On the edges of the market: the Court of justice of the European Union and information asymmetry in the regulated professions

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Introduction

Some characteristics of the regulated professions cast doubt on whether it is appropriate to apply competition rules to them. Unlike traditional activities, the professions contain a substantial personal aspect relating to the practitioner, who draws on years of training and experience in his field to provide his services. This characteristic, particularly the intellectual aspect, places these activities on the edges of the market, not far from the practice of an art. Competition between professionals focuses on quality, the personally-tailored relationship with clients and speed of execution. In contrast to traditional economic activities, relations between the professional and his client are marked by high information asymmetry. In this context, professional rules (for instance, advertising bans or tariff regulation) that go against EU competition rules can nonetheless help to prevent adverse selection and moral hazard phenomena, and work in favour of the public interest. At a time when economic justification of European law decisions has become very important, can the economic concept of information asymmetry be an argument, a means of legal challenge, actionable before the courts? Can it lead to moderation of the application of competition rules in the regulated professions? To answer these questions, we look specifically at case law issued by the Court of Justice. The first section deals with the gradual emergence of the concept of information asymmetry in the opinions issued by the Court’s Advocates General on the question of regulation of professions. The second section discusses the only two decisions that have referred to the concept, and the third and final section concludes on the specific irreducibility of the regulated professions, which in our opinion justifies consideration of the information asymmetry phenomenon by the Court.

1 Acknowledgements: this paper is the end product of a research project which benefited from financial support from the HEC Foundation. We wish to express our thanks to this institution.

2 Information asymmetry has been studied in depth by G. Akerlof, who created the notion of adverse selection and moral hazard in 1970, in his article entitled “The market for lemons: quality uncertainty and the market mechanism”, Quarterly Journal of Economics, 84, 487-500 (1970). Adverse selection takes place where professionals providing quality services withdraw from the market, leaving on the market only those that offer mediocre services at a lower cost. This is to be feared when consumers, who are incapable of evaluating the quality of the service even after consuming it, refuse to pay an above-market price for a better-quality service. Moral hazard is also generated by information asymmetry: the professional may abus of the situation by invoicing, at a high price, unnecessary or excessively high-quality services in view if the client’s real needs.
I Emergence of the concept

Appropriation by the Court of a purely economic concept, could only take place, if it was to take place, with the greatest caution. It was initially driven by the Court's Advocates General, on various cases concerning regulation of the professions. The Court appears to have expressed a certain reservation: while the solutions adopted were compatible with the Advocate Generals’ opinions that referred to this economic concept, the earliest rulings made no mention of it.

1.1 Opinion in the Pavlov case

To the best of our knowledge, the first reference to information asymmetry was by AG Jacobs. His opinions in the Pavel Pavlov case clarified the issue so that all subsequent opinions refer back to them.

AG Jacobs wrote:

“Then, there is the important problem of so-called asymmetric information. Such an asymmetry between seller and buyer arises where the buyer cannot fully assess the quality of the product he receives. In the professions the problem is particularly acute because of the nature of their highly technical services. The consumer cannot assess the quality of those services prior to purchase by inspection (as he could for example when buying cheese), but only after consumption. Even worse, he might never fully understand whether or not the professional (e.g. doctor, architect, lawyer) provided a high quality service… The usual methods of overcoming or mitigating the negative effects of asymmetric information, or in other words of preventing a 'race to the bottom', can all be found in the professions. Access examinations are intended to guarantee a high initial standard of skills. Liability rules, the consequences of a good or a bad reputation, and certification schemes are incentives to exploit those skills to the full. Advertising is seen by some as a means of overcoming or mitigating asymmetry, whilst others claim that advertising exacerbates the problems. One conclusion to be drawn is that in order to counter the effects of asymmetry a certain level of regulation of those markets is necessary.”

This discussion is crucial. In citing information asymmetry, AG Jacobs paved the way for carefully shaded application of competition rules in this sector. He opined in favour of a profession-by-profession and rule-by-rule approach to assess the existence of any restriction on competition, in view of the context.

Assuming article 85.1 EC (now 101.1 TFUE)) will be considered applicable in the final analysis, AG Jacobs mentioned the possibility of examining whether the conditions for application of the exception stated in 85.3 EC (now 101.3 TFUE)) could be applied. In doing so, he raised a highly complex question: how should the quality of services be taken into consideration?

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3 Opinion in Pavel Pavlov, [2000] ECR Page I-06451, para. 86. All underlining is mine.
“In addition, it will have to be examined whether Article 85.3 (where applicable) can be interpreted so as to take into account concerns for the quality of professional services and its importance for society as a whole.” ⁴

This reference to quality, while raising considerable difficulties for Economists, does address the true issue.

Concerning the activity of specialist doctors, Mr Jacobs observed:

“…medical specialists provide (as do almost all professionals) non-homogeneous personalised services. That means that each doctor's services have different qualities and properties. Medical specialists can moreover greatly influence the quality of their services (for example by spending more time on a case). Consequently, even if costs for their services were rigid, competition on the basis of quality would normally be vigorous.” ⁵

The terms in brackets are significant, suggesting broad application of this quality factor in the professions, not just the medical profession, which would multiply the difficulties.

In the Reisebüro Broede⁶ and Gebhard⁷ cases, the Court of Justice validated some restrictions to EU freedoms inherent to professional regulations. This time the problem concerned competition rules, taking into account the asymmetric information, enabling AG Jacobs to address the question of self-regulation of the professions:

“The complex nature of those services and their permanent evolution through rapidly changing knowledge and technical developments make it difficult for parliaments and governments to adopt the necessary detailed and up-to-date rules. Self-regulation by knowledgeable members of the professions is often more appropriate since it can react with the necessary flexibility. The main challenge for every competition law system is therefore to prevent abuses of regulatory powers without abolishing the regulatory autonomy of the professions.” ⁸

This opinion sentence encapsulates the stakes perfectly. However, the Court’s ruling does not refer to information asymmetry.

1.2 Opinion in the Wouters case

In his opinion in the Wouters case, AG Léger considered that the professional service markets may have a weakness, precisely because of the asymmetric information between the professional and the client. Therefore, not only could certain professional regulations be harmless to competition; they could in fact be necessary to guarantee relevant competition:

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⁴ Ibid, para. 90.
⁵ Ibid, para. 142
⁸ Ibid, para. 92
“First, it is not inconceivable that, having regard to the characteristics of the market for legal services, certain professional rules may be likely to encourage competition within the meaning of the Court’s case-law as it now stands.

As Mr Jacobs has observed, the markets for professional services are notable for ‘asymmetric information’. In so far as the consumer is rarely in a position to assess the quality of the services provided, certain rules might prove necessary in order to ensure that the market operates in normal competitive conditions…”

Implicit in Mr Léger’s statements is a concern for the quality of the professional services that parallels the concern expressed by Mr Jacobs. Speaking of competition in the abstract sense is meaningless in the case of the professions, whether the case concerns doctors or lawyers. The aim is to define, then restore, in the optimum approach for society, the right, practicable level of competition, considering competition as a means to achieving a positive social end.

Mr Léger also suggested to the Court a three-point alternative – the “three guidelines”.

The first, and the most radical possibility consists of considering that “professional rules which are in fact capable of encouraging or guaranteeing normal competition on the market for legal services might fall outside the prohibition laid down in Article 85.1 by virtue of the ‘rule of reason’.”

This reflects a “modern” understanding of article 101 TFUE which from the outset, i.e. in the analysis carried out for application of article 101.1 consists of a not purely legal but already economic interpretation.

The second possibility would be to recognise the applicability of EU competition law as set forth in article 101.1 to national professional regulations, but exempt those regulations under article 101.3, which supposes that all the requirements of the treaty would have to be met, i.e. the four conditions of article 101.3.

Lastly, Mr Léger suggested a third approach: using article 90.2 (now 106.2 TFUE) of the Treaty. This third “guideline”, was followed by an interesting development: can a lawyer’s activity be of “general economic interest exhibiting special characteristics as compared with that of other economic activities”?  

Mr Léger defended this idea:

“…lawyers perform activities which are essential in a State governed by the rule of law. They make it possible for individuals to have a better knowledge and understanding of the rights granted to them and to enforce those rights more efficiently. In other words, in a State governed by the rule of law, lawyers ensure the effectiveness of the principle of access to the law and to the courts.”

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9 A.G. Philippe Léger’s opinion under Wouters, [2002] ECR I-01577, para. 112
10 Ibid
11 TFEU, art. 106.2
12 Opinion AG Léger, cited earlier, para. 175
Since the competition-restricting professional regulation concerned is necessary to guarantee the higher interest protected by the Treaty, application of the competition rule may be bypassed. Under this reasoning, national professional regulations would be validated.

The third approach suggested by Mr Léger is definitely the most complex. It only results in exemption from EU competition rules after a reasoning process in several stages.

We note that this reasoning is relevant to all the professions. Lawyers, Notaries or Solicitors, Doctors, Vets, Architects, Surveyors, Accountants, etc all exercise a complex art, and the quality of their work has direct repercussions for their clients and on society in general.

But in the end the Court opted for the first approach: inapplicability of article 101.1, the most radical option.

However, the Court’s decision contained no reference to the economic concept of information asymmetry. The formulation of the decision is completely compatible with this economic concept, but unlike AG Léger’s opinion, makes absolutely no mention of it. At this stage then, it is not possible to conclude that the Court had formally incorporated the economic concept of information asymmetry into its reasoning.

1.3 Opinion in the Arduino case

Adopted the same day as the Wouters ruling, the Arduino case concerned the question of validity of a compulsory tariff for lawyer’s fees in Italy.

Starting from the premise that “the quality of the services provided by the professions is of crucial importance for several reasons”, AG Léger pointed out that “the professions provide services which concern essential aspects of society, such as public health (the medical professions), justice (the legal profession) or public safety and town planning (the architects' profession)” and insisted that “these various services can also have an immediate and direct impact on fundamental aspects of the life of citizens, such as their physical safety”.

Refering again to AG Jacobs, Mr Léger mentioned the externalities associated with the services of professions, which take the form of “losses or benefits for society as a whole”.15

He also wrote: “Lastly, the markets for professional services are characterised by ‘asymmetric information’.

Since the consumer is rarely in a position to assess the quality of the services offered, it is essential to lay down certain rules to maintain the quality of these services.

It follows from these considerations that the maintenance of the high quality of the services supplied by members of the Bar would undoubtedly constitute a legitimate objective in the public interest.”

The weight of this proposal is all the greater when the measure concerned has a noticeably stronger anti-competition effect than the measure under discussion in the Wouters case.

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14 Ibid, para. 112.
15 Ibid. In AG. Jacobs opinion in the Pavlov case, cited earlier, para. 85
16 Ibid, para. 112 and 113.
Setting a compulsory tariff lies at the heart of the offences that cause most damage to free, fair competition.

This no doubt explains why AG Léger expressed strong reservations regarding one Italian rule, the compulsory minimum tariff. The measure proposed must be appropriate for achieving the objective pursued, and proportionate to that objective. In Mr Léger’s opinion, this is not true of a compulsory minimum tariff:

“First, I consider that there is no causal effect between the level of fees charged and the quality of services supplied. I fail to see how a system of mandatory prices would prevent members of the profession from offering inadequate services if, in any event, they lacked qualifications, competence or moral conscience. Second, the quality of services is - or ought to be - guaranteed by measures of a different type, such as those governing the conditions of entry to the profession and the professional liability of members of the Bar.”17

But this argument, mentioned later in the discussion of the Cipolla ruling, does not prevent Mr Léger from concluding that a Member State could validly adopt such rule provided three conditions were met:

“ (1) the public authorities of the Member State concerned exercise effective control over the content of the fee scale proposed by the professional body; (2) the State measure approving the fee scale pursues a legitimate aim in the public interest; and (3) the State measure is proportionate to the aim which it pursues.” 18

Regarding the Arduino judgement itself, it is impossible to draw any conclusion relative to the issue covered by this study. The Court simply observed that the measure challenged was indeed a regulatory decision by the Italian state, rather than an automatic validation of an agreement decided by the Italian Bar. As this regulatory nature rules out application of article 101 of the Treaty, the Court did not rule on the other aspects of the case.19

In contrast to AG Léger’s opinion, there is no point of law or fact to link the Court's decision to the concept of information asymmetry.

1.4 Opinion in the Doulamis case

In the Doulamis case,20 the Court of Justice was confronted to a dentist who had breached Belgian law’s ban on advertising for dental treatment by placing advertisements in the Belgacom directory.

AG Bot considered that article 101 was inapplicable to the Belgian State’s rule on advertising.

17 Ibid, para. 117
18 Ibid, para. 119
19 Mrs Prieto laments this shift in the Court’s decisions. The Court had previously applied a combination of articles 10 and 81 of the Treaty, obliging the Member State not to adopt measures that would endanger achievement of the Treaty’s objectives. C. Prieto, « Les professions libérales et le droit de la concurrence : de la confrontation à la conciliation des finalités », in La modernisation du droit communautaire de la concurrence, LGDJ Paris 2006, para. 34
20 Case C-446/05 Ioannis Doulamis [2008] ECR I-01377
He also developed a very interesting analysis on the compatibility of the disputed rule with the European freedoms, describing the contractual relationship between the dental care provider and his client as follows:

“the relationship between a patient and a treatment provider is stronger than the relationship with a product, which results merely from consumer habits. In the healthcare sector, that relationship is based on the patient’s trust in the service provider as an individual or in a healthcare establishment and the need for quality in respect of such services is clearly of the highest.”

We note the use of the expression trust, which relates to the term used by economists to classify the most typical services among those marked by high information asymmetry: “credence goods”.

AG Bot observed the strict regulation of all health professions in Member States, and the difficulties encountered in free circulation of professionals despite the harmonisation directives adopted at EU level. As a result, a ban on advertising might well be more of a hindrance for professionals from other Member States than professionals from the host State. Considering possible justifications for such a restriction, Mr Bot easily identified protection of public health as referred to in article 46.1 (now 52.1) of the Treaty.

The debate focused on the principle of proportionality, since the Belgian rule banned all forms of advertising, but Mr Bot considered that protection of public health could justify a national regulation that completely bans advertising.

This position was based on consideration of the specificity of healthcare services compared to services in general, as they “affect the physical integrity and psychological balance of the recipient”.

AG Bot distinguished satisfaction of a desire to consume from satisfaction of a need to restore health, writing: “Bearing in mind the importance of what is thus at stake, when having to decide whether or not to avail himself of treatment, the patient does not have the same freedom of choice as he does with other services. When he avails himself of treatment, the patient is not satisfying a desire but responding to a need.”

In this field the concerns thus go beyond the professional’s duty of information, which is intended to protect the consumer, the weak party in the contract, as envisaged in Oceano Grupo and subsequent rulings.

The issue of information asymmetry, meanwhile, is referred to particularly clearly:

“In the second place, the dental care sector, as with all activities in the healthcare sector, is one in which, in my opinion, the degree of ‘asymmetry of information’ between the provider and the recipient of the service…, is at its highest. This means that, in his area of activity, the

21 Opinion of AG Bot in Doulamis, para. 94.
22 Ibid, para. 114
23 Ibid.
service provider has a level of competence which is very much higher than that of the recipient, so that the latter is not in a position to make a genuine assessment of the quality of the service he is purchasing.

Consequently, taking into account that asymmetry in the level of competence and the significance to the patient of the decision whether or not to avail himself of healthcare services, I consider that the relationship of trust between the patient and the healthcare professional is a vital one. In other words, it must be possible for the patient to be convinced that, when that practitioner advises or recommends that he follow a course of treatment, the reasons for that advice or recommendation relate solely to the protection of his health.”

The informative value of advertising, which was recognised by the Court of First Instance in the EPO case, was rejected in this case by AG Bot by fear that the patient might discount an advertisement even though it corresponded to a service that would be of genuine use to him.

In other words, health professional market characteristics require a modus operandi for practitioners that does not undermine trust with patients, both in their specific interest and in the general interest.

This analysis has the advantage of clearly highlighting the dual dimension of practice of the regulated professions: they are private activities with an undeniably economic aspect, but also activities with significant externalities for society, requiring regulation of the way they are practiced. This naturally has consequences at the desirable, valuable level of competition between professionals.

For all of these reasons, it is regrettable that the Court did not take the opportunity to rule on these arguments. Consequently, once again no consideration of the economic concept of information asymmetry is visible in the Doulamis ruling.

To conclude this section, it is interesting to note the convergent nature of the approach taken by three Advocates General to the Court in the four cases on regulation of the professions examined above: each one refers to the concept of information asymmetry in the relations between the professional and his client. In each case, the Advocate General concludes that the professional regulation is valid, and that the EU rules on competition or freedom of movement are inapplicable. However, in all four cases, the Court itself makes no direct reference to this economic concept in the grounds for its ruling, such that the value added of information asymmetry as a legal argument is still not established.

II Limited recognition of the concept

The Court has referred to information asymmetry in two decisions, but even then, the reference is only explicit in one.

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26 Opinion of AG Bot in Doulamis, cited earlier para. 115 and 116.
27 Case T-144/99, Institute of Professional Representatives [2001] II-01087, para. 72
28 We may ask, as Mrs Prieto recommends: does this circumstance exempt the Court for examining the substance of the case? Does not the Treaty prohibit Member States from adopting measures that are contrary to the effect of article 81? Prieto, cited earlier, para. 37 to 39
2.1 Cipolla

The ECJ’s first direct reference to information asymmetry is to be found in the Cipolla ruling.\(^{29}\) This case follows directly in the footsteps of the Arduino ruling, since once again the point in dispute was the validity of regulated fees for lawyers in Italy.\(^{30}\)

In his opinion, AG Poiares Maduro distanced himself from the concept of information asymmetry, expressing reservations towards the Arduino ruling,\(^{31}\) and appeared to rejoin the position expressed in Arduino, essentially in order to avoid an overhasty turnabout in case law.\(^{32}\)

AG Poiares Maduro made a distinction between services provided by lawyers in the course of a litigation, and other, out-of-court services. In his opinion, “It could be argued that the market in out-of-court legal services differs from the market in legal services provided in the context of proceedings before a court. In the former case there is less asymmetry of information between the lawyer and his clients because the recipients of the service refer to a lawyer more frequently, so they are in a better position to assess the quality of the service provided.”\(^{33}\)

This position could be challenged. A tax law or inheritance law issue may lead an individual to seek a one-off consultation with a specialised lawyer. Given the highly technical nature of the subject, the information asymmetry does not appear any smaller than in a court litigation. Also, some disputes are relatively run-of-the-mill - cases concerning driving licences or divorce procedures, for instance - and this distinction is probably not the most relevant.

The argument of frequency of use of a lawyer seems more convincing, and rejoins certain positions expressed by the Commission in respect of corporate/business clients, who are supposed to be less affected by information asymmetry than other individuals.\(^{34}\)

The Italian and German governments put forward the argument of an adverse selection risk “that fierce competition between lawyers would lead to price competition resulting in a reduction in the quality of the services provided, to the detriment of consumers. That likelihood would be all the greater since the market in legal services is characterised by asymmetry of information between lawyers and consumers, since the latter do not have necessary criteria for assessing the quality of the services provided.”\(^{35}\)

AG Poiares Maduro was apparently unconvinced by the adverse selection argument, rejecting the idea that minimum tariffs would guarantee the quality of lawyers’ services. This brought him closer to the concerns expressed by Mr Léger in his opinions in the Arduino case.\(^{36}\)

\(^{29}\) Case C-94/04, Federico Cipolla [2006] ECR I-11421
\(^{30}\) The case concerned the minimum tariff imposed by regulation for out-of-court services But in contrast to the Arduino case, the question referred for preliminary ruling concerned competition law and European freedoms
\(^{31}\) AG Poiares Maduro opined for verifying the existence of a legitimate public interest in addition to supervision of the process by Member States. See para. 34
\(^{32}\) Opinion para. 30, 38 and 40
\(^{33}\) Ibid, para. 41
\(^{34}\) Professional Services - Scope for more reform. Follow-up to the Report on Competition in Professional Services, COM/2005/405, September 5 2005, para. 11 and 12
\(^{35}\) Opinion of Mr Poiares Maduro, para. 83.
\(^{36}\) See AG Léger’s opinion, cited earlier, para. 117
To justify his position, Mr Poiares Maduro mentioned the economic doctrine “which considers that it is by no means demonstrated that the abolition of the minimum fees would necessarily lead to deterioration in the quality of legal services provided.” He added a reference to an article by John E. Kwoka.

However, Kwoka’s analysis concerns the regulation of advertising by optometrists, not the regulation of their professional fees. Although he concludes that the quality and price of optometrists’ services are unaffected in States that authorise advertising, it appears premature to deduce that eliminating regulation of fees would not lead to deterioration in service quality.

Kwoka also acknowledges that economic models demonstrate the relevance of the adverse selection concept in information asymmetry. The economic doctrine is not therefore unanimous in considering there is no link between the minimum fee level and the quality of services.

The German government had also advanced the idea that below a certain level of fees, quality of services was no longer guaranteed. The AG’s response was that “This presupposes, however, that it would be guaranteed above a certain level” and “It is necessary to demonstrate that the abolition of minimum fees would automatically lead to a reduction in the quality of the legal services.”

This requirement seems excessive. The risk of deterioration in legal service quality should suffice. Providing proof that the quality of the legal service is systematically guaranteed above a certain level of fees is an impossible demand.

AG Poiares Maduro finally concluded that the fixing of minimum fees could not be justified by an overriding reason of public interest.

Given this opinion, I consider that the Cipolla ruling is thus all the more significant.

The Court stated a position firmly rooted in past case law: protection of consumers, especially recipients of the legal services provided by persons concerned in the administration of justice, and protection of the proper administration of justice, may be regarded as imperative in the public interest.

In contrast to the AG, it stated that:

“Although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, in a context such as that of the Italian market which, as indicated in the decision making the reference, is characterised by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by

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37 Ibid, para. 86.
39 Opinion AG Poiares Maduro, para. 86 again
40 For example, Gebhard, cited earlier
possibly offering services at a discount, with the risk of deterioration in the quality of the services provided.”

In my opinion this comment by the Court shows that the Court has incorporated the information asymmetry and adverse selection issue.

The following paragraph supplies the proof:

“Account must also be taken of the specific features both of the market in question, as noted in the preceding paragraph, and the services in question and, in particular, of the fact that, in the field of lawyers’ services, there is usually an asymmetry of information between ‘client-consumers’ and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them.”

As far as I know, this ruling is the only one in which the Court expresses clear, explicit acknowledgement of the economic concept of information asymmetry.

2. 2 Commission v. Italy (regulation applicable to pharmacies in Italy)

However, in a recent case, the Court ruled on an Italian regulation that restricted the right to own and run a pharmacy to pharmacists, and banned companies that sold pharmaceutical products from taking investments in pharmacies.

In his opinion, AG Bot noted that “the task carried out by pharmacists is not limited to the sale of medicinal products. The dispensing of medicinal products also requires a pharmacist to provide other services such as checking medical prescriptions, making up pharmaceutical preparations, or providing information and advice to ensure the proper use of the medicinal products.”

AG Bot continued: “As pharmaceutical activity is characterised, as are many health professions, by an asymmetrical distribution of information, a patient must be able to have complete confidence in the advice given by a pharmacist”.

He therefore concluded that it is necessary to preserve the independence that enables the pharmacist to perform his function, in the public interest. This independence must be protectable against the influence that could be exercised on the pharmacist by manufacturers of medicines and wholesaler-distributors: the Italian lawmaker “sought, in particular, to prevent the risks of conflicts of interest which it considered might be linked to vertical integration of the pharmaceutical sector, in order, inter alia, to combat the phenomenon of overconsumption of medicinal products and to ensure the presence of a sufficient variety of medicinal products in pharmacies.”

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41 Cipolla, cited earlier, para. 67.
42 Ibid, para. 68.
43 Case C-531/06, Commission v. Italy [2009] ECR I-04103
46 Ibid, para. 92.
In my opinion, this independence should enable the pharmacist to play his role as a special regulator on the medicine market, similar to the role played by the notary in Latin-law countries in the preparation of a notarised deed. This idea was perceptible in the opinion of AG Bot, who wrote: “The Italian legislature also considered it necessary for a professional person to act as a filter between manufacturers of medicinal products and the public in order to provide independent control over the proper administration of medicinal products.”

These considerations led AG Bot to conclude that the Italian rule under dispute was valid, as it was considered appropriate and proportionate to the objective of general interest it pursues.

The issue of proportionality was debatable. Some States had adopted regulatory measures allowing non-pharmacists to own a pharmacy, as long as the medicine is dispensed by an employee who is a qualified pharmacist.

With this regard, the Court had ruled against Greek legislation on optician’s shops in an earlier case although the Greek government had claimed that “the prohibition of the operation of more than one shop by any natural person was enacted for overriding reasons of general interest in relation to the protection of public health.”

But the Court ruled that: “In this case, it is sufficient to note that the objective of protecting public health upon which the Hellenic Republic relies may be achieved by measures which are less restrictive of the freedom of establishment both for natural and legal persons, for example by requiring the presence of qualified, salaried opticians or associates in each optician’s shop, rules concerning civil liability for the actions of others, and rules requiring professional indemnity insurance.

It is thus clear that the disputed restrictions go beyond what is required in order to achieve the objective pursued. There is therefore no justification for them.”

Mr Bot replied to this objection as follows: “the dispensing of medicinal products cannot be regarded in the same way as the selling of optical products, I consider that a Member State may decide, without infringing the principle of proportionality...to allow only pharmacists to own and operate pharmacies”.

This graduation of the general interest between opticians and pharmacists can be seen as an illustration of the case-by-case approach recommended by Mr Jacobs in his opinion for the Pavlov case.

The Court directly echoed his opinion on this point. Its ruling first set forth the specificity of medicines compared to general merchandise, stressing that there is a risk that improper or

47 Ibid.
48 Whereas in a previous judgement of 25 May 1993, LPO, Case C-271/92, the Court had ruled: « National legislation which reserves the sale of products designed to correct a defect in a human bodily function to traders holding the relevant professional qualifications is intended to protect public health. The sale of contact lenses, even if ophthalmologists are responsible for prescribing them, cannot be regarded as a commercial activity like any other, since the vendor must be able to provide users with information on the use and care of the lenses. »
49 Case C-140/03, Commission v. Greece, [2005] ECR I-03177 para. 35
50 Ibid para. 36
51 Opinion AG Bot in Commission v. Italy, para. 124.
52 See above
unnecessary consumption of such products could seriously damage the health “without the consumer being in a position to realise that when they are administered.” 54

Surely this should be seen as a direct reference to the information asymmetry typical of credence goods.

Therefore, the public health risk legitimates intervention by Member States to allow only pharmacists to sell medicines “because of the safeguards which pharmacists must provide and the information which they must be in a position to furnish to consumers.” 55

While it is true that the Court did not use the expression “information asymmetry”, it can be considered to have implicitly appropriated the concept in this case.

III On the edges of the market: the irreducible specificity of the professions

The information asymmetry between the client and the professional creates a specific situation that casts considerable doubt on whether stronger application of competition rules to the regulated professions will drive the expected benefits for the Economy, and the users of professional services. As the Commission appears to be determined to take a firmer stand in applying these rules to them, the Court’s perception of the information asymmetry issues specific to these professions stimulates debate on a specific approach to professional activities. It is thus necessary to retrace the grounds on the subject as stated in the past, and examine the appropriateness of the Court’s recent rulings on these questions.

3.1 Turning around the specificities of the professions

As the single European market was created, Mr Ehlermann, identified the specificities of the professions. 56 He named three specificities:

- “the predominance of the intellectual, technical or specialised nature of the services
- the personal and direct basis on which they are rendered
- the high-level training of the practitioners providing the services” 57

I can only agree on these points. However, this observation does not seem to be accompanied by any critical consideration of the links between those features and the restricted access and regulatory framework. This analysis thus fails to bring out the useful perspective encompassing not only the economic dimension of the work of the professions, but also its specificity and how it is of value to society.

53 Case C-369/88, Criminal proceedings against Jean-Marie Delattre [1991] ECR Page I-01487, at para 54: “In the case of medicinal products within the meaning of Directive 65/65, account must be taken of the very particular nature of the product and the market involved, which explains the fact that in all the Member States there are, albeit with differences of detail, rules restricting their marketing and, in particular, some form of monopoly on the retail sale of such products is granted to pharmacists by reason of the safeguards which pharmacists must provide and the information which they must be in a position to furnish to the consumer.”
54 Commission v. Italy, cited earlier, para. 90.
55 Ibid, para. 58.
57 Our translation
Given the specificities of the professions, was not the right question: what useful or effective level of competition, compliant with Treaty rules but taking into consideration the profession's particularities, should the Commission promote?

As a result the only way open to the Commission appears to consist of more intensive application of the rules, to move closer to the standards observed in other sectors of the Economy.

Nonetheless, Mr Ehlermann supplied five general principles to guide the Commission’s application of competition rules. The first principle offers interesting potential:58

“the practices of the professions are evaluated so as to observe whether the restrictions likely to be applied to competition are justified in view of the intended objectives, whether they are not excessive in nature compared to those objectives, considering the economic and legal context specific to each profession and the nature of services.”59

This interesting avenue in fact seems to offer limited prospects given the second principle: “the national legislative or regulatory framework has no effect on application on competition rules…This means that even restrictive practices allowed or encouraged by national legislation or regulations can be declared contrary to EEC treaty rules.”60

In short, despite certain intentions to take the context into consideration, the prospect of reconciliation between professional regulation and competition law looked unlikely.

Some years later, Mrs Idot noted the general interest mission of the professional orders, and referred to the specificity of the professions, in order to define an adjusted, intelligent level of application for the competition rules.61

Considering that under article 85.3 (now 101.3 TFUE) it is impossible to take into account the public interest pursued by the professional orders, Ms Idot wondered, as Mr Léger later would in his opinion, whether it was appropriate to apply article 90.2 (now 106.2 TFUE). The traditional application of article 90.2 raised a doubt: is the mission of the professional orders in the general economic interest? Does it not concern a general interest whose content extends beyond the economic field, to encompass the broader interest of society as a whole? Ms Idot suggested that “sure enough, if we allow exceptions for an economic service, then the same approach should apply all the more in this field, which lies on the edges of the economic”.62

Shortly afterwards, the European Commission issued its decision in the EPO case.63 Although the Commission recalled that “the fact that they represent a regulated liberal profession and that their services are intellectual, technical or specialised in nature and are supplied on a personal and direct basis does not alter the nature of their economic activity”, 64 it added that

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58 Note that this was before the adoption of Reg 1/2003
59 Our translation
60 Ibid
61 L. Idot : quelques réflexions sur l’application du droit communautaire de la concurrence aux ordres professionnels Journal des Tribunaux, Droit européen 1997 p. 73
62 Our translation
64 Ibid, para. 23
several provisions of the code of conduct are “necessary (…) in order to ensure impartiality, competence, integrity and responsibility on the part of representatives, to prevent conflicts of interest and misleading advertising, to protect professional secrecy or to guarantee the proper functioning of the EPO.” 65 Those provisions, thus, fell outside the ambit of Article 85.1.”

The Commission was then considering the general interest from the level of Art. 85.1 (now 101.1 TFUE), in an apparent echo of the opinion of AG Jacobs in the Albany case, which was issued in the same period.66

Harold Nyssens67 warned against the Commission’s use of a rule of reason in this case, and noted, apparently with apprehension, that “we may wonder, first, whether the circumstances that are supposedly specific to the Representatives before the European Patent Office are as unique and specific as the Commission claims. Do not lawyers, for example, also find themselves having to act in relatively long legal procedures with an outcome that is uncertain to say the least?”68

But it remained doubtful that this EPO decision was the forerunner of such a shift. Indeed, the decision issued some years later in the case of the Belgian architects69 indicated a return to stricter application of competition law.

Either way, in its EPO ruling,70 the Court of First Instance returned to the question of professional ethics rules in the light of Art. 101 TFEU, since the EPO had argued that as ethical rules are in the general interest, they should escape the ban laid down in article 101.1.71 The argument was rejected as far too non-specific. However, the door was left open for case-by-case assessment of each code of ethics in its context, “taking account of its impact on the freedom of action of the members of the profession and on its organisation and also on the recipients of the services in question.”72

In this case, it seems the CFI did not perceive the specific issues at stake in comparative advertising within a regulated profession. Referring to the merits of advertising in general on an ordinary market,73 the CFI considered: “Furthermore, when it is fair and in accordance with the appropriate rules, 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.”74

65 Ibid, para. 29. Concerning a ban on outcome-related fees, the Commission observed: “Even if in other circumstances it might constitute a restriction of competition to prohibit fees from being determined according to outcome, it is necessary in the economic and legal context specific to the profession in question in order to guarantee impartiality on the part of representatives …”
68 Our translation
69 Commission decision Belgian Architect’s association, COMP/A.38549, OJ L 004 of 6 January 2005
70 cited earlier
71 Ibid, para. 64
72 Ibid, para. 65
73 “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.” Para. 72 of the CFI ruling.
74 Ibid, para. 73
Consequently, this review of the various attempts to approach the sector of the professions evidentiates hesitations, just before the dual development that happened when the Wouters decision was issued and regulation 1/2003 was adopted at practically the same time.

3.2 New prospects for an approach to the professions

Adoption of EC Regulation 1/2003 was a key turning point as regards this study. It obliged the professional orders to self-evaluate their professional rules, while the Commission issued: a report on competition in professional services\textsuperscript{75} and a Communication.\textsuperscript{76}

Both documents contain the orientation to be applied in respect of professional rules that could breach article 101.1 of the Treaty. Any rules not justified by the general interest or good practice of the profession must be eliminated. This assessment thus involves an overall economic and society-related review that is very similar to the approach taken in the Wouters case, although the Commission warned against extensive interpretation of the reasoning underlying this ruling, especially in the decision issued for the Belgian architects’ order case.\textsuperscript{77}

In importing factors from the case law on the freedom of establishment and the freedom to provide services into competition law,\textsuperscript{78} the Court supplied a grid for specific analysis for the professions just as the Commission was announcing a major step forward in application of Art. 101 and 102 of the Treaty, designed to better integrate the economic grounds into assessment of restrictions on competition.

In doing so, it tackled a trickier question: how application of competition law affects the quality of services provided by professionals? As Ms Prieto noted, the consumer of professional services, who “is not able to define his needs nor to evaluate the quality of the service before, or even after the event… will not even be able to benefit from a competitive environment, as he does not have the capacity to discern his true interest.”\textsuperscript{79}

Noting the asymmetry of information characteristic of relations between clients and professionals, she highlighted the possible consequences of a poor-quality service both for the consumers themselves and for society as a whole (externalities).\textsuperscript{80} In using competition rules to tackle regulation of the professions, the Commission was taking the risk of harming guarantees. Although professional codes of practice can result in a cost, or even restrict certain competitive possibilities when applied to excess, it is apposite to join Mrs Prieto in her question on the purpose of the Commission’s action: “Does challenging the remedies mean ignoring the poor functioning of the service markets?”\textsuperscript{81}

The question remains relevant. Following on from the OECD’s work on the professions and competition, a European review project was initiated within the Lisbon strategy. In this

\textsuperscript{75} COM (2004) 83
\textsuperscript{76} COM (2005) 405, cited earlier
\textsuperscript{77} Cited earlier, para. 97
\textsuperscript{78} Notably Reisebüro, cited earlier
\textsuperscript{79} Our translation
\textsuperscript{80} C. Prieto, « Les professions libérales et le droit de la concurrence: de la confrontation à la conciliation des finalités », cited earlier, para. 5
\textsuperscript{81} Ibid, last sentence of para. 5. Our translation.
context, the IHS studies,\textsuperscript{82} in particular the study on conveyancing services in the European Union,\textsuperscript{83} evidenced the extreme diversity of restrictions on competition resulting from organisation of the professions concerned in various Member States. This study concluded that there was no link between the level of regulation (a cost factor) and the quality of services provided to consumers, and therefore supported the Commission in its general deregulation approach modelled on the systems in the most free-market States.

There was criticism, however, of the method used by the study’s authors. The functions associated with the national rules governing the profession were not identified clearly enough, and this prevented evaluation of the professions from a quality standpoint.\textsuperscript{84} Moreover, the very real specificities of certain Member States' laws governing property conveyancing make comparison of the effectiveness of professionals operating in different legal contexts particularly risky.

This brings us back to the problem of the complexity and quality of professional services. In absence of a homogeneous, qualitative legal system, application of EU competition rules without consideration of the associated guarantees existing in certain Member States could result in alignment at the lowest level of legal protection, with all consequences on the associated externalities.

With such differences in the very foundations of the legal systems of the Member States the likelihood of agreement on the advisability of leaving regulation (or self-regulation) do its work is small. Thus, it is not illegitimate to seek a less controversial place where exchange of arguments might find a less disputable solution.

Specifically, in daring (even tentatively) to address the context of information asymmetry characteristic of the professions, the Court opened up an interesting path: introducing a certain degree of consideration of the general interest, but based on reasoning that encompasses the economic features of the context in which the professions are exercised. Maybe this path might succeed in reconciling European competition law with the specificity of the professions.

Regarding the information asymmetry problem, Mr Van den Bergh wrote that the quality of professional legal services has three dimensions: integrity, the quality of the legal advice itself, and commercial quality (the way the client is treated commercially): only the third of these is likely to be correctly perceived by an ordinary client.

Monitoring the quality of legal services by making professionals responsible after provision of the service was studied by Shavell,\textsuperscript{85} who demonstrated the limitations of this model. Therefore, “upstream” regulation of the professions should not be disregarded.

For example, the relative effectiveness of the regulation of notaries is encountered again in Benito Arrunada’s study of Latin-law model notaries,\textsuperscript{86} which shows how the regulation model for these professions is adapted to their public functions.

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\textsuperscript{82} Economic impact of regulation in the field of liberal professions in different Member States, regulation of professional services, Institute for Advanced Studies, Vienna January 2003
\textsuperscript{83} Study COMP/2006/D3/003 Conveyancing Services Market, December 2007
\textsuperscript{85} Shavell, Foundations of Economics of Law, Harvard University Press
Moreover, due to the technical nature of the legal professions, self-regulation may be preferred to standard-setting as the lawmaker is less aware of the actual problems encountered than the professional body, although the problem of the general interest being “hijacked” by a professional body is a real difficulty.  

In view of these economic analyses, there is a need to reflect on the possible impact for consumers of the deregulation being pursued by the European Commission in the professional services sector.

### 3.3 The “mystery”: the irreducible specificity of the professions on the edges of the market

For sure, the professions should not be exempt from competition law or the EU freedoms. The services they provide undeniably have an economic dimension and participate in the market economy, but that does not mean they can be identified or summed up simply by inclusion in the economic whole.

This article contends that there is a degree of irreducibility in the professions to the sole rules of the common market, at least the rules commonly applied to all economic actors in the European market. The reason for this is that the professions have two foundations: one in economic life, and one in the exercising of intellectual and moral faculties that generate information asymmetry with the client. Considering just one of these dimensions and neglecting the other results in a rough, ineffective approach that is undesirable for society.

As the European Commission announced its intention to intensify application of competition rules to the professions, the Court has displayed a certain restraint.

The Court seems to have identified the concept of information asymmetry and considered it with caution. I am of the opinion that the approach incorporating consideration of information asymmetry is to be encouraged.

It is both close to, and distinct from, categories well-known to the Court. It is close to its developments in consumer law, a field where the Court has shown it is able to consider the consumer’s weak position in terms of his relationship with the professional co-contractor, particularly by asserting the active duty of information incumbent on the professional. What is valid for a consumer contract relationship, both in the interest of the weak party and in the general interest, should also in theory be valid for a relationship between a private individual and a provider of professional services.

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87 On this subject, see R. Van den Bergh, Towards efficient self-regulation in markets for professional services, European Competition Law Annual 2004: the relationship between competition law and the (liberal) professions, in which the author pleads for self-regulation combined with the different professional regulators in a single Member State, in order to prevent the monopoly on the power of self-regulation from becoming corporatism.
88 Océano Grupo and following cases, cited earlier
Because what is at stake in consulting a lawyer, solicitor or notary or a doctor is more important for the client or patient than the stakes for the customer in a consumer relationship, as AG Bot observed. The duty of information is greater, because the client's person or assets will be affected, and a relationship of trust is necessary.

Yet the duty of information under consumer law is insufficient, and therein lies the difference that justifies consideration of the information symmetry specific to the professions. Once beyond a basic level that varies depending on the objective difficulty of the matter in hand and the client's level of education, the professional is unable to give his client full information. The specialist knowledge that characterises the professional is the product of high-level education and professional experience in complex intellectual categories. But a duty of information cannot apply to what cannot be understood.

This area of “mystery” is constitutive of an irreducible specificity of the professions, and explains why they are at the edges of the market. In particular, it prevents the service provided by one professional from being totally identical to a service provided by another professional. Economically speaking, it is even desirable, because that is where the factor of competition between professionals actually lies: the quality of the service supplied to the client, comprising the capacity to solve the problem and the speed of execution of the task. But another difficulty then arises: measuring the quality of the service is in fact largely beyond the client’s capacities.

Therein also lies a substantial difference from another type of activity on the edge of the market, namely professional sporting activities.

In this domain, the Court, not without difficulty and successive approximations, has incorporated the specificities of professional sports into its assessment of whether competition rules should apply to regulation of sports activities. The Court judged that the IOC’s rules might conflict with Treaty competition rules, but that the decisions by the IOC or a sports organisation did not necessarily fall into the scope of Art. 101.1 of the Treaty. In other words, the Court acknowledged the need to take into account the context surrounding the sports organisations’ decisions and sought to determine whether the rule was justified by a legitimate objective, particularly to ensure a sports competition runs smoothly.

This means accepting that certain rules that necessarily have anticompetitive effects must be tolerated to create the level at which the only possible competition can reasonably take place through the sport. Sport, like the professions, requires mobilisation of faculties inherent to the person who practices it (for the sportsman, superior physical capacities, training, physical fitness, competitive spirit) which necessarily distinguish the performance of any given sportsman from the performance of his competitor. The individualisation of performance brings us back to the problem of quality. But in sports, quality is immediately measurable, even by the general public that is the “consumer” of sports events, and this distinguishes the consumer of such events from the client of a professional service. In short, although professional sporting activity is different from ordinary economic activities and this justifies the Court’s acceptance of certain regulations, even if they are anticompetitive, there is no additional issue of information asymmetry.

89 Case C-519/04, David Meca-Medina [2006] ECR I-06991
There is indeed specificity in the professions: the irreducible portion of “mystery” that characterises professional services and makes the quality of the service very difficult to measure. Since information asymmetry remains after execution of services by the professional, the classification of “credence goods”, a term from the vocabulary of law and economics, is relevant. The corollary is the need for regulation, to avoid the adverse selection and moral hazard problems highlighted by the Economists.

The issue is much more important than in consumer goods or sports, due to the externalities associated with good quality in the professional services. Health, legal safety, building safety and corporate financial statement reliability, are all fields in which deterioration in service quality in the European Union would have particularly serious consequences for society.

Reference to the concept of information asymmetry is also directly in the lines of the change instigated by the European Commission in interpretation of the Treaty’s competition rules at the turn of the year 2000, increasingly incorporating economic analysis of the markets under consideration. All the Commission’s decisions in competition matters now refer, in conjunction with or before consideration of the relevant Treaty article, to the quality of the underlying economic reasoning, particularly in terms of efficiencies. There is thus no obstacle, given the specificity of a sector of activity located at the edge of the market, to using an economic argument that is relevant in any national context, even to moderate application of competition rules.

Use of an originally economic concept by a Court made up of legal specialists may seem paradoxical, especially when it is used to reject Treaty competition rules. Could the Commission’s Directorate General find itself trapped by systematic use of the economic analysis it has called for itself? It is a possibility, but that debate is of secondary importance when the efficiency of the professions in a service economy is at stake. Yes, the Court must carry on as it has started.

Philippe Corruble