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Grégoire Massé

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CES

Centre d'Économie de la Sorbonne
UMR 8174

**Law professions, low regulation: assessing French
notarial competition through (de)regulation indexes**

Grégoire MASSÉ

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Grégoire MASSÉ*

ABSTRACT

This paper questions the difficulty of quantifying French notaries' regulatory evolutions with existing regulatory indicators. Whereas the notary profession faced a major transformation with high competitive outcomes, regulatory indicators that initiated this process did not change. Does this mean that French notaries do not belong to the European deregulation process of professional services?

In this paper, we aim to consider the more general issue of assessing professional services' regulation and question both indexes' internal and external validity. We show that (1) regulatory indicators used to promote professional deregulation in Europe belong to a "flat world" paradigm, and that (2) they are inconsistent in assessing evolutions resulting from the European Open Method of Coordination.

We process in two steps. First, we identify an "index framework" which includes regulatory indicators from different indexes-based policies. As they have common structure and aims, their methodology relies on a full-comparability paradigm, with the idea that regulatory "best practices" from different countries and professions could be implemented in any professions or countries. Moreover, this comparability perspective echoes the Open Method of Coordination, namely a policy method used in the European context of regulatory convergence. However, when we consider their applicability in the French context, we note indexes' inability to compare professional regulations: regulatory indicators only quantify a small part of professional rules, and cannot explain some dynamic evolutions. They belong to a "flat world" paradigm, with an underlying theoretical economic model restricting the regulatory scope.

We then try to define precisely this theoretical model in order to grasp its consequences on policymaking. If regulatory indicators do frame the economic assessment of regulation, we aim to make their model consistent in a general equilibrium perspective. We see that indicators' theoretical regulatory model is a contestability model of non-regulation, which cannot justify piecemeal deregulations. This theoretical model advocates for a total deregulation in professional services, whereas the Open Method of Coordination had only promoted piecemeal deregulation policies. Beyond this external inconsistency, our conclusion is that – paradoxically – the underlying theoretical model does not apprehend law, and can only advocate for a legal revolution instead of a regulatory evolution.

Therefore, we support a more law-grounded approach for regulatory quantification, and advocate for new indexes in the quantification of Open Method of Coordination's effects.

Keywords: Regulation Indexes (Regulatory Indicators); Legal Services; Professional competition; Comparative law and economics.

JEL codes: J44, L51, D45, K23

* Université Paris 1 Panthéon-Sorbonne, Centre d'Économie de la Sorbonne (UMR 8174, CNRS), Paris, France.
Contact: Gregoire.Masse@univ-paris1.fr.
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TABLE OF CONTENTS

Abstract	1
Table of Contents	2
1 – Introduction: An unquantified regulatory evolution for French notaries	3
2 – A deregulation process... which leads to re-regulation: a new framework for competition in the French notary profession	5
2-1 – Promoting deregulation in European Notarial Services	5
2-1-1 – An “index framework”: an economic tool to assess regulation	5
2-1-2 – The “Best practices” methodology: promoting a hybrid model of professional competition	7
2-2 – The new regulatory framework in the French notary profession: a more competitive regulation?	8
2-2-1 – A competition-improving reform for an old corporatist profession	8
2-2-2 – Is “liberalisation through administration” competition improving? Paradoxical evidences from indexes	10
3 – From optimal regulation to non-regulation: contestability in legal services to justify total deregulation	12
3-1 – Minimising regulation, enhancing competition	12
3-1-1 – A method for modelling optimal entry and conduct regulations	12
3-1-2 – When did it go wrong? A model compatible with both perfect competition and monopoly	13
3-2 – A contestability-oriented model of optimal regulation... for no-regulation	17
3-2-1 – Which market for legal services? Optimal regulation for a contestability scheme.....	17
3-2-2 – A contradiction between the economic tool and the policy method	18
4 – Conclusion: Quantifying regulation or competition?	19
Bibliography	21
Annexes	25

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1 – INTRODUCTION: AN UNQUANTIFIED REGULATORY EVOLUTION FOR FRENCH NOTARIES

In 2015, the ancient French notary profession faced a major regulatory evolution with high competition outcomes. Nine years later, the profession appears to be transformed. On the one hand, the number of professionals increased by almost 80 %, while the number of notary firms increased from a twenty-yearly 4600 to 6961 in 2023 (ADLC, 2023a). On the other hand, prices were lowered to a more competitive level, and some were even completely deregulated (particularly non-monopoly activities, as conveyancing). In these price-deregulated sectors, price-cartels behaviours faced strong sanctions (ADLC, 2019). At the same time, the advertising was liberalised, with the possibility to use new techniques of contacting, oriented towards the development of new entrants. In 2023, the professional ethics code was made more competition-oriented, and its enforcement through disciplinary procedures more transparent (ADLC, 2023b). The professional order struggles to resist against this quantitative competition path, and fails in counteracting this conclusion of a two-decades deregulation process for legal services. If these regulatory evolutions seem to have obvious competitive results, it is however not so clear when we consider regulation indexes used to justify the deregulation process. Indeed, the OECD's PMR regulatory indicators for French notaries are, since the 2018 revision, of 3,54 out of six¹. If we calculate this index for French notaries without considering the mentioned regulatory evolutions (as if we were in 2014) ... it is still of 3,54 out of six. In other words, regulation changed, but not regulatory indicators.

This paper focuses on this impossibility to quantify French regulatory evolutions in legal services, and points out two major issues for indexes that inspired the regulatory evolution. First, they define a specific analytic framework for professional services, with implicit assumptions on professional competition and legal differences. They suppose that the optimal notarial – and more generally professional – regulation is a non-regulation model, and that we should interpret every professional rule on this flat paradigm. Second, as they refer to indicators-based policies, we question indicators' fitness to policymaking, and particularly to comparative methods in promoting competition. We see that regulatory indicators can only promote a full deregulation and a strong homogeneity of professional markets, and need legal systems' differences to be nullified. However, these indicators are used to promote piecemeal deregulations, and unfit with their own full-deregulation paradigm. They only propose both a limited assessment of regulation levels and misleading justifications of regulatory evolutions.

Regulatory indicators are not newcomers in economics and politics of professional services, and were the cause of French notaries' regulatory evolution. As a matter of fact, 2024 is the 20th anniversary of the European Commission's (EC henceforth) Communication on professional services (EC, 2004), initiating an important movement of professional deregulation across the European Union. This communication itself relied on regulatory indicators built by the Institute for Advanced Studies of Vienna (IHS after)². European notaries were presented, for the most part, as over-regulated, and the EC invited member States to professional liberalisation – following the Dutch Notary Act example of 1999

¹ [Indicators of Product Market Regulation - OECD](#)

² As we present in 2-1, the OECD regulatory indicators for professional services we mentioned are directly inspired from IHS' regulation indexes (IHS, 2003). As the OECD's indexes are the latest and most refined form of professional regulation indexes, this paper principally uses them.

(Noailly & Nahuis, 2010). These benchmarking and index constructions were inspired from prior regulatory indicators in different international contexts³, which participated to implement a “service providers” paradigm for legal services (Terry, 2008b). In this paradigm, the Court of Justice of the European Union (CJEU) recognised in two cases (*Wouters*, 2002; *Arduino*, 2002) that liberal professionals were “undertakings” (under the meaning of the European treaties) and that antitrust legislation applied to them. It followed an enforcement of mutual recognition of qualifications (through directives⁴ and case law⁵) for law professionals in the EU. In the context of the Lisbon Strategy (2000), the EC decided to reuse the “Open Method of Coordination” (OMC henceforth; Terry, 2009) with the ambition of creating a single market for professional services. Professional regulation’s comparison should inspire regulatory reforms towards more competition, and convergence of national markets towards common objectives. The European Commission thus regularly compares national regulations in professional services (EC, 2013; EC, 2016; EC, 2021), and pressures to assess professional rules’ “proportionality”⁶ (EC, 2004). All these injunctions, combined with empirical studies quantifying professional services’ over-regulation (IHS, 2003; Copenhagen Economics, 2005; ZERP, 2007; EC, 2013) inspired a liberalisation for French “Public and Ministerial Officers”⁷ in 2015, despite a professional corporatist struggling against reformation.

Eventually, the “deregulation process” in legal services results from the fusion of three distinct but parallel elements: (i) the European construction (with the ideal of a single market for professional services), (ii) the implementation of the OMC in a new context and (iii) the EC’s injunctions towards more competition-oriented regulations. The OMC, as a “soft law” program, launched several movements of regulation assessment and deregulations, but only represents a small part of European competition policy (Terry, 2009). Therefore, we can identify different phases of this deregulation process. First, the EC proposed the OMC as a method of coordination, and an analysis of legal professionals’ regulation relying on regulatory indicators. These indicators-based studies have pointed out a negative relationship between regulation and both productivity (IHS, 2003), and quality (ZERP, 2007). On the other hand, they also concluded to a positive relationship between regulation and prices (ZERP, 2007). When it comes to services, reducing legal barriers leads to a massive competition impact according to Copenhagen Economics, particularly in professional services (Copenhagen Economics, 2005). Second, European countries assessed their domestic regulations for different sectors and proposed deregulations according to the EC’s policy recommendations. In France, it led to several institutional reports (see part 2-2). Finally, there were regulatory reforms in different countries. As Garoupa (2014) points out, EC’s recommendations were put into practice by some countries

³ See part 2-1

⁴ There were different Directives from the European Commission for mutual recognition of qualifications: 77/249/CE (lawyer’s denomination and definition by providing services; mutual recognition) 98/5/CE (mutual recognition for lawyers’ qualifications) 2005/36/CE (directive on mutual recognition of qualifications for services)

⁵ CJEU’s case law enforced a mutual recognition of qualifications for lawyers and non-discrimination for notaries in the EU: *Morgenbesser* (2003), *Koller* (2011), and *C-50/08* (2011).

⁶ This idea of regulation’s “(dis)proportionality” echoes, in a more international context, different works of the OECD on professional regulation issues (see OECD, 2000; OECD, 2007). This is the idea that “*Rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective*” (EC, 2004, p.4).

If we refer to the latest Directive on “Proportionality test before adoption of new regulation of professions” of the EU Parliament (Directive 2018/958), this concept means that every regulatory reform for professions (new regulation or modification of an existing one) fulfil four conditions:

- It is “applied in a non-discriminatory manner.”
- It needs to be justified by “public interest objectives” (the Directive gives a list of what might constitute these objectives §17).
- It is “suitable for securing the attainment of the objective which they pursue.”

It does “not go beyond what is necessary in order to attain that objective.”

⁷ This 2015 reform concerns all French “Officiers Publics et Ministériels”: with Notaries, it concerned Bailiffs, Auctioneers, Commercial court clerks and Lawyers at the Council of State and at the Court of Cassation. The notary profession represents a majority of these officers.

(particularly the Legal Services Act (2007) in the United Kingdom, for instance, which reformed barristers and solicitors following the Clementi Report) but some exceptions existed (see for instance Spanish or Portuguese lawyers).

This paper aims to analyse the fusion of the OMC and regulatory indicators, and the limits of assessing the “deregulation process” it initiated in French notarial services. More than questioning the competition effects of a particular reform on a particular profession, it proposes to interrogate the (un)fitness between the OMC and professional regulation indexes. The idea is not to highlight a necessary imperfection of regulation indexes, or to question their methodological choices nor to criticise the OMC. We explain why these indexes cannot assess regulatory evolutions in the OMC’s context, by considering both comparability issues for professional markets and the economic modelling of the competition within these markets. More precisely, we see that regulatory indicators rely on a “non-functional equivalence” (part 2) which assumes the existence of a “flat world” for legal services (Terry, 2008a). This flat world is made of contestability and hypotheses that could not fit the OMC’s ambitions (part 3): this combination explains why major transformations of a professional market cannot be quantified. If the OMC needs to be quantified, it must change its (de)regulation indexes. We therefore invite to consider that existing regulatory indicators are not consistent in assessing all kinds of deregulation, and – although we do not pretend to build new regulatory indicators – propose insights for regulatory quantification.

2 – A DEREGULATION PROCESS... WHICH LEADS TO RE-REGULATION: A NEW FRAMEWORK FOR COMPETITION IN THE FRENCH NOTARY PROFESSION

Competition-enhancing reforms in the French notary profession appeared to be a mix of several contexts. From a European perspective of globalisation and deregulation of legal services’ markets, a comparative approach led to promote convergence towards competitive best practices. Regulation indexes were constructed to assess regulation, to compare competition levels and to conclude on reforms to make. From a French perspective, an anti-corporatist political tradition appropriated the EC’s stance, and proposed economic justifications towards regulatory reforms (Attali, 2008; IGF, 2013; Ferrand, 2014; Untermaier & Houillon, 2014).

2-1 – Promoting deregulation in European Notarial Services

2-1-1 – An “index framework”: an economic tool to assess regulation

Professional regulation was under international scrutiny before EC’s Communication. It led to a deregulation process, which was inspired by institutional reports and conferences. The Global Agreement on Trade in Services (GATS) or the Organisation for Economic Co-operation and Development (OECD) created a new paradigm of legal services as “service providers” (Terry, 2008b; Terry, 2010). This paradigm, as said L. Terry (2008b), analyses professional services as “normal” services, and thus applies to those industrial economic schemes. *Wouters* and *Arduino* cases (2002) considered legal professionals as “undertakings within the meaning of Article 85 of the EC Treaty” (now Article 101 of the TFEU). In this context, Monti’s “stocktaking exercise” and EC’s Communication were a new step in this regulatory approach (Terry, 2009) as it inaugurated a deregulation path for the European Single Market. On the one hand, the European “Open Method of Coordination” let national governments free to decide how to reach this common objective of professional deregulation. On the other hand, the EC defined and quantified the question of professional services’ regulatory framework (what are the rules to test? What kind of tests should be applied?) and highlighted this issue for single market purposes⁸. In this perspective, economics appeared as a comparative law tool (Michaels, 2009)

⁸ The EC (2004) defined five types of professional rules under scrutiny, and invited the EU countries to assess individually their proportionality. These professional rules were (i) Fixed prices and (ii) Recommended prices, (iii) Advertising regulations, (iv) Entry requirements and reserved rights and (v) Regulations governing business

to promote and justify professional deregulation, and the DG competition offered a public contract to the Institute for Advanced Studies of Vienna to assess professional regulation economic outcomes (Terry, 2009). These discussions resulted in a report (IHS, 2003), which became the main empirical source of EC's Communication. The IHS report led to the creation of professional regulation indexes⁹ used as tools to compare national and professional regulations, and to assess their proportionality relatively to competition. With these indexes, IHS (2003), EC (2004), or ZERP (2007) later¹⁰, concluded that many professions were over-regulated, which can be explained by "private interest theories" or "regulatory capture" (Stigler, 1971; Posner, 1974).

The IHS indexes (and ZERP's reuse of these indexes) are not the latest attempt to quantify regulation; actually, index construction belongs to different contexts of professional markets' globalisation. Therefore, an "indicators framework" exists beyond the single IHS index, with a common basis and methodological common elements. For example, Nguyen-Hong's works on regulation's quantification in professional services' trade assessment (Nguyen Hong, 2000) directly inspired Paterson *et al.* (the authors of the IHS and the ZERP studies) in constructing Market Entry and Market Conduct indexes. The former wrote in GATS context, when the latter developed in OMC's context. Similarly, the IHS professional regulation index inspired the OECD "Product Market Regulation" index for Professional Services¹¹ in 2003 (PMR Questionnaire, 2003; Conway, Janod & Nicoletti, 2005). Despite all these revisions, today's PMR index for professional services is a refinement of IHS'. Moreover, the 2018 revision has main variables in common with European Commission's index "PRO-SERV" index (EC, 2016) ... itself directly inspired from 2013 version of PMR (EC, 2016; Pelkmans, 2017). What we see defines an "index framework", with some insights: a mutual inspiration and sharing of methods and variables, and a community of contexts (market openness, promotion of competition). Today, PMR indicators are still used as guidelines for better competition and efficiency:

"The OECD PMR indicators are the most complete quantitative measures of barriers to competition currently available" (OECD, PMR Brochure 2020, p.5).

They share a structure, based on a bipartition between "Entry" and "Conduct" regulation which follows a distinction made by the OECD (OECD, 2000), with the idea that entry rules are "structural" and conduct rules "behavioural". Today, indicators' use goes beyond institutions, particularly in academic works. Mlinaric, Oplotnik & Brezovnik (2018) use PMR regulatory indicators for regulatory comparison in Legal services; Mocetti, Rizzica & Roma (2021) build "OECD-type" indexes, based on PMR indicators (Vitale & *ali.*, 2015), to make inter-professional comparisons in regulated occupations in Italy ...

Nevertheless, this mutual inspiration does not mean that these different indexes are perfectly comparable and substitutes. Particularly, PMR's 2018 revision changed some variables and introduced new ones, and sub-variables' weightings and scaling have major differences. For example, the IHS differently weights "Licensing" in the Market Entry Regulation Index (40 % of the index), "Regulation of Prices, and Fees" in the Market Conduct Regulation Index (25 %), while the OECD applies the same

structures and multi-disciplinary practices. All these rules were quantified into the IHS study (IHS, 2003; See Annex 1 for the detail of sub-variables), and are still in OECD's PMR indicators.

⁹ The indexes constructed in IHS (2003) are inspired of Nguyen-Hong works for the Australian Productivity Commission (Nguyen-Hong, 2000). His indexes were constructed in evaluating GATS and quantified regulation with a standard of services' trade liberalisation.

¹⁰ IHS and ZERP reports share two authors (Iain Paterson, Marcel Fink)

¹¹ "Product Market Regulation" (PMR) is OECD's regulation indicators system, with a regulatory quantification purpose. Particularly, there are sectoral indexes: Professional services (Legal services, Engineering, Architecture, Accounting) belong to a larger sector ("Regulation in Retail Distribution and Business Services", RBSR), itself in "Non-Manufacturing Regulation" (NMR). For more details, see Nicoletti, Scarpetta & Boylaud (2000), Conway, Janod & Nicoletti (2005), Wöfl, Wanner, Kozluk & Nicoletti (2009), Koske, Wanner, Bitetti & Barbiero (2015) and Vitale, Bitetti, Wanner, Danitz & Moiso (2020).

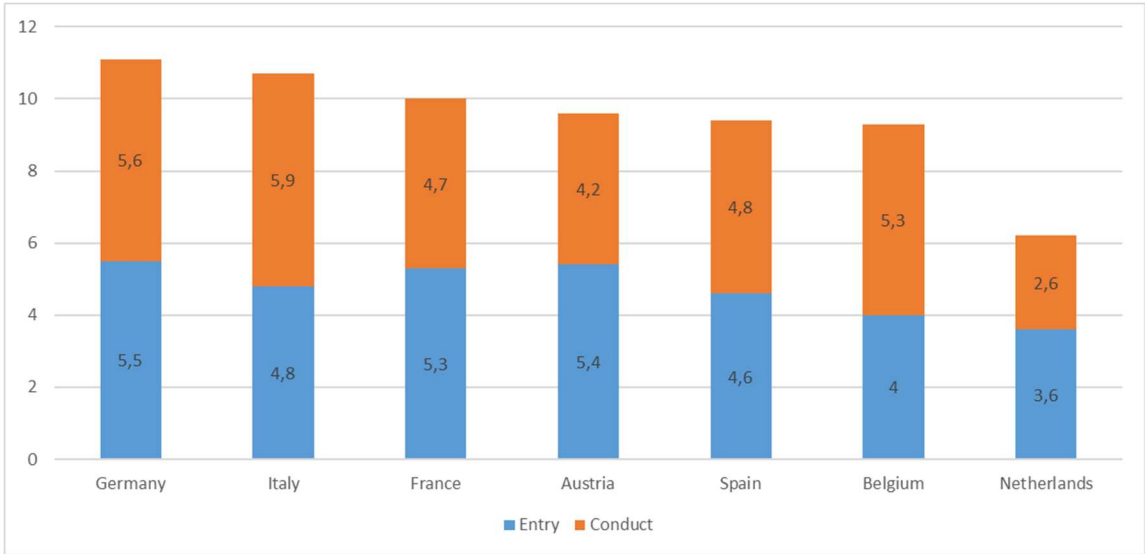
There were several revisions of PMR indexes since their creation in 1998; Professional Services were introduced in 2003, and revised in 2008, 2013 and 2018.

weighting to all sub-variables (14.3 % for entry sub-variables and 12.5% for conduct ones). These differences create important gaps in benchmarking countries’ regulation. For example, for notaries, France is one of the most regulated countries according to IHS indexes, while it is one of the most “competitive-friendly” in OECD’s indexes¹².

2-1-2 – The “Best practices” methodology: promoting a hybrid model of professional competition

In OMC’s context, indexes appear to be a non-compulsory deregulation method: they provide an information on regulation’s nature, and with “best practices” give insights for further reforms. The “best practices” idea relies on an equity method: all professional rules are equivalent in terms of competitive outcomes, and are comparable based on this competitive standard. As professional rules constitute indexes’ sub-variables, and there exists “best” countries in terms of competition for each of these professional rules. Therefore, national professional regulations should converge towards a hybrid and optimal regulation, which is the addition of all these best practices; for example, if we consider French notaries in 2003, they were one of the most regulated after Germans and Italians (IHS, 2003). EC tackled notaries’ regulation, because of an old and strong over-regulation, and invited Latin Notaries to converge towards more proportionality. Graph 1 shows that in Notarial services, Netherlands proposed the lowest regulation (and so on, the most competition-oriented regulation). The Dutch Notary Act (1999) deregulated both entry and conducts in the profession, by ending quotas, facilitating installations, and deregulating prices (Van den Bergh & Montangie, 2007; Noailly & Nahuis, 2010). This example is thus often presented as the archetype of the good path towards deregulation (particularly in ZERP, 2007).

Graph 1: The IHS regulation index for Notarial services in 2003



Sources: Paterson, Fink, Ogus et al (Jan 2003) “Economic impact of regulation in the field of liberal professions in different Member States”, Institute for Advanced Studies (IHS), Vienna, study for the European Commission

As we can see, IHS’s regulation indexes rely on a double purpose: to assess regulation’s proportionality (a professional rule necessary and sufficient to achieve a public interest objective) and to promote regulatory convergence¹³ towards a hybrid model of regulation. Moreover, they offer an empirical

¹² This difference results from both the introduction of new variables (where French notaries have a more competition-friendly regulation than other countries) and the changing of weightings. On IHS’ and OECD’s common variables, French notaries’ results overlap.

¹³ This idea is compatible with a model of Tieboutian regulatory competition (Tiebout, 1956; Easterbrook, 1983), where countries compete in terms of professional services’ regulation. Indexes might be

ground for deregulation, by comparing countries' professional regulations and inferring economic results:

“We are led by this study to the overall conclusion that the lower regulation strategies which work in one Member State might be made to work in another, without decreasing the quality of professional services, and for the ultimate benefit of the consumer.” (IHS, 2003, p. 6).

This promotion of both competitive “best practices” and exchanges between countries' professional regulations is at the core of OECD's index construction along with the “International Best Practices” method. It belongs to the same paradigm of comparability of national laws, and makes the implicit assumption that professional rules are “functionally equivalent” between countries (Zweigert & Kötz, 1998). As Conway and Nicoletti (2006), two of PMR authors notice,

“It should be noted that in assessing regulations in both the retail distribution and the professional services sectors the implicit assumption is that barriers to entry or constraints on conduct that exist in one country but not in others are not needed to ensure service quality, protect workers or protect consumers and, hence, unnecessarily distort competition.” (Conway & Nicoletti, 2006, p.12).

The International Best Practices method considers equivalent all professional regulations based on a competition standard, and assesses an “optimal” level through comparison. In other terms the lower the index is, the more competitive-friendly professional regulation is. Each sub-variables (which points a specific professional rule) should therefore be minimised, and lead to a better competition. Optimality assessment, in this case, does not propose a theoretical model of regulation (Mlinaric, Oplotnik & Brezovnik, 2018), but an empirical ground for regulatory reform.

To sum up, regulatory indicators rely on three implicit assumptions. *First*, professional rules can be considered as separable: we can distinguish quotas and economic needs tests from price regulation, graduation requirements... *Second*, these rules are comparable, both between countries and between professions. It should be noted that both in IHS and OECD reports, notaries' regulatory indicator questionnaire quasi overlaps with lawyers', real estate agents', accountants', architects' and engineers'¹⁴. *Finally*, with the “Best Practices” methodology, professional rules are implementable: if a rule exists in a country A but does not exist in a country B, then it is not necessary and has to be removed. This community of assumptions, methods, and policy recommendations in this “index framework” disentangles the essence of the Open Method of Coordination from its European context. Indeed, the OMC, in professional services' case, seems to belong to a larger policymaking context.

2-2 – The new regulatory framework in the French notary profession: a more competitive regulation?

The French notary profession's reformation answered to the numerous European injunctions to enhance competition in professional services. In a sense, it pursues the “Open Method of Coordination”: the EU promotes competition in liberal professions, and France enhances this competition for legal services, with its own method. However, almost a decade later, did the regulatory environment effectively change?

2-2-1 – A competition-improving reform for an old corporatist profession

Notaries are “Public and Ministerial Officers”¹⁵: they are liberal professionals with a public monopoly (Thuderoz, 1991). Notarial market's specificity results from this historic monopoly on authentication for certain deeds: in France, conveyancing or inheritance require a notarial deed. As “Ministerial Officers”, notaries are under the Ministry of Justice's supervision: until 2015, both national professional order and Ministry of Justice defined new notary firms to enter the market and enforced fixed prices. This “co-regulation” (in the sense of Chaserant & Harnay, 2010) was criticised as the archetype of “regulatory capture” (Stigler, 1971; Posner, 1974). As Suleiman (1987a; 1987b) pointed,

¹⁴ [Indicators of Product Market Regulation - OECD](#)

¹⁵ « Officiers Publics et Ministériels »

notaries behaved as a strong corporation, and the Ministry’s “co-regulation” turned into a powerful “self-regulation”. Some institutional reports tried to expose this capture¹⁶, but failed in reforming the profession. In this perspective, the European move towards professional deregulation echoed a long-term French anti-corporatist stance (Marty, 2017; Frison-Roche & Roda, 2022).

The notarial captured regulation was strong and organised: until 2015, the professional representatives¹⁷ settled the number of new notary firms (“*Offices*”) to be created. With the Ministry of Justice, notaries set up a binding tariff upon their main activities, and enforced the profession ethics through discipline – but in a Nuñez-type self-regulated organisation (Nuñez, 2007), they did not reveal any of the disciplinary sanctions. This led to corporatist-like practices, with a strong entry and conduct control and opacity of internal affairs for a unique and monopolistic profession (Shaked & Sutton, 1981). It resulted in a sluggish notary firms’ evolution on the middle or long term, and a weak growth of the number of professionals. Notary firms stagnated between 1995 and 2015, and the number of professionals increased by an average of 1.3% each year on this period (Table 1). This regulatory capture was reinforced by a “gendered capture” (Massé, 2023), professional self-regulation of entry leading to women’s exclusion from the profession. Main institutional reports presented regulated fees as over the competitive equilibrium (EC, 2004; ZERP, 2007; IGF, 2013) with high mark-ups, considered as a “rent”. Ethics code prohibited main forms of advertising. All these elements gathered conditions for a regulatory capture.

Table 1: Growth and Average annual growth rates for notary firms and professionals (1995-2023)

	Notary Firms		Notaries	
	1995-2015	2015-2023	1995-2015	2015-2023
Growth rate	-2 %	+52.6 %	+29.2%	+78.5 %
Average Annual Growth Rate	-0.1 %	+5.4 %	+1.3 %	+7.5 %

Sources: *L'évolution des métiers de la justice - Sénat (senat.fr)* ; *Notarial profession’s annual reports (2015 and 2023)*; author’s calculations.

Following some institutional reports directly inspired from EC’s works and related studies (Attali, 2008; IGF, 2013; Ferrand, 2014; Untermaier & Houillon, 2014), the former French Ministry of Economics and Finances E. Macron launched a “liberalisation” of the notary profession¹⁸. It resulted in a new regulatory framework for notaries: the profession moved from a self-regulation to a “hetero-regulation” (Chaserant & Harnay, 2010). The French antitrust agency (Autorité de la Concurrence, ADLC henceforth) now proposes regulatory schemes for market entry and prices, and both Ministry of Justice and Ministry of Economics and Finances can approve or reject these schemes. The ADLC defines installation phases for new liberal professionals through specific communications, and installation maps for each of these phases¹⁹. To construct these maps, the ADLC calculates economic needs tests for geographical consistent markets (ADLC, 2016) and proposes a maximum number of installations for each. Graduate notaries can candidate in different geographic areas, and a lottery process usually selects future entrants in these areas. Until then, all ADLC notifications on entry were ratified and put into effect, which makes it the effective regulatory agency for notaries. The agency also communicates on tariffs and fees for notarial services (ADLC, 2019; ADLC, 2020), and proposes a fee convergence towards notary firms’ average costs. Since the 2015 Law, notarial regulated fees were reduced for certain services.

¹⁶ See, for example, Armand & Rueff (1960), Attali (2008) or IGF (2013).
¹⁷ The notary profession is hierarchized into a national professional order (the “Conseil Supérieur du Notariat”, CSN), regional chambers and more local representatives. Before 2015, settlement comities for new notary firms were composed for a at least a half of national representatives of the profession (see Massé, 2023).
¹⁸ [LOI n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques \(1\) - Légifrance \(legifrance.gouv.fr\)](#)
¹⁹ In 2024, there were 4 installation phases, with 4 associated ADLC’s communication and maps: 2016-2018; 2018-2020; 2021-2023; 2023-2025

It should be noted here that France innovates in terms of legal professions' regulation. Indeed, instead of creating a new regulatory agency or making several agencies compete (Szczygielski, 2022), the 2015 reform put the national antitrust agency in charge of this regulation. This might seem surprising, as ADLC's role is to sanction anticompetitive behaviours *ex-post* (cartels, abuses of dominance ...) and not to regulate markets *ex-ante*²⁰. Such a model overlaps with a Laffont & Tirole (1993) regulatory scheme, and might constitute a "de-capture" of the profession. Indeed, there is a "two-tiered" regulatory structure, with ADLC as the "agency" and Ministries of Justice and Economy and Finances as the "Congress". In this agency model, the regulated industry (here, notaries) benefits from an "informational rent", and ADLC has resources to analyse professional competition issues, and an expertise to propose a regulatory scheme. With a transparency process (ADLC publishes all its communications about professional regulation), any bilateral contracting with the industry appears impossible. The old regulatory capture scheme seems to be vanished, and there can be no doubt on the new framework's competitive outcomes for notarial market. It led to what we might call a supply shock on the notarial market, by multiplying the number of notary firms by 1.53 since the reform, with the number of professionals increasing in average by 7.5 % each year between 2015 and 2023 (Table 1). Notaries are freer in establishing prices (they might practice a discount on some regulated fees, and certain fees for non-monopoly activities were fully deregulated²¹), and some regulated fees have been reduced. Since 2019, they are also freer in advertising, with the possibility to use "personal contacting"²². The ADLC pressured for advertising regulation to be softened, particularly for new notary firms. According to the agency, these rules restricted new firms' development and distorted the new competition it promoted. Finally, the ADLC is trying to make professionals' ethics code more competition-oriented, by communicating and proposing new rules, and to make ethics conformation and enforcement transparent and procedural (ADLC, 2023b).

As we can see, there are conditions for a competition-improving process: supply shock, lower prices, freer advertising and more transparency. Professionals and ADLC agree on the fact that this new framework changes the conditions of competition.

2-2-2 – Is "liberalisation through administration" competition improving? Paradoxical evidences from indexes

All this process appears to be a perfect example of what could be the OMC: (1) EC communicates on regulation in legal services, analyses the over-regulation and proposes paths towards more competition in this industry, (2) a reformation process takes place, and (3) in middle-long term, this results in more competition on the professional market. As they justified this policymaking, we expect regulatory indicators to follow this trend, and to give evidences of this regulatory evolution.

However, when we consider IHS' (which inspired the process) or OECD's (which are a refinement of IHS' indicator) professional regulation indicators, we cannot quantify these evolutions on competition ground. For example, the sub-variable "Quotas and Economic needs tests" of the IHS Market Entry Regulation Index (Annex 1) does not change, because it is a dummy variable (with "Yes" / "No" possibilities), as long as there are still economic needs tests. We find the same question in PMR's entry regulation index ("Is the number of professionals allowed to practice in your country limited by law or self-regulation by professional bodies (or a combination of the two)?", see table 2), which answer remains a "yes" in 2018. This is quite simple to understand: the index quantifies quotas' existence, but is blind to (1) who regulates or (2) how it regulates. Nevertheless, the competition impact is massive: the number of notary firms created between 1995 and 2015 approximates zero, while between the first installation phase (2016-2018) there were 944 new notary firms, and 724 for the second phase (2018-

²⁰ We should precise here that ADLC realises *ex-ante* market analyses in merger control cases.

²¹ Particularly notarial activities as real-estate agents: there were regulated fees before 2015, and are now totally free.

²² [Décret n° 2019-257 du 29 mars 2019 relatif aux officiers publics ou ministériels - Légifrance \(legifrance.gouv.fr\)](https://www.legifrance.gouv.fr/eli/decree/2019/03/29/2019-257). Personal contacting is an advertising technique, which consists in mailing former clients about the services provided by the notary firms, according to their profiles.

2020)²³. The index quantifies as a functional equivalent two different – not to say opposite – regulations: one capture-intensive, and the other competition-enhancing.

We note the same issues for price regulation. As a matter of fact, the IHS or the OECD use the same price regulation scaling: the more it constitutes an impediment for adjusting prices to marginal cost's minimum, the less it is competition-friendly²⁴. This quantification is blind to prices' effective level, and assumes that a non-regulated price is necessarily closer to a competitive level than a regulated one. It also implies that all fixed prices are functionally equivalents in damaging competition. However, as suggests Laffont & Tirole's model of "two-tiered regulation" (Laffont & Tirole, 1993), a non-captured regulation agency can fix prices according to an estimate of what could be a competitive price, and this is what ADLC tries to enforce by lowering fixed prices. This difficulty to address prices' regulation is strengthened by comparing the index *between* professions. Indeed, when we observe French lawyers and notaries' index value for prices' regulations, an equal value (5 / 6, for "Binding minimum or fixed prices for some activities") conceals two different impacts of regulation on competition. Regulated fees represent approximately 80-90 % of notarial sales, while they concern only four activities for French lawyers, in a small segment of their market²⁵.

The two examples of quotas and prices show France's specificity in liberalising notaries, with a "liberalisation *via* administration" (Blanc, 2015): the Macron Law transferred regulatory prerogatives from the professional order to a non-professional agency specialised in antitrust issues. ADLC's regulation itself undertakes this paradoxical governance, and calls it "*regulated freedom of installation*"²⁶. Advertising and ethics mutations, similarly, do not produce any variation in indexes, but for different reasons. In the case of advertising, the effect results from OECD's scaling: there is an alternative between three regulation levels

- "All forms of advertising are allowed" – the most "competition-friendly" regulation.
- "Some forms of marketing or advertising are prohibited".
- "All forms of marketing or advertising are prohibited" – the less competition-friendly regulation.

Nevertheless, the French 2019 reform for notarial advertising did not impact the index value: some forms of marketing or advertising were "prohibited" before 2019, and some forms are still prohibited after. Then, the index framing creates a gap between regulatory possibilities, and cannot quantify any variation in advertising regulation. For ethics, it seems simpler to understand: no sub-variable concerns ethics issues.

*

Our observations show that there is a non-functional equivalence: on empirical ground, indexes quantify with same regulation outcomes different kinds of professional rules, with different functions or issues. They represent professional rules as identical in terms of competitive outcomes, for different legal services (lawyers and notaries), different legal systems (French notaries and Swedish notaries, for example) and different professions (notaries, architects, engineers...). They forget that a rule does not necessarily have the same function in different contexts (Zweigert & Kötz, 1998), and that there might

²³ We calculate these results from ADLC (2016, 2018, 2021), but there might be a lag issued from the necessary time for a firm installation. For example, a notary firm created in the first installation phase context can be registered only in 2018 or 2019, and appears only for the second phase.

²⁴ In the index perspective, no price regulation is preferred to recommended prices, themselves preferred to maxima prices, themselves preferred to minima prices; see Table 2 and Annex 1.

²⁵ According to the Professional order (CSN, 2021), French notaries have regulated fees for property deeds and conveyancing authentication (more than 50 % of their sales), and most family transfer activities (more than 30 % of notarial sales: bequests, inheritance, wedding contracts...). In contrast, regulated fees only concern foreclosure, partitions, licitation and judicial sureties for lawyers. This only represents a tiny fraction of lawyers' activities, and a majority in the profession does not practice it.

²⁶ "Liberté d'installation régulée", ADLC, 2016

exist different models of professional competition. In other words, they consider that “The legal world is flat” (Terry, 2008a). Given this flatness, what kind of world these indicators promote? Is this world economically compatible with OMC’s policy recommendations?

3 – FROM OPTIMAL REGULATION TO NON-REGULATION: CONTESTABILITY IN LEGAL SERVICES TO JUSTIFY TOTAL DEREGULATION

As we have seen, the regulation index quantifies regulation’s (un)fitness to a model of competition, but cannot serve as a basis for comparison (between professions or between countries) if professional competition does not fit this model. This is what we call, according to Zweigert & Kötz comparative law approach, a “non-functional equivalence”. Regulatory indicators assume that professional rules fulfil a particular function, and in this perspective, French notaries’ reformation cannot be quantified by indexes because it belongs to another paradigm – while it fulfils a competition-friendly function. As they benchmark countries according to the degree of impediments to competition, regulatory indicators assume the existence of a continuum ranging from pure captured professional regulation to perfect professional competition. In this context, they propose a solution: a lower index is always preferable, and OECD’s hybrid regulatory model appears as the optimal level for regulation. We cannot understand this “one-size fits all” optimality out of a general equilibrium model, with first best optimum objectives.

3-1 – Minimising regulation, enhancing competition

3-1-1 – A method for modelling optimal entry and conduct regulations

We assume that OECD’s benchmark for regulatory comparison belongs to a particular paradigm of professional competition²⁷. In order to understand it, our method consists in minimising all sub-indexes’ values. This method is consistent with an “OMC approach”: we propose to converge towards best “existing practices”. It represents a “hybrid” model, because it aggregates all these practices for each professional rule. For each rule, these best practices belong to different countries: we obtain an idealistic and theoretical professional regulation issuing from existing regulation. PMR Questionnaires are presented in Tables 2 and 3.

The theoretical “*Entry*” model consists in reducing all professional controls on entry and minimising all costs. First, several entry sub-variables’ promote quantitative potential competition, based on profession’s disappearance and competition’s intensification. This arises from a double-sided competition, with inter-professional competition (there are no exclusive rights nor title protection by law, and no compulsory professional order) and intra-professional competition (there are no quotas or economic needs tests nor territorial restrictions). In other words, we need to create the conditions for a free entry on a market for legal practitioners. This is consistent with PMR’s philosophy for other legal services: by promoting – with the same indexes – a deregulation over all legal professions, the OECD aims to create a unique legal services market, with “legal practitioners” (more than “professionals”) providing different degrees of specialised services. There are no barriers on this market: all service providers might authenticate property deeds, and there are no monopolies. There is a subtlety concerning the “Education” sub-variable (graduation, formation and compulsory practice). As a matter of fact, if we want it to be more competitive-friendly, we have two possibilities:

²⁷ We hereafter only consider PMR’s indexes, because they are the latest and most refined form of professional regulation indexes. Indeed, as we said in 1-1, IHS and OECD indexes belong to an “index framework” with a common structure (particularly “Entry” & “Structure” bipartition) and shared sub-variables. Both of them fail to assess French regulation’s evolution.

- If there are no exclusive rights²⁸, there could be an indefinite compulsory education and practice in terms of years.
- If there are exclusive rights, compulsory education, formation and practice shall not go beyond 3 cumulated years.

This sub-variable seems to be consistent with capture theory, and particularly the idea that a title with monopoly protects more professionals than it enhances quality (Kleiner, 2006; Kleiner & Koumenta, 2022). This compulsory education and practice creates unnecessary entry barriers, with no empirical guarantee that it is quality-improving (Winston & Karpilow, 2016). However, this raises the problem of the market outcome: if a professional title does not provide exclusive or shared rights, could we still talk about “professions”? PMR’s framework for lawyers and notaries define two possible markets: a market with professionals, entitled and with monopolies over certain activities (there are “lawyers”, “notaries”, “bailiffs” ...); a legal services market, with “legal practitioners” supplying legal services. In our perspective of index’s minimisation, these problems are solved by the fact that there are no exclusive rights nor professional title (we minimise Question “E” in table 2). To sum up, there could be an indefinite compulsory education and practice, but it does not lead to any protected title or monopoly.

The idealistic “*Conduct*” model relies on agency freedom for all potential suppliers. Professional fees cannot be regulated: as we previously saw, the “Fee and Prices” sub-variable (Table 3) benchmarks price regulation according to its impediments to a competitive prices’ adjustment. Similarly, there should be no advertising regulation, regardless of its effects: in a Stiglerian model, advertising is necessarily information-improving (Stigler, 1961). If it is consistent with a “routine legal service”²⁹ approach (Cox, Schroeter & Smith, 1985), it does not raise the issue of consumer information (Akerlof, 1970; Nelson, 1970; Nelson, 1974) nor the particularities of a “credence goods” industry (Darby & Karni, 1973). This might neglect the theoretical and empirical difficulty to draw strong conclusions over information and quality implications of advertising (Comanor & Wilson, 1979). The other variables try to ease shareholding in notary firms and capital mobility: legal firms should have no specified form, and might be incorporated in larger firms (non-necessarily legal), particularly through shareholding. In this context, and consistently with the entry framework, there shall be no rules over inter-professional cooperation. All these regulations offer the possibility to make scale and scope economies, but invite to interrogate specialisation costs’ loss (Chaserant & Harnay, 2010).

This model of entry and conduct approximates Swedish public notaries’ regulation, whose index is near from zero³⁰ (precisely 0.07, because of the existence of a professional title protected by law). This also explains why French notaries’ evolution does not fit the model, and could not be considered as a deregulation: it is a “liberalisation *via* administration” (Blanc, 2015) where quotas, economic needs tests, and regulated prices still exist. Indexes are blind to “who” regulates and “how” it does, as long there is less or no regulation. Advertising is quantified on a benchmark that cannot measure regulation’s variations, but only quantifies its suppression. Finally, these indexes do not incorporate ethics as an element of professional regulation, even if there exists models of self-regulation and ethics enforcement (Domberger & Sherr, 1989; Nuñez, 2007; Chaserant & Harnay, 2015; Szczygielski, 2022).

3-1-2 – When did it go wrong? A model compatible with both perfect competition and monopoly

As we can see, this model is compatible with a perfectly competitive market. The index model’s vision of notarial services’ market implies that it is not a professional market, but consists in a legal services market for legal practitioners. The latter are law graduates with different specializations

²⁸ Here, it does not matter whether there is a protected professional title or not. However, it is interesting to note that PMR Entry index proposes a functional equivalence between 3 years of compulsory education and exclusive rights, and an indefinite duration for this education without exclusive rights.

²⁹ Cox & al. (1982) define « routine legal services » as services provided by lawyers with (1) a “negligible” marginal productivity for legal skills, (2) a defined set of activities and (3) a weak importance of quality variables.

³⁰ We precise here that Swedish notaries do not have the same legal activities than French notaries, or more generally than “Continental Law Notaries” (Gauthier & Grard, 2014).

(depending on their investments in human capital), without professional examination, order, titles or exclusive rights. They might supply authentication for property deeds (but have no monopoly), in any type of firm (Law firms, as non-Law firms) and with any type of inter-professional cooperation. There are no restrictions on suppliers' quantity: every law graduate can enter the market. Prices and advertising are entirely free. In other words, there remain no impediments on practitioners' entry or conduct, and let the possibility for a perfect competition.

However, this model is also potentially compatible with a monopolist law firm. Indeed, if we consider one firm – not necessarily legal – implemented on all the territory (with annexes), there might exist a single-firm market for legal services. This firm offers all legal services, with legal practitioners specialised in different branches of Law, and makes economies of scope; it also realises economies of scale, as an inter-industry firm. It heavily advertises, and therefore creates strong entry costs and barriers for any potential entrant. With no price and fee regulation, it applies monopoly prices. Ironically, this model can reproduce all the arguments that tackled regulation. If it does, there are two possibilities: it either is the result of one firm's superiority (Demsetz, 1973), or it needs an antitrust action to make the market more competitive-friendly. Even PMR's creators acknowledge this problem as an enforcement issue and a formal approach of barriers to competition:

“One potential difficulty with measuring the impact of regulation on competition is accounting for the influence of enforcement. Stringent regulations may not bite on competition if not enforced, and even the most liberal regulatory settings may not promote competition if not implemented correctly [...] Moreover, as already mentioned, barriers to competition may not be fully captured by the indicators when they are mostly informal” (Conway et Nicoletti, 2006, p.7)

This does not evacuate the paradoxical situation of these indexes. As economic tools for both regulation assessment and public policy, they propose a competition benchmark for regulation and deregulation. However, given the French example, they do not necessarily quantify pro-competition policies, and invite to follow a specific path for professional services' reformation... with uncertain outcomes. In this context, our purpose is to make indexes' model economically consistent with competition issues, to see if enforcement is the only element the indicators do not capture. This will lead to study what PMR defines as optimal regulation for legal professionals.

Table 2: PMR Questionnaire for the “Entry Regulation” index

Question A (Quotas / Regulation of the number of professionals): « Is the number of professionals allowed to practice in your country limited by law or self-regulation by professional bodies (or a combination of the two)? »	
Yes : 6	No : 0
Question B (Education): « Is an undergraduate university degree or a vocational course / any additional education / relevant compulsory practice required in order to legally practice the profession or to obtain the professional title when this is protected by the law (whether this is required by law or by self-regulation by professional bodies, or a combination of the two) and what is its duration?»	
<i>Total n of years of undergraduate and additional education and of compulsory practice</i>	
<ul style="list-style-type: none"> - No exclusive rights or $n \leq 3$: 0 - $3 < n \leq 4$: 1 - $4 < n \leq 5$: 2 - $5 < n \leq 6$: 3 - $6 < n \leq 7$: 4 - $7 < n \leq 8$: 5 - $n > 8$: 6 	
Question C (Pathways): « How many pathways are there to obtain the qualifications to legally practice the profession? »	
<ul style="list-style-type: none"> - 3 or more : 0 - 2 pathways : 3 - 1 pathway : 6 	
Question D (Territorial competence): « Are there territorial restrictions to the ability of professionals to practice within your jurisdiction, imposed by law or self-regulation by professional bodies (or a combination of the two)? »	
Yes : 6	No : 0
Question E (Monopoly scope): « Do professional have exclusive or shared exclusive rights to provide certain activities? Is the professional title protected by the law ?”	
<i>Exclusive right = 1 ; shared right = 0,5</i>	
<ul style="list-style-type: none"> - No exclusive rights + no title protection by the law : 0 - No exclusive rights + title protection by the law : 1 - Score of rights ≤ 1 : 2 - $1 < \text{Score of rights} \leq 2$: 3 - $2 < \text{Score of rights} \leq 3$: 4 - $3 < \text{Score of rights} \leq 4$: 5 - Score of rights > 4 : 6 	
Question F (Examinations): « Is there a requirement to pass one or more professional examinations in order to legally practice the profession or to obtain the professional title when this is protected by the law? If you have answered Yes to the question above, who administers this professional examination? »	
<ul style="list-style-type: none"> - No exclusive rights or no examination : 0 - Exam + State or independent regulator : 2 - Exam + State and professional body / chamber : 4 - Exam + Professional body / chamber : 6 	
Question G (Professional organization): « Is it compulsory to be a member of a professional organization for an individual in order to legally practice the profession or to obtain the professional title when this is protected by the law? »	
Yes : 6	No : 0

Source: Sector PMR Indicators Schemata, [Indicators of Product Market Regulation - OECD](#)

Table 3 : PMR Questionnaire for the “Conduct Regulation” Index

Question H (Fees and prices): “Are the fees or prices that a profession charges regulated by the government or self-regulated?”
<ul style="list-style-type: none"> • No : 0 • Non-binding recommended prices for some activities : 1 • Non-binding recommended prices for all activities : 2 • Binding maximum prices for some activities : 3 • Binding maximum prices for all activities : 4 • Binding minimum or fixed prices for some activities : 5 • Binding minimum or fixed prices for all activities : 6
Question I (Advertising) : “Is there any regulation on advertising and marketing by the profession?”
<ul style="list-style-type: none"> • No, all forms of advertising and marketing are allowed : 0 • Yes, but only some form of advertising and marketing are prohibited : 3 • Yes, all forms of advertising and marketing are prohibited : 6
Question K (Legal form) : Are there restrictions on the legal form of business that a professional firm can take?
<ul style="list-style-type: none"> • No restrictions on legal form : 0 • Incorporation allowed (but not the trading of shares on stock market) : 1 • Limited liability allowed (but no incorporation) : 3 • No limited liability is allowed : 5 • Only sole proprietorship/personally-owned enterprise is allowed : 6
Question L (Inter-professional cooperation) : Is there an regulation on inter-professional cooperation?
<ul style="list-style-type: none"> • All forms of cooperation allowed : 0 • There are some generic restrictions to avoid conflicts of interest : 2 • There is an explicit ban on business cooperation with some professions : 4 • There is an explicit ban on business cooperation with any other profession : 6
Question M (Ownership-type interest – Non-professionals) : Can non-notaries / non-lawyers have an ownership-type interest in a notary / law firm?
<ul style="list-style-type: none"> • Yes, up to 100 % of the capital : 0 • Yes, up to 74 % of the capital : 2 • Yes, up to 49 % of the capital : 4 • No : 6
Question N (Ownership-type interest – Firms) : Are there restrictions on which firms can have an ownership-type interest in a notary / law firm (whether imposed by law or self-regulation by professional bodies, or a combination of the two)?
<ul style="list-style-type: none"> • Any firm can have an interest in a law firm that covers more than 49 % of the capital : 0 • Any firm can have an interest in a law firm that covers up to 49 % of the capital : 2 • Only law firms can have an interest in a law firm that covers more than 49 % of the capital : 3 • Only law firms can have an interest in a law firm that covers up to 49 % of the capital : 4 • No firms can have an interest in a law firm : 6
Question O (Voting rights – Non-professionals) : Can non-notaries / non-lawyers have voting rights in a notary firm?
<ul style="list-style-type: none"> • Yes, up to 100 % of the voting rights : 0 • Yes, up to 74 % of the voting rights : 2 • Yes, up to 49 % of the voting rights : 4 • No : 6
Question P (Voting rights – Firms) : Are there restrictions on which firms can have voting rights in a notary / law firm (whether imposed by law or self-regulation by professional bodies, or a combination of the two)?
<ul style="list-style-type: none"> • Any firm can have more than 49 % of the voting rights in a law firm : 0 • Any firm can have up to 49 % of the voting rights in a law firm : 2 • Only law firms can have more than 49 % of the voting rights in a law firm : 3 • Only law firms can have up to 49 % of the voting rights in a law firm : 4 • No firms can have any voting rights in a law firm : 6

Source: Sector PMR Indicators Schemata, [Indicators of Product Market Regulation - OECD](#)

3-2 – A contestability-oriented model of optimal regulation... for no-regulation

By promoting competition through a particular deregulation on legal services markets, PMR indexes question the possibility of an optimal regulation in a general equilibrium context. Testing the economic consistency of this framework implies to question the kind of optimality these indexes achieve. Following Lipsey & Lancaster's (1956) "Second Best" theory, if we want PMR's regulation model to be optimal (and therefore to achieve a first best), we should add several assumptions to the minimised PMR.

3-2-1 – Which market for legal services? Optimal regulation for a contestability scheme

In order to assess the economic consistency of PMR's or OMC's professional regulation model, we take all minimised sub-variables and try to test their internal validity in a general equilibrium model. In this perspective, our aim is to minimise all supplementary assumptions we can make to reach a first best optimum, as regulatory indicators promote. As we said, this cannot be a model of perfect competition without additional hypotheses, because there are no guarantees that notarial market will not turn into a monopoly. This is a problem of effective atomicity: there are no restrictions on entry, but this is not a sufficient condition for suppliers to be price takers. If we need suppliers to be price takers, we must add several assumptions and behavioural constraints – without supplementary regulation.

The Open Method of Coordination in itself (and our minimisation method) lies in a first hypothesis for a first best achievement: as we minimised all sub-variables to consider an ideal model, we assumed that all "sources of divergence" (Lipsey, 2008) were removed. Therefore, our first assumption relies on the idea that regulation is the only "source of divergence". Indeed, first best optimum attainment needs all distortions to competition to be "policy-created" (Lipsey & Lancaster, 1956; Lipsey, 2008) i.e. that without policy, there are necessary conditions for perfect competition. The idea is that Pareto-efficiency needs all "sources of divergence" to be nullified; otherwise, deregulation cannot be justified by first best attainment, and we need to find a second-best alternative (Lipsey & Lancaster, 1956). PMR indexes focus on regulation and conclude that the less regulated the market is, the more competitive and optimal it is. In other words, only regulation distorts competition. This seems to be coherent with indexes' nature: as we previously said, the contestability nature of regulation indicators leads to a "zero regulation" promotion. Indexes' model implies the absence of all other forms of distortion: asymmetric information, externalities ... Particularly, it excludes the idea that legal services might be "credence products" (Darby & Karni, 1973). To be consistent with indexes' sub-variables, we therefore assume that information problems are solved by advertising (Stigler, 1961; Nelson, 1970).

The second assumption we need to make follows from the first: if regulation (taken as a whole) is the only source of distortion, an optimal deregulation means the removal of all forms of regulation. Indeed, according to Lipsey & Lancaster's model (1956), first best attainment needs to remove simultaneously all regulations. They assert that there are no first-best rationales for "piecemeal policies", that is to say for deregulation policies focusing on one particular professional rule. In terms of indexes, this hypothesis means that sub-indexes' values shall be minimised simultaneously; if there remains a non-zero sub-variable, there are no guarantees for more optimality – and no economic justification for a piecemeal deregulation in a general equilibrium context.

In this perspective, a contestability scheme can justify the model (Baumol, 1982; Baumol, Panzar & Willig, 1982) without additional constraints. A "perfectly contestable market" (Baumol, Panzar & Willig, 1982) means that there is a perfect freedom of entry (no entry costs, no quality costs...), no exit costs (no barriers), and two properties: (i) the potential entrant accesses to the same market demand of incumbent firms and (ii) (s)he decides to enter the market regarding incumbents' prices. According to Baumol (1982), market contestability relies on the entrant possibility to make a "hit-and-run", i.e. to enter the market, make a positive profit, and leave. Following Baumol, this only possibility deters incumbents to price over marginal costs. In this perspective, we can interpret PMR's model as a

contestability model. First, it relies on a potential entry scheme, with the purpose of minimising entry costs (with regulation considered as a cost). It promotes a quantitative contestability, with an entirely free entry to make the pool of potential entrants as large as possible; this leads to exert what we called a “double-sided competition”, both inter-professional (no professional order, no professional titles nor exclusive rights) and intra-professional (no quotas, no territorial restrictions). It also creates a qualitative contestability³¹: with multiple pathways, no professional exams for a graduation (which duration might be minimal or non-compulsory), the regulation framework enlarges the pool of potential entrants, by minimising non-monetary costs (particularly education ones). Moreover, all conduct requirements follow a pro-competition or pro-contestability scheme: there are no impediments to prices’ adjustment to marginal costs, advertising is information improving, and we can guarantee an optimal mobility for capital.

However, this could not achieve a *perfect* contestability model, particularly when we consider its dynamic. Indeed, we can identify several entry or exit costs that might limit contestability’s achievement³², by making the *hit-and-run* difficult. For example, if we follow the Stiglerian idea that advertising is information improving (Stigler, 1961), then law firms have to advertise on the market – at least to inform consumers about their existence and their services. This advertising cannot be costless, and gives the incumbents an advantage over potential entrants in different models (Comanor & Wilson, 1979). That is to say that in a dynamic perspective, there are no guarantees of stability on this market, despite its non-regulation. Thus, we have to make a final hypothesis. The last assumption follows Conway & Nicolletti’s (2006) quote on enforcement: we have to consider that competition’s necessary conditions are sufficient conditions, and that there is no enforcement problem for competition and contestability. Particularly, notary firms (or legal practitioners) will necessarily be price takers.

It illustrates why French experience of notarial reformation cannot be quantified. Regulatory indicators do not quantify regulation’s fitness to competition, but advocate – through contestability – for non-regulation: in this model, there could not be a better regulation than “zero regulation”. The ADLC approach also relies on a partial equilibrium model, by trying to achieve effective atomicity through massive entry; ADLC identifies atomicity with a significant number of suppliers, necessary in a partial equilibrium modelling (Fama & Laffer, 1973). PMR model cannot be interpreted in this partial equilibrium perspective: it pretends to quantify regulation for all existing markets, and draw conclusions on the potential for all-industries deregulation. Moreover, some variables in professional services’ indexes imply other markets: inter-professional competition, ownership interest and capital for non-legal firms...

3-2-2 – A contradiction between the economic tool and the policy method

We can explain PMR model’s specificity by a trade-off between two purposes for regulation indexes: globalisation and competition. Indeed, as we previously said, indexes’ construction belongs to different contexts, particularly of market integration and liberalisation. The first index occurrence was during the GATS, with a scaling proposed by Hoekman (1996) to quantify, in the GATS, degrees of liberalisation of trade in services. This benchmark was applied by Nguyen-Hong (2000) to professional services, in order to assess their liberalisation in the GATS context. When IHS appropriated these indicators, it applied them to European’s context of OMC, to achieve the single market’s globalisation and competition. This trade-off between globalisation and competition necessarily advocates for non-regulation: all rules are competition damaging and barriers to globalisation. However, as it uses a unique tool to achieve different policy objectives, it fails in promoting competition – particularly because globalisation and competition in legal services do not necessarily overlap (Garoupa, 2014).

Indeed, we note that deregulation policies’ justifications made by the European Commission or the OECD are paradoxical: through OMC, European Commission invited to piecemeal deregulation,

³¹ This qualitative contestability dimension is particularly interesting from a quality questioning.

³² Even Baumol (1982) acknowledges the purely theoretical dimension of “perfect contestability”. Our purpose is here to test the economic consistency of our model

and pointed specific professional rules to be removed (EC, 2004). When the OECD uses PMR indexes for comparison (and says which notaries or lawyers are the most “competition-friendly”), it promotes regulatory convergence but not entire deregulation. In other words, regulatory indicators cannot justify another method of coordination than pure deregulation. The OMC or the OECD cannot base their recommendations on regulatory indicators, because they do not belong to the same context: the coordination method does not fit the economic tool. First, the OMC and OECD’s recommendations promote piecemeal deregulations, while indicators can only justify a total deregulation. Moreover, indicators do not promote any kind of competition, but a contestability scheme – which OMC nor OECD never promoted as an ideal market for legal services. The OMC relied on a “proportionality” model of competition, which never explicitly advocated for a total deregulation. To sum up, regulatory indicators will not quantify a coordination towards international best practices whereas they were empirical arguments to promote this coordination.

Furthermore, the different assumptions to make indicators economically consistent lie in a specific approach of legal services, which echoes the “service providers” paradigm (Terry, 2008b). More than making professional rules functionally equivalents in different contexts, it assumes a full equivalence between the profession and the market: making the professional rules contestable is making its market contestable. In other words, if we want regulatory indicators to converge towards perfect contestability, it means that both markets and professions should overlap between countries. In professional case, this is not problematic: indicators’ theoretical market would not be a market for professionals, but a market for legal practitioners. However, as competition’s necessary conditions are sufficient conditions, we need all services supplied by legal practitioners to be homogeneous. In this perspective, in all European countries (not to say, in OECD’s perspective, all over the world), the scope of supplied legal services should overlap. This asks whether such services as authentication, which is Continental Law specific (Gauthier & Gard, 2014) will still be supplied – whereas most of European countries use this legal instrument (CNEU, 2008). It leads to two possibilities

- (i) There are still authentication services, but no longer notaries – a situation difficult to conceive, as authentic deeds have no functional equivalents (Gauthier & Gard, 2014) and constitute a key element of Continental Law.
- (ii) There is a removal of authentication services to make domestic legal markets homogeneous and comparable.

In both cases, this implies to reconsider all Continental Law’s architecture – and to follow the conclusions of the *Legal Origins Theory* (Glaeser & Shleifer, 2002; La Porta & *al.*). Therefore, the Open Method of Coordination through regulatory indicators is contradictory: it does not promote convergence towards a hybrid model, but proposes to create an uncertain market for undefined suppliers. The OMC never proposed to remove the authentication (CNEU, 2008) nor to redesign the structure of legal systems itself. In other words, indexes’ recommendations could not fit OMC’s recommendations.

Thus, we better understand why French notaries’ new regulation framework cannot be taken as a competition-oriented reform in PMR’s sense: it is a piecemeal policy towards more competition in the regulation framework, but it does not make the market more contestable. As indexes promote piecemeal policies, piecemeal deregulation following indexes do not reach a first-best optimality, and appears as an antinomy. Indeed, professional rules’ quantification belongs to this first-best paradigm, but invite to follow different second best paths. Only a total deregulation – with hypotheses – might achieve a first best optimality.

4 – CONCLUSION: QUANTIFYING REGULATION OR COMPETITION?

Our analysis led to the conclusion of a deregulation process motivated by regulation indexes... that cannot evaluate competition-improving policies. Empirical limits, lack of applicability or realism are not the only results this paper draws. Given its tools, indexes’ project for legal services relies on two

misleading paradigms. First, a full-comparability paradigm (when indexes differ from zero), which postulates a functional equivalence between all national professional rules, and a potential implementation of these rules in different national contexts. It assumes that “the legal world is flat” (Terry, 2008a) and that a single model of competition in professional services should exist. However, professional rules -- as they are quantified -- are non-functionally equivalents, because of a second paradigm. It consists of benchmarking regulation according to a perfect contestability approach. Such an approach tries to assess contestability in a hypothetical market for legal practitioners. Nevertheless, it invites to “piecemeal” policymaking with first best optimality arguments. Paradoxically, in the OMC context, it quantifies regulation on a first-best type standard to promote piecemeal policies... that cannot achieve a first-best optimality (Lipsey & Lancaster, 1956). The regulatory indicator as an economic tool cannot be the basis of piecemeal policy recommendations, as they do not share common principles. Moreover, these few elements invite us to conclude over what regulatory indicators effectively “say” and quantify. Regulatory indicators seem to be strong in promoting policies (Michaels, 2009). With a non-functional equivalence and a particular paradigm of competition relying on different assumptions, they only imperfectly measure a small part of regulation. In other words, in regulatory matter, we do not know how to quantify where we are, where we go nor how to move from a point A to a point B.

Given these different issues, we advocate for reconsidering both regulatory approach and competition comparability between regulated professions in different countries. In OMC’s perspective, new regulatory indicators must be created to quantify different kinds of regulatory evolutions, and effectively compare national laws. Comparative law studies about legal professions show that both the number of professions and their competition depend on the nature of the legal systems (Gauthier & Gard, 2014; Gauthier, 2014; Gauthier, 2015). The French example in itself shows that there is a variety of professional competitions resulting from regulatory frameworks. Therefore, legal services’ markets are different between legal systems, and their world could not be considered as “flat” (Terry, 2008a). As “Law matters” (Michaels, 2009), these legal differences cannot be reduced to a parametric and monolithic approach of regulation, but invite to incorporate legal diversity into economic modelling.

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ANNEXES

Coding for Market Entry Regulation Index and Market Conduct Regulation Index (IHS, 2003)

Market Entry Regulation Index

	Category/Variables	Coding	Scale	Weighting1	Weighting2
ER	Entry regulation (general)	ERLC*0.40+ ERED*0.40+ ERQT*0.20	0 to 6		
ERLC	Licensing Number of exclusive and shared exclusive tasks	0 = 0 1 = 1.5 2 = 3 3 = 4.5 4 or more = 6	0 to 6		40%
ERED	Requirements in education/does only apply in cases of licensing; if no licensing: "0"	ERED1*0.30+ ERED2*0.40+ ERED3*0.20+ ERED4*0.10	0to6		40%
ERED1	Duration of special education/university or other higher degree	0 to ≥ 6 years	0 to 6	30%	
ERED2	Duration compulsory practising	0 to ≥ 6 years	0 to 6	40%	
ERED3	Number of professional exams	(0 to ≥ 3)*2	0 to 6	20%	
ERED4	Number of entry routes to profession (inv. scale)	(0 = 4 or more routes; 1=3 routes; 2=2 routes; 3=1 route)*2	0 to 6	10%	
ERQT	Quotas/economic needs test	0=no 6=yes	0 or 6		20%

Conduct Regulation Index

	Category/Variables	Coding	Scale	Weight-ing 1	Weight-ing 2
CR	Conduct Regulation (general)	MCPR*0.25+ MCAD*0.15+ MCLOC*0.15+ MCDIV*0.20+ MCIC*0.25	0 to 6		
MCPR	Regulations on prices and fees	0 = no regulations 1 = non binding reference prices on some services 2 = non binding reference prices on all services 3 = maximum prices on some services 4 = maximum prices on all services 5 = minimum prices on some services 6 = minimum prices on all services	0 to 6		25%
MCAD	Regulations on advertising	0 = no spec. regulations 2 = some forms forbidden (like comparative price advertising, direct mailing etc.) 4 = most forms are forbidden (advertising only in very narrow margins allowed) 6 = all forms of advertising are forbidden	0 to 6		15%
MCLOC	Regulations on location	0 = location not restricted 6 = location restricted	0 to 6		15%
MCDIV	Regulations on diversification	0 = no specific regulations 3 = diversification under specific preconditions allowed (branch office head is a professional, maximum number of branch offices etc.) 6 = diversification not allowed in any case	0 to 6		20%
MCIC	Regulations on form of business and interprofessional co-operation (general)	MCIC1*0.5+ MCIC2*0.5	0 to 6		25%
MCIC1	MCIC1 Regulations on form of business	0 = all forms (incl. incorporation allowed in any case) 2 = partnership allowed, incorporation only allowed in specific cases (regulations on ownership etc.) 5 = incorporation forbidden in any case 6 = partnership and incorporation forbidden in any case; only sole practitioners etc. allowed.	0 to 6	50%	
MCIC2	MCIC2 Regulations on interprofessional co-operation	0 = all forms allowed 3 = with all professions but no incorporation; or only with comparable professions in all forms allowed etc. 4.5 = only with comparable professions and no incorporation 6 = generally forbidden	0 to 6	50%	