthened exercise of the profession in **corporate form***

39. After its reform, the LCP expressly and unequivocally provides that Professional Colleges cannot place restrictions on its members pursuing the profession in corporate form, which will be governed by the applicable legal provisions.[17]

k) *Protecting the interests of **consumers and users***

40. The Omnibus Law introduced as a new purpose for Professional Colleges the protection of the interests of the persons who use the services provided by their member professionals (article 1.3 LCP).

41. This new function is complemented by the implementation of information obligations for the Colleges through a point of single contact (article 10.2 LCP), transparency in their management (article 11) and the creation of a helpdesk for members and consumers and users (article 12).

l) *Repeal of rules contrary to the Omnibus Law*

42. The Repealing provision of the Omnibus Law renders null and void "*all legal or regulatory provisions, or bylaws of professional organisations and other internal rules of professional colleges that are contrary to the provisions of this Law*".

43. This provision formally guarantees the transposition of the Services Directive into Spanish national law. In addition, from a practical standpoint it requires that a review be conducted of all those internal College rules that are not consistent with the LCP reforms enacted by the Omnibus Law.

II.2.2 Assessment of the reform

44. The CNC believes that all the changes analysed in the national laws and regulations merit a very positive evaluation, as they represent a clear step forward towards a modern regulatory framework for professional services that is consistent with the free market and free enterprise principles which competition policy strives to protect. The LCP is today much more respectful of and favourable to effective competition in the provision of professional services.

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[16] Article 2.5 LCP: "*…The Bylaws of Professional Colleges, or such Deontological Codes as may be approved by those Colleges, may contain express provisions aimed at requiring member professionals to conduct their commercial communications in compliance with the law, with the aim of safeguarding the independence and integrity of the profession, and, where applicable, the duty of professional secrecy*".

[17] Article 2.6 LCP: "*Corporate exercise of the profession will be governed by the applicable legal provisions. In no event may Professional Colleges nor their member organisations directly or through their bylaws or other internal rules establish restrictions on the exercise of the profession in corporate form*".

45. In fact, the CNC already had the opportunity to assess these changes in its *Report on Draft Bill for Omnibus Law* in 2009. The assessment in that report was positive, and many of the measures were in line with the proposals set out in the *CNC Report on the Professional Services Sector and Professional Associations* published in 2008.

46. Notwithstanding the previous positive assessments, as has already been underscored in the said reports, at the present date the horizontal legislation remains overly vague regarding reservations of activity and mandatory membership. These issues need to be precisely delimited and clarified in the regulatory framework. What is more, both give rise to a reflection on the status that should be granted to Colleges for professions not subject to mandatory membership.

47. With respect to **reservations of activity**, imposing educational and training requirements as a condition for pursuing a profession is a restriction of competition that may nevertheless be justified for reasons of public interest. However, the risk of prohibiting qualified professionals with sufficient technical capacities to carry on an activity must be avoided, and this risk may arise when reservations of activity are tied to specific formal titles. Instead, it is preferable for the reservations of activity, when they must exist for justified and proportionate reasons, to be subordinated to the technical competence of the professionals, which may perhaps not be exclusive to one specific title but rather to a broader set of qualifications.

48. The above is especially important when taking into account that, as already noted in the 2008 CNC report and in the *Report on Draft Bill for Omnibus Law*, the Bologna Process has resulted in the "*disappearance of the "catalogue of degrees", and the doors this opens for innovation in creating new university degrees*". Consequently, "*the new qualifications and degrees created, stimulated by the Bologna Process, will encounter markets that have already been carved up and reservations of activity for other degrees, which can basically have two effects. The first will be hesitation by universities when it comes to proposing new degrees, in the belief that the new qualifications may confront greater problems in the job market. The second effect, and more important from the competition standpoint, would be for holders of the new degrees to seek out their own reservation of activity, thereby constituting multiple and ever more narrowly delimited markets, which would affect competition in professional services negatively*".

49. With respect to **mandatory membership**, it is an entry barrier for the professional activity with important consequences, because, in addition to being obliged to pay dues, an initial membership charge or other fees, the professional is also subjected to the College rules controlling and regulating the activity. And it also ties in with the problem discussed above of reservations of activity, as the rules for each professional activity customarily include a series of conditions for becoming a member of the

College and those conditions frequently refer to particular degrees. That is, by defining a closed list of degrees that qualify the professional to join the College, a necessary condition for exercising a professional activity, a reservation of activity is being created with similar restrictive effects to those described in the preceding paragraphs.

50. It should be recalled that the Umbrella Law regards mandatory membership requirements as an authorisation scheme, which means they can only be imposed if the triple test of non-discrimination, necessity and proportionality is met. Before approving the Omnibus Law, lawmakers encountered numerous mandatory membership requirements in diverse regulations which in most cases were neither justified nor proportionate nor non-discriminatory. However, even though the Omnibus Law took up the question, it did not completely close the matter, and gave rise, at the present time, to maintenance of the previous rules on compulsory affiliation with Professional Colleges.

51. Thus, on the one hand, the Omnibus Law imposed a dual requirement for requiring College membership: statute law status of the rules that establish the obligation and that those rules be national in scope (article 5 of the Omnibus Law, which amended article 3.2 of the LCP). This, moreover, avoids the tensions in the unity of the national market that could arise from divergent regional rules. But, on the other hand, the Omnibus Law did not repeal the membership obligations in existence as at its entry into force, but instead maintained them on a transitional basis until the enactment of a later law that was to determine the professions that would be subject to compulsory membership (Fourth transitional provision of the Omnibus Law). Now, more than two years after the Omnibus Law came into effect, that later law remains to be approved, and no Bill for such law has been brought before the Spanish Parliament .

52. The “map” of mandatory membership obligations in force at the effective date of the Omnibus Law was thus frozen, and this has produced a situation, supposedly transitional but in place for more than two years now, in which there has been de facto acceptance of mandatory membership requirements established by non-statutory provisions or by laws or regulations dictated by the regional governments, and such requirements are commonly seen in the internal rules of Professional Colleges, mainly in their bylaws.

53. The continued existence of membership obligations dictated by the Autonomous Communities has also given rise to a consolidation of membership obligations in certain regions which do not exist in others, and this generates tensions in the unity of the national market that could pose problems in the effective application of the principle of single College membership that was imposed by the Omnibus Law. According to article

3.3 of the LCP,[18] when a profession has Professional Colleges in only certain Autonomous Communities, professionals may practice the profession in any part of the country provided they comply with the legal requirements where their sole or principal place of business is located. But there is no specific provision in the LCP regarding a situation in which a profession has Professional Colleges in all Autonomous Communities, but not all of them require membership as a condition for exercising the profession. The spirit of the law may make these situations analogous to those expressly provided for in article 3.3 of the LCP, so the professional will only be subject to the laws that apply in the location of the sole or principal place of business.

54. Besides this problem, the existence of differences in mandatory membership provisions between Autonomous Communities can generate problems for the rest of the powers that the LCP attributes to Professional Colleges with mandatory membership requirements. For example, if membership is required in a given region, according to article 1.3 of the LCP, the Professional College in that region would have the representation of the profession as one of its essential aims and would perform that function in exclusivity. So professionals domiciled in another region where College membership is not required would be bound in that Autonomous Community by the College's representation, but would have no voice in that representation because they are not a member of the College; nor would they be represented in that region by another association, because under article 1.3 of the LCP that falls within the exclusive competence of the Professional College for that region.

55. Lastly, divergences in mandatory membership provisions between Autonomous Communities may raise other practical problems in relation to the submission of professionals from other regions to the rules on professional practice issued by the Colleges in the regions in which membership is required, for example, the deontological codes.

56. In summary, for the reasons explained above, it is considered absolutely necessary that a national law be passed defining which professions are subject to mandatory membership throughout all of Spain, on the basis of principles of demonstrated necessity, proportionality and non-discrimination in accordance with the Umbrella Law.

57. For these purposes, it should be taken into account that making membership compulsory is a greater restriction of competitive than are

[18] "*When a profession is organised by geographical colleges, in order to exercise the profession throughout all of Spain, it will be sufficient for the profession to join only one of those colleges, namely, the one competent for the sole or principal place of business. For these purposes, when a profession only has Professional Colleges in some Autonomous Communities, the professionals will be governed by the legislation of the location of their sole or principal place of business, which will be sufficient for exercising the profession in all of Spain*".

reservations of activity, because it requires that the professionals, in addition to having the requisite skills and training for practicing the profession, must be registered with and submit to the competent Professional College. For this reason, any justification for establishing mandatory membership must be grounded in reasons beyond those that justify reservations of activity, and the binding nature of the membership must be shown to be proportionate and non-discriminatory. In this regard, the test of necessity, proportionality and non-discrimination must be applied not just to the mandatory membership requirement itself, but also to the requisite conditions for entering the Professional College. Those conditions must allow entry into the Professional College by the greatest possible number of professionals, unless there are reasons of justified public interest. Furthermore, and in line with what has been stated above on reservations of activity, entry into those Colleges cannot be made conditional on possession of specific academic degrees, but on the professional having the technical expertise deemed necessary, as demonstrated by any means that sufficiently accredits the necessary expertise.

58. Lastly, a reflection should be made on the **professions with no mandatory membership requirement**. In theory, in professions without mandatory membership, Professional Colleges have functions similar to those of professional associations and actually compete with them to represent the professionals, and in this case there does not appear to be any justification for maintaining a privileged status for the Colleges. But the LCP and other laws recognise numerous privileges for Professional Colleges versus professional associations, such as their status as corporations under public law and as competent authority, the name, the role in the lists of court expert witnesses and similar lists, project certifications and other matters discussed in the remaining sections of this report. If lawmakers opt to maintain the status which the LCP currently grants to Colleges for professions not subject to mandatory membership, they should be mindful that in granting certain privileges to Professional Colleges they may be favouring anti-competitive restrictions. It is therefore preferable that those privileges be eliminated or, if they are maintained, that they be based on reasons that meet the test of demonstrated necessity, proportionality and non-discrimination.

II.3. REGIONAL REGULATION

59. Competence for laying down the basis of the legal regulation of Professional Colleges rests exclusively with the Spanish State.[19] The LCP is therefore considered basic legislation, that is, it can be taken as the minimum regulation that lays down the fundamental principles that must be applied in all Autonomous Communities.[20]

60. The Autonomous Communities, for their part, may assume competence for developing and implementing the basic regulatory framework for Professional Colleges, given that this is not expressly reserved for the State in article 149.3 of the Spanish Constitution. All of the regions have assumed said powers in relation to Professional Colleges and have approved laws regulating Colleges with a regional geographical scope. Toward that end, every Autonomous Community, except Asturias, has its own horizontal law regulating the Professional Colleges within its territory.

61. In general, those regional legal frameworks on Professional Colleges regulate aspects that are unregulated or only superficially regulated in the national laws, such as, for example: exercise of administrative competences, relations of the Colleges with the regional administration, criteria for the creation, merger, splitup and dissolution of regional Colleges, the scope of the administration's role in approving their bylaws and the regulation of the registry of Colleges and of regional Councils, amongst others.

62. The Third final provision of the Umbrella Law sets out the obligation of the competent Public Administrations, within their respective geographical scope, to approve the provisions implementing and enforcing that law.

63. The Fourth final provision implements a mechanism for making the culpable Administration bear financial liability if a sanction is imposed on the Kingdom of Spain, along with a system for setoff and netting of debts if such liability is enforced.[21] It therefore falls to the Autonomous

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[19] Spanish Constitutional Court judgment 76/1983 of 5 August 1983*"…it falls to the national legislation to set out the principles and basic rules that must be conformed to by the organisation and competences of the public law corporations representing professional interests…".* Although Professional Colleges do not qualify as public administrations per se, they do have a public law legal personality and safeguard interests of a public nature that have been attributed to them by law or by the Administration. In this sense, they are captured by article 149.1.18 of the Spanish Constitution, which establishes that the State has exclusive competence for the basis of the legal regulation of public administrations.

[20] See also the first final provision of the Omnibus Law, which provides that its article 5, which reforms the LCP, "…*is dictated under paragraphs 18 and 30 of article 149.1 of the Constitution, which respectively attribute to the State the competence to dictate the basis of the legal regime governing public administrations and to regulate the conditions for obtaining, issuing and certifying professional titles*".

[21] "*Public Administrations which in the exercise of their competences commit a breach of this Law or of the related EU law and thus give rise to European institutions imposing a sanction on Kingdom of Spain, will bear the liabilities arising from such breach in the portion*

Communities, in relation to the matters for which they have competence under their respective statutes of devolution (Estatutos de Autonomía), to adopt the necessary measures to apply the basic national legislation transposing the Services Directive.

64. Some Autonomous Communities, however, have not yet adapted their regional laws to the provisions of the Umbrella Law[22] and to the reform of the basic regulation of Professional Colleges carried out by the Omnibus Law. Specifically, the Canary Islands, Castilla la Mancha, Valencian Community, Extremadura, Murcia and the Basque Country maintain their pre-Umbrella Law laws on these matters in place.

65. The regulations of Professional Colleges in those Autonomous Communities continue to include provisions that are clearly contrary to the basic national laws, some of which are particularly detrimental to competition, and do not yet reflect important aspects of the basic national rules.

66. From a formal legal standpoint, this divergence between the basic national regulations and the regional rules might not raise conflicts in certain circumstances. For example, the laws of Extremadura, the Basque Country and Valencian Community provide that the regional laws are understood to be without prejudice to the basic national legislation.[23] Furthermore, in the case of the Basque Country, there must also be taken into account the terms of the Ninth additional provision of its Law 18/1997.[24] Nevertheless, even where all regional provisions that are contrary to the LCP are to be deemed as implicitly amended to conform to that law, it seems, more than recommendable, necessary, to proceed to review the regional texts to make them explicitly compatible with the LCP.

67. On the other hand, several Autonomous Communities have reformed their laws to introduce amendments regarding Professional Colleges after the Umbrella Law's transposition of the Services Directive: Andalusia, Galicia,

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attributable thereto. The State Administration shall set off said debt incurred by the liable administration to the national Public Treasury against the sums it must transfer to that administration in accordance with the procedure related in Act 50/1998 of 30 December 1998 on Fiscal, Administrative and Social Policy Measures…".

[22] The Fifth final provision of the Umbrella Law provided that "…*In order to allow fulfilment of the obligation contained in article 44 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Autonomous Cities and Communities and Local Entities must notify the General State Administration, prior to 26 December 2009, of the legal and regulatory provisions within their ambit that they have amended to adapt their content to the provisions of the Directive and of this Law…"*

[23] Article 1 of Law 11/2002 of Extremadura; article 1 of Law 6/1997 of the Valencian Community; article 1 of Law 18/1997 of the Basque Country.

[24] "*The articles of this law that reproduce all or part of the provisions regulating the basis of the regime governing Professional Colleges have been incorporated into this text for reasons of systematic legislative technique. Consequently, they will be understood to be amended at the time they are revised in the aforesaid basic regulatory framework*"

La Rioja, Navarre, Castilla y León, Madrid, Catalonia, Cantabria, Aragón and the Balearic Isles.[25]

68. Although the process of adapting regional legislations on Professional Colleges for this second group of regions has in general terms conformed to the LCP, there remain some provisions whose construction may restrict competition or be directly contrary to the national laws. The clearest cases of such contradiction have been the object of appeals before the Constitutional Court.

II.3.1 Coherence of regional laws with the reform of the basic national horizontal regulation on Professional Colleges

69. There follows an analysis of the consistency of regional provisions with the modifications made to the LCP, the basic national law on Professional Colleges, following the same order as the preceding section of this report.

Table 1. Regional horizontal laws regulating the activity of Professional Colleges, ordered according to the most recent modification

Region	Law	Most recent reform of the law
Basque Country	Law 18/1997 of 21 November 1997 on the exercise of qualified professions and Professional Colleges and Councils.	-
Valencian Community	Law 6/1997 of 4 December 1997 on Professional Councils and Colleges of the Valencian Community.	-
Castilla-La Mancha	Law 10/1999 of 26 May 1999 on the Creation of Professional Colleges of Castilla-La Mancha.	-
Region of Murcia	Law 6/1999 of 4 November 1999 on Professional Colleges of the Region of Murcia.	Law 1/2002 of 20 March 2002.
Canary Islands	Law 10/1990 of 23 May 1990 on Professional Colleges.	Law 2/2002 of 27 March 2002.
Extremadura	Law 11/2002 of 12 December 2002 on Professional Colleges and Councils of Professional Colleges of Extremadura.	-
Community of	Law 19/1997 of 11 July 1997 on Professional	Law 8/2009 of 21 December 2009.

[25] In certain cases, regional competition authorities have produced reports on the changes of the rules governing Professional Colleges in their respective regions. Specifically: Madrid Competition Tribunal (2010), *Professional Colleges in the Community of Madrid, an incomplete reform from the standpoint of competition*; Catalonian Competition Authority (2006), *Report on Regulation 4/2010 Law 7/2006 of 31 May on the exercise of qualified professions and professional colleges*; Galician Competition Tribunal (2008), *Study on the regulation and the activity of Professional Colleges in Galicia from the standpoint of competition*; Andalusian Competition Council (2009*), Report I 06/09 on the promotion of competition in the Professional Colleges of the Self-Governing Community of Andalusia* and Andalusian Competition Council (2010), *Report N 02/10 on the Draft Bill amending Law 10/2003 of 6 November 2003 on Professional Colleges of Andalusia and Law 6/1995 of 29 December 1995 on Andalusian Councils of Professional Colleges*. And several regions have issued more specific reports on the laws that create Professional Colleges or on proposals for reforming the bylaws of said associations.

Madrid	Colleges of the Community of Madrid.	
Castilla y León	Law 8/1997 of 8 July 1997 on Professional Colleges of Castilla y León.	Decree-Law 3/2009 of 23 December 2009.
Galicia	Law 11/2001 of 18 September 2001 on Professional Colleges of the Autonomous Community of Galicia.	Law 1/2010 of 11 February 2010.
Navarre	Historical Local Charter Law 3/1998 of 6 April 1998 on Professional Colleges of Navarre.	Historical Local Charter Law 6/2010 of 6 April 2010.
Aragón	Law 2/1998 of 12 March 1998 on Professional Colleges of Aragón.	Decree-Law 1/2010 of 27 April 2010.
Catalonia	Law 7/2006 of 31 May 2006 of Catalonia on the practice of qualified professions and on Professional Colleges.	Legislative Decree 3/2010 of 5 October 2010.
Balearic Isles	Law 10/1998 of 14 December 1998 on Professional Colleges of the Balearic Isles.	Act 12/2010 of 12 November 2010.
Andalusia	Law 10/2003 of 6 November 1003 regulating the Professional Colleges of Andalusia.	Law 10/2011 of 5 December 2011.
La Rioja	Law 4/1999 of 31 March 1999 on Professional Colleges of La Rioja.	Law 7/2011 of 22 December 2011.
Cantabria	Law 1/2001 of 16 March 2001 on Professional Colleges of Cantabria.	Law of Cantabria 5/2011 of 29 December 2011.

Source: CNC

*a) Greater control of **mandatory membership***

70. Article 3.2 of the LCP provides that "*An indispensable requirement for exercise of the professions will be membership in the competent Professional College where so stipulated by a national law".* For its part, the Fourth transitional provision of the Omnibus Law stipulates that until the national law determining the membership obligations enters into force, the requirements currently in force will remain in place.

71. This provision has not, in general terms, been reflected in regional regulations. Only Andalusia, Aragón, the Balearic Isles, Cantabria and Castilla y León have written into their laws the national rule that mandatory membership can only be required by national law.[26]

72. The rest of the regional legislations do not, as a general rule, explicitly refer to the LCP provision that mandatory membership requirements can only be defined by national law, which makes it possible for such requirements to be unlawfully established in regional regulations or in the internal rules of the Professional Colleges.

73. And there are some cases where regional laws directly contravene the LCP rules, whether (i) by establishing regional competence for requiring membership or (ii) by establishing those membership obligations directly in violation of the national rule.

74. The first type is seen in Murcia, the Basque Country and Madrid. In Murcia, the relevant law provides that the "*attribution of a collegial regime and organisation to a given profession can only be done by a law of the*

[26] Article 3bis.2 of Law 10/2003 of Andalusia; article 22.1 of Law 2/1998 of Aragón; article 16.1 of Law 10/1998 of the Balearic Isles; article 17.2 of Law 1/2001 of Cantabria; article 16.2 of Law 8/1997 of Castilla y León.

Regional Assembly".[27] In the Community of Madrid, the law provides that "*Membership by professionals in the relevant College will be voluntary, unless otherwise provided by the law creating the Professional College or, if applicable, the regulation creating it referred to by the second additional provision of this Law*".[28] In the Basque Country, the law provides that the collegial qualified professions are those established as such by law,[29] without specifying a national or regional law, and expressly permits that the membership obligation be established in the law creating the Professional College, which may be a regional statute.[30]

75. There are several examples of the second type of incompatibility. The relevant law of the Canary Islands establishes that "*When a college has been established, the respective profession may only be exercised within its geographical ambit by joining that college*".[31] Similarly, the Castilla-La Mancha law provides that "*An indispensable requirement for exercising the self-regulated professions is to be a member of the relevant Professional College*. And in Navarre the law stipulates that "*An indispensable requirement for exercising self-regulated professions in the Historic Charter Community of Navarre is membership in a Professional College* […]".[32] The law in Catalonia establishes that "*Membership in the relevant professional college is a necessary requirement for exercising self-regulated professions* […]".[33]

76. The case of Galicia merits separate mention. The Galician law on Professional Colleges (Law 11/2001 of 18 September 2001 on Professional Colleges of the Autonomous Community of Galicia) was amended in 2010.[34] But certain modifications made in the Galician legislation, in particular, the rules on mandatory membership requirements, were considered contrary to the basic national model by the Government of Spain and challenged in an appeal before the Constitutional Court.[35] Specifically, the Galician law, in addition to not stipulating which class of provisions can lay down mandatory membership requirements, establishes compulsory membership in Professional Colleges for the medical and health professionals at the service of

[27] Article 3.1 of Law 6/1999 of the Region of Murcia.

[28] Article 3.1 of Law 19/1997 of the Community of Madrid.

[29] Article 2.3 of Law 18/1997 of the Basque Country.

[30] Article 30 of Law 18/1997 of the Basque Country.

[31] Article 9.1 of Law 10/1990 of the Canary Islands.

[32] Article 16.2 of Law 3/1998 of Navarre.

[33] Article 38.1 of Law 7/2006 of Catalonia.

[34] By Law 1/2010 of 11 February 2010 amending diverse Laws of Galicia to adapt them to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[35] Appeal of unconstitutionality num. 8260-2010.

government administrations who treat patients in the Public Health System of Galicia, as well as for private practice.[36]

77. Furthermore, since the time the Omnibus Law entered into force, three regional laws regulating Professional Colleges have been approved that establish membership as a condition for being able to exercise the profession in those regions, without heeding the reservation of this power for national law: Law 2/2010 of 26 February 2010 on the creation of the Professional College of Speech Therapists of Extremadura, Law 3/2010 of 26 February 2010 on the creation of the Professional College of Dental Hygienists of Extremadura, and Law 11/2010 of 11 October 2010 on the Creation of the Professional College of Occupational Therapists of Castilla y Leon. These three laws have raised conflicts between the powers of the central State and the Autonomous Communities. In the first two cases they were the object of challenges for unconstitutionality (appeals 8507-2010 and 8506-2010, respectively), and in the third a bilateral agreement was adopted to adapt the regional law to the national rules.

*b) Greater control of **incompatibilities and restrictions on** combined exercise of more than one profession*

78. Article 2.5 of the LCP curtails the capacity of Professional Colleges to impose limitations on professionals in the above aspects, and stipulates that such restrictions may only be established by statutory law.[37]

79. Very few regions have incorporated this national legal provision into their own laws. It is only expressly mentioned in the legislation of Andalusia, Aragón, the Balearic Isles, Cantabria and Galicia.[38] The Law of Catalonia specifically provides that the incompatibility restrictions imposed on the exercise of a profession will be those set out by law.[39]

80. The rest of the regions do not explicitly regulate how such incompatibility limitations or restrictions on combined exercise of professions are to be established, which may open the door for such constraints to be introduced by non-statutory internal provisions of Professional Colleges. In fact, some regional provisions expressly allow the Colleges to impose limitations of this kind. For example, in the Basque Country, the relevant law gives Professional Colleges freedom to establish incompatibility restrictions on exercise of the profession in question and grants them

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[36] Article 3.2 of Law 11/2001 of Galicia.

[37] Article 2.5 of the LCP: "*In any event, the only requirements requiring exclusive dedication to a profession or limiting the combined exercise of one or more professions will be those established by law* […]".

[38] Article 3.4 of Law 10/2003 of Andalusia; article 4.3 of Law 2/1998 of Aragón; article 16.3 of Law 10/1998 of the Balearic Isles; article 17.2 of Law 1/2001 of Cantabria; article 2.2 of Law 11/2001 of Galicia.

[39] Articles 6 and 7 of Law 7/2006 of Catalonia.

capacity to monitor possible conflicts of interest and declare their absence in an individual case.[40]

c) *The reduction of obstacles to the **free movement of College members***

81. The Omnibus Law incorporated into the LCP various provisions strengthening the freedom to provide professional services in geographical areas other than the one where the professionals have their principal domicile. Specifically, article 3.3 of the LCP provides as follows: "*When a profession is organised by geographical colleges, in order to exercise the profession throughout all of Spain, it will be sufficient for the professional to join only one of those colleges, namely, the one competent for the sole or principal place of business. For these purposes, when a profession only has Professional Colleges in some Autonomous Communities, the professionals will be governed by the legislation of the location of their sole or principal place of business, which will be sufficient for exercising the profession in all of Spain. The Colleges cannot require of the professionals that exercise in a different territory than the territory of their membership any notification or authorisation whatsoever, nor the payment of economic consideration other than that normally required of their members for receiving services not covered by the College dues* […]".

82. These principles regarding free movement are expressly incorporated into the laws of Andalusia, Aragón, Cantabria, Castilla y León and La Rioja.[41]

83. The other regional legislations maintain, in general, restrictions on the free movement of professionals that have disappeared under the LCP. Thus, in certain regions (Castilla-La Mancha, Galicia, Extremadura, Murcia) the law permits exercise of the profession in the region by professionals who belong to Colleges from other areas, although it allows the host Colleges to establish prior notification obligations,[42] and two regions (Murcia, Castilla-La Mancha) specify, in a full frontal attack on the LDC, that the purpose of said notification is for the professionals to become subject "…*with the economic conditions established in each case, to the planning, project certification, deontological control and disciplinary powers*" of the host College. According to the legislation of the Canary Islands, a professional must join the competent College in that region in order to pursue the profession there, unless a European Community rule provides otherwise;[43] and, in what represents a nearly caricaturistic fragmentation of the national market, it even goes so far as to require professionals who

[40] Article 6, paragraphs 2, 3 and 4 of Law 18/1997 of the Basque Country.

[41] Article 3bis.3 of Law 10/2003 of Andalusia; article 22.2 of Law 2/1998 of Aragón; article 17.3 of Law 1/2001 of Cantabria; article 17 of Law 8/1997 of Castilla y León; article 16.4 of Law 4/1999 of La Rioja.

[42] Article 6.4 of Law 10/1999 of Castilla-La Mancha; article 16.4 of Law 11/2002 of Extremadura; article 2.4 of Law 11/2001 of Galicia; article 6.3 of Law 6/1999 of the Region of Murcia.

[43] Article 9.1 and first additional provision of Law 10/1990 of the Canary Islands.

belong to one College in the Canary Islands but propose to practice their profession in another area within the archipelago covered by a different College to join the latter College.[44]

84. Other examples of regional laws that incorporate direct contradictions with the LCP are seen in the legislation of Navarre and Madrid. Article 16.2 of Law 3/1998 of Navarre stipulates that "*An indispensable requirement for exercising self-regulated professions in the Historic Charter Community of Navarre will be membership in a Professional College of this Community, unless membership in another College of the same profession in a different geographical area is accredited*". And article 3.1 of Law 19/1997 of Madrid provides that "…*the respective professions may be exercised in the territory of the Community of Madrid by professionals who are members of Professional Colleges of other areas by reason of their sole or principal place of business, on the terms and with the exceptions established in the basic national legislation*". Both precepts could come into conflict with the national rules inasmuch as professionals are required to be members of their home College in order to be able to pursue their profession in Navarre or in Madrid, a requirement that may be impossible to comply with if there is no Professional College in their home territory, or which imposes on professionals a mandatory membership in their home location if a Professional College does exist there. According to the LCP, if the home location of the professional does not have this requirement, it cannot be imposed on the professional in any other Autonomous Community. The Navarre law could also contradict the LCP in requiring professionals from another area to "accredit" College membership in order to practice in Navarre, because the LCP prohibits obliging professionals to make any notification as a condition for providing services outside their place of origin.

85. Lastly, there are other regional laws that do not have direct contradictions with the LCP, but which fail to expressly lay down the same safeguards for the effective free movement of professionals as the LCP does, such as prohibiting Colleges from requiring prior notification of professionals from other areas.

d) *Elimination of the function of* ***exclusive institutional representation*** *of the profession for Colleges in professions that do not have mandatory membership*

86. Article 1.3 of the LCP considers exclusive institutional representation of professions as an essential aim of Professional Colleges only for professions subject to mandatory membership. Colleges without mandatory membership, therefore, cannot hold that function in exclusivity.

87. Nevertheless, very few regions specify in their laws that Professional Colleges do not have exclusivity in representing their profession in those

[44] Article 9, paragraphs 1 and 2, of Law 10/1990 of the Canary Islands.

cases where membership is not compulsory. The only regions whose rules conform to the basic national law in this respect are those of Andalusia, Aragón, the Balearic Isles and Cantabria.[45]

88. As for the regional regulations that have not been expressly adapted to the basic national law, two different situations may be distinguished. First, there are the Autonomous Communities that dispense the same treatment to Colleges of professions with mandatory membership as to those without a membership obligation, recognising representation of the profession as one of the their aims in both cases: the Canary Islands (with the nuance that representation of the profession rests with the Councils of Colleges), Castilla-La Mancha, Castilla y León, Catalonia, Galicia, Extremadura, La Rioja, Murcia, Navarre and the Basque Country.[46] In all of these situations, it would be highly advisable for the distinction made in the basic national regulation to be reflected in the regional rules.

89. Second, there are Autonomous Communities in which the contradiction with the national law is more flagrant, as with regional legislations that expressly provide that the Professional Colleges have the exclusive right to represent the profession, irrespective of whether or not the profession is subject to mandatory membership: the Community of Madrid and the Valencian Community.[47]

e) *Stronger submission* ***of the acts of Professional Colleges to the limits of the LDC***

90. Article 2.4 of the LCP provides that "*The resolutions, decisions and recommendations of the Colleges will respect the limits of the Competition Act 15/2007 of 3 July 2007*".

91. Only the regions of Andalusia, Aragón, the Balearic Isles and Cantabria have incorporated this provision into their laws regulating Professional Colleges.[48] None of the other regions explicitly state that Professional Colleges are subject to the LDC.

f) *Limits on* ***College dues***

[45] Article 17 of Law 10/2003 of Andalusia; article 17 of Law 2/1998 of Aragón; article 10 of Law 10/1998 of the Balearic Isles; article 9 of Law 1/2001 of Cantabria.

[46] Article 27.b of Law 10/1990 of the Canary Islands; article 36.1 of Law 7/2006 of Catalonia; article 20.c of Law 10/1999 of Castilla-La Mancha; article 5 of Law 8/1997 of Castilla y León; article 8.1 of Law 11/2001 of Galicia; article 10.c of Law 11/2002 of Extremadura; article 9 of Law 4/1999 of La Rioja; article 3.1 of Law 3/1998 of Navarre; article 7.c of Law 6/1999 of Murcia; article 22 of Law 18/1997 of the Basque Country.

[47] Article 13 of Law 19/1997 of the Community of Madrid; article 4.c of Law 6/1997 of the Valencian Community.

[48] Article 3.3 of Law 10/2003 of Andalusia; article 4.2 of Law 2/1998 of Aragón; article 2.4 of Law 10/1998 of the Balearic Isles; article 3.2 of Law 1/2001 of Cantabria.

92. Article 3.2 of the LCP establishes that "…*The registration or initial membership charge may in no event be in excess of the costs associated with the registration*…".

93. Only the laws of Andalusia, Aragón, the Balearic Isles, Cantabria, Castilla y León and Galicia recognise this rule.[49] None of the other regional legislations establish limits on the College dues and charges.

g) Regulation of ***College certifications of projects (visados)***

94. Article 13 of the LCP sets out the regulation of the certifications of project approval known as "*visados*" and provides that Colleges of technical professions will certify professional work within their ambit of competence when so established by the national Government via a royal decree. The Royal Decree regulating these project certifications was approved in August of 2010 (RD 1000/2010 on collegial certification obligations).

95. Only the legislation of Aragón, the Balearic Isles, Cantabria, Castilla y León and La Rioja have been adapted to the national rules on these certifications.[50]

96. The other regions all maintain regulations that have not been fully brought into line with the basic national provisions or which are capable of generating confusion or legal uncertainty.

97. Thus, there are several regions (the Basque Country, Valencian Community, Canary Islands, Madrid) which indicate that the compulsory nature of the certifications is determined by the bylaws of the competent professional College, contrary to what is provided in the LCP.[51] For example, article 14.i of Law 19/1997 of Madrid continues to consider that certifying the professional work of their members is a function of Professional Colleges "*when so established expressly in their bylaws, in accordance with what is provided, where applicable, in the relevant laws and regulations*". It must be expressly indicated that the only obligatory certifications are those established as such in the national law.[52]

98. A separate mention is merited by the law in Galicia. Article 9.i of Law 11/2001 of Galicia includes as one of the functions of Colleges to certify

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[49] Article 3bis.2 of Law 10/2003 of Andalusia; article 22.1 of Law 2/1998 of Aragón; article 13.3 of Law 10/1998 of the Balearic Isles; article 17.2 of Law 1/2001 of Cantabria; article 12.k of Law 8/1997 of Castilla y León; article 2.3 of Law 11/2001 of Galicia.

[50] Article 50 of Law 2/1998 of Aragón; article 11 of Law 10/1998 of the Balearic Isles; article 26 of Law 1/2001 of Cantabria; article 12.i of Law 8/1997 of Castilla y León; article 9.i de la Law 4/1999 de La Rioja.

[51] Article 19, letter I of Law 10/1990 of the Canary Islands; article 5.f of Law 6/1997 of the Valencian Community. article 14.i of Law 19/1997 of the Community of Madrid; article 24, letter I of Law 18/1997 of the Basque Country.

[52] This was also asserted by the Competition Tribunal of the Community of Madrid in its 2010 Report: *Professional Colleges in the Community of Madrid, an incomplete reform from the standpoint of competition*.

the professional work of their members "*only when solicited by the latter at the express request of their clients or by legal imposition*", without specifying that College certifications are regulated by the LCP and, therefore, that they cannot be regulated by regional laws. Even more serious, however, is that article 10 *quinquies* of that Galician law expressly regulates College certifications in contradiction with the LCP.[53]

h) *The express prohibition of* ***scales of professional fees***

99. Article 14 of the LCP sets out a prohibition on fee recommendations, and provides that "*Professional Colleges and their collegial organisations cannot establish indicative scales or any other orientation, recommendation, guideline, norm or rule on professional fees, save as provided in the Fourth additional provision".*[54]

100. This rule has only been incorporated into the laws of the regions of Andalusia, Aragón, the Balearic Isles, Cantabria and Galicia.[55] Law 7/2006 of Catalonia, although it specifies in article 40.f that one of the functions of the Colleges is to "*provide users and consumers with information on professional fees always respecting the rule of free competition*", does not expressly prohibit recommendations for professional fees.

101. Of the other regional legislations, many expressly maintain the competence of Professional Colleges for a function that is incompatible with the applicable national rules, that is, providing guidance on fees scales for professional services. This is the case of Castilla-La Mancha, the Valencian Community, Extremadura, Madrid, Murcia and the Basque Country.[56]

102. A separate mention is warranted by the legislation of the Canary Islands, which does not even include the nuance written into the LCP in 1996, which converted the College function of establishing minimum fees into one of establishing merely indicative fee scales. Instead, it stipulates that the Professional Colleges of the Canary Islands are competent "*To dictate rules on fees that are not designated as official duties, tariffs or rates*", a

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53 These articles have been the object of unconstitutionality appeal num. 8260-2010.

54 The Fourth provision sets out that "*The Colleges may establish indicative criteria solely for purposes of the assessment of costs and the swearing of accounts of lawyers. Such criteria will likewise be valid for calculating the fees and rights that apply for purposes of assessing the cost of free legal assistance".*

55 Article 2.k of Law 10/2003 of Andalusia; article 47 of Law 2/1998 of Aragón; article 13.2 of Law 10/1998 of the Balearic Isles; article 27 of Law 1/2001 of Cantabria; article 10 *sexies* of Law 11/2001 of Galicia.

56 Article 21.l of Law 10/1999 of Castilla-La Mancha; article 5.n of Law 6/1997 of the Valencian Community. article 11.l of Law 11/2002 of Extremadura; article 14.f of Law 19/1997 of the Community of Madrid; article 9.h of Law 6/1999 of the Region of Murcia; article 24.E of Law 18/1997 of the Basque Country.

function which it aggravates with that of "*Taking charge of collecting the professional fees on a general basis or at the request of their members*".[57]

i) *Limitations on **commercial communications** of professionals*

103. Article 2.5 of the LCP only allows Colleges to require their members "*to conduct their commercial communications in compliance with the law, with the aim of safeguarding the independence and integrity of the profession, and, where applicable, the duty of professional secrecy*".

104. Only Andalusia, Aragón, the Balearic Isles, Cantabria and Galicia have written this limitation on Colleges into their legislation.[58]

105. None of the other regions establish any limit whatsoever on the control that Colleges may exert over the commercial communications of their members, and in the more flagrant cases, Colleges are expressly authorised to carry out actions that are not allowed by the LCP.

106. For example, the law of the Basque Country recognises the possible existence of situations constituting "*irregular professional actions*" other than those set out in the LDC or in the Unfair Competition Act, which may be classified as a serious or very serious infringement by the Colleges, and which are defined in the deontological codes.[59] In Extremadura and in Castilla-La Mancha, the law establishes that one of the functions of Professional Colleges is to "*Grant a reasoned authorisation of advertising by their members in accordance with the conditions or requirements established by the General Bylaws governing the profession (Estatutos Generales) or by the bylaws of the relevant Professional College*".[60]

j) *Strengthened exercise of the profession in **corporate form***

107. Article 2.6 of the LCP provides that Colleges cannot restrict exercise of the profession in corporate form, which "*will be governed by the relevant legal provisions*".

108. Only Andalusia, Aragón, the Balearic Isles, Cantabria and Castilla y León have incorporated this limitation on the powers of Professional Colleges into their legislation.[61]

109. The rest of the regions do not expressly prevent Colleges from limiting corporate pursuit of the profession.

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[57] Article 19, letters L and J, respectively, of Law 10/1990 of the Canary Islands.

[58] Article 3.4 of Law 10/2003 of Andalusia; article 4.3 of Law 2/1998 of Aragón; article 11.1b of Law 10/1998 of the Balearic Isles; article 3.3 of Law 1/2001 of Cantabria; article 2.2 of Law 11/2001 of Galicia.

[59] Article 11.2 of Law 18/1997 of the Basque Country.

[60] Article 11.m of Law 11/2002 of Extremadura; article 21.ll of Law 10/1999 of Castilla-La Mancha;

[61] Article 3.5 of Law 10/2003 of Andalusia; article 4.4 of Law 2/1998 of Aragón; article 11.1a of Law 10/1998 of the Balearic Isles; article 3.4 of Law 1/2001 of Cantabria; article 17 *bis* of Law 8/1997 of Castilla y León;

*k) Protecting the interests of **consumers and users***

110. Article 1.3 of the LCP stipulates that protecting the interests of the consumers and users of the services provided by their members is an essential aim of Professional Colleges, which gives a new dimension to the scope of the powers of these professional bodies.

111. Only the Autonomous Communities of Andalusia, Aragón, the Balearic Isles, Cantabria, Castilla y León, Catalonia and Galicia have incorporated into their respective laws this new purpose of Professional Colleges.[62]

112. The laws in the rest of the regions do not contemplate the protection of consumer and user interests as one of the aims of these bodies. There are certain provisions in their legislations that state that one of the aims of the Colleges is to safeguard the quality of the professional services[63] and to take into account the general interests or benefits of the citizenry or of society as a whole in the exercise of their functions,[64] but the CNC does not view this as sufficient. In addition, those regional legislations do not establish requirements for their Professional Colleges in relation to points of single contact, transparency in their management or attention to consumers and users.

II.3.2 Assessment of the reforms of regional legislation

113. Before taking up this assessment, it is important to recall once again that the analysis carried out here does not refer to the formal compatibility of regional legislations with the reforms made to the LCP. The repealing provision of the Omnibus Law establishes that all provisions which are contrary in full or in part to that law are automatically repealed, and to the extent that the Omnibus Law reforms the LCP on matters of a basic nature, this implies that the provisions of the LCP will prevail over the provisions of any regional regulations that are contrary thereto. This primacy of the basic national laws is expressly recognised in many regional legislations, with the most paradigmatic case being that of the Basque Country.[65]

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62 Article 17 of Law 10/2003 of Andalusia; article 17 of Law 2/1998 of Aragón; article 10 of Law 10/1998 of the Balearic Isles; article 9 of Law 1/2001 of Cantabria; article 12.f of Law 8/1997 of Castilla y León; article 36 of Law 7/2006 of Catalonia; article 8 of Law 11/2001 of Galicia.

63 Article 18.a of Law 10/1990 of the Canary Islands; article 20.b of Law 10/1999 of Castilla-La Mancha; article 4.b of Law 6/1997 of the Valencian Community. article 10.b of Law 11/2002 of Extremadura; article 7.e of Law 6/1999 of Murcia;

64 Article 18.c of Law 10/1990 of the Canary Islands; article 20.a of Law 10/1999 of Castilla-La Mancha; article 13 of Law 19/1997 of the Community of Madrid; article 4.a of Law 6/1997 of the Valencian Community. article 10.a of Law 11/2002 of Extremadura; article 8 of Law 4/1999 of La Rioja; article 7.d of Law 6/1999 of the Region of Murcia; article 3.1 of Law 3/1998 of Navarre; article 22 of Law 18/1997 of the Basque Country.

65 The Ninth additional provision of Law 18/1997 of the Basque Country stipulates that: "*The articles of this law that reproduce all or part of the provisions regulating the basis of the*

114. Instead, what this section analyses is the express adaptation of the regional rules to the national ones, as there is an obvious risk that lack of express adaptation of regional rules to the basic legal framework for Spain as a whole may produce significant legal uncertainty that can be used to maintain anti-competitive restrictions in the provision of professional services.

115. In fact, the primacy of the basic legislation may be undermined by reforms of the regional laws, as shown by the examples of the reform of the Galician law on Professional Colleges or certain laws creating Professional Colleges in Extremadura and in Castilla y León, cases which prompted the national Government to file court challenges of their constitutionality because they expressly contradicted the basic national rules.

116. It is therefore advisable that, independently of the formal aspects, the basic national rules be expressly incorporated into regional laws.

117. From the description given in the preceding section, it follows that the group of Autonomous Communities whose horizontal legislative provisions on Professional Colleges are completely in line with the basic national rules consists of only two regions: Aragón and Cantabria are the only Autonomous Communities whose legislation has expressly integrated all of the reforms enacted by the Omnibus Law in the LCP.

118. It is exceedingly difficult to assess the situation in the rest of the Autonomous Communities, because any divergence from the national rules is capable of facilitating or concealing a restriction of competition. Moreover, situations coexist in which the difference between the regional laws and the basic national laws is minimal, but real, together with other cases in which the divergence only affects a single aspect but is enormous.

119. All in all, it should be noted within the regions whose laws do not incorporate all of the provisions of the basic national framework, some have laws that are compatible with most of the reforms of the LCP (Andalusia, the Balearic Isles), others have laws that have been adapted only in some aspects (Castilla y León, Catalonia, Galicia, La Rioja), others have modified their legislation after the approval of the Services Directive to align it more closely with the latter, although without following the national rules (Madrid, Navarre) and, lastly, other Autonomous Communities have made no effort to adapt their laws and regulations to the new times.

120. Thus, as can be seen in table 2 below, the national map of regional legislations is not at all homogeneous, which poses important risks for

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regime governing Professional Colleges have been incorporated into this text for reasons of systematic legislative technique. Consequently, they will be understood to be amended at the time they are revised in the aforesaid basic regulatory framework."

ensuring achievement of a framework of effective competition in the provision of professional services.

Table 2. Adaptation of the horizontal regional laws regulating the activity of Professional Colleges to the reforms made in the basic national legislation on these matters (LCP)

Regions (in green, those that have reformed their laws on professional colleges after the Umbrella Law)	Greater control of mandatory membership	Greater control of incompatibilities	Elimination of obstacles to free movement of College members	Exclusive representation	Stronger submission to the Competition Act	Limits on College dues	Regulation of project approval certifications by Colleges (visados)	Express prohibition of scales of professional fees	Limitations on commercial communications of professionals	Corporate exercise of the profession	Protecting the interests of consumers and users
Basque Country	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Valencian Community	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Castilla-La Mancha	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Region of Murcia	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Canary Islands	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Extremadura	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Community of Madrid	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Castilla y León	YES	NO	YES	NO	NO	YES	YES	YES	NO	YES	NO
Galicia	NO	YES	NO	NO	NO	YES	NO	NO	YES	NO	YES
Navarre	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Aragón	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
Catalonia	NO	YES	NO	NO	NO	NO	NO	NO	NO	NO	YES
Balearic Isles	YES	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES
Andalusia	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	YES
La Rioja	NO	NO	YES	NO	NO	NO	YES	NO	NO	NO	NO
Cantabria	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES

Source: CNC, prepared in house.

121. In summary, it is highly advisable for Autonomous Communities to modify their regional legislations as soon as possible to make them expressly consistent with the basic national rules. This would lessen the risks for effective competition and generate progress towards a unified national market in this regard.

III. BYLAWS OF PROFESSIONAL COLLEGES

122. According to article 6 of the LCP, without prejudice to the laws regulating the profession in question, Professional Colleges are governed by their bylaws and by their internal rules and regulations. If there is more than one College for the same profession in the country, there must be a General Council (article 4.4 of the LCP), charged with the function of drafting General Bylaws (Estatutos Generales) for all of the Colleges in the same profession, after hearing those Colleges. The bylaws of the General Councils and of national Colleges are drawn up by said bodies and approved by the Government in a royal decree, at the proposal of the competent Ministry. The bylaws of Colleges with less than national scope are also subject to control by the General Council on the matters within its competence, and must respect the sector regulations and the General Bylaws, without overlooking the different competences that may rest with different Autonomous Communities regarding the scrutiny of the legality of those bylaws. The internal rules and regulations, as well as the deontological codes and other provisions of national Colleges are approved as stipulated in the applicable General Bylaws. The Law on Professional Colleges only provides that the deontological codes must be public.

123. The Omnibus Law, in its repealing provision, set aside all legal or regulatory provisions and rules of the bylaws and internal rules and regulations of Professional Colleges that were contrary to that law (except for the provisions regarding mandatory membership, which, according to the Fourth transitional provision, are maintained until the approval of the law regulating those this matter).

124. Pursuant to said repealing provision, since the Omnibus Law was enacted a review has begun of the General Bylaws of national Colleges and General Councils to adapt their internal rules to the changes operated by the Law.

125. This review of bylaws and other collegial rules has been promoted by what is now called the Ministry of Economy and Competitiveness, as the department charged with the transposition of the Services Directive, in close coordination with the rest of the Public Administrations through the Committee for Improved Regulation of Service Activities.[66] In relation to the General Bylaws the formal processing of the proposed reform must be done through the Ministry via which each of the collegial organisations

[66] To continue advancing in the improvement of economic regulation, the Umbrella Law envisaged that the various administrations would maintain stable cooperation by creating an ad hoc committee for this purpose. The Institutional Resolution Establishing the Committee for Improved Regulation (CMR) was signed on 19 July 2010. Its work program takes in five categories of regulation on which to focus its work, two of them specific to Professional Colleges: collegial certifications of project approval and reservations of activity.

interacts with the Administration and be approved by a governmental royal decree. For the bylaws of each of the local or regional Colleges, the processing will be done as stipulated by the applicable regional laws.

126. However, at the present time very few Professional Colleges have their bylaws and other internal rules expressly adapted to the Omnibus Law, even though the latter came into force over two years ago.

127. This delay in explicit adaptation to the changes in the regulatory framework for Professional Colleges, both in the regional regulations and in the internal rules of the different Colleges, can be used to maintain restrictions which are contrary to the Omnibus Law, detrimental to competition and to consumers and which no longer have any basis in law. There is also the risk that new restrictions will emerge, as a reaction to the legal changes, seeking to maintain the situations of limited competition for the benefit of a small group of professionals. The lack of explicit adaptation of College rules to the law is favouring the development of these restrictions.

128. In view of the issues described above, there follows a general review of the main restrictions on competition that may arise from the provisions of the bylaws and other lower ranking internal rules of national Professional Colleges and General and Higher Councils of Professional Colleges[67] by the light of the relevant case-law and the views of authoritative commentators and actions of the former Competition Tribunal, the CNC and regional competition authorities.

129. The purpose of this analysis is to identify the conducts of Professional Colleges that restrict competition, especially those which are legally untenable in the new regulatory framework, with the dual objective of reminding Colleges of the harmful nature of those conducts and stimulating swift and proper adaptation of their internal rules regulating professions to the novelties written into the Law on Professional Colleges. This discussion also seeks to give Colleges guidance so that the achievement of their legitimate purposes can be done with full respect for competition, promoting the adoption in the internal rules of the Professional Colleges of appropriate measures for preventing possible anti-competitive conducts.

[67] Each profession may have as many Professional Colleges as geographical demarcations, each one regulated by the national or regional law creating it, by their bylaws and by their deontological code or equivalent rules and other provisions of lower ranking. Therefore, taking into account that the bylaws of Professional Colleges are in a process of mandatory reform and that within each profession the non-national Professional Colleges are subject to a hierarchical relation, within the ambit of their respective competences, in relation to the regional rules regulating their activity and to the bylaws of their General Council, it has been decided to confine the analysis of the internal regulations of the Colleges to the General Bylaws and to other provisions that are common to each profession as a whole.

130. Certain bylaw provisions that may be anti-competitive have been the object of clear pronouncements by antitrust authorities and the courts that dispel any doubt as to their restrictive nature. And there are other provisions which, although they may be legally restrictive or facilitate the existence of restrictions of competition that are, apparently, less clamorous, have an equivalent economic effect to the above. Lastly, provisions have been detected which facilitate or promote new ways of curtailing competition, which seek to counteract the successive reforms of the European and national rules regulating professional activity in Spain; reforms which are increasingly better informed and clearer, mindful of the pressing need to promote competition, protect consumers and users and eliminate all unnecessary or disproportionate obstacles to the take-up and practice of professions.

131. The review carried out in this report includes many concrete examples in which the internal rules of Colleges produce constraints of competition, but it should be emphasised that the situations mentioned here are not the only ones in which such restrictions have been found. On the contrary, the report highlights paradigmatic cases which may serve as an example or illustration, but bearing in mind that there are anti-competitive restrictions that are not expressly covered in this report that Professional Colleges and their members can detect and help to correct. Furthermore, this report is in no way a substitute for the bringing of antitrust infringement proceedings, so that the use of certain potentially anti-competitive situations as examples here does not necessarily prejudge the result of their possible eventual examination in such proceedings in accordance with the concrete circumstances that may be found in each specific case.

132. Restrictions on free exercise of a profession have traditionally been classified as follows:[68]

- **Entry or access restrictions** are those that potentially limit or condition the number of professionals that may pursue the profession, in general or in a specific geographical area or territory. In economic terms, they tend to **limit the supply** of professional services in the market, which reduces the intensity of competition between professionals with the result, *caeteris paribus*, of limiting supplyside variety and hence reducing consumer choice, dimming the incentives of professionals to provide higher quality services and to innovate, increasing the prices of the professional services and facilitating the emergence of anti-competitive arrangements or practices that reinforce the aforesaid negative effects.

- **Restrictions on exercise** are those which imply explicit or tacit horizontal coordination between professionals or limit the real

[68] This division in no way implies that restrictions classified as restrictions on access may not also be considered restrictions on exercise, nor vice versa.

capacity of professionals to compete with and differentiate themselves from one another. Economically, they tend to **unify the supply** of professional services and facilitate the emergence of anti-competitive arrangements or practices that reinforce the aforesaid negative effects and reduce supplyside variety, consumer choice, quality and innovation, and tend to raise the prices of the services provided.

III.1. RESTRICTIONS ON ACCESS

III.1.1 Exclusivity due to mandatory membership requirements and other measures with equivalent effect

133. Compulsory membership implies exclusivity, in that only certain professionals, namely those who belong to the relevant Professional College, can exercise a given professional activity. This exclusivity is a barrier to entry for third party competitors that harm consumers by narrowing the potential offering in the market. This situation, moreover, facilitates or promotes conducts prohibited by the LDC because the Professional College has all professionals who compete in the market identified and those professionals are subject to the College's regulation and oversight of the activity. Consequently, membership obligations must be defined restrictively and be established by statutory law if they are to qualify as allowable under article 4 of the LDC.[69]

134. Although the LCP now requires that membership obligations be stipulated by statutory law, in practice the Fourth transitional provision of the Omnibus Law consolidated the membership requirements existing at its entry into force and which derived from many other sources. Thus, there are rules of various legal rankings and sources that establish membership requirements as a condition for exercising a profession. And, together with these, there are other measures which, though they do not lay down an explicit obligation to belong to a Professional College, imply a significant disadvantage for non-member professionals such that in practice professionals find themselves forced to join, or to have strong incentives to join, the College. These other measures include: exclusivity in the use of a professional name, exclusive representation of the profession, inclusion on lists of expert witnesses and similar lists and the fight against encroachment on a profession.

III.1.1.1 Regulated mandatory membership obligations

135. In certain professions there is a formal obligation to belong to a Professional College in order to exercise the profession. The most typical situation is for the requirement to be set out in the law creating the Professional College which, at the same time as it creates said body,

[69] It should be recalled in this regard, that said legal basis must in all cases pass the test of necessity, proportionality and absence of better alternatives.

imposes the obligation to join it as a condition for exercising the profession and establishes the formal qualifications that are needed to join, although cases are seen of mandatory membership requirements not established in a national law. On this point it bears emphasis that in many cases no definition is given of the content of the profession that is being regulated, and the name of the profession is simply taken to be that of the required qualification. This leads to situations in which it is not clear what functions or activities are being reserved for the members of the College, giving rise to litigation between professionals and to uncertainty amongst the users of their services.

136. The establishment of mandatory membership for exercising a given professional activity entails a closure of that market and a reduction in the offering of services by those professionals, both of an *inter-professional* nature, because only those professionals who meet the strict qualifying title requirements for membership are allowed to practice the profession, even though there may be other formal qualifications that prepare a professional to pursue that activity just as well, and *intra-professional,* because only professionals who belong to the College can carry on the profession. Given that mandatory membership restricts competition to an even greater degree than the formal qualification requirement (which only produces an *inter-professional* restriction), it must also be fully justified and said justification needs to go further than the one that supports the requirement of a specific formal qualification for exercising an activity. As was already indicated by the TDC in its Report of 1992[70] and has been reiterated in the *Report on Anti-Competitive Restrictions in the Rules and Regulations that Govern the Activity of Court Procurators*, the objective of mandatory membership can only be to improve the quality of the services provided by professionals and to help maintain certain pro-client conducts by those professionals. This objective, in a scenario in which the asymmetric information between professionals and clients is ever less unbalanced, is what would justify the collegial regime, which for the professionals implies submission to the rules and decisions of the College by virtue of the functions legally attributed to these corporations of public law.

137. Consistently with these premises, the former version of the LCP, in relation to the regulation of membership obligations had mandated that mandatory membership can only be established by statute law. The Omnibus Law amended this precept to add that such statutes could only be national in scope and hence not regional. It also stipulated that the national Government was to approve a law determining which professions are subject to mandatory membership. The Fourth transitional provision of the Omnibus Law limited said administrative discretion for determining the mandatory membership professions, when it stipulated that the future law

[70] TDC (1992) *Report on the free practice of professions*.

"must provide for continuance of the membership obligation in those cases and professions in which it is shown to be an efficient instrument for controlling the exercise of the profession for the better protection of the recipients of the services and in those activities in which there may be a serious and direct effect on matters of special public interest, such as the protection of health and of the physical wellbeing or of the personal safety or legal security of natural persons".[71]

138. Nevertheless, the Omnibus Law provides that until the future law regulating mandatory membership requirements comes into force, the membership obligations in force when the Omnibus Law entered into effect, that is, at 27 December 2009 will remain in place. This means that there are currently mandatory membership requirements not supported by a national statute. Approval of the law regulating mandatory membership is thus an urgent imperative, as discussed at length in section II of this report.

139. As a result, the obligations established in the past in rules and regulations of different legal ranking and currently reflected in College bylaws are deemed to still be in effect on a transitional basis. But it is clear that no innovations can be introduced regarding membership obligations by any legal instrument other than a national law. Professional College bylaws that are approved in the adaptation to the recent legal changes must avoid any reference to mandatory membership in the College or, at least, indicate that said obligation reflects the provisions set out in the legal instruments of sufficient ranking and is "transitional" until definitively determined in a national law. In this regard, there should not be approved provisions such as those contained in the proposed *General Bylaws for the profession of Property Administrator, Territorial Colleges and of their General Council,*[72] which establishes in articles 1 and 2 that membership in the College is a necessary condition for carrying on the administration of properties, as that would be unlawful. In this specific case, the problem is even greater, because at present, not only is membership in the College required for pursuing the profession of administration and management of properties,[73] there is in fact no academic title that is objectively suitable for

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[71] It should be recalled that the mandatory membership obligation is an authorisation scheme of those referred to by Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and must therefore be non-discriminatory, justified by an overriding reason relating to the public interest, in accordance with the case law of the Court of Justice of the EU and that no less restrictive alternatives are available for achieving its objective.

[72] Approved by the extraordinary plenum of the General Council on 25 March 2010 and filed with the Ministry of Housing on 26 March in order to initiate the process of their approval.

[73] According to the TDC resolution in case 529/01, Administradores de Fincas (Property Administrators), certain regional Colleges of property administrators engage in anti-competitive practices by publishing diverse advertisements claiming exclusivity for their members in the property administration activity, producing a severe supplyside distortion in that market and harm to the public interest. Both the Spanish National Court (Audiencia

carrying on the administration of urban properties.[74] In the said proposed General Bylaws, article 1 identifies the administration of properties with an area of professional activity that is currently not and should not be reserved for any specific group of professionals,[75] whereas article 2 indicates that a necessary condition for pursuing the profession of property administrator is membership in the relevant Professional College.[76] So the Bylaws would mean that this ambit of professional activity, which has up to now not been reserved for any group of professionals,[77] would henceforth be exclusively reserved for property administrators who belong to the College. The CNC believes this proposal cannot be enacted as this reservation of activity is illegal.

III.1.1.2 Exclusivity in the institutional representation of the profession

140. An essential function of Professional Colleges is the exclusive institutional representation of the profession if the profession is subject to mandatory membership obligations, as provided in article 1.3 LCP. In the absence of such membership requirements, however, Professional Colleges do not have exclusivity. But situations are found in which the internal College rules maintain that exclusivity despite what is provided in the LCP.

141. Were a situation to arise in which a Professional College holds exclusive institutional representation of a profession the exercise of which does not require membership in the College, then an asymmetry would be created between the two groups of practicing professionals. On the one hand, there are the College members, whose interests are institutionally represented by the College. And then there are the non-members, who are affected by the institutional representation just the same but who do not belong to the institution (the College) that is responsible in this example for

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Nacional) and the Supreme Court have upheld that decision on the basis that property administrators do not enjoy exclusivity in the administration of properties. Another very similar resolution was handed down in case 521/01 Agentes de la Propiedad Inmobiliaria (Real Estate Agents).

[74] The Spanish Constitutional Court ruled along these lines in its judgment of 14 March 1994, as recalled by the Foundations in Law of the Supreme Court judgment of 28 March 2011 which set aside the appeal brought before the Supreme Court by the Official College of Property Administrators of Galicia against the National Court's ruling on the aforementioned TDC decision in case 529/01, Administradores de Fincas (Property Administrators).

[75] Article 1: "*Said activity will be understood to be professionally exercised by those natural persons who on a regular and constant basis, with an office opened for such purpose and with adequate preparation, destine all or part of their work to the administration of rural or urban properties owned by other persons for the benefit of the latter*."

[76] Article 2: "*The following are indispensable requirements for exercising the profession of Property Administrator: … c) Membership in the Regional College of Property Administrators for the location of the sole or principal place of business of the interested party*."

[77] But to be able to use the name "Administrador de Fincas" (Property Administrator), the professional must be a member of the Professional College, which in any event constitutes a form of exclusivity although of a different kind. See section III.1.1.3 on exclusivity through restrictions on professional names.

their exclusive representation (nor, therefore, can they opt for some other type of professional representation), with the attendant danger that their interests may be ignored. So situations of this type can generate barriers to the take-up and pursuit of the profession similar to those raised by mandatory membership, given that the importance of having proper institutional representation will compel professionals to join the College in order to be able to practice their profession on equal footing.

142. Furthermore, in the example described here the exclusive institutional representation of the profession by the College, in the absence of a mandatory membership obligation, would give it a competitive advantage over the other sectorial associations that may exist in that same professional activity, reducing the real competition between institutions of this type to the detriment of consumers and of the profession.

143. Numerous cases have been found of professions without mandatory membership requirements but in which the rules governing the Professional College equivocate, in the sense that, though they do not stipulate that the College represents the professional activity on an exclusive basis, they are worded in a way that may lead to a *de facto* interpretation to that effect. In these cases the problem is normally that the equivocally worded rules derive from the actual legal texts that created the Professional Colleges.

144. For example, article 64.2 of Law 26/2006 of 17 July 2006 on Mediation in Private Insurance and Reinsurance provides that: "*Essential aims of the Colleges of insurance brokers include the representation of said activity, without prejudice to the right of association enshrined in the Spanish Constitution, and the defence of the corporate interests of their members*".

145. This type of wording may generate interpretative doubts as to whether the College in question is recognised as holding the exclusive institutional representation. Now, such an interpretation, which without a statutory basis may run afoul of antitrust law due to its restrictive effect, can be discarded even in the case of instruments with status of statutory law because it is contrary to article 1.3 of the LCP, by virtue of the repealing provision of the Omnibus Law.

III.1.1.3 Restrictions on names of professions

146. Members of certain Colleges for professions not subject to mandatory membership requirements enjoy the exclusive right to use a concrete professional name that is directly identifiable with the professional activity they carry on. This *reservation of name* may hinder exercise of the profession by non-members of the College and hence limit their access to that professional market. Therefore, restrictions of this kind can have an equivalent effect to mandatory membership because the professionals have to join the College in order not to be placed at a significant

competitive disadvantage with respect to those who can use the appropriate professional name.

147. This is the situation, for example, of property administrators[78] and economists. Thus, as provided in the Statutes of the profession,[79] any person wishing to use the professional name of "Economist" must be duly enrolled in the College of Economists, whereas a holder of a degree in Economics not duly registered as a member of the College cannot refer to him or herself as an "Economist", even though he or she has the same professional qualification as the others, who may refer to themselves as such merely by fact of their membership in the College. Such restrictions have no justification in professions that are not subject to mandatory College membership requirements.

148. In the case of real estate agents, their General Bylaws establish that *"practicing members <u>may</u> in their professional activity use the name of real estate agent (agente de la propiedad inmobiliaria)".*[80] Wording of this type produces certain confusion as to whether the College members are being granted an exclusive right to use the of "real estate agent" professional name, as that provision would be devoid of any real meaning if the right it gives the members to call themselves "real estate agents" could be held by any professional without having to be enrolled in the College. Now, given that said bylaws provisions does not expressly grant exclusivity, a restrictive construction of that power cannot prosper, and the provision must therefore be construed not as creating a right to the name but merely confirming it. In any event, it would be advisable for the provisions of this kind to include a clarification that they do not grant an exclusive right to the name of the profession.

149. If their literal application is allowed, these restrictions on names of professions could hinder the professional's access to other areas of activity. In the case of economists, Spain' Insolvency Act 22/2003 of 9 July 2003 provides in article 27.1 that economists with five years of professional experience and demonstrable specialisation in insolvency proceedings may serve as receivers. The name restriction set out in the Professional Statute of Economists means that an economist must belong to the College in order to practice the profession, which in turn implies that

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[78] Article 6.1 of the Bylaws of the National College of Property Administrators of 28 January 1969, published in the Official State Gazette (BOE) of 3 June 1969, establishes that the aims and powers of the college are, inter alia, *"officially holding the full and exclusive representation of the profession, both at the national level and internationally, before public officials, authorities, courts, official bodies of any class and level"*.

[79] Professional Statute of Economists and Mercantile Experts and Professors, approved by Royal Decree 871/1977 of 26 April 1977. Article 1, third paragraph, provides verbatim "*The professional name of Economists may only be used by holders of the degrees referred to in the two preceding paragraphs who are enrolled in the relevant Colleges of Economists*".

[80] Article 2.1 of Royal Decree 1294/2007 of 28 September 2007 approving the General Bylaws of the Official Colleges of Real Estate Agents and of their General Council.

only those economists enrolled in the relevant College will meet the legal requirements for being appointed as receivers in bankruptcy and insolvency proceedings. Taken to its extreme, the five years of professional experience required by the Insolvency Act can only be accumulated by professionals who have been College members for at least five years, a restriction that has already been considered excessive by the Catalonian competition authority (case 12/2009, *Colegio de Economistas de Cataluña*). If the Statute is amended to remove College membership as prerequisite for being able to use the name economist, any non-member professional who has exercised the profession of economist could qualify to be a receiver.

III.1.1.4 Lists of court expert witnesses

150. Professional Colleges draw up lists of professionals who wish to serve as expert witnesses before the courts as part of the function provided for them in the LCP, article 5, letter h). The way such lists are established is capable of creating barriers to entry in this segment of the market and has an equivalent effect to mandatory membership requirements where the latter do not exist. Given the singular position of Professional Colleges as the source used by judges and the courts for lists of expert witnesses in judicial proceedings, the manner in which these lists are prepared is not without its effect on competition and can introduce elements that hinder, distort or restrict effective competition in the market, as has occurred in the past and been highlighted in many resolutions in infringement proceedings.[81]

Exclusion of non-member professionals:

151. In non-membership professions, when a College draws up the list of professionals that will be submitted to the court as candidates for providing expert testimony only including members of the College, it is excluding from the list professionals who are members of other Colleges or who are not enrolled in any College. Thus, limiting these lists to only College members means the right to serve as expert witness is being reserved for a specific group of professionals, and this may have a restrictive effect on competition equivalent to compulsory membership requirements.

152. Therefore, a limitation on access to the profession may arise when Professional Colleges exclude a professional from the lists of expert witnesses they send to judges and courts based on: (i) membership in another College of the same profession, (ii) membership in a College for another profession if the professional holds the required qualifications, (iii) non-membership in a College if membership is not a mandatory requirement for exercising the professional activity to which the expert testimony relates, (iv) fulfilment of other requirements established by the

[81] See CNC Council resolution of 9 February 2009 in case 637/08, Peritos/Arquitectos de la Comunidad Valenciana (Experts/Architects of the Valencian Community).

College, such as having passed certain courses or accrediting professional experience, for example.

153. The regulatory framework supports the function of Professional Colleges of compiling lists of expert witnesses for court matters. Article 5.h of the LCP provides that within their geographical ambit, Professional Colleges have the function of "*providing the Courts, in accordance with the law, the list of College members who may be called upon to give expert testimony in court matters, or appointing them directly, as applicable*."

154. In relation to the court appointment of expert witnesses, the Spanish Civil Procedure Act 1/2000 of 7 January 2000 (Ley de Enjuiciamiento Civil — LEC) gives Professional Colleges preference in the function of determining the lists of such witnesses. Article 341.1 of the LEC provides that "*In January of each year the various Professional Colleges or, in default thereof, analogous entities, as well as the cultural and scientific academies and institutions referred to by paragraph 2 of the preceding article will be asked to submit a list of members or associates willing to serve as expert witnesses*…". And article 341.2 goes on to establish that "*When a person without an official title, with practice or understanding in the matter, is to be appointed an expert witness, upon prior summonsing of the parties, the appointment will be made by means of the procedure established in the preceding paragraph, using a list of persons that will be requested each year of unions, associations and appropriate entities, and which must consist of at least five of said persons*…".

155. The preference granted to Professional Colleges by the LEC for providing these lists means that the Colleges must be careful as to the requirements they use for drawing up the lists, as non-inclusion there of professionals willing to participate may restrict competition.

156. Here, it is fundamental to recall that **College membership is not an indispensable requirement for giving expert testimony**: first of all, article 341 of the LEC provides the procedure to be followed when no Professional College exists, a situation in which the lists of court witnesses would necessarily consist of non-members; and second, article 340 of the LEC, which lays down the requisites for these witnesses, does not stipulate College membership as a condition, but only mentions the requisite formal qualification, an issue on which the CNC has already pronounced itself in the past.[82] Along these same lines, the resolution

[82] The CNC resolution of 9 February 2009 in case 637/08, Peritos/Arquitectos de la Comunidad Valenciana, when evaluating the requisites laid down in the LEC to act as a court expert witness (Foundation in Law Three), recalls that article 340.1 of the LEC only provides that "*they must hold the official title that pertains to the subject matter and nature of the opinion to be given*" in the case of official professional titles, and concludes that "*The legal rule on this point goes no further, implying that if those requisites are met, both the parties and the judge or court may choose from amongst those legally qualified to serve as expert who offer their services in relation to a civil court proceeding*." In addition, the resolution goes on to explicitly say that, except for the requirements of having the requisite official title and, if College

issued by the General Council of the Judiciary on 28 October 2010[83] indicates that the only requirement established by the Supreme Court for forming part of the lists of expert witnesses is to have the requisite formal qualification, not College membership.[84]

157. Now then, despite the lack of objective necessity for the lists of court witnesses to be composed exclusively of professional College members, the LEC refers to the lists of expert witnesses sent to the courts as "*lists of members or associates*", which seems to establish the obligation that those lists only include members or, at least, associated professionals. This construction of article 341 of the LEC has been regarded as "reasonable" by the Supreme Court in its recent judgment of 21 September 2011 (RJ\2011\7183, Foundation in Law Five), although the high court nonetheless also points out that there may possibly exist "*an alternative construction with a comparable appearance of reasonableness*". That reasonable alternative interpretation could be that the lists compiled by the Colleges for the courts must include College-member professionals as well as non-members who ask the College to be included on the list, presenting, for example, their degree.

158. For these reasons, it seems advisable to consider a change in the regulations to unequivocally allow, in the case of professions not subject to mandatory membership in a given geographical area, that professionals who do not belong to a College or who belong to one in a different area to serve as expert witnesses in court on the same conditions as for College members, given that membership is not a requirement for giving expert testimony according to articles 340 and 341 of the LEC.[85] In this respect, in addition to the appropriate changes to LEC it is also advisable for the proposed reform to include, given the predominance of Professional Colleges as source of the lists of court experts, a change to article 5.h of the LCP.

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membership is compulsory for exercising the profession, of being a member, "*the LEC does not specify any other criterion for "regulation" by the Professional College, beyond these requirements.*"

[83] Resolution of 28 October 2010 of the Plenum of the General Council of the Judiciary, which amended the Council's Instruction 5/2001 of 19 December 2001 on the annual submission to the courts of the lists of professionals for court appointment as expert witnesses, and the Protocol of action of the procedural common service for the appointment of judicial expert witnesses of 9 February 2005.

[84] "…*the case-law of the Supreme Court on the matter … only establishes as a requirement for appointment as expert witness the formal qualification proper to the expert testimony that is sought …*"

[85] In fact, the role of the Professional Colleges in providing these lists to the courts was a novelty introduced in Spain by the Civil Procedure Act of 2000 (Law 1/2000). Under the previous Civil Procedure Act (approved by the Royal Decree of 3 February 1881), the Colleges played no role in appointing expert witnesses, which was left to the judge (article 661 of the Civil Procedure Act of 1881).

Other entry requirements:

159. The obstacles for entering the list of court experts are broader than those discussed above, as shown by the examples that follow. Other constraints on competition may originate from requiring certain conditions to be eligible for the list. This can take highly diverse forms:

- **Requiring membership in the College responsible for the list**: this closes off the market for the benefit of the members of the Professional College in question, with a clear anti-competitive object and effect. The Competition Tribunal of the Community of Madrid ruled along these lines in its resolution in case 05/2010, Colegio de Economistas de Madrid (College of Economists of Madrid), in relation to a complaint filed by a member of the College of Economists of Catalonia against the refusal by the College of Economists of Madrid to accept the complainant's request to be included in the rotating list of practicing economists of Madrid and remain included on the official lists of "economists for judicial actions and expert testimony" and "economists for insolvency actions". To settle the case the College proposed commitments involving, inter alia, accepting the complainant's request and bringing the internal College into line with the Omnibus Law. The case was thus resolved through the termination by commitments procedure.

- **Incompatibility with presence on other lists**: In its resolution in case 637/08, Arquitectos Peritos Judiciales, the CNC held that the evidence showed there was an infringement of article 1 of the Competition Act (LDC) by the Official College of Architects of the Valencian Community, arising from a resolution declaring it incompatible for architects to be included in the College's list of architect expert witnesses if they were present on any other list of architect expert witnesses, pursuant to which the College removed some of its member architects from its list of eligible court witnesses.[86] The resolution handed down in case SAN 04/2009, Ingenieros Industriales (Industrial Engineers), of the Competition Tribunal of the Valencian Community ruled that the warnings issued by the Official College of Industrial Engineers of the Valencian Community to its members regarding their presence on the expert witness lists of other Colleges was contrary to article 1 of the LDC.

- **Requirement of project certifications (visados)**: In the above-cited resolution issued case SAN 04/2009, Ingenieros Industriales (Industrial Engineers) by the Competition Tribunal of the Valencian Community, a sanction was also imposed on the College's rule requiring that the members had to submit their work to the project

[86] The resolution handed down in case 637/08 Arquitectos Peritos Judiciales (Court Expert Architects) was appealed before the National Court (Audiencia Nacional), which rejected the challenge (judgment of 3 November 2009).

certification as a mandatory condition for inclusion on its list of expert industrial engineers.

- **Training courses**: Requiring the taking of training courses as a condition for College members to be included on the lists is also a restriction of competition. For one, the cost in terms of money and time of the course could reduce the professionals incentives for participating in this segment of the market and entail exploitation by the College of its privileged status, and, second, the College could regulate the supply of eligible professionals for the lists by altering the difficulty, cost or number of training courses required. Practices of this kind are currently being investigated by the Catalonian competition authority in case 25/2010, Capib. The scope of the investigation was later expanded to take in the College's requirement that its members continue taking certain training courses in order to remain on the list of experts for rotating assignment of appraisal work, as well as the College rule that the members had to belong to the different sub-regional Colleges in order to be included on the respective provincial and local lists.

- **Prior professional experience**: Another conduct that artificially restricts competition is requiring lengthy periods of professional practice as a condition for inclusion on the court lists of experts. This practice effectively closes off the market to individuals who have recently begun exercising the profession and to non-members, in the case of professions where College membership is voluntary.

III.1.1.5 Other lists with restricted access

160. The anti-competitive restrictions mentioned in the preceding section are not exclusive to the lists of experts drawn up by Professional Colleges. The access barriers for a given segment of professional activity that are created by Colleges can also be seen in other areas, such as, for example, entry on the lists of receivers in insolvency proceedings or the systems for access to ex officio assignments and free legal assistance of Colleges of lawyers.

161. In the case of bankruptcy receivers, they are governed by the Insolvency Act 22/2003 of 9 July 2003, article 27.3 of which provides that a list will exist in the central coordinating offices (*decanatos*) of the competent courts of the professionals and entities that have stated their availability to serve as receivers, their training in bankruptcy matters and, in all events, their commitment to continue their training in this area. It also stipulated that for this purpose the Official Register of Statutory Auditors (Registro Oficial de Auditores de Cuentas) and the relevant Professional Colleges will in December of each year present the respective list of available individuals, adding that College membership is not a requirement for being able to request, free of charge, to be included on the court list.

162. Therefore, according to the above, where College membership is mandatory, the only way professionals can be eligible for work in bankruptcy receiverships is to be included on the lists sent by the College to the courts. This exclusivity may restrict competition if Professional Colleges make inclusion on the list subject to requirements that go beyond those set forth in the Insolvency Act 22/2003.

163. The Catalonian competition authority ruled along these lines in its resolution in case 12/2009, *Colegio de Economistas de Cataluña*, which was settled with a termination by commitments in which the College of Economists of Catalonia undertook to eliminate prior membership of five years in that College as a prerequisite for being appointed a receiver, as well the prohibition on inclusion in other lists, with the infringement being classified as very serious. It bears noting that the Insolvency Act provides in article 27 that economists who wish to serve as receivers must have five years of professional experience, which is not the same as requiring five years of membership in the College.

164. Along these same lines, in the case of the lists of lawyers that the Colleges send to courts to serve as receivers in insolvency proceedings (article 27.3 of the Spanish Insolvency Act), imposing requirements different from those set out in the Insolvency Act may constitute a restriction of competition. In particular, article 27.1.1 of said law only requires the candidate to accredit specialised training in bankruptcy law. Therefore, a collegial requirement that the members included on the lists must take certain courses or training specifically provided by one Professional College or another may constitute an anti-competitive restriction.

165. Another example, already discussed above, is that of the Competition Tribunal of the Community of Madrid, which in its resolution of proceeding 05/2010, Colegio de Economistas de Madrid, established a termination by commitments in a case in which said College refused to let a member of the College of Economists of Catalonia onto the Madrid College's rotating list of practicing economists and remain included on its official lists of “economists for judicial actions and expert testimony” and “economists for insolvency action”.

III.1.1.6 The College function of adopting measures aimed at preventing unauthorised practice of a profession

166. The fight against unauthorised practice of a profession, a function that the LCP recognises as resting with Professional Colleges, on occasions goes beyond the limits of the College's proper functions and can erect unjustified and disproportionate barriers to entry that may run afoul of competition law.

167. This function of combating encroachment by unqualified practitioners is mentioned frequently in the bylaws of Professional Colleges, as well as in other internal rules, such as the Deontological Codes of the General Councils. For example, article 7.10 of the bylaws of the Official College of

Geologists[87] includes the collegial function of adopting measures to avoid professional encroachment. Another example is article 7.3.c of the General Bylaws of the Official Colleges of Architects and their Higher Council,[88] which provides that said Colleges have the function of preventing unauthorised practice of the profession and pursuing court prosecution thereof.

168. Although provisions of this kind are not anti-competitive per se, they do facilitate the appearance of restrictions of competition and extra precaution must therefore be taken in their application. It is a constraint of competition for Colleges in a profession to unjustifiably reserve for themselves an area of activity vis-à-vis other professions on the grounds of the fight against inter-professional encroachment.

169. A good example of this type of anti-competitive situation is found in the CNC resolution on case S/0002/07, Consejo Arquitectos (Architects Council), which ruled on possible excessive use of the College's function of combating unauthorised practice of the profession. The proceeding ended with a termination by commitments. In that case several non-national Colleges of industrial engineers and technical experts filed a complaint against the Colleges of architects and junior architects in their respective geographical areas for having issued instructions to their project certification offices to deny certifications (visados) to designs of buildings primarily intended for administrative, healthcare, religious, all types of residential, educational and cultural use and whose prescribed safety and health studies were signed by a technician other than an architect or junior architect, thereby arbitrarily excluding industrial junior engineers and technicians. This type of conduct involves a clear restraint on competition.

170. Another example is seen in the consequences that followed the *Report and recommendations in relation to the refusal of different Public Administrations to authorise energy projects signed by mining engineers*, published by the CNC on 24 November 2010. Said report concluded that the refusal of those authorities to authorise energy projects unless they were signed by industrial engineers was generating an unjustified reservation of activity, given that mining engineers also had the expertise to perform these tasks, thereby creating a serious obstacle to competition. After the report was released, the CNC learned that the General Council of Official Colleges of Industrial Engineers was sending a document to different public administrations trying to refute the CNC report, without publicity, and advocating that signing the energy project plans was an activity reserved for industrial engineers. The CNC confirmed and reiterated the conclusions of its original report.

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87 Royal Decree 1378/2001 of 7 December 2001.

88 Royal Decree 327/2002 of 5 April 2002.

III.1.2 Difficulties for acquiring College membership

171. When College membership is compulsory for exercising the profession or when, as noted in the preceding sections, a non-member professional is at a clear disadvantage vis-à-vis the College members in practicing the profession, a person who does not meet the membership requirements is or may be excluded from the market. Therefore, the membership requirements are a restriction to entry into the profession and should be limited to the utmost.

172. The conditions for achieving membership in the College are normally defined in the law that creates the College in question. It would be desirable for those conditions to have sufficient justification and be proportionate, as they create a reservation of activity. But, what is more, the wording of the legal text should be drafted with the utmost clarity to avoid subsequent discretion by the Colleges. But such clarity is not customary and this gives Professional Colleges room to try to establish additional requirements, for example in their bylaws, or discretion in how they assess the fulfilment of the conditions in each particular case. Thus, together with the direct stipulation by the Colleges of unjustified requirements for attaining membership, there are other indirect ways of restricting membership, such as the rules on incompatibility, initial membership charges that exceed the costs of processing a new membership, security bonds or compulsory contracting of other services from the College.

III.1.2.1 Membership requirements

173. At present, there are situations in which Professional Colleges augment the requirements for attaining membership, with restrictive effects on competition.

174. One theoretical example of restrictions of this kind is found in the resolution entered by the Basque Competition Tribunal in case 01/2010, *Colegio Oficial de Decoradores y Diseñadores de Interior de Álava* (Official College of Interior Designers and Decorators of Álava), which held that said College abused its dominant position by refusing, without justification, membership to professionals who held the title of Técnico Superior en Proyectos y Dirección de Obras de Decoración (Senior Technician in the Design and Management of Decoration Works), which was acceptable, on the other hand, for admission to the counterpart College in Vizcaya, a practice supported by the High Court of Justice of the Basque Country.

175. At present, article 3.1 LCP stipulates that "*whoever holds the required qualifying title and satisfies the conditions indicated in the bylaws will have the right to be admitted into the relevant Professional College*". Although this provision does establish that the College entry conditions must be effectively set out in the bylaws, it does not stipulate that the Colleges are

the ones with authority to determine which qualifying titles are required to become a member.

176. In this regard, as already explained in section II of this report, for each profession with mandatory membership requirements the new law that is to regulate that membership obligation, and, if applicable, to regulate reservations of activity, should also determine the requirements that must be met for admission into the Colleges representing the self-regulated professions (that is, those subject to mandatory membership) on a clear, reasoned, proportionate and non-discretionary basis. In particular, it is considered preferable that the entry requirements for Professional Colleges be established not on the basis of specific formal titles, but as a function of the technical expertise deemed necessary, which should also be demonstrable using any other sufficiently reliable means. This would allow the professionals trained according to the new titles created by the Bologna Process to be eligible for membership if they have the requisite training, thereby injecting some much needed flexibility into the system.

177. As for professions not subject to compulsory College membership, it is also considered preferable that the formal qualifications needed for membership be determined by law, according to the same principles as indicated in the preceding paragraph. Certainly, this option may be criticised because the role of Colleges in professions not subject to mandatory membership are similar —or should arguably be similar— to that of mere associations. Now then, so long as the law continues to give Professional Colleges advantages over professional associations, such as their creation and recognition in statute law and their status as “competent authority”, it is important to maintain the utmost respect for equal treatment of professionals as regards admission into the Colleges, even where membership is not a formal requirement for practicing the profession. Equal treatment is better ensured if the definition of which professionals are eligible for membership is given in a statute and not in the internal rules of each College.

178. In this regard, it should be noted that the Bologna process, by allowing universities to establish their own degrees, will foreseeably give rise to more specialisation amongst professionals and to a greater diversity of degrees. In this context, measures are needed so that Professional Colleges do not close their doors to professionals who are sufficiently qualified to exercise the profession but hold the new degrees. It is also important to avoid a situation in which each degree has its own Professional College, as this limits the ability of a professional to provide multidisciplinary services and would result in an anti-competitive fragmentation into subsectors of the market for the professional services in question.

179. The foregoing is particularly important for professions in which membership in a College is mandatory or in which membership, more than just providing an advantage, is a decisive factor.

III.1.2.2 Incompatibilities for multidisciplinary exercise

180. Disqualifications due to incompatibility are restrictions on free competition because, for one, they are a barrier to entry in the profession and, second, they prevent multidisciplinary services from being offered to consumers.

181. Article 25 of the Umbrella Law, on multidisciplinary activities, allows the bylaws to establish provisions with the force of law on multidisciplinary incompatibilities in regulated professions "*…inasmuch as necessary to ensure compliance with deontological requirements that are different and incompatible owing to the specific nature of each profession, provided those provisions are justified according to the principles laid down in article 5 of this Law*", that is, that they meet the test of non-discrimination, necessity and proportionality.

182. And the Omnibus Law, in turn, introduces a new article 2.5 in the LCP which provides that "*the only requirements requiring exclusive dedication to a profession or limiting the combined exercise of one or more professions will be those established by law"*.

183. However, numerous General Bylaws and other College rules have been found that continue to maintain provisions which must be corrected because they are incompatible with the laws now in place.

Veterinarians:

184. The General Bylaws of the Spanish Collegial Organisation of Veterinarians,[89] approved by Royal Decree 1840/2000, provide in article 6.1.x that exercise of the profession may be declared incompatible when so warranted for ethical and deontological reasons. This provision may be considered a particularly worrisome example because, not only does it stray from the letter of the law, but, what is more, it makes declaration of incompatibility a discretionary decision, which is poor regulatory praxis. Furthermore, article 6.1 of the Deontological Code of the Profession of Veterinarians also fails to mention that these declarations of incompatibility must be set out in statute law.

Property Administrators:

185. Article 6.6 of the Bylaws of the National College of Property Administrators stipulates that the College is the body with authority to determine the incompatibilities affecting its members in the exercise of the profession.

Court Procurators (*procuradores*):

[89] Royal Decree 1840/2000 of 10 November 2000.

186. The General Bylaws of Court Procurators of Spain[90] lays down the rules on incompatibilities for the profession in its article 24. The provisions on incompatibility that raise competition problems are those contained in paragraphs 1.b and 1.c of that article, which state the practice of this profession is incompatible with the exercise of the profession of lawyer, administrative manager, employment relations specialist and any other profession whose own rules and regulations so specify.

187. The CNC already gave its assessment of these incompatibilities in its *Report on Anti-Competitive Restrictions in the Rules and Regulations that Govern the Activity of Court Procurators*, published in June 2009. In that report the CNC held that the incompatibility rules were not sufficiently justified and that the reasons traditionally alleged involving the need for immediacy and assiduousness or for impartiality are not considered sufficient, amongst other reasons, because, for example, lawyers already do advocacy work in the contentious administrative (judicial review) jurisdiction, without this having posed any problem. The CNC therefore recommended that those incompatibility restrictions be eliminated and that, at the same time, the exclusivity enjoyed by court procurators in procedural representation be revised so that, at the least, lawyers be allowed to carry on that activity.

188. Since then the regulations governing the functions of court procurators and the rules on incompatibility have changed, but the conclusions of the 2009 Report still hold.

189. The new wording of the Civil Procedure Act (LEC), as established by Act 13/2009 of 3 November 2009 on reform of procedural legislation to implement the new Judicial Office, declares that combined exercise of the professions of court procurator and lawyer is incompatible, such that in this case the incompatibility rule would be in line with the provisions of the Umbrella Law and of the Omnibus Law. But the rest of the incompatibilities mentioned in article 24 of the General Bylaws of the Court Procurators of Spain which have no basis in law would not be enforceable at present, because they do not conform to the provisions of the Umbrella and Omnibus laws, that is, because they have not been established by statute law.[91]

190. However, regardless of its legal exception, in the opinion of the CNC the incompatibility of simultaneous exercise of the professions of procurator and lawyer is not sufficiently justified according to the principles of non-discrimination, necessity and proportionality required by article 25.2.a of

[90] Royal Decree 1281/2002 of 5 December 2002.

[91] In this regard, it should be pointed out that the proposed reform of the bylaws submitted to the Ministry of Justice by the General Council of Court Procurators has been adapted to this new legal framework, given that article 61 of the new proposed Bylaws stipulates that the profession of court procurator is only incompatible with the simultaneous exercise of the profession of lawyer, on the terms specified in article 23 of the LEC.

the Umbrella Law and the Services Directive. There is no justification based on those principles in the preamble to the Civil Procedure Act (Law 13/2009). Furthermore, that incompatibility was not included in the original Bill, but was added as an amendment in the Congress of Deputies and was justified using arguments based on the distinct natures and legal positions of the two professions in court proceedings and on the fact that procurators cooperate with the administration of justice, which adds a public dimension to their activity that goes beyond the solitary interest of the procurator's client.

III.1.2.3 Initial membership fee and other charges

Initial fees:

191. From an economic standpoint, when initial membership fees are set high, especially in those cases where membership conveys significant competitive advantage in the market as sunk costs for the member, and thus constitute a barrier to taking up the profession, they have the effect of discouraging, delaying or impeding the entry of new competitors, which reduces effective competition and, furthermore, of making it more likely that the professionals will pass the cost of the membership fees onto consumers.

192. The former TDC referred to this issue, for example, in its resolution of 14 December 2000 in case 481/99, which involved property administrators in Sevilla and Huelva, where it indicated that "*the TDC … cannot pass up the opportunity to confirm, along with the SDC, that initial membership charges cannot be established to prevent entry by new College members or by competitors that belong to Colleges in other geographic areas. For this reason, decisions by Colleges regarding the level of initiation fees must always be founded on objective considerations of the real cost, for, otherwise, the charge would be a barrier to entry by new competitors and violate the LDC*".

193. Certainly, to measure the exclusionary effect described above it is fundamental, in addition to weighing the obligation to belong to the College or, in default thereof, the need felt by the professionals to join the College in order to compete on equal footing with College members, that two other elements be taken into account: the cost of membership and the incidence of occasional exercise of the profession. Thus, even where membership is mandatory, if the initial charges are low, the exclusionary effect will likely be minimal, as it will be easier for the professional to economically justify the occasional pursuit of the professional activity in question. Also, where membership is not mandatory but is advantageous and the professional activity is one in which an increase in earnings can be reasonably expected to generate a quick increase in professionals from other related

activities, and conversely, that a drop in earnings will lead to an outflux,[92] the cost of membership may be seen as a greater obstacle.

194. In any event, membership charges have been a traditional source of funding for Professional Colleges, which even where they do not produce exclusionary effects for the professionals should nonetheless be examined to see whether they relate to activities that are profitable for the members and that are carried on efficiently so as to justify passing on their cost. In addition, initial charges not in line with the costs may serve as another means for the professionals who are already members to fund themselves at the cost of the new entrants, for example, when those initial entry fees for new members are increased to pay for past expenses incurred by the College for the benefit of the incumbent members.

195. As currently worded, article 3.2 of the LCP stipulates that the registration or initial membership charge must in no event exceed the costs associated with the registration, without distinguishing between mandatory and non-mandatory membership professions. Although not legally necessary, it would be desirable for this same provision to be included into the General Bylaws governing Professional Colleges, in order to strengthen this rule on their conduct, in view of the widespread practice of charging large initial fees that are not consistent with the criteria set out in the law. However, there persist many examples of General Bylaws of Colleges with mandatory membership that do not stipulate the requirement that the membership fees must be in line with the associated costs. The fact that those instruments fail to clarify that the initial charges must reflect the costs, as stipulated by the law, even though not formally necessary, does make it difficult to control the legality of those charges and prevent their possible anti-competitive effects, because they are regulated in another part of the rules governing the Colleges.

196. A good example of this problem is seen with court procurators, whose initial membership fees became an issue given their size, as was pointed out in the *CNC report on anti-competitive restrictions in the rules and regulations that govern the activity of court procurators* released in 2009.[93] In view of these problems, it would be advisable for article 106.1 of the General Bylaws of Court Procurators of Spain to be amended to reflect the legal rule that the initial membership fees must reflect costs.

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[92] Strategies involving quick entry and exit from the market, typical of "contestable" markets (W. Baumol, 1981), commonly referred to as "hit-and-run" strategies.

[93] The report indicates that the amount of those entry fees varies depending on the College and even within the same College there can be differences based on whether its geographical district is located in the capital of the College or in other areas. For capitals, those entry charges ranged between 1,200 and 6,000 euros, with an average of 4,600 euros. In the rest of the geographical areas, the fees ranged between 1,350 and 6,000 euros, with an average in this case of 4,180 euros.

197. Another example is article 53.f of the General Bylaws of Spanish Lawyers,[94] which stipulates that the Governing Board of the Colleges has the function of determining the entry fees that must be paid by members to fund the College services and expenses. In this case it should be noted that according to the Omnibus Law, the entry fees must not be used to fund College services and expenses, but only to cover the costs of processing the new member's registration.

Other compulsory charges:

198. Furthermore, initial membership fees are not the only charge that can have the negative effects described in the preceding paragraphs. In general, all binding dues paid by professionals to continue belong to a Professional College are capable of constituting a barrier to entry in the market and, in some cases, an anti-competitive practice if they are discriminatory or excessive.

199. Faced with the LCP-mandated need to align entry fees with costs, Professional Colleges may find themselves tempted to maintain their revenue base by raising other compulsory charges, such as the periodic dues that members must pay or the charges associated with services that the members must necessarily contract with the College in order to practice the profession, such as the communications reception service of the Colleges of Court Procurators established by the LEC. In these cases, the member has no choice but to pay if he or she wishes to continue exercising the profession, although if the price is abusive or discriminatory the College could be engaging in a practice prohibited by the Spanish Competition Act.

200. Other College services which, though not obligatory, do allow the member to practice the profession on equal footing should also have to be provided at prices and in conditions that are neither abusive nor discriminatory. This would be the case, for example, of the technology platforms provided by certain Colleges of pharmacists for implementing electronic prescriptions.

III.1.2.4 Establishment of guarantees as a condition for exercising the profession

201. The LCP contains no provisions regarding the posting of security bonds, although from the standpoint of competition in the market, the establishment of such provisions could be considered a barrier to entry.

202. In professions with mandatory membership, or where membership is not compulsory but conveys significant competitive advantage, the posting of bonds to guarantee the member's professional practice has an effect on the conditions of access to the profession equivalent to that of high membership fees, given that a bonding requirement discourages, delays

[94] Royal Decree 658/2001 of 22 June 2001.

or impedes the entry of new competitors, which reduces effective competition and, furthermore, makes it more likely that the professionals will pass the related cost onto consumers.

203. Although such guarantees are in economic terms not strictly speaking a sunk cost, since they are recovered at the time the professional stops practicing, in practice they do act as such, because, first, they are normally recovered so much later that the professionals tend to view them as an unrecoverable cost when they deposit them; and, second, the guarantees do not normally earn market interest rates equivalent to a long-term loan, so the professional sees them as a compulsory exactment. Therefore, these guarantees imply placing at the College's disposal a certain sum of money that the new professional could have used for productive purposes relating to the exercise of the profession. As such, they have an opportunity cost directly proportional to the amount of the guarantee deposit and the value of the new member and inversely proportional to his or her age.[95] Moreover, it is not clear what their purpose is in practice. Although it is usually claimed that they are intended as an instrument to protect the consumer, it is not common to actually see these guarantees used for that purpose.

204. Bylaw provisions on the obligation to post security as a condition for exercising the profession may be found in certain General Bylaws, such as those governing the Colleges of Court Procurators of Spain (article 47) or of Property Administrators (article 6.8). Both have drawn up proposals to reform those instruments that do not include the guarantees. In this regard, it should be noted that the unjustified imposition of guarantees, when College membership is mandatory, may be anti-competitive, and all the more where the guarantees involve large sums.

205. It also bears recalling that the Umbrella Law requires that the imposition of compulsory insurance requirements be set out in statutory law. It follows by analogy that the obligation to post guarantees cannot be established in the General Bylaws or Statutes and even less in an internal College rule.

III.1.2.5 Requirement to contract services needed to exercise the profession with specific companies or with the College itself

206. A great number of Professional Colleges offer services to their members or make arrangements with outside firms to provide services to their members. This may promote competition by producing an increase in the number of operators offering those services, better aligning those services to the specific needs of the College members and reducing their cost. But these arrangements may generate harmful anti-competitive effects in certain circumstances, for example:

[95] Measured by the ex-post capacity of the member to achieve earnings from the exercise of the profession equal to the amount of the security deposit.

- Where membership is mandatory or if College members wield significant competitive advantages over non-members, the fact of a College requiring members to contract the service with the College or with an outside firm designated by the College may have the same exclusionary effects (a high or discriminatory price for those services constitutes a barrier to entry by new competitors) or exploitative effects as College membership charges.
- If the College engages a firm on an exclusive basis to provide a service that is necessary or important for the members to be able to practice the profession, a competitive disadvantage may arise for non-members who cannot obtain that service on the same advantageous commercial terms as those offered by the outside firm to the College members.
- If the College renders the service directly, or contracts a third party to provide it and determines the price of other commercial conditions, this may foster an alignment of the fees or other conditions applied by its members, especially if the service represents an important part of their cost structure.
- If the College members account for an important part of the market, direct provision of the service by the College or designation by the College of the provider can distort competition in the market for the provision of those auxiliary services.

207. For example, in some instances the law mandates that to exercise certain professions, generally self-regulated professions, the professional must contract civil liability insurance or belong to certain welfare insurance groups. As a means of fostering compliance with those requirements, Colleges often include them as requisite conditions for membership.

208. This is the case, for example, of the General Bylaws of the Official Colleges of Agronomists and of their General Council,[96] article 5.2.3 of which provides that an indispensable requirement for becoming a member will be to enrol in the compulsory minimum insurance groups established by the General Council of Colleges. The General Council, however, has no legal capacity to limit the insurance groups in which College members may enrol, and must confine itself to what is stipulated in this regard in the laws.

209. This type of conduct is currently being investigated by the Catalonian competition authority in case 25/2010, Capib. The actions denounced in the proceeding, according to the notice issued by the said antitrust authority on 30 November 2010, refer to a requirement by the College of Real Estate Agents of Barcelona "*that its members be entered in the*

[96] Royal Decree 2716/1982 of 24 September 1982.

Register of Real Estate Agents of Catalonia, along with the obligation to contract civil liability insurance through said entity".

210. Recall that article 10.g of the Umbrella Law stipulates that in no event may access to or exercise of a professional activity be subject to an obligation that the establishment of financial guarantees or taking out of insurance be done with a provider or body established in Spain.

III.1.3 Territorial restrictions

III.1.3.1 Mandatory membership in a given College to be able to practice the profession within its geographical ambit

211. The principle of single College membership seeks to achieve greater integration of the national market, allowing more supplyside mobility, fostering innovation and promoting a pro-competitive environment characterised by lower prices and better services. Conversely, multiple membership, that is, requiring a professional to be enrolled in every Professional College in whose territory he or she proposes to practice, leads to higher operating costs for the system and represents a barrier to entry in each district covered by a College, and thus fragments the market and narrows the offering of professionals available to users of professional services, all to the detriment of greater competition.

212. In the past, competition authorities have declared that restrictions which lead to a compartmentalisation of the market are anti-competitive. In its resolution in case 460/99, Veterinarios de Ciudad Real, the former TDC declared that the Official College of Veterinarians of Ciudad Real had engaged in a practice prohibited by the Competition Act when it adopted measures aimed at placing geographical limits on the professional activity of veterinarians. The measures involved the imposition, as a condition for participating in the anti-rabies campaign of 1998, that veterinarians could only act in that province, thereby preventing simultaneous participation in the anti-rabies campaigns of two or more provinces.[97]

213. The LCP lays down the single College membership principle in article 3.3, where it stipulates that when a profession is organised by geographical Colleges, in order to exercise the profession throughout all of Spain, it will be sufficient for the professional to join only one of those colleges, namely, the one competent for his or her sole or principal place of business. Therefore, the General Councils or Professional Colleges that require membership in the local College in order to exercise the profession in that area will be in breach of the current regulations, and the bylaws and other internal College rules that have not been adapted to the single College principle will have been repealed.

[97] The resolution in case 460/99 Veterinarios Ciudad Real was appealed before the National Court, which rejected the appeal (judgment of 10 October 2003).

214. Constraints on competition of this kind may be found in the General Bylaws of the Collegial Medical Organisation and of the General Council of Official Colleges of Medical Doctors.[98] Specifically, article 35.1 of those bylaws provides that to practice the profession within the geographical ambit of a given College, the doctor must belong to that College, whereas article 36.1 stipulates that members can only exercise the profession where they reside, thus making practice impossible in the territory of any College other than the home College.

215. Other situations that may lead to *de facto* establishment of mandatory membership include, for example, requiring members to use the common services provided by the host College. In this case, the professional incurs an added monetary cost to be able to practice the profession in a given territory, which amounts to the establishment of sunk costs and hence a barrier to taking up the profession there.

III.1.3.2 Prior notification obligations before practicing in the territory of a given College

216. Any impediment to the free provision of services is a barrier to entry that limits or restricts the integration of the national market to a greater or lesser extent, thereby hindering the development of a competitive market. Establishment by Professional Colleges, as a condition for exercising the profession in their territory, of prior notification obligations for all professionals who belong to other Colleges or belong to no College because membership is not mandatory in the area where their business address is located, according to article 3.3 LCP, imposes administrative costs on professionals that have the effect of fragmenting the market and narrowing the offering of professionals available to users of professional services, hindering and limiting between Colleges for the same profession.

217. That is why the LCP, in article 3.3, stipulates that Colleges cannot require professionals who exercise the profession in a different territory than that of their College any notification or authorisation. The LCP adds that for purposes of exercising the planning and disciplinary powers that rest with the Professional College for the territory in which the professional activity is exercised, the Colleges must use the mechanisms for communication and administrative cooperation between competent authorities envisaged in the Umbrella Law.

218. However, numerous bylaw provisions are still in place that are contrary to these precepts of the LCP. For example, the General Bylaws of Spanish Lawyers and the General Bylaws of the Official Colleges of Real Estate

[98] Royal Decree 1018/1980 of 19 May 1980.

Agents[99] introduced this type of prior notification obligations incompatible with the prevailing law.

219. Another similar case is the proposed General Bylaws for the profession of Property Administrators, Territorial Colleges and their General Council, which in certain provisions are consistent with the LCP (article 4.1), but which then go on to manifestly contradict that law (article 11) by introducing the obligation to give the host College notification of exercise of the profession.

III.1.3.3 Lack of transparency in College rules

220. With certain frequency we find an insufficient degree of transparency and publicity in the rules governing Professional Colleges, so that access to those rules is very complicated or outright impossible for anyone except members of the College. Professional Colleges often do not provide links on their websites to their bylaws, to the deontological codes of the profession (which is expressly contemplated in article 10.2 of the LCP), to the internal rules or to the rules on advertising, nor to other resolutions adopted by the College that could affect professionals practicing in the College's territory, so that it is not clear what the regulations are that supposedly govern the exercise of a self-regulated profession in a given geographical area.[100]

221. This can be an important barrier to entry in the profession, because even professionals who belong to the College in other areas may confront difficulties for practicing in another area due to lack of knowledge of the rules that govern the pursuit of the profession there. These problems may also distort competition in professions not subject to mandatory College membership if non-members cannot obtain the information they need to exercise the profession.

222. In addition, this lack of transparency creates a scenario of incomplete and asymmetric information that can be particularly detrimental to the clients who use the professional services by facilitating the pursuit of anti-competitive practices by the professionals. An open and transparent framework makes Professional Colleges more accountable in the process of drawing up their rules and regulations.

223. Note that the Omnibus Law introduced a new article 10 in the LCP in relation to the "point of single contact", through which the Colleges have the duty to arrange so that the professionals can, free of charge, "*Obtain all the information and forms needed to take up and exercise the*

[99] Royal Decree 1294/2007 of 28 September 2007.

[100] For purposes of clarification, the information disclosure discussed here refers to the information needed to achieve proper performance of the professional services, and by no means includes sensitive information on costs, fees, suppliers or clients, the exchange of which could give rise to antitrust violations.

professional activity" (article 10.1), and that paragraph 2 of that same article expressly mentions that, amongst their other obligations, Professional Colleges must post their deontological codes on their websites.

224. The obligation of Colleges to disclose this information is viewed favourably by the CNC and regarded as an important advance in the regulation of Professional Colleges and of the professional services sector.

225. In this regard, it should be recalled that the transparency obligations deriving from the point of single contact are not confined to posting the deontological codes on the website, but also take in all those documents that must be known by the professionals "*to take up and exercise the professional activity*", as provided by article 10.1 of the LCP. This arguably includes all prevailing rules and regulations that affect each College, including those already publicised in the relevant Official Gazettes. In any event, failure to publicise all College rules of relevance for the exercise of the profession in each territory, apart from implying a violation of article 10 of the LCP, may operate as a geographical barrier to entry (for professionals who operate in other territories) and for professionals not enrolled in a College.

226. In summary, in view of the anti-competitive effects described here and the obligations derived from the current regulatory framework, Professional Colleges should offer the greatest possible transparency and publicity of the rules governing their geographical area and of the measures and actions of the College that may have bearing on the provision of professional services, making them accessible to the general public and to professionals interested in becoming College members, and not just to their own members. This should be done, moreover, with assurance of anonymous access to that information, for otherwise access would have similar effects to prior notification obligations for exercising the profession in a given territory, which were done away with in the latest reform of the LCP.

III.2. RESTRICTIONS ON EXERCISE

227. Restrictions on exercise of a profession may have the goal or effect of limiting the competitiveness of the professionals involved, preventing or reducing their capacity to compete on prices and other competitive variables. Ultimately, they seek to exploit a collective position of strength in the market, at the expense of end users of the services and of professionals who are not yet College members. The result of these restrictions is to reduce the variety or the quality of the professional services, making them more expensive.

228. The restrictions on exercise are many and varied, although they often seek to affect, in one way or another, the fees, a crucial element for effective competition between practitioners of the profession. In addition to restrictions on freedom to set prices, this analysis covers many other types

of restrictions on professional practice that have a negative effect on other competition variables and ultimately limit the competitive capacity of professionals and the progress of their profession. Lastly, further below we analyse the issue of the *visado* certifications issued by Colleges.

III.2.1 Issues regarding fees and their collection

229. Professional fees (*honorarios*), the price charged by professionals for their services, are of great interest from the standpoint of competition. Pricing freedom is crucial for a market economy to function properly and has to be the general rule so that the economic system as a whole, and consumers in particular, can reap the maximum benefits of competition, while at the same time achieving the best possible allocation of production resources based on the signals that prices give of shortages or excesses in the market. Only in very concrete situations, and subject to prior justification based on strictly economic, proportionate and non-discriminatory considerations, can any intervention that affects pricing freedom be considered.

230. The benefits of pricing freedom, when there are a sufficient number of supply and demandside players and there are mechanisms for correcting market failures, go beyond the reduction of the prices paid by consumers. Freedom to set prices gives rise to an intensification of competition that fosters innovation and improvements in the quality and variety of services, as well as to a better allocation of production resources that invigorates economic growth and job creation. Conversely, setting fixed, minimum, maximum or indicative prices, apart from hemming in the capacity to obtain the aforesaid benefits, privileges the entrenched professionals unjustifiably, to the detriment of new entrants, with especially significant effects on the youngest and most enterprising professionals.

231. In their actions, Professional Colleges have often fostered or allowed restrictions on free pricing. Examples of these restrictions are the establishment of fixed, minimum or maximum prices, indicative fee scales or limitations on the capacity to apply discounts.

232. Fixing professional fees is one of the most harmful anti-competitive practices, as it constrains the ability of professionals to use their prices as a differentiating competitive factor. Fixed or minimum fees, apart from narrowing supply, drive prices above the level that would result from the free play of supply and demand, with the consequent harm to consumers. Pricing guidance in the form of indicative scales of fees and maximum fees, even where not binding, promote alignment of fees, and experience shows that they are normally combined with other elements that increase their binding force for the professional concerned. Moreover, in general, regardless of how binding the agreed prices are, the process of establishing them entails the sharing by competitors of information on

costs and other sensitive commercial matters, which in and of itself may imply a restriction of competition punishable by the Competition Act (LDC).

233. Another pricing practice that can have substantial impact on competition is that of having the Professional Colleges collecting the fees. Such arrangements make it easier to monitor application of unlawful anti-competitive agreements and discourages professionals from pursuing an innovative or aggressive commercial strategy because they limit its novelty or surprise effect.

234. These problems, which are obvious when the College requires members to centralize collection of their fees, may also arise even where that obligation is not formally included in the internal rules of the College. For one, when there is an anti-competitive agreement involving a group of members, they may voluntarily centralise their collections through the College as a way of ensuring application of the agreement. Also, where a significant number of members voluntarily use the centralised collection service, there is the risk of divulging commercially sensitive information with anti-competitive effects, especially taking into account that the information on fees collected will be available to competitors who occupy executive responsibilities in the Colleges.

235. The LCP originally included setting mandatory minimum fees as one of the functions of Professional Colleges, with authority to require their members to centralise collection of their fees via their College.

236. These rules were in force until the reform introduced by *Act 7/1997 of 14 April 1997 on liberalisation measures in matters of land and Professional Colleges*. Said law eliminated the possibility of setting mandatory minimum fees, but allowed Colleges to establish illustrative or indicative fee schedules. It also did away with the power to require that fee collection be done through the College, although it allowed this service to continue to be made available to members on a voluntary basis, as it remains today.[101]

237. Later on, the LCP reform introduced by the Omnibus Law in 2009 removed from article 5 of the LCP the collegial function of establishing indicative fee scales and introduced a new article 14 prohibiting Colleges from making recommendations regarding fees. There continues to exist in this regard, the lone exception of the establishment of guidance ("indicative criteria"),

[101] In the resolution in case 423/98, ASISA, the Official College of Medical Doctors of the province of Sevilla (COMS) was fined for its decision to boycott ASISA, which was carried out through diverse acts. The COMS had not reached an agreement with ASISA and sought to prevent its members from working for that entity. However, the case record showed how the Official College of Medical Doctors of Barcelona (COMB), faced with the failure to reach an agreement with ASISA, had established minimum pricing agreements and arrangements for collection of fees through the College. In the case of COMB, the judicial review chamber of the High Court of Justice of Catalonia, in judgment 973/1997, cleared the COMB of behaving unlawfully because it had acted under the LCP then in force and, therefore, the TDC could not rule on a matter that was res judicata.

not indicative scales, for the sole purposes of the assessment of costs and the swearing of accounts of lawyers.

238. There follows a discussion of these aspects of professional fees, taking into account whether or not they are regulated, followed by comments on the fee collection system as a monitoring instrument used by Colleges with possible harmful effects for competition.

III.2.1.1 Regulated fees: duties

239. Certain professional services are subject to regulated fees known as *aranceles* (hereinafter referred to as "duties"), as is the case of notaries, court procurators and registrars. An evaluation of the concrete reasons that could justify the specific regulation of each of these professional groups is beyond the scope of this report, although there are certain general elements that bear mention in relation to regulation of duties.

240. The system of unfettered pricing, in the most developed economies, serves as indicator of shortages and promotes the efficient allocation of resources. As such it plays a pivotal and irreplaceable role in the economic system, as it is the only known information mechanism that, in a decentralised fashion and with minimal information costs, creates the incentives needed for economic operators to behave in a pro-competitive manner. Instances in which intervention in market pricing —for example by the remuneration in the form of a duty— are desirable from the standpoint of economic efficiency are exceptional.

241. Furthermore, the harmful effects of regulating duties are greater the more intense the competition that could be reasonably expected in the absence of such intervention. Thus, in professional groups subject to a *numerus clausus* (closed number) and geographical limitations, as is the case with registrars or notaries, it is not reasonable to expect that liberalisation of prices only, with continuation of the other restrictions, would intensify effective competition as much as in the case of procurators. Therefore, in the latter case, the restrictive effects of such pricing regulation are greater.

242. For these reasons, regulation of pricing should only exist if fully justified, proportionate and non-discriminatory. In this respect, article 11.1.g of the Umbrella Law provides that *"the regulations governing access to or exercise of a service activity cannot make said access or exercise subject to: … g) restrictions on pricing freedom, such as minimum or maximum tariffs, or limitations on discounts"*. The Umbrella Law only permits an exception to this principle where there are overriding requirements relating to the public interest, provided, moreover, that the measure is proportionate and non-discriminatory. And the Umbrella Law also requires in this case that the measure be justified in the instrument that establishes it and that it must be notified to the European Commission.

243. However, the regulations governing the duties that exist in Spain (for notaries, court procurators and registrars) are not backed by any such

justification or by the safeguards required by the Umbrella Law. In addition, the regulations are not sufficiently flexible when it comes to the application of discounts by professionals.

244. What is more, in the Spanish system Professional Colleges enjoy a privileged situation for influencing in the process of determining these duties, as a result of article 9.i of the LCP, according to which the General Councils have the function of issuing a prescribed report on all regulatory proposals that modify the rules governing Professional Colleges.

245. In any event, allowing professional groups to eliminate or reduce the already narrow competitive playing field, for example by collectively putting limits on the discounts that can be offered or establishing compensatory mechanisms, represents a very serious restriction on exercise of the profession.

246. Thus, in the TDC resolution of 18 October 2006 in case 603/05, Procuradores Ponteareas[102], a group of court procurators working in the same judicial district were fined for arranging not to apply in a specific case the discounts to the official duties that were allowable by law (as much as 12% of the official duties).

247. There have been numerous sanctions imposed for compensatory mechanisms between professionals. To cite the most recent one, the CNC resolution of 20 January 2011 in case S/0196/09, Colegio Notarial de Asturias (Notary College of Asturias),[103] fined that College for establishing fee compensation arrangements between notaries in towns where there were two or more notary offices. Other examples of sanctions on similar practices are found in the resolutions of 20 June 2002 (case 544/02, Colegio Notarial de Madrid)[104] and 21 July 2004 (case 562/2003, Colegio Notarial Bilbao).[105]

III.2.1.2 Unregulated fees

248. Both the former TDC and the CNC have on numerous occasions ruled that[106] the establishment of **illustrative or indicative fee schedules** can have similar effects to price fixing agreements because, even though a cartel is not explicitly established, the participants have greater capacity to

[102] Confirmed by the judgment handed down by the National Court (Audiencia Nacional) on 17 June 2008.

[103] We have no information indicating this resolution has been challenged.

[104] Upheld by the Supreme Court in its judgment of 2 June 2009.

[105] Upheld by the Supreme Court in its judgment of 26 April 2010.

[106] TDC (1992) *Report on the free practice of professions*; CNC (2008) *Recommendations to public authorities for more efficient and pro-competitive market regulation*; and CNC (2008) *Report on the professional services sector and professional associations*. The second of these reports advocated eliminating the powers of Professional Colleges to establish indicative fees scales for failing the efficient regulation test of necessity, proportionality and least distortion.

all behave in unison because they can reasonably anticipate the behaviour of their competitors. Price recommendations, therefore, not only present obvious disadvantages, but they are likely to augment the possibilities of coordination between the incumbent service providers in the market.

249. The European Commission also takes this approach, as set out in Decision 2005/8, which found the Belgian Architects' Association guilty of including fee-scale guidelines in its deontological rules.

250. Pricing recommendations, moreover, entail sharing commercially sensitive information, an act which of itself restricts competition by letting competitors know the strategic preferences of other service providers.

251. Since the amendments made in 2009 by virtue of the Omnibus Law, the LCP no longer allows, generally speaking, the establishment of fee scales, not even in the form of non-compulsory indicative criteria.[107]

252. Colleges must therefore abstain from drawing up, updating, publishing or disseminating such fee scales or recommendations and immediately take them off their websites, including those reserved for their members, as each and every one of those actions is contrary to LDC. Furthermore, all bylaw provisions or norms included in the deontological codes or internal rules of any other kind that refer to a collegial function of establishing fee guidance must be considered to have been repealed. This is the case of the General Bylaws of the Collegial Organisation of Nurses of Spain, of the General Council and Regulation of the professional activity of Nursing,[108] and the General Bylaws of lawyers, veterinarians, architects, master builders and junior architects,[109] agricultural engineers, road engineers[110] and geologists. There are also professions, such as odontology, in which this type of collegial provisions are contained not in the General Bylaws, but in the deontological code for the profession. This leads to the conclusion that the deontological codes and other internal College rules of a similar nature should never include monetarily quantified precepts or any elements that favour coordination of fees or restrict their free pricing. Also, the General Bylaws should restrict the content of College regulations of this kind in order to avoid the inclusion of provisions contrary to the LCP

[107] On the issue of indicative fee scales, the Basque Competition Tribunal, in the resolution of case 4/08, Apis Bizkaia y Guipuzkoa, before the Omnibus Law eliminated such guidelines as a College function, concluded that they contained collective pricing recommendations that could infringe article 1 of the Competition Act (LDC), as well as conducts not allowed under the LCP and hence not eligible for the legal exemption provided under article 4 LDC, given that said conducts were not imposed by law. In any event, today there is no room for doubt on this question.

[108] Royal Decree 1231/2001 of 8 November 2001.

[109] Royal Decree 1471/1977 of 13 May 1471 approving the Bylaws of the General Council and official Colleges of Master Builders and Junior Architects.

[110] Royal Decree 1271/2003 of 10 October 2003 approving the Bylaws of the College of Civil Engineers (roadway, canal and port engineers).

in internal rules of lower legal ranking that may not be captured in a scrutiny of the lawfulness of the bylaws.

253. The reform of the LCP implemented by the Omnibus Law has maintained **one sole exception to the general prohibition on establishing pricing guidelines**. The Fourth additional provision of the LCP stipulates that "*The Colleges may establish indicative criteria solely for purposes of the assessment of costs and the swearing of accounts of lawyers. Such criteria will likewise be valid for calculating the fees and rights that apply for purposes of assessing the cost of free legal assistance"*.

254. A significant nuance to bear in mind is that said additional provision of the LCP refers to indicative "criteria" (*criterios orientativos*) and not to "scales" (*baremos orientativos*). The former should be taken to mean the set of elements that should be taken into account for the assessment of costs and the swearing of accounts of lawyers, and not the quantitative result of applying those criteria in each specific case, which would be the price or fee.

255. With the 1997 reform of the LCP, Professional Colleges could no longer set minimum or fixed fees, and had to confine themselves, until the Omnibus Law prohibited them as well, to establishing indicative non-compulsory fee scales. But in many cases, contrary to the law, **the function of establishing fixed or minimum fees has been maintained** in the bylaws in force today. These provisions must be understood to have been repealed by the Omnibus Law, and if they continue to be applied in practice it should be noted that they are subject to the prohibitions contained in the Competition Act.

256. Antitrust authorities have handed down numerous sanctions for conducts of this kind. For example, in the resolution in case 445/98, Colegio Ingenieros Técnicos Industriales Burgos (College of Industrial Junior Engineers of Burgos), the TDC fined the said College for approving and distributing a circular to its members containing a minimum fee scale for budgeting individual home heating installations. Also, the TDC in its resolution in case 566/03, Protésicos Dentales de Madrid, fined the Professional College of Dental Technicians of Madrid for setting minimum fees and prices for sale to the public.[111] More recently, the CNC, in its resolution in case 629/07, Colegio de Arquitectos de Huelva, fined the College of Architects of Huelva for drawing up an annual "Method for simplified calculation of budget estimates for material execution of different types of works", as it entailed a collective pricing recommendation that restricts competition.[112] One last example is the TDC resolution in case

[111] The appeal lodged with the National Court (Audiencia Nacional) by the College was rejected and the Supreme Court later declined an application by the College to set aside that decision.

[112] The resolution in case 629/07 Colegio Arquitectos Huelva was appealed before the National Court, which turned it down in its judgment of 21 January 2011.

635/07, Colegio Estomatólogos de las Palmas, which fined the Official College of Odontologists and Stomatologists of Las Palmas de Gran Canaria for establishing recommended minimum professional fees.[113]

257. All those provisions which separately or in aggregate produce an equivalent effect to fixed, minimum or recommended prices are also considered price fixing.

258. **Restrictions on discounts** are a typical means of achieving minimum prices. Such is the case of the deontological code for the profession of odontologists, which in article 45.5 prohibits pricing treatments at below cost, and, in general, any other type of "unfair competition". The provision also says that certain discounts or other trading practices intended to gain clientele by pro-competitive means are also not permitted, displaying the erroneous and unlawful misconception of "unfair competition" maintained by the deontological code of said Professional College.

259. An example of **provisions that operate in aggregate** is seen in the case of "administrative managers". The Organic Statute of the Profession of Administrative Manager[114] provides in article 52.d that the General Council has the function of establishing indicative fee scales. This provision is strengthened by another one, in the deontological code for the profession, which establishes that administrative managers cannot carry on "unfair capture" of clientele, and considers an instance of such conduct to be systematic charging of fees below the minimums indicated by the College. In this case, the combined effect of the two provisions is to establish a minimum price.

260. Likewise considered restrictive are practices such as the one sanctioned by the TDC in its resolution in case 528/01, Consejo General de la Abogacía (General Council de Lawyers — CGA), which ruled the CGA violated competition law when it prohibited in article 16 of the Deontological Code for Lawyers the establishment of percentage contingency fee (*cuota litis estricta*). Although in this specific case there have been certain regulatory changes since the events referred to by the case, it should be recalled, first of all, that after the appeals[115] filed by the parties against the said resolution of the TDC, the Supreme Court (Judicial

[113] The resolution handed down in case 635/07 Colegios Estomatólgos de las Palmas was appealed before the National Court, which turned down that challenge in its judgment of 10 July 2009).

[114] Decree 424/1963 of 1 March 1963, which approved the Organic Statute of the Profession of Administrative Manager, amended on this point by Royal Decree 2532/1998 of 27 November 1998 amending the Organic Statute of the Profession of Administrative Manager.

[115] The resolution handed down in case 528/01 Consejo General de la Abogacía (General Council of Lawyers) was challenged before the National Court, which upheld the appeal in its totality in its judgment of 27 June 2005. Said judgment was appealed to the Supreme Court, which upheld the appeal in part in its judgment of 4 November 2008). As a result of these rulings, the establishment of a percentage contingency fee is allowed, although the fine levied by the TDC on the General Council of Lawyers was annulled.

Review Chamber, section 1), in its judgment of 4 November 2008, permitted the establishment of such success fees. Second, it also bears mention that after the events referred to by the TDC resolution, the new General Bylaws of Spanish Lawyers (Royal Decree 658/2001 22 June 2001) was approved, introducing an article 44.3 with identical characteristics to the aforementioned article 16 of the Deontological Code. Said article 44.3, however, has to be considered to restrict competition given that the LCP stipulates, in article 2.4, that the resolutions, decisions and recommendations of Professional College must respect the limits of the LDC and that article 14 of the LCP provides that Colleges cannot establish indicative fee scales nor issue any guidance, recommendation, instruction, norm or rule on professional fees, except for purposes of assessing costs.

261. Lastly, there are measures that seek to increase College revenues and which may involve abusive pricing. This was seen in the resolution in case 526/01, Certificados de Defunción (Death Certificates), in which the TDC held that 17 provincial Official Colleges of Medical Doctors had abused their dominant position in the market for distribution of death certificates (distribution of said certificates was attributed to the Colleges in exclusivity in their respective territories), to make issuance of the certificates subject to payment of a sum higher than that established by the Collegial Medical Organisation, thereby also breaching Act 7/1997 of 14 April 1997 on liberalisation measures in matters of land and Professional Colleges, which prohibits Colleges from setting the price of their members' services.[116]

III.2.1.3 College fee collection service as means of monitoring the activity of members

262. The 1997 reform of the LCP eliminated the power of Professional Colleges to require members to centralise collection of their fees through the College, making such service optional for the members. So, at present, article 5.p of the LCP provides that Colleges have the function of managing collection of payments, remuneration and professional fees if the member so requests freely and expressly, in those cases where the College has set up the requisite services and in the conditions set out in the Bylaws of each College.

263. Collection of fees via Professional Colleges poses major risks for competition. One the one hand, if any arrangements are already in place between the professionals on fixing prices, sharing the market or compensatory mechanisms, centralising the collection of fees can serve as a tool for monitoring which professionals are complying with the agreement. And even where no such anti-competitive agreement is in

[116] The resolution handed down in case 526/01, Certificados de Defunción (Death Certificates) was appealed to the National Court by 15 of the 17 provincial Colleges of doctors that were sanctioned. The National Court rejected all of the appeals.

place, if a significant number of professionals have the College manage their collections, the dissemination of information on revenues can facilitate restrictions of competition.

264. For example, in the resolution in case S/0210/09, Colegio de Veterinarios de Murcia,[117] the College of Veterinarians of Murcia was sanctioned for an anti-competitive practice which, amongst other questions, included implementing a system that obliged the veterinarians participating in the anti-rabies campaigns during several years to centralise receipt of the animal identification and vaccination materials through the College. This arrangement allowed the College to strengthen the College's anti-competitive control of the members and their activity.

265. There are General Bylaws that authorise the College to verify receipt of fees. Such is the case of the General Bylaws of the Court Procurators of Spain, which in article 34.2 stipulate that the Governing Boards may require members to demonstrate their compliance with the applicable rules on regulated fees (duties), even requiring them to present the invoices of advance expenses and rights and their related accounting entries. This measure, which can be used to spot practices not authorised by the rules on the regulated frees being applied, can also be employed by the College to attempt to avoid price competition or promote the enforcement of anti-competitive cooperation arrangements between the professionals.

266. Lastly, given that collecting fees is a part of any professional activity, the possible justifications relied upon by the Colleges that provide services of this kind must take into account their potential anti-competitive implications and the availability of effective alternative mechanisms in commercial law for dealing with possible non-payments by clients.

III.2.2 Other restrictions on the capacity of professionals to compete

III.2.2.1 The College function of procuring harmony and collaboration amongst members, preventing unfair competition between them

267. The LCP attributes to Colleges, according to article 5.k, the function of function of "*procuring harmony and collaboration amongst members, preventing unfair competition between them*". This provision frequently results in Colleges specifying in their internal rules the situations and actions that are regarded as fair and unfair and applying disciplinary measures for conducts considered unfair.

268. The above can produce constraints on competition because the interpretation the College rules make of unfair competition is vague, discretionary and not in accordance with the Spanish Unfair Competition Act 3/1991 of 10 January 1991 (Ley de Competencia Desleal — LCD),

[117] An appeal was lodged against this resolution before the National Court in November 2011 and awaits decision.

and discourages competitive behaviour by professionals. Furthermore, the capacity of Colleges to impose penalties on the pretext of protecting "fairness" in conducts can also produce anti-competitive restrictions, given the risk entailed by one group of professionals being judged by others, their trading rivals, for the way they conduct their commercial activity.

269. For example, according to article 18.c of the General Bylaws of the Colleges of Licensed Insurance Brokers and of their General Council, the obligations of College members in relation to professional fellowship, harmony and ethics must be governed by the Universal Code of Ethics. The latter text, in turn, in section 2.10 provides, on the one hand, that professionals will carry on their activity pursuant to the "fair competition" principle, an obviously indeterminate concept and, on the other, that to obtain transactions in competition with their fellow professionals they cannot cede any or all of their fair remuneration or grant any additional economic compensation, whether in cash or in kind. This rule limits commercial offers and the capacity of professionals to apply discounts and other pro-competitive trading practices.

270. Another case is found in the Spanish Code of Dental Ethics and Deontology, which in article 45.5 prohibits pricing treatments at below cost and, in general, any and all types of unfair competition. The Unfair Competition Act, however, contains no provision that limits the capacity of an odontologist to set the prices, discounts and promotional offers he or she deems fit in each case and market situation.

271. A similar case is that of the Deontological Code of Lawyers, which in article 8.2 determines what is considered unfair competition, going beyond the terms of the Unfair Competition Act, especially in relation to advertising and marketing. Restrictions on advertising and marketing are discussed further ahead in this report.

272. Yet another example is the Deontological Code of Civil Engineers (roadway, canal and port engineers). The wording of article 4.7 of that code is somewhat similar to article 17.2 of the Unfair Competition Act, which regulates selling at a loss. But there are certain differences: whereas the Unfair Competition Act sets down that a price level may be unfair because it "*misleads consumers as to the level of prices of other goods or services of the same establishment*", the Deontological Code provides that engineers "*will abstain from setting* [their fees] *at below cost during a time period, seeking to make the customer believe that the normal fees charged by other members are excessive and produce windfall profits*". In other words, while the Unfair Competition Act seeks to avoid consumers being misled with respect to the level of prices charged by a competitor (establishment) for its overall offering, the Deontological Code of Civil Engineers treats fees that stray from the "standard" fees of the rest of the professionals as unfair.

273. It should be noted, lastly, that the harmful anti-competitive effects of a poor definition of "fairness" and "unfairness" in the trading conducts of professionals are augmented by the College disciplinary rules, given that many internal norms (General Bylaws and Deontological Codes, primarily) classify unfair trading practices as very serious infringements. Examples of this situation are seen in the General Bylaws of the Professional Colleges of Paymasters (Colegios Profesionales de Habilitados de las Clases Pasivas)[118], lawyers (articles 4.j, 53.o and 85.e of the General Bylaws of Spanish Lawyers) and court procurators (articles 81.j, 98.n and 66.d of the General Bylaws of the Court Procurators of Spain).

274. In conclusion, the concept of unfair competition can only be defined by law and judged by the courts. Therefore, the function of Professional Colleges should be to bring cases of unfair competition before the courts, and under their disciplinary rules the penalties for acts of unfair competition should only be applied when the conduct has been sanctioned by a court.

III.2.2.2 Advertising restrictions

275. As pointed out in the *Report on the professional services sector and professional associations* published by the CNC in 2008, advertising is a fundamental competitive tool for incumbent professionals and new entrants. Advertising improves the information available to potential clients on the service in question, allowing them to evaluate the price, quality and differences with respect to the products or services offered by other suppliers.

276. The General Court of the European Union (GCEU), in its judgment of 28 March 2001 in case T-144/99 emphasised that "*As regards the prohibition in the strict sense of comparative advertising ...it should be noted, first of all, that advertising is an important element of the competitive situation on any given market, since it provides a better picture of the merits of each of the operators, the quality of their services and their fees. … comparative advertising makes it possible in particular to provide more information to users and thus help them choose a professional representative in the Community as a whole whom they may approach*". The GCEU therefore goes on to asset that "*The Commission is therefore quite right, in the Decision, to identify the favourable effects which fair and appropriate comparative advertising has on competition (recital 41) and, on the other hand, the restrictions on competition which the prohibition of any form of that method of advertising entails (recital 43)*".

277. It should also be recalled that both the TDC and the CNC have on numerous occasions sanctioned College practices that restrict advertising. The TDC, in its resolution in case 471/99, Odontólogos de Córdoba, held

[118] Royal Decree 40/1996 of 19 January 1996, which approved the General Bylaws of the Professional Colleges of Paymasters (Colegios Profesionales de Habilitados de las Clases Pasivas).

the evidence showed that practices contrary to article 1.1 of the Competition Act 16/1989 existed and were attributable to the Official College of Odontologists and Stomatologists of Córdoba and to the General Council of the Official Colleges of Odontologists and Stomatologists of Spain, for having approved certain College rules that contained prohibitions and anti-competitive limitations on the content of advertising information and on the advertising media used.[119]

278. Article 2.5 of the LCP stipulates that the bylaws and deontological rules of Professional Colleges regarding commercial communications can only contain provisions aimed at requiring their members to conduct themselves in relation to commercial communications in accordance with the law, such that Colleges cannot demand of their members actions other than those expressly envisaged in the applicable laws. The laws regulating aspects of advertising are the General Advertising Act 34/1988 of 11 November 1988, the Unfair Competition Act 3/1991 of 10 January 1991 and the special laws regulating certain advertising activities, as set down in the article 1 of the General Advertising Act. Therefore, all College rules must necessarily be in conformity with said laws.

279. We nevertheless frequently find bylaw provisions and other College rules, including deontological codes, advertising regulations and codes of conduct, inter alia, that have not been adapted to the terms of the LCP. Those provisions may restrict the capacity of professionals to use advertising and commercial communications to compete and can be challenged by other Colleges, the members themselves, professionals interested in joining the Colleges and consumers and users of the services, in addition to being subject to prosecution under the Competition Act.

280. Article 73.l of the General Bylaws of the Spanish Collegial Organisation of Veterinarians prohibits advertising by members that infringes the provisions of the applicable laws or the resolutions of the Collegial Organisation of Veterinarians on advertising. Now, according to the LCP, commercial communications must conform to the law and never to the rules of the collegial organisation if the latter are not in full agreement with the law. These provisions are supplemented by the Deontological Code of the Profession of Veterinarians, which in article 31.5 mandates that advertising in the communications media must be confined to a series of

[119] The resolution handed down in case 471/99 Odontólogos Córdoba was appealed before the National Court by both the General Council of the Official Colleges of Odontologists and Stomatologists of Spain and by the Official College of Odontologists and Stomatologists of Córdoba. The former appeal was dismissed in its totality (judgment of 22 October 2003), and the latter was upheld in part by the National Court, as regards the declarations and sanctions contained in the competition tribunal's resolution, with the consequent reduction of the fine levied by the TDC (judgment of 30 October 2003).

specifically defined on a list,[120] plus any other mention not contrary to the prevailing laws on advertising. Determining the obligatory content of media advertising may be restrictive of competition because it implies harmonisation and unification of the advertising done by professionals, thereby preventing any commercial differentiation between them so as to narrow customer choice and hinder the entry of new professionals in the market.

281. The Notary Regulation[121] provides in article 327.2 that the Executive Boards of Colleges have the function of regulating advertising within their respective geographical ambits. Given that the Law of Notaries of 28 May 1862 makes no reference to advertising or to commercial communications, these matters are governed by the provisions of the General Advertising Act and of the Unfair Competition Act. Therefore, this regulatory task must be strictly in line with the applicable legal provisions and any actions that restricts competition may be punishable.

282. However, it is more common to find provisions with possibly restrictive implications for competition in other College rules than in the General Bylaws.

283. For example, the General Regulation on Internal Organisation of the Official College of Telecommunications Engineers lays down that advertising is subject to the rules of the College and to the laws on advertising that are promulgated. This would permit a subsequent restrictive definition of advertising limits in the internal rules.

284. In other codes the restrictions on advertising are expressed more openly. The Deontological Code of Court Procurators, in article 8, provides that commercial communications are unregulated, but that they must conform to the General Advertising Act, to the Unfair Competition Act and to a series of considerations that are not reflected in any other law, such as, for example, that such communications can only be informative in nature and not persuasive. The Regulation on Advertising of the Court Procurators of Spain likewise provides that advertising cannot express persuasive content or make any reference to the price or costs of the professional services, inter alia.

285. Similarly to the above, the Deontological Code of Lawyers includes potentially anti-competitive restrictions in articles 7 and 8. Article 7 says that lawyers must conform in advertising matters to the provisions, inter alia, of the deontological code of the profession, as well as to the rules dictated by the Regional Council and the College for the geographical area

[120] Specifically: i) name of the establishment, ii) name of the veterinarian-proprietor, ii) logotype, iv) address and telephone number, v) days and hours open for consultation, vi) services provided in the establishment, vii) academic degree and other authorised qualifications recognised under the prevailing laws and regulations, including EU rules, viii) any other reference not contrary to the prevailing laws on advertising.

[121] Approved by the Decree of 2 June 1944.

where they practice. These provisions are clearly contrary to the LCP and can give rise to anti-competitive conducts. That same article 7 goes on to define as contrary to the profession's deontological code any and all advertising that contains direct or indirect references to clients of the advertising lawyer, to cases the lawyer has handled, to successes or the results in those cases, or comparisons. This implies a de facto limitation of a lawyer's capacity to differentiate his or her services with respect to other lawyers. Limiting comparative advertising beyond the terms of the law implies restricting the capacity of lawyers to compete, especially of new entrants and of the more innovative lawyers. Article 8 specifies that advertising procedures which do not conform to the deontological code or the profession or to the rest the College rules will be considered unfair competition, even though the concept of “unfair competition” cannot be defined more broadly than provided in the current Unfair Competition Act 3/1991 of 10 January 1991.

286. Another deontological code using similar terms to regulate advertising is the Spanish Code of Dental Ethics and Deontology. Article 49.2 asserts that advertising must conform both in form and in content to the guidelines developed by the collegial organisation in this respect. And article 51 then goes on to establish that advertising done in plaques, advertisements, letterhead of stationery or prescriptions, annual listings, guides, professional directories or any other means of dissemination will be written in a discreet manner in all aspects and always in accordance with the ethical-deontological norms established by the collegial organisation.

287. One last example of incorrect practices is the Regulation governing the deontological rules on professional action of the General Council of Technical Architecture of Spain, article 10.9 of which establishes that members will abstain, when publicising their services, from engaging in “price-based advertising” that induces consumers to believe that the fees are lower than those of the other members, or from establishing below-cost fees for a given time period.

III.2.2.3 Restrictions on subcontracting personnel to capture clients

288. A fundamental aspect in rendering a service is the professional's capacity to attract clientele, given that the success of the activity will in large part depend on this. In this sense, professionals should be free to choose the means they consider most appropriate for building up their customer base, including engaging specialised staff. In addition, this is a complementary means of promoting the professional activity to, for example, that of advertising, as it allows professionals to pursue the strategy the think best fits each specific case.

289. But diverse general bylaws and deontological codes are seen that restrict this free entrepreneurial initiative with no apparent justification from the standpoint of effective competition in the market.

290. For example, the General Bylaws of the Collegial Medical Organisation and of the General Council of Official Colleges of Medical Doctors provide in article 44.e that all members must abstain from employing persons to recruit clients. The same example is seen in article 19.f of the General Bylaws of Odontologists and Stomatologists and of their General Council.[122]

291. Provisions of this kind can also be found in deontological codes, such as those for court procurators (article 9), architects (art. 18) and junior architects and master builders (article 5.6), which prohibit said professionals from obtaining work by means of commissions granted to third parties.

292. The actions of collegial organisations aimed at constraining the contracting of personnel to capture clients or at adopting other commercial policies with this objective will be considered contrary to the Competition Act and hence liable for sanction.

III.2.2.4 Restrictions on corporate exercise of the profession

293. The right to engage in free enterprise is set out in article 38 of the Spanish Constitution as a fundamental right of citizens. From an economic perspective, a company is a fundamental pillar of the market economy, due both to the pivotal role played by companies and employers in the efficient allocation of economic resources and to their potential for satisfying the needs and desires of consumers, while limiting the economic risk to which natural persons are exposed, as well as to their capacity to create jobs.

294. Due to the growing complexity of professional activities and to the need to maximise the economic and social benefits reaped from specialisation and division of labour, in recent years professions are increasingly pursued via professional companies.

295. Therefore, any restriction on pursuing a profession in corporate form that does not meet the test of necessity, proportionality and least distortion is capable of limiting or restricting effective competition in the market and may be challenged by other Colleges, by the members themselves, by professionals interested in joining the College or consumers, and, if applicable, may be sanctionable under the Competition Act.

296. The CNC has had occasion in the past to analyse restrictions on corporate exercise of professions, such as seen in its resolution in case S/0189/09, Consejo Arquitectos Técnicos. According to that decision, the General Council of Official Colleges of Master Builders and Junior Architects had been involved in drawing up a Model Regulation for a Collegial Register of Professional Companies with the intention of recommending it to the Colleges that belong to the Council. This constituted a violation of the

[122] Royal Decree 2828/1998 of 23 December 1998.

Competition Act because the model includes articles that were without justification hindering or preventing services from being provided by professional companies, by imposing discriminatory and excessive requirements compared to those applied to individual professionals. The case was concluded with a termination by commitments in which the Council undertook to eliminate or amend the contested articles.

297. Since 2007 the pursuit of professional activities in the form of a "professional company" (sociedad profesional) is regulated by Act 2/2007 of 15 March 2007 on Professional Companies,[123] article 1 of which provides that *"companies whose registered corporate object is the common exercise of a professional activity must be incorporated as professional companies on the terms of this Act"*. That law, amongst other matters, stipulates that professional companies are governed by the provisions of the Act and subsidiarily by the rules regulating the type of corporate form adopted, and therefore does not allow companies of this kind to be regulated by any other type of law or regulation. It allows professional companies to exercise several professional activities simultaneously unless their combined pursuit is captured by a statutory law prohibition on conflicts of interest or incompatibilities.

298. The aforesaid provisions of the Law of Professional Companies have been strengthened by the new article 2.6 of the LCP introduced by the Omnibus Law, which provides that: "*corporate exercise of the profession will be governed by the applicable legal provisions. In no event may Professional Colleges nor their member organisations directly or through their bylaws or other internal rules establish restrictions on the exercise of the profession in corporate form*".

299. Despite the provisions of the Law of Professional Companies and the prohibitions laid down in the LCP, there are diverse general bylaws which still regulate corporate exercise of a profession on terms that are more restrictive of competition and which should therefore be understood to have been repealed. College conducts that have the effect of restricting corporate exercise contrary to the terms of article 2.6 of the LCP and those which condition pursuit of the profession via professional companies, which under Act 2/2007 are given full capacity to operate as professionals, have no basis in law and may therefore be prosecuted by competition authorities.

[123] The Statement of Purpose of the Professional Companies Act indicates that the professional company referred to by said statute is *"that which is constituted as subjective centre for allocation of the legal transaction established with the client or user, attributing thereto the rights and obligations that arise therefrom and in which, moreover, the standard actions of the professional activity in question are carried on or executed directly under the registered name of the firm. Therefore, not included within the scope of this Act are, partnerships to share resources (sociedades de medios)* (…) *partnerships for communication of profits (sociedades de comunicación de ganancias); and intermediary partnerships (sociedades de intermediación)"* .

300. The General Bylaws of Spanish Lawyers lay down numerous precepts contrary to the regulation of professional companies in articles 28 and 29, which may constitute restrictions on corporate exercise of the profession. The most striking ones are mentioned below:

- Article 28.1 does not mention that article 2.6 of the LCP provides that corporate exercise of the profession will be governed by the applicable legal provisions, nor that article 1.3 of the Law of Professional Companies establishes that said firms will be regulated by the terms of that law and subsidiarily by the rules governing the corporate form adopted.
- Article 28.2 provides that the grouping's sole purpose must be the professional practice of law and that both the capital and the financial and voting rights must be attributed exclusively to the member lawyers. Note in this respect that multidisciplinary practice allows economies of scale and scope to be attained, while making it easier to offer a comprehensive set of complementary services, which will allow new business lines, foster innovation and, ultimately, benefit the client. In addition, the obligation that all of the capital be held by the member lawyers limits the creation of these companies and the entry into their shareholder base of, for example, institutional investors specialised in businesses of this kind, thereby restricting the sector's growth potential.
- Article 29.1 stipulates conditions for multidisciplinary exercise that go beyond those laid down in the Law of Professional Companies in article 3, which declares that professional companies may exercise several professional activities, provided their pursuit has not been declared incompatible by provision of statute law. Concretely, it provides that lawyers may partner with other liberal professionals that are not incompatible on a multidisciplinary collaboration basis. These restraints, as already mentioned, prevent, amongst other things, the attainment of greater economies of scale and scope and curtail innovation. Furthermore, article 29.3 establishes that the member lawyers must withdraw when any of the members commits a breach of prohibitions, incompatibility rules or deontological provisions proper to the profession of lawyers. This seems excessive as such withdrawal will entail significant harm to the professionals who are not responsible for the actions of the members in breach.
- Article 28.3 sets down aspects relating to entry in the Special Registry competent for the College where the company's registered office is located. This is contrary to the Law of Professional Companies.[124]

[124] In fact, the resolution in case S/0189/09, Consejo Arquitectos Técnicos, dealt precisely with inappropriate use of those registries.

301. Another example is found in the General Bylaws of the Official Colleges of Architects and their Higher Council, article 34 of which provides that the Colleges will set up registers which are not necessarily regulated according to the terms of the Law of Professional Companies and in which there may only be entered the companies that meet the conditions of legal and deontological propriety stipulated by the Higher Council of Colleges. This can give rise to the establishment of restrictions and limitations on effective competition in the market by the competent Colleges.

302. A third example is seen in the Bylaws of Administrative Managers, in which article 7 establishes various provisions on participation in companies that carry on said activity that may be restrictive of competition and neither conform to the current wording of the LCP nor to that of the Law of Professional Companies:

- Limitations are set on the participation of natural persons in those companies.
- When non-member professionals participate, whether as administrative managers or other profession, their participation cannot exceed 25%, unless they are spouses or family relations up to the third degree of the partner administrative manager.
- Authorisation from the College of membership is required and is subject, amongst other criteria, to the condition that all administrative managers who participate in the company be on record with the relevant College as practicing professionals, or that the liability of the partners for any professional action is individual in all cases, with the company bearing joint and several liability, and that the right to occupy the premises where the activity is to be carried on rests with all or some of the partners who are administrative managers or with the company itself.

303. These requirements are excessive from the standpoint of antitrust law, do not conform to the terms of the Law of Professional Companies and are expressly contrary to article 2.6 of the LCP.

304. Lastly, it bears emphasis that collegial restrictions on free exercise of the profession are found not only in the general bylaws, but are also dispersed in the rest of the rules governing Colleges and in the deontological codes of the professions. By way of example, the Deontological Code of the Profession of Veterinarians, provides in article 28.2 that veterinarian companies must have the exercise of the profession of veterinarian as their exclusive registered corporate object and must be exclusively composed of practicing veterinarians.

III.2.2.5 Rules on substitution of professionals

305. The rules on substitution of professionals are currently regulated in the deontological codes although they are also found in general bylaws that harbour provisions that restrict competition, ostensibly on the grounds of

"gentlemanliness" (*sic*) in substitutions of professionals. Indeed, from the standpoint of market efficiency, the ideal would be for such substitutions to be able to be made when requested by the client, in the quickest manner and at the least cost to the client.

306. According to article 5.i of the LCP, Professional Colleges have the function of regulating the professional activity of their members within their area of competence. But the type of restrictions discussed in this section go clearly beyond that collegial function and can imply violations of the Competition Act.

307. Article 73 of the General Bylaws of the Official College of Telecommunications Engineers[125] defines as a minor infringement the taking charge of professional work commissioned to a fellow professional without giving prior notice to the latter, who in no event may deny the engagement of the substitute. The requirement to request clearance from the replaced professional in writing is seen with relative frequency in general bylaws and can hinder or delay the substitution. It may also reduce the incentive for professionals to try to offer their services to customers already captured by fellow professionals, because since the latter must be informed they can try to hinder the migration of their more profitable clients, such that it is more likely that the clients who accept the offers belong to the group of least profitable clients. All of this can reduce the intensity with which professionals offer their services to new clients.

308. According to the General Bylaws of Spanish Lawyers (article 26) before the substitution is effectively implemented, the substitute must ask for clearance from the replaced professional in writing and the latter cannot deny it. In addition, the text specifies that the substitute has the duty to collaborate diligently in managing the outstanding fees pending payment to the replaced lawyer, which adds more costs to the substitution and hence services as a disincentive. It should also be noted that there are legal mechanisms in commercial law for responding to non-payment of fees, so no need is seen for measures of this kind which may in practice entail strong restrictions on competition.

309. Another example can be seen in the General Bylaws of the Court Procurators of Spain, which in article 30.1 provided that the procurator who acquiesced to representing the client in a case in which a fellow procurator is acting or has acted at the same judicial instance had to pay the fees, expenses and rights accrued at the time of the substitution, which notably limited the possibilities of substitutions amongst these professionals. This practice was addressed by the CNC in case S/0127/09, Procuradores, which was concluded with the procurators

[125] Royal Decree 261/2002 of 8 March 2002.

agreeing to amend the general bylaws of the profession to avoid situations of this kind.[126]

310. The deontological code for the nursing profession stipulates in article 68 that nurses may not take charge of a client being cared for by a professional colleague without the prior consent of the latter, except where there is justified cause and in emergencies. This College rule is improper and even goes beyond the lawyer clearances discussed above, because in the case of nurses, for example, the replaced nurse may decline to consent to the substitution.

311. The case of agronomists (including agricultural engineers) is similar, as their professional deontological rules provided in section 17 say that an agronomist can only act in a case in which a fellow agronomist is working with the knowledge and permission of the latter.

312. The Deontological Code of the Official College of Geologists establishes in article 8.7 that the substitutes must make their best efforts to ensure that the replaced colleagues receive their fees and other items to which they are professionally entitled.

313. Lastly, the resolution handed down in case S/0203/09, COAPI, brought against the Official College of Industrial Property Rights Agents (COAPI) for alleged restriction on advertising and competition between industrial property right agents after the COAPI had brought disciplinary proceedings against a member who had offered services to clients of other members. The case was also resolved with a termination by commitments in which COAPI undertook to put an end to the disciplinary actions taken against the member and modify the wording of its Code of conduct.

III.2.2.6 Physical and timing restrictions on the freedom to provide services

314. Some Colleges introduce bylaw provisions that restrict the free exercise of the profession by imposing limits on the time and location where the services can be provided, for example, the possible locations of offices and days and hours in which the profession may be practiced. Such rules narrow supply and hence have potentially anti-competitive effects which may make them contrary to competition law.

315. Article 11.1.g of the Umbrella Law provides that *"the regulations governing access to or exercise of a service activity cannot make said access or exercise subject to: a) Quantitative or geographical restrictions and, specifically, limits based on population or on a minimum difference between service providers. Economic considerations, such as ensuring the economic viability of certain providers, cannot be relied upon to justify quantitative or geographical restrictions*". Exceptions are only allowed in situations where there is an overriding reason relating to the public interest

[126] See also the resolution of the Competition Tribunal of the Community of Madrid in case 01/2010, Procuradores Madrid/Régimen de Sustitución (Madrid Court Procurators/Rules on Substitution), which was also concluded by a termination by commitments.

according to that law and provided the measure is proportionate and not discriminatory. Furthermore, the grounds for the exception must be set out in the regulation approving it and be notified to the European Commission.

316. For example, article 42 of the Notary Regulations provides that there can be no more than one notary office in the same building, unless authorised by the Governing Board. And even more curious, unnecessary and restrictive is that a notary office cannot be established in a building that has housed another notary office in the last three years.

III.2.2.7 Other practices relating to the collegial function of regulating the profession

317. The abundant sanctioning precedents of the CNC shows that there are conducts that restrict competition which have not been mentioned so far. Some of them might appear, mistakenly, to be covered by the Colleges' function of regulating the professional activity of their members established in article 5.i LCP. Of these anti-competitive practices, special attention needs to be called to market-sharing agreements.

318. Arrangements between professionals to share markets can be coordinated through the competent Professional College. One example is found in the resolution in case 639/08, Colegio Farmacéuticos Castilla-La Mancha, in which the CNC Council declared there was an anti-competitive conduct prohibited by article 1 LDC carried on by the regional public healthcare services of Castilla-La Mancha (SESCAM) and the Council of the Official Colleges of Pharmacists of Castilla-La Mancha. The conduct involved arranging for the Official Colleges of Pharmacists of Castilla-La Mancha to establish amongst the pharmacies who so desired a system of rotating assignment for the direct supply of pharmaceutical benefits included in the National Health System to public and private healthcare centres.[127]

319. Another type of arrangement that serves as an example of these constraints on competition are arrangements for rotating assignment and compensatory mechanisms amongst notaries, already mentioned in the section on regulated fees.

III.2.3 College certifications (visados)

320. In its original wording of 1974, the LCP provided in article 5 that Professional Colleges had the function of examining and certifying the professional work of their members when so stipulated in the relevant General Bylaws. But nothing was said about the nature, purpose or content of these controversial project certifications, known as "visados", thereby leaving it to the discretion of the Professional Colleges

[127] The resolution in case 639/08, Colegio Farmacéuticos Castilla-La Mancha, has not been appealed.

themselves. Only in 1997 was the LCP amended to specify that the examination and certifications could not include fees or other contract terms and conditions, which had to be left to the parties. It was not until the reform of the LCP introduced by the Omnibus Law, in 2009, that the content of College certifications was regulated in statutory law.

321. At present, these College certifications are a means of formal control of the activity of members and cannot take in a technical control of the standard elements of the professional work. Even though there is no such mechanism in the leading economies of the European Union, in Spain the mandatory "*visado*" system has been maintained for a limited number of professional activities.

322. Until the 1997 reform of the LCP the certifications would also be used for certain anti-competitive purposes, because they made it easier to track fees and other commercial conditions. In addition, given that they were necessary for executing the work, the certifications were used to make sure the work did not continue until the professional had been paid his or her fees, as this was carried on at that time through the College. In this way the certifications helped ensure compliance with College arrangements that restricted competition.

323. The resolution handed down in case 372/96, Arquitectos de Madrid, found the Official College of Architects of Madrid (COAM) guilty of setting the amount budgeted for a construction project designed by a member and made issuance of the certification conditional on acceptance of those conditions.[128] So in that case the certification was used as a means of setting prices.

324. Another example of the many TDC rulings against these project certifications is case 397/97, Aparejadores de Madrid, in which the College of Master Builders of Madrid was fined for its practice of denying certifications until the customer posted the requisite bond guaranteeing payment of the fees to a previous professional.

325. Despite the 1997 reform of the LCP, various Colleges continue using project certifications to curtail competition. For example, the resolution in case 629/07, Colegio de Arquitectos de Huelva, fined said College of Architects for imposing on its members, under the threat of not certifying their projects, the “Method for simplified calculation of budget estimates for material execution of different types of works”, which the CNC regarded as having the equivalent effect to a collective pricing recommendation.

326. Another resolution in this interim period between the 1997 and the 2009 reforms of the LCP was issued in case S/0002/07, Consejo Superior de Arquitectos de España (Higher Council of Architects of Spain). In that case

[128] The COAM appealed the resolution before the National Court, which rejected the appeal, and this decision was the object of an application to the Supreme Court to set aside the rejection. The application was dismissed by the high court.

a termination by commitments was established with that Higher Council for having adopted a decision requiring that in construction projects for which exclusive competence rests with architects, the safety and health studies had to be signed by a full architect or a junior architect (*arquitecto técnico*), with certification to be denied if those studies were signed by anyone else. The termination by commitments provided that the safety and health studies could be signed by any competent technical expert in accordance with his or her competences and specialities.

327. A more recent resolution was handed down by the Defence of Competition Council of Andalusia in case S/02/2012 Consejo Andaluz de Colegios Oficiales de Arquitectos (Council of the Official Colleges of Architects of Andalusia: CACOA), which fined CACOA for approving on 9 June 2008 an anti-competitive measure that prevented other competent technical professionals from drawing up partial project plans which they were legally entitled to design.

328. The "visado" certification mechanism needed specific regulation in the LCP itself and it was precisely the Omnibus Law that established its present regulation that clearly improved the previous regulatory framework from the standpoint of competition. On the one hand, it introduced a new article 13 on collegial certifications, which provides that Colleges will certify professional projects when so requested by the client or when a Royal Decree so mandates and this is justified because there is a direct causal relation between the work of the professional and implications for the physical wellbeing and safety of persons, and because the certification mechanism is the most proportionate means of control. It also specified that the purpose of the certification is to verify the identity and authorisation of the signing professional, and the formal appropriateness and completeness of the documentation for the professional work according to the laws and regulations applicable to the work in question. Therefore, the safety control function was limited to checking these specific points. Lastly, it established that where certifications are mandatory their cost cannot be abusive or discriminatory.

329. With the approval of Royal Decree 1000/2010 of 5 August 2010 on Mandatory Collegial Certifications, the number of mandatory certifications was limited to a total of nine, down from the approximately 80 diverse activities previously subject to College certifications. Specifically, article 2 maintained three certifications in relation to building construction, two for building implosions and demolitions, three for manufacture and sale of explosives, cartridges and fireworks, and one for mining resources. It also stipulated, correctly, that the professional may choose the College which he or she considers most appropriate from amongst those competent for the subject matter, as well as the College he or she regards as geographically most appropriate within the permitted limits, thereby introducing greater competition, both inter-collegial (between Colleges for

different professions) and intra-collegial (between Colleges of the same profession).

330. Even though the national reform of College certifications (article 13 LCP) and the approval of its implementing regulations are enormously propitious for favouring competition and, in the view of the CNC, are steps in the right direction, potential competition problems are posed, on the one hand, by the failure of Colleges to adapt their rules or activity to the new regulation on certifications and, on the other, by the instruments being deployed by certain government administrations as an alternative to College certifications in order to perform the functions that now rest with them.

331. From the standpoint of the General Bylaws for the different professions, it should be emphasised that the adaptation to the new rules on Colleges has been scarce thus far and that the Colleges have a special obligation, as corporations under public law, to incorporate the prevailing law into their regulations with the utmost swiftness.

332. Thus, amongst the numerous examples that could be cited, the General Bylaws of the Official Colleges of Architects and their Higher Council maintain diverse provisions with a potential anti-competitive impact: first, article 7.3.e stipulates that bylaw provisions may establish the type of work that requires mandatory certifications, while article 27.e specifies that the members have the duty of presenting all professional documents that they authorise with their signature for "visado" certification; both of these provisions are contrary to article 13 of the LCP and to Royal Decree 1000/2010 on Mandatory Certifications and may be anti-competitive.

333. Another example of restrictions is the General Bylaws of the Official Colleges of Industrial Engineers and of their General Council.[129] Article 6.1 states that the Colleges will define the administrative content of the "*visado*", without mentioning that those certifications must conform to the provisions of the LCP and its implementing regulations. Also, article 6.3 stipulates that the documents signed by an industrial engineer and which are to have administrative effects must be certified by the Official College for the territory of the administration in question. This article raises several problems: i) it only obliges industrial engineers when the work could at times be certified by another professional; ii) the certification obligation only exists for the types of professional work specifically set out in RD 1000/2010, independently of their effects; and iii) it means the certification cannot be done in any College.

334. The General Bylaws of the Spanish Collegial Organisation of Veterinarians provides in article 75.1 that the reports, plans and opinions issued by the members must be submitted to the collegial certification procedure. These certification obligations are contrary to Royal Decree 1000/2010 and may be considered an unjustified restriction of competition. The establishment

[129] Royal Decree 1332/2000 of 7 July 2000.

of this obligation is unlawful and, not only does it imply administrative costs for the professionals involved and their clients, it may also have the effect of delaying or impeding the performance of the professional work of veterinarians, with the consequent harm to them and to their clients. Therefore, a certification obligation that goes beyond what is provided in article 2 of Royal Decree 1000/2010 may entail a violation of competition law and be contrary to the regulations on Professional Colleges.

335. So, even though the new legal rules on "visado" certifications are more pro-competitive than the previous ones, anti-competitive restraints continue to arise in this area of collegial activity. Examples are:

- **Agreements between different Colleges on how and how much to charge for the certification:** given the freedom currently enjoyed by professionals for choosing the College in which to have their professional work certified, price-fixing and other types of restrictions of competition may continue being generated.[130]
- **Expanding the scope of the type of work subject to mandatory certifications and requiring notification of uncertified work**: these practices are contrary to the current legal regulation of certifications. To minimise their occurrence, Professional Colleges must explicitly adapt their rules to the current regulations on collegial certifications to avoid creating confusing on this matter.
- **Making eligibility for professional insurance or other services provided by the College conditional on collegial certifications**: Professional Colleges cannot tie eligibility for professional insurance or for other services they provide to an obligation that members must have their work certified by the College in question unless there is an objective justification for doing so. These conducts curtail competition and can be sanctioned by competition authorities, as stated in the resolution in case SAN 04/2009, Ingenieros Industriales, of the Competition Tribunal of the Valencian Community, which held that the College's rule making the submission of work to certification a mandatory condition to be included on the list of members who offer their expert appraisal services was a restriction of competition.

<u>Alternative instruments to collegial “visado” certification now implemented</u>

336. The elimination of the certification obligation for a great variety of projects means that government administrations that need to verify the identity and qualifications of the professional signing the designs and plans and to make certain documentary verifications now have to use other instruments

[130] For example, if the Colleges decide that certifications requested in Colleges other than the one for the geographical territory in question are to be denied or delayed in a discriminatory fashion, they may be infringing competition law.

for these purposes. Those instruments run from direct verification by the administration itself to the establishment of accords with Professional Colleges or the delegation of functions to third parties.

337. In January 2011 case S/0235/10, FEMP-Ingenieros Superiores Industriales, Ingenieros Técnicos Industriales y Arquitectos Técnicos, was opened after a complaint was filed against the signing of an agreement and collective recommendations between the Spanish Federation of Municipalities (FEMP) and different Professional Colleges to promote the implementation of certifications of technical suitability in municipal governments. These arrangements curbed competition in the provision of those services, and in other areas, by reserving activities for certain Colleges. The case was concluded by the CNC with a termination by commitments on 28 December 2011 after the FEMP undertook to rescind the accord and to refrain from signing any such agreements in the future.

338. Given that the different instruments have distinct implications for effective competition in the market, in general terms government agencies must choose the most appropriate instrument based on an analysis of necessity, proportionality and least distortion.

339. A recent example of the possible issues that can arise was seen in article 46 of Law 9/2011 of 29 December 2011 on the promotion of economic activity in Catalonia. That provision, which amended Law 20/2009 of 4 December 2009 on environmental prevention and control in Catalonia, stipulates that the Professional Colleges competent by reason of subject matter can perform documentary verification and examination functions prior to those exercised by the Administration to certify that the technical data presented to the Administration conform to those required for the activity referred to by the authorisation or for the licence and to the quality standards of the technical documents submitted, adding that agreements in this respect may be established between the Administration and the competent Professional Colleges. It should be noted that only if such agreements exist may the Professional Colleges carry on those activities. Furthermore, it bears emphasis that in the great majority of these cases document verification systems exist that would be preferable to the de facto one of establishing arrangements that are very similar to the former College "visado" certifications.

340. In relation to government outsourcing of document examination functions, note that this should only be done when it is truly demonstrated to be necessary. And, when it is necessary, the authorities should choose the option most favourable to competition. For example, in principle, an authorisation scheme that sets down objective criteria for technical suitability that must be fulfilled by the entities that take on these tasks would be preferable to the signing of collaboration agreements between government agencies and one or a small group of Professional Colleges.

341. Cooperation agreements, which are normally not awarded through competitive procedures, can favour the establishment of reservations of activity for certain professions or territorial Colleges and hence go against the principle of single College membership. Therefore, the agreements must not be an instrument to discriminate between Colleges or other entities and should be open to all operators who meet certain minimum objective requirements for being included based on transparent criteria and non-discriminatory access.

342. In addition, the competent authorities must ensure that, when agreements are signed, the citizens will still have the possibility of approaching the Administration directly within the framework of the procedure involved in each case, with no impairment to their rights or expectations.

343. In any event, it should be noted that the use of collaboration agreements as an instrument for document examination and accreditation bears numerous similarities to the previous system of mandatory collegial certifications, so that in practical terms it may imply the maintenance of a system which was done away with in the new wording of the LCP and in its implementing regulations, Royal Decree 1000/2010 on collegial certification obligations, due to its anti-competitive effects and high monetary and administrative costs.

344. For all of these reasons, we remind public authorities of the need to apply the test of necessity, proportionality and least distortion to matters of College certifications and of the accreditation and technical competence of professionals.

IV. CONCLUSIONS

345. The liberalisation of professional services in Spain has gained great momentum in recent years, since the approval of the Services Directive (2006) and its transposition into Spanish law via the Umbrella Law (2009) and Omnibus Law (2009) . These reforms have marked a major advance in eliminating the traditional restrictions on access to and exercise of professions. At present, save for the College membership obligations that those reforms left pending, the national horizontal regulations may be regarded as an adequate framework for the functioning of competition in the market for professional services.[131]

346. However, the reform of the basic national framework of a horizontal nature governing professional services must not become a merely aesthetic reform and has to be embraced and internalised by the Autonomous Communities and, especially, by the leading players on this stage: the Professional Colleges, whose internal rules are in many cases not compatible with the new national legislation. The present moment brings a unique opportunity that must not be passed up to liberalise and modernise the pursuit of professional activities.

347. In this connection, the National Competition Commission (CNC) has detected three major fronts where action is required, which have been described profusely over the course of this report, and they are addressed by the recommendations set out in the following section. There follows a description of those three key areas by order of priority.

348. First, given the special responsibility that derives from their status as corporations under public law, Professional Colleges must truly embrace the fact that the reform involves a structural change which demands that they deploy all means at their disposal to ensure that the professional activities for which they are responsible are carried on in a framework of effective competition. It is crucial that their bylaws, deontological codes and other internal rules governing their function be adapted to this new framework and put an end to all restrictions on competition and all other elements which, though they do not directly constitute a restriction, serve to weaken true competition between professionals. This report contains a succinct summary of the experience accumulated by the CNC in relation to obstacles to effective competition in the provision of professional services, and may in this sense be taken as a guide for modernisation.

[131] In fact, the Communication of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "*Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive*" (COM (2011) 20 final) gives a very positive assessment of each of the reforms enacted in the legislation on Professional Colleges in Spain.

349. Second, regional governments cannot maintain regulatory frameworks on the pursuit of professional activities that are obsolete and incompatible with the basic horizontal rules that now prevail at the national level. The reform of professional services throughout the entire country must be real, not just cosmetic or merely formal, all the more given that regulatory dispersion is a major constraint on effective competition and impediment for the market unity needed if Spain is to get back on the road to growth. This report seeks to identify with concrete cases the Autonomous Communities responsible for this situation.

350. Third, as already indicated, the successive legislative reforms transposing the Services Directive into the national horizontal legislative framework have created a much more competitive environment in the exercise of professional activities than the one that traditionally existed in the European Union and in Spain. Although the European Commission has singled out Spain as one of the Member States with a better transposition of the Services Directive, this cannot justify complacent acceptance of the current situation, as there remains room for further strengthening of a truly competitive environment. The reform left pending the determination of which professions are to be subject to mandatory membership requirements, an issue of major importance because it has implications, not just for promoting a more unfettered and competitive environment in the exercise of professions, but also for the achievement of a single market throughout the entire country. The CNC must warn in this regard that establishing membership in a Professional College as a mandatory condition for exercising the profession constitutes a strong restriction of competition and, as such, can only be maintained where it is strictly necessary and proportionate and provided no other less restrictive means are available for achieving the objectives pursued.

V. RECOMMENDATIONS

One. Professional Colleges should review their internal rules and eliminate and abstain from creating barriers to entry in the profession

All collegial organisations are urged to review their internal rules (bylaws, deontological codes, internal regulations and other norms governing their operation) to bring them into line with the new regulatory framework and avoid elements that may restrict competition in the market by limiting access to exercise of their professional activities.

There follows a summary of the most important barriers to access that still remain in place in internal College rules, and which are analysed in detailed in section III.1 of this report:

1. Provisions or measures that oblige or cause a professional to join a College in order to be able to exercise a professional activity
- **Mandatory collegial membership as a condition for practicing the profession**, unless established by law. - **Designation of the Professional College as exclusive institutional representative for the profession**, if membership in the College has not been established as a binding condition for exercising the profession by a provision of statutory law. - **Exclusivity in the use of a given name for the profession for professionals who are members of the College**, when this is not established in a law and when College membership has not been stipulated as mandatory by a provision of statutory law. - Discriminating between professionals in relation to **inclusion on lists of expert witnesses, receivers in insolvency proceedings, rotating assignments and pro bono legal work and similar lists**, or subjecting eligibility for those lists to requirements not laid down by the relevant legislation, such as College membership, taking courses, accreditation of certain experience, cumulative time as College member or non-inclusion on other lists. - The **use of the collegial functions of regulating exercise of the profession and of avoiding unauthorised practice of a profession** to impose restrictions or limitations on competition.

2. Provisions or measures that hinder a professional from enrolling in the College, where membership is necessary for exercising the profession or for being able to compete on a level playing field with other member professionals
- **Excessive or discriminatory requirements for the professionals to be enrolled in the College**. - **Conditions other than those established by law that require that a profession be exercised in exclusivity** or that limit the combined exercise of two or more professions. - **College enrolment charges and other mandatory payments** for being able to practice the profession on equal terms with other professionals **at discriminatory or excessive prices**. - The **obligation to post depositsbonds** to be able to exercise the profession other than those provided for by law. - The requirement **that certain services needed for exercising a profession be contracted with the Professional College**, or designating the providers of those services on a binding basis for members.

3. Provisions or measures that hinder professionals from providing their services in territories other than the one where they operate normally or primarily, on an occasional or permanent basis
- **The obligation that professionals be enrolled in the College for a given territory in order to be able to provide their services in that territory**, when they are already members in the home territory where their sole or principal place of business is located or when College membership is not mandatory for exercising the profession in question in that home territory. - Obligations to **notify the Professional College in order to be able to exercise in the territory covered** by that College. - **Lack of transparency in internal rules of importance for exercising the profession**, in general or in a given district. In particular, all internal collegial rules (bylaws, deontological codes, internal regulations and similar norms) and all other resolutions and decisions of the College's governing bodies that may affect the pursuit of the profession in a given territory must be public and easily and immediately accessible, free of charge, for member and non-member professionals on equal terms, and must in no event require submitting a written or oral request to the College.

Two. Professional Colleges must eliminate and abstain from creating restrictions on exercise of the profession

All collegial organisations are urged to review their internal rules (bylaws, deontological codes, internal regulations and other norms governing their operation) to bring them into line with the new regulatory framework and avoid elements that may restrict competition in the market by limiting commercial freedom in the professional activities.

There follows a summary of the most important barriers to exercise of professions that still remain in place in internal College rules, and which are analysed in detail in section III.2 of this report:

4. Provisions or measures that restrict the capacity of professionals to price their services independently
- Establishing **indicative fee scales or any other indication, recommendation, guideline, norm or rule regarding professional fees**, except for the indicative criteria prepared solely for purposes of assessing costs and swearing accounts of lawyers established by law, in which case the Professional Colleges must use all means at their disposal to avoid disclosure thereof to the public or to the members. - Obliging professionals to **centralise collections and payments for the professional services provided and disseminating information on collections and payments** other than on an aggregate basis, or of an excessively recently nature, or which in any other way facilitates monitoring of the commercial behaviour of the professionals on matters of fees and prices actually charged, without prejudice to obligations laid down by law.

5. Provisions or measures that restrict the capacity of professionals from independently deciding the manner in which they provide their professional services on non-price matters

- Using the College function of **preventing or policing unfair competition** amongst members to establish restrictions or limitations on competition and, in particular, defining instances of unfair competition not strictly and precisely confined to those stipulated by law or using sanctions for infringements of unfair competition laws to constrain competition between professionals.
- Establishing **restrictions or limitations on advertising** by professionals that go beyond those strictly stipulated in the applicable laws.
- Establishing **restrictions on the subcontracting of personnel** to capture clients that go beyond the exact verbatim terms of the applicable laws.
- Establishing **restrictions on any type of corporate exercise of the profession** beyond those strictly stipulated in the applicable laws.
- Establishing **rules on substitution of professionals that prohibit, hinder or delay said replacements requested by the client**, without prejudice to such exceptions as may be provided for in the applicable laws.
- **Limiting or restricting the location where or hours during which the professional services may be provided**.

6. Provisions or measures that favour the maintenance of repealed College privileges regarding certifications that entail or foster a decrease in the intensity of supplyside competition for those certifications or that subordinate grant of the certifications to additional conditions or requirements that are not justified

- **Difficulties, denials or certain conditions for attainment of certifications** by the professionals.
- Adopting **agreements between Colleges on how and how much to charge** for the certifications.
- **Expanding the scope of the type of work subject to mandatory certification** with respect to what is strictly specified by law.
- Establishing **prior notification obligations for uncertified work**.

Three. Transparency in complying with pro-competitive measures

Professional Colleges are recommended to accept the obligation to give an at least annual report to their members, and to the public on their websites, on the activities carried on to ensure compliance with the recommendations contained in this report, in order to allow the members to be informed and to conduct effective monitoring of the collegial activities relating to mandatory compliance with competition rules.

Four. Explicit adaptation of regional laws to the basic national legislation

The Autonomous Communities are urged to review their horizontal laws on professional services to ensure they are entirely consistent with the reforms enacted in the basic national laws by the Umbrella Law and the Omnibus Law.

The following table summarises the current state of adaptation of regional laws to the national regulatory framework:

Regions (in green, those that have reformed their laws on professional colleges after the Umbrella Law)	Greater control of mandatory membership	Greater control of incompatibilities	Elimination of obstacles to free movement of College members	Exclusive representation	Stronger submission to the Competition Act	Limits on College dues	Regulation of project approval certifications by Colleges	Express prohibition of scales of professional fees	Limitations on commercial communications of professionals	Corporate exercise of the profession	Protecting the interests of consumers and users
Basque Country	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Valencian Community	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Castilla-La Mancha	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Region of Murcia	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Canary Islands	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Extremadura	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Community of Madrid	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Castilla y León	YES	NO	YES	NO	NO	YES	YES	YES	NO	YES	NO
Galicia	NO	YES	NO	NO	NO	YES	NO	NO	YES	NO	YES
Navarre	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Aragón	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
Catalonia	NO	YES	NO	NO	NO	NO	NO	NO	NO	NO	YES
Balearic Isles	YES	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES
Andalusia	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	YES
La Rioja	NO	NO	YES	NO	NO	NO	YES	NO	NO	NO	NO
Cantabria	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES

Five. Single catalogue of professions subject to mandatory membership and justification for reservations of activity

The Government of Spain is recommended to establish and justify a single catalogue for the entire country of the professions that must be subject to mandatory College membership, in order to avoid the dispersion currently seen between different regions and the existence of unjustified membership requirements.

The CNC reminds authorities that requiring College membership in order to exercise a profession entails an important restriction of competition and an authorisation scheme which, according to the Umbrella Law, must be necessary, proportionate to that necessity and non-discriminatory. For these purposes, the following recommendations are made:

1. The necessity of College membership in a professional activity must be rigorously justified and based on reasons of overriding public interest different from those that underpin reservations of activity, in accordance with the Fourth transitional provision of the Umbrella Law.
2. Where reasons of public interest warrant requiring mandatory membership, that need must be weighed against the ensuing anti-competitive implications and an assessment should be made of whether there are alternatives that permit achieving the aims pursued by mandatory membership in a manner that distorts competition to a lesser degree.
3. Where there are public interest reasons that make mandatory membership necessary and proportionate, efforts must be made to ensure that College entry requirement are proportionate and non-discriminatory. In this regard, it is preferable that those requirements not be subordinated to the possession of specific educational qualifications, but rather that the professionals have the technical capacity deemed necessary, and that said competence can be demonstrated by any means that provides sufficient evidence, because requiring specific titles can promote the creation of artificial barriers and segment the exercise of professions in Spain.

Six. Where professional activities are maintained in which College membership is not mandatory, Professional Colleges should not be able to maintain privileges that generate distortions of effective competition

It is recommend to the Government of Spain and to the Autonomous Communities that the laws creating Professional Colleges, sector-specific laws on economic regulation and the bylaws governing professions:

a) Not grant Colleges functions of **exclusive institutional representation** of professions not subject to mandatory membership.

b) Not stipulate **exclusivity in the use of a name of a profession** when College membership is not mandatory, as this entails discrimination against non-member professionals and even prevents their access to certain areas of professional practice.

The Government of Spain is also recommended to **clarify the legislation on expert testimony in courts** to avoid self-interested interpretations of the conjunction of articles 340 and 341 of the Civil Procedure Act and of article 5.h of the Law on Professional Colleges that can be used to produce restrictions of competition. It is specifically recommended that:

1. Articles 340 and 341 of the Civil Procedure Act be amended to expressly set out the obligation of the courts to take into account the lists of judicial expert witnesses not submitted by Professional Colleges in those cases where College membership is not required for exercising the profession.

2. Article 5.h) of the Law on Professional Colleges be amended to expressly provide that, in professions not subject to mandatory membership in a given territory, the lists of expert witnesses compiled by the Colleges must allow member and non-member professionals to be included on the lists on equal terms.