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Restrictions on MDPs and Business Organization in the Legal Professions: A Literature Survey

A Report for the MDP committee of the International Bar Association (IBA)

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1. Introduction

In some countries lawyers are not allowed to form multi-disciplinary partnerships (MDPs)[1] with other professionals, such as accountants and notaries.[2] This prohibition may follow either from public regulation or from self-regulation formulated by the Bar, aimed at the protection of lawyers' independence and respect for ethical values.[3] Competition authorities, however, have generally been skeptical of a ban on MDPs, because such a ban would restrict competition.[4] The European Court of Justice (ECJ) also showed some skepticism in its judgement in the *Wouters* case of 2002, which dealt with a prohibition of MDPs between members of the Bar and accountants in the Netherlands. The ECJ held that "a prohibition of multi-disciplinary partnerships of members of the Bar and accountants [is] liable to limit production and technical development".[5]

It might seem that the aftermath of accounting scandals such as Enron and Worldcom (and the demise of accounting and professional services firm Arthur Andersen) has dampened corporate sentiment for large-scale MDPs. However, according to Sir David Clementi, this "should not obscure the fact that small to medium sized professional service providers are well placed to cater to individuals, or small businesses, with a set of inter-related needs" and that accountants and lawyers "might benefit from sharing the overheads of high street premises and IT systems to make their business more viable".[6] In addition, there have been many changes in the (now stricter) regulation of accountants, in particular audititors[7], and there (still) appears to be some consumer interest in the convenience and accessibility of 'one stop shopping' provided by MDPs.[8]

In this report, the theoretical and empirical findings on the (predicted) effects of restrictions on MDPs will be presented, as found in the academic literature in the field of law and economics, and in reports published by national competition authorities and the European Commission.

[1] According to Mullerat (2000, p. 481), MDPs are characterised by the following: they provide more than one professional service; they include lawyers as partners, directors or share owners; and there is profit sharing between members of more than one profession.
[2] See with respect to Europe, e.g Paterson, Fink, Ogus et al (2003), p. 49 and p. 56.
[3] European Commission (2003a), pp. 12-13.
[4] Examples are the OFT in the UK and the Canadian Competition Bureau. See below, chapter 3.
[5] Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, 19 February 2002, paras 86-90. Eventually the ECJ decided that the regulation concerned did not infringe European competition rules, since the ban on MDPs could have reasonably been considered necessary for the proper practice of the legal profession as organised in the Netherlands (para 110).
[6] Clementi (2004), p. 134. See further chapter 3 of this report.
[7] See e.g. Philipsen (2009).
[8] Clementi (2004), pp 133-134.

The scope of the analysis will mostly be limited to MDPs involving lawyers and accountants/auditors, as this is the most common type of MDP involving lawyers.[9] This also becomes clear from the academic literature, where particularly MDPs between lawyers and accountants/auditors have been discussed. However, where necessary we will also consider co-operation between lawyers and other professions.

In addition to questions related to the effects of MDP restrictions, questions related to the liability in tort of partners in an MDP merit further attention, especially in the light of the many corporate and accounting scandals that occurred in the past decade. These questions of liability are closely related to the business form of the MDP. We will therefore also discuss several business forms in which MDPs can be embedded, their internal structure and the potential liability risks they might entail.

This report is structured as follows. The next chapter (2) provides an overview of existing economic literature on professional regulation and multi-disciplinary partnerships. This literature focuses in particular on the arguments in favour and against prohibitions on MDPs, but also on business form, outside ownership and management of law firms. In chapter 3 similar topics are discussed, but from the perspective of national competition authorities (such as the OFT in the U.K. and the Canadian Competition Bureau) and the European Commission, rather than the economic (academic) literature. Naturally there is quite some overlap with chapter 2. The business forms in which MDPs can be embedded and the potential liability risks, to which they might give rise, will be discussed in chapter 4. In chapter 5 we will discuss the internal governance structure of MDPs and give some recommendations regarding the way the internal structure can be used to combat some of the objections uttered against MDPs. Chapter 6 concludes.

This report was prepared by researchers affiliated with the research institutes METRO and ICGI, both of which are connected to the faculty of law of Maastricht University. METRO is the institute for transnational legal research, which is specialized in (comparative) environmental law, tort law and insurance, and law and economics. ICGI is the institute for corporate law, corporate governance and innovation policies.

[9] It is also the most debated type of MDP. See Mullerat (2000).

2. An overview of the economic literature

There is a vast economic literature on the need for and effects of regulation[10] in markets for professional services. In section 2.1 a brief introduction to this literature is provided. After that, an overview is presented of the more specific theoretical (2.2) and empirical (2.3) literature that discusses the effects of restrictions on MDPs involving lawyers and other professions.

2.1 Economic theories of regulation

The existing views on regulation can broadly be divided into two approaches: the public interest approach and the private interest approach. The *public interest approach to regulation* looks upon regulation as a possible remedy for so-called 'market failure'.[11] It assumes that regulation is always designed to serve the public interest.[12] With regard to the market for legal services, the most important market failure is caused by information problems. The information asymmetry between lawyers and (potential) clients may give rise to deterioration of the quality of legal services, because lawyers are unable to signal the true quality of their services. Lawyers may also abuse their information advantage, for example by providing additional services that clients would not have wanted if they were fully informed.[13] Some regulatory intervention is then necessary in order to cure these problems, for example by making the provision of certain information mandatory, or by introducing certification or licensing systems.

Besides information asymmetry, other forms of market failure that may occur in legal services markets include the presence of negative externalities and undersupply caused by the 'public good' nature of legal services. Negative externalities are effects of poor quality legal services on third parties. For example, poor quality legal advice on the legality of contract terms will not only harm the direct buyer of the legal service, but also his or her clients at later stages of the production and distribution chain.[14]

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[10] In this context, the term regulation refers to both public regulation and self-regulation that restricts entry into the profession (e.g. educational requirements and establishment rules) or regulates the conduct of members of the profession (e.g. advertising restrictions and price regulation).

[11] The term 'market failure' refers to perceived shortcomings of the market system itself to deal with certain problems that prevent an economically efficient outcome in a market.

[12] Economists would say that regulation is directed towards an improvement in social welfare. For details, see Philipsen (2003), pp. 10-18.

[13] These are the well-known problems of adverse selection and moral hazard. For further details and a discussion of the practical relevance of adverse selection and moral hazard in the market for legal services, see Van den Bergh (2007), pp. 20-22, Garoupa (2008), pp. 467-468, and Philipsen (2010), pp. 205-206.

[14] Van den Bergh (2007), p. 22; Philipsen (2003), pp. 17-19.

With regard to the public goods, it could be argued that legal services serve a public goal (facilitating a well-functioning judicial system) and therefore generate positive externalities. If this is true, there may indeed be an underproduction of legal services in an unregulated market (although this is debated).[15] The presence of negative externalities and public goods again justifies some government intervention, in the form of regulation, liability rules and/or taxation.

It is important to note that the costs of correcting market failure by means of regulation always need to be smaller than the efficiency gains derived from the regulation. Moreover, regulation should not limit market entry or restrict competition more than is necessary to cure the prevailing market failure. Finally, it should be noted that governments may have other public interest justifications for regulation of legal services besides correcting market failures, for example related to goals of distributive justice (e.g. access to legal services for low incomes) and paternalistic goals (e.g. forcing laymen to get legal assistance when they engage in important transactions).

The *private interest approach to regulation* stresses the role of interest groups, such as professional associations, in the formation of regulation.[16] The basic idea is that interest groups are continually influencing political decisions to seek rents for themselves, which is unproductive from a social welfare point of view. For example, professional associations might lobby for regulation that restricts competition between professionals, or regulation that makes entry into the profession more difficult. Because professional associations are small relative to the public as a whole, single issue oriented and well-organized, they are likely to be successful in obtaining wealth transfers at the expense of the general public through lobbying.[17]

To be able to analyse the extent to which regulation in a specific profession serves private interests rather than the public interest, empirical analyses need to be carried out. Although there are certainly some indications in the (mostly U.S.-based) empirical literature backing the private interest approach and its rent-seeking hypothesis more generally, there is no real consensus in the literature on the actual incidence and consequences of rent-seeking behaviour in the legal professions.[18]

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[15] Van den Bergh (2007), p. 24; Philipsen (2010), pp. 206-207.

[16] This approach has developed from different theories, such as public choice, capture theory and the 'Chicago' theory of regulation. For descriptions and references, see Philipsen (2003), pp. 23-27.

[17] Economists would say that the transaction costs of professional associations are low, while the information costs of the public at large of finding out about the detrimental effects of (too) restrictive regulation are high. Olson (1965). See also Van den Bergh (2007), pp. 25-26, and Garoupa (2008), p. 470.

[18] Philipsen (2010), pp. 207-208. Attempts at an empirical analysis of regulation in the legal services markets include Faure (1993), Paterson, Fink, Ogus et al (2003), Pagliero (2005), and the studies mentioned in Stephen and Love (2000).

2.2 Restrictions on MDPs in the literature: theory

In a paper prepared for the OECD, Roger van den Bergh presents the arguments in favour of and against a ban on MDPs. They can be summarized as follows: [19]

Arguments for bans on MDPs:

- guarding professional secrecy
- preventing conflicts of interest
- in relation to legal disciplinary partnerships (LDPs): barristers are more likely to give independent advice if they remain separate from solicitors
- in relation to LDPs: prevention of mergers, which would result in (further) market concentration

Arguments against bans on MDPs:

- consumers cannot profit from 'one-stop shopping'
- some economies of scope are not realized
- no internal risk spreading
- perhaps less innovation: more difficult access to capital which may be needed to invest in equipment and infrastructure to improve consumer services
- in relation to LDPs: consumers will face a double mark-up on the services they receive, if barristers and solicitors are prevented from working together

The arguments supporting a restriction on MDPs mainly come from the legal professions themselves. Firstly, it is argued that partnerships with other professionals threaten the lawyer-client relationship, if these professionals are not bound by a duty of professional secrecy (the "attorney-client privilege").[20] Secondly, co-operation between lawyers and accountants may cause conflicts of interest that are detrimental for consumers. Mullerat (2000) notes that "*both the accountant and the lawyer must be independent. But the accountant must also be impartial* […] *while the lawyer in essence is partial (a defender of one party).*

[19] Van den Bergh (2007), pp. 49-50.
[20] See also Mullerat (2000), p. 482.

The two of them working in association, becoming a single-adviser entity, could not carry out such conflicting functions."[21]

The main justifications for a ban on legal disciplinary partnerships (LDPs) in common law countries, e.g. between barristers and solicitors, is that barristers should be able to give independent advice, and this ability would be compromised by a partnership with solicitors. In addition, LDPs would lead to mergers, with the effect that there will be fewer barristers that can provide services to smaller solicitor firms.[22] The latter two arguments (independence, fear of market concentration) have also been applied to MDPs consisting of lawyers and accountants.[23]

One of the critics of MDPs in the U.S. is the lawyer Lawrence J. Fox, who - before the Enron case even started - wrote an article attacking the big accounting firms, referring to all of the arguments mentioned above. Fox argued that the Big 5 accounting firms (currently Big 4), by hiring thousands of lawyers, "have mounted a frontal assault on the legal profession that threatens to destroy the foundation of professional independence, loyalty and confidentiality".[24] He stated that these firms had violated the legal profession's rules on governing conflicts of interest and confidentiality, and rules prohibiting a limitation of lawyer liability and direct solicitation of clients. The shift in activities from (mainly) auditing to other services, such as consulting, data processing, and legal services, thus not only threatens the independence of the accounting firms in conducting the auditing function, but also the independence of legal professionals. Furthermore, referring to empirical evidence of noncompliance with auditor independence rules by employees of these firms who were investing in audit clients, Fox did not believe in the "firewalls […] which separate those who work on an audit from those who want to invest in companies being audited".[25]

In addition to the arguments put forward by the legal professions, the economic literature also provides a justification for restrictions on MDPs, which is based on 'agency costs'. It follows from Carr and Mathewson (1990) and Matthews (1991) that sole practitioners and professional partnerships are the most likely (i.e. least costly, in terms of

[21] Mullerat (2000), pp. 482-483. The author (p. 492) furthermore argues that MDPs represent "a new step in the deprofessionalization" and commercialization of the legal profession.
[22] For an extensive analysis of LDPs, see Clementi (2004), pp. 108-128.
[23] See for example the analysis of the *Wouters* case in section 3 below, where it is pointed out the accountancy market is much more concentrated than the legal services market. See also Mullerat (2000).
[24] Fox (2000), p. 1097.
[25] Fox (2000), pp. 1100-1101.

providing the right incentives) form of organisation, because effort in production and quality cannot be judged properly by non-professionals.[26]

The arguments against restrictions on MDPs follow predominantly from economic theory. The first argument presented by Van den Bergh is that MDPs would be able to offer 'full service' to consumers by bringing together the know-how of different professions. The second argument is related to economies of scope. A ban on MDPs would prohibit the exchange of information between different professionals on specific problems in a multidisciplinary case. This is inefficient: allowing MDPs would save on transaction costs, because it would reduce the number of individual contacts between consumers and professionals.[27] Stephen and Love (2000) also refer to 'economies of specialization'. They note that "[*i]n a multi-lawyer firm it is, perhaps, more likely that there will be a specialist within the firm who is the least-cost provider of the service function. The probability of this being so may increase the more lawyers there are in the firm. […] the fewer the number of partners and the more specialized the service function required the more likely that the firm will not be the least-cost supplier. This may even be the more so if the firm is an MDP*."[28] A similar point is made by Garoupa (2008), who states that "*by banning other organisational forms* [i.e. corporations, MDPs]*, the specialisation of professionals beyond particular aspects of their service (thus lowering the cost of providing services) and economies of scope (by providing a 'one-stop shop' service including lawyers, accountants, surveyors and tax advisers) are lost*."[29] The third argument provided by Van den Bergh holds that different professions may face different business cycles and fluctuations in income. Not allowing MDPs would then take away the possibility to spread related risks among the partners.[30] All of these benefits of MDPs can according to Van den Bergh lead to lower prices for consumers. In addition, innovation may be promoted: if MDPs are allowed this may facilitate access to capital needed to invest in equipment and infrastructure to improve consumer services.[31]

Looking at the list of economic arguments against a total ban on MDPs, the question is whether less restrictive means of regulation would be able to achieve the aims of guarding

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[26] Garoupa (2008), p. 483. Furthermore, Carr and Mathewson (1990, p. 328) found that partnerships dominate sole practitioners when client cases are large and the detection of chiselling is low.
[27] Van den Bergh (2007), p. 49.
[28] Stephen and Love (2000), p. 1005.
[29] Garoupa (2008), p. 483. Fox (2000, pp. 1105-1106) is not optimistic about the concept of one-stop shopping, claiming that it (and laywers working for nonlawyers) reduces the legal profession to yet "another profit center at a department store for consulting services".
[30] *Ibid.*
[31] Van den Bergh (2007), p. 49.

professional secrecy and preventing conflicts of interest. Van den Bergh himself has three suggestions.[32] Least restrictive would be information remedies which simply require *informing the client* that the duty of confidentiality of one MDP member conflicts with the duty of disclosure of another MDP member. Alternatively, measures could be introduced that prevent certain information flows between different professions. One option would then be to introduce the so-called '*Chinese walls*', which prevent information flows from professionals in the partnership who are bound by professional secrecy to other members in the partnership who are not. However, critics have pointed out that such Chinese walls "are often a deceptive concept used to avoid an insurmountable obstacle" (i.e. the legal privilege).[33] Another option according to Van den Bergh would be to *impose professional secrecy obligations on all partners* in an MDP.[34]

Regulation that prohibits the formation of limited liability partnerships is usually defended by the argument that unlimited liability has a strong disciplinary function towards the professionals in a partnership. If financial liability for harm or error could be limited or shared, it is feared that the professional's duty to the client might be compromised. If, in contrast, professionals in a partnership risk facing unlimited personal liability claims, this would give them incentives to monitor the quality of services provided by their partners.[35] Whether this theory holds up in practice is doubtful, in the light of the recent corporate and accounting scandals, such as the Arthur Andersen/Enron case.[36] According to Van den Bergh a ban on limited liability partnerships is unnecessary, as "the interest of consumers may be adequately protected by imposing mandatory liability insurance or by measures which ensure an adequate capitalisation of the partnership".[37]

Similar arguments apply to rules that restrict the ownership and management of law firms, by prohibiting law firms to be owned or managed by non-lawyers. Proponents of such rules argue that they are necessary to prevent that lawyers are pressured into acting in the commercial interests of the owners or investors rather than in the best interests of the client. However, it can easily be argued that lawyers themselves are also driven by profits, and that at least minority participations held by other professionals should be considered.[38] Ownership

[32] Van den Bergh (2007), pp. 49-50.
[33] Mullerat (2002). See also Scott and Konsta (1999).
[34] See also Deards (2002).
[35] OECD (2000), p. 26; Van den Bergh (2007), p. 50.
[36] Further details can be found in another OECD study: see Philipsen (2009).
[37] Van den Bergh (2007), p. 50.
[38] *Ibid.* See also Grout (2005), who finds it difficult to understand the assumption that there is a distinction between the incentives of lawyers working together and their incentives when they are owned or majority managed by non-lawyers.

restrictions limit the possibilities of achieving economies of scale and may serve as a barrier to expansion by limiting the possibilities to attract capital. Also, a prohibition on hiring non-lawyers as managers may inhibit innovation of more efficient methods to deliver legal services to consumers.[39]

In an earlier study, the OECD argued that "[t]hese constraints limit the creation of new and possibly more cost-efficient business structures. In considering whether to permit limited-liability corporate forms, it may be necessary to balance the risk of diluting those protections against the benefits of access to capital or management flexibility."[40] Similarly, Garoupa (2008) argues that restrictions on organisational forms are "*difficult to justify by reference to the public interest. If some aspects of professional services may favour partnerships over corporations, the market and not the professional body should be expected to solve this tendency*."[41] One should also take into account the many changes in the (international) legal services markets. If regulations in certain countries would allow only a limited number of organisational forms, this does not help the entry of foreign law firms and partnerships.[42]

Copenhagen Economics (2006), however, concluded that there will only be small gains by opening up to other types of ownership. Because law firms are not heavily capital dependent, access to capital is probably not a real obstacle to law firms, so it is argued.[43] Moreover, outside ownership could damage the independence of lawyers and "there is a real risk that other types of owners (e.g. banks) would want to own their own law firms in order to increase the price towards their loyal clients."[44] Because lawyer independence and client confidentiality have to be observed at all times, and because this may conflict with the interests of non-lawyer owners, regulation that covers all owners should be designed, if outside ownership is to be allowed at all. An example of such regulation mentioned by the authors is "letting employees who are not lawyers own part of the firm."[45]

In a study for the UK's Department of Consitutional Affairs, Grout (2005) considered the potential risks arising from the introduction of outside ownership in greater detail. He distinguishes between small and large partnerships (including MDPs). In the former, some

[39] See also Copenhagen Economics (2006, p. 15), where it is mentioned that outside owners might have better access to capital, are better at reducing costs or better at developing new business ideas.
[40] OECD, 2000, pp. 26-27.
[41] Garoupa (2008), p. 483, referring to Hansmann (1990).
[42] See also Garoupa (2008), p. 484. A related issue put forward by Garoupa is that of in-house lawyers, as found in large companies and banks. Because in-house counsel improves business compliance and reduces information asymmetry between corporations and external lawyers, there is no obvious public interest argument to restrict the legal activity of in-house lawyers.
[43] Copenhagen Economics (2008), p. 49.
[44] Copenhagen Economics (2008), p. 15. However, this particular statement is not backed by any arguments based on economic theory or empirical evidence.
[45] *Ibid.*

restrictions on non-lawyer management composition would make sense according to Grout, in the latter not. The reasoning is as follows. In any partnership the return each partner receives is made up of two parts, a lawyer-specific part based on human capital used within the partnership, and a business-specific part consisting of a share of the return to the partnership. The human capital component makes up a significant portion of an individual partner's return and therefore directly steers his or her behaviour. The fact that a regulatory body such as a Bar can impose heavy sanctions (e.g. disbarring) on lawyers in case of inappropriate behaviour, and thereby affect that lawyer's human capital, such a body would have more 'bite' on a lawyer partner than a non-lawyer partner. Of course, a non-lawyer partner's human capital may also be damaged if found guilty of a serious misdemeanour, but not to the same extent. In small partnerships or MDPs, one might therefore consider to opt for the 'majority lawyer' rule, or (as this is a slightly arbitrary rule) a similar minor restriction to management composition.[46]

In large partnerships, the aggregate value of the company's shares can be large. "*This can create a strong incentive to monitor the behaviour of the professionals in the firm, particularly if there is a broader corporate reputation at risk.* [… Customers] *may be willing to pay more for their legal services as a result if this effect is strong. However, if equity is concentrated in a few hands then* […] *the human capital at risk for a lawyer owner will be almost insignificant in comparison to the value of his/her equity at risk. Since the lawyer owner's human capital at risk is an insignificant part of their total risk, when it comes to calculus as to whether to risk an inappropriate act or not it should be almost irrelevant whether a combined owner/manager is a lawyer or not*."[47] Whereas lawyers have often put forward that non-lawyer owners may benefit from distorting the behaviour of a lawyer manager, Grout emphasises exactly the opposite view. Because the human capital of the lawyer manager is the major part of lawyer's assets at risk where there is a non-lawyer owner, the regulatory structure 'bites' significantly on the behaviour of the lawyer manager. Any equity value that is saved by protecting a major client goes to the outside owner, so the lawyer will be less inclined to take risks in the light of the (expected) gains to losses ratio. The author therefore concludes that regulation should be focused on the underlying incentives rather than on the business structure, by looking at the size of the MDP and the concentration of ownership.[48] This also implies, for example, that it may be appropriate for large MDPs to impose restrictions on management incentive schemes (irrespective of whether the

[46] Grout (2005), p. 2.
[47] *Ibid.*
[48] Grout (2005), pp. 2-3. In the paper some empirical evidence is presented to back the distinction between small and large firms. This evidence according to the author shows that "misconduct and poor quality is heavily focused on small businesses" (see pp. 31-32).

management consists mainly of lawyers or non-lawyers), in order to prevent too risky strategies and to minimize the chances of misconduct.

2.3 Restrictions on MDPs in the literature: empirics

As concluded earlier by Van den Bergh, there is very little empirical evidence that confirms any of the arguments presented in favour or against restrictions on MDPs, business form and outside ownership or management.[49] Some of the arguments are indeed hard to test in practice. For example, how to measure economies of scope? How to analyse whether in MDPs there have been any adverse effects on the duty to observe professional secrecy? Or how to find out which (if any) new business models have been introduced as a result of outside ownership? On the other hand, it does not seem impossible to send out questionnaires to business clients in order to find out whether there is a demand for one-stop shopping, or what are their views and worries with respect to professional values of lawyers and auditors working for the same firm.[50] Also, one could examine the effects of MDPs and relaxations in ownership and management rules on concentration in the legal service markets.[51] However, so far we have not been able to find any empirical literature on these specific issues, apart from research carried out for the Clementi report in the U.K., which suggested that indeed there would be some potential client demand for one-stop shops.[52]

There are some studies on different but related issues. Stephen and Gillanders (1993) present evidence that mutual control within law firms in the UK mainly takes place through *ex ante* screening of prospective partners, rather than *ex post* through monitoring by professionals who are already in the partnership. This would undermine the main argument in favour of restrictions on limited liability partnerships.[53]

Carr and Matthewson (1990) found that the average size of law firms in the US was larger in states where limited liability partnerships were allowed then in those where they were not,

[49] Van den Bergh (2006), pp. 50-51.
[50] See also Fox (2000), pp. 1104-1108, who mentions a lack of empirical evidence, but also (implicitly) suggests that the information asymmetry between business clients and professionals is too large to generate reliable results.
[51] Studies on the effects of ownership rules, mergers and accountancy scandals on concentration in the *audit* market have been performed by GAO (2003) for the U.S., and Oxera (2006, 2007) for the U.K. See also Philipsen (2009) in a report for the OECD.
[52] See section 3.3 below. Clementi (2004, p. 133) also suggests, without quoting specific research, that e.g. in the context of claims arising out of motor accidents, MDPs could offer an integrated service, dealing with property damage, health , rehabilitation and compensation. Another example are affinity groups such as trade unions, which provide a range of legal services to their members, including legal advice.
[53] Stephen and Love (2000), p. 1009; Van den Bergh (2006), p. 50.

and considered this a possible indication of efficiency gains that can be obtained by forming limited liability partnerships. A similar conclusion was reached by Button and Fleming (1992), while analysing the architectural professions in the UK in the 1980s. According to Button and Fleming, the abolition of the rule preventing practice under limited liability led to a considerable growth in limited liability companies, almost entirely at the expense of 'sole principal' architectural practices.[54]

Indecon (2003) refers to a U.S. FTC study on the effects of MDPs between dentists and dental auxiliaries (i.e. hygienists and assistants).[55] In this study, States with and without a rule restricting the use of dental auxiliaries were compared. In the States without such a restriction, costs of individual treatments were 6 to 30% lower, while the quality of services provided by auxiliaries (for the dental procedures studied) was found to be equal to that provided by dentists. This led the authors to conclude that "relaxation of restrictions on the number of hygienists that a dentist may employ would benefit consumers by providing the same quality of service at a lower price."[56]

Stephen (2002) found that in European jurisdictions where MDPs are permitted, commercial law is increasingly dominated by the legal branch of the major international accounting firms. The author provides an explanation of this in terms of the internal efficiency of law firms in various jurisdictions. As a result of EU legislation that aims for a Single European Market in legal services[57], "*differences in efficiency of law firms arising from differences in competitive pressure across jurisdictions are likely to lead to cross-border mergers involving law firms from 'efficient' and 'inefficient'* [i.e. those where competition is restricted, leading to higher fee levels] *jurisdictions. Such mergers are likely to lead to pressure building up in the more regulated jurisdictions for further liberalisation of legal service markets.*"[58] Therefore, so Stephen argues, EU legislation may indirectly increase efficiency, even though it does not directly reduce the power of national bar associations.[59]

[54] See also Indecon – London Economics (2003), p. 48.
[55] Indecon – London Economics (2003), p. 47. See also Van den Bergh (2006), p. 51.
[56] Liang and Ogur (1987), p. 3.
[57] The author mentions the Establishment Directive (98/5/EC) and (to a lesser extent) the Mutual Recognition Directive (89/48/EEC). Citizens of a Member State refused entry to the legal profession could qualify in another Member State and thereafter practice in the restrictive state, as long as the costs of this procedure are compensated by the gains from practicing in the restrictive state. Any practice rules designed to restrict competition between lawyers in one jurisdiction, thereby raising fee levels, will attract lawyers from other jurisdictions where fees are lower, according to Stephen (2002), p. 118.
[58] Stephen (2002), p. 115.
[59] Stephen (2002), p. 124.

3. A competition law perspective

In this section an overview is presented of some of the actions taken by competition authorities with respect to regulation in the legal professions, in particular restrictions on MDPs and business form. As pointed out by competition authorities in many jurisdictions, there is a tension between competition (antitrust) law and restrictions on MDPs. However, it has also been pointed out that some of these restrictions may be necessary in order to ensure the proper practice of the legal profession.

Below we will consider developments in the United States, Australia, England and Wales, Ireland, the European Union and Canada (in more or less chronological order). Considering the rather limited scope of the research, we can only present a quick-scan of what happened in each of these jurisdictions. Moreover, there are of course many more countries where the legal professions and MDPs have been under review.[60]

3.1 United States

Terry (2009) notes that the "trend towards deregulation" of the legal profession began in the United States in the 1960s. Well-known cases from the U.S. applying antitrust law to the legal professions include *Goldfarb v. State Bar of Virginia* (1975) and *Bates v. State Bar of Arizona* (1977). The former struck down a recommended minimum fee schedule formulated by a voluntary bar association, whereas the latter struck down an advertising ban that was incorporated in a disciplinary rule.[61] An extensive overview of U.S. cases in which antitrust allegations against the legal profession or bar associations were upheld, and cases in which antitrust allegations were raised but no violations were found, is presented by Morgan (1998).[62] It follows from this overview that there have been no cases on the issue of inter-professional co-operation.

MDPs are prohibited by Rule 5.4 of the American Bar Association's Model Rules of Professional Conduct. Although there had been extensive debate over this prohibition particularly in the late 1990s and early 2000s[63], due to the events following Enron's

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[60] For example the Netherlands (see Commissie Advocatuur (2006) and NMa (2006)) and Denmark (see Copenhagen Economics (2006)).
[61] Terry (2009), pp. 6-7.
[62] Morgan (1998), pp. 431-439.
[63] In 1998 an MDP Commission was established by the ABA to explore and chart reactions from legal professionals. Moreover, many states had appointed committees or task forces to consider the pros and cons of MDPs. Nnona (2004, pp. 116-117. Also legal associations in many other countries, as well as

bankruptcy – leading to the downfall of Arthur Andersen and (indirectly) the introduction of the Sarbanes-Oxley Act of 2002 - “some of the momentum behind the quest for the de-proscription of MDPs was lost”.[64] After all, the (then) Big 5 accounting and professional services firms up to that point were considered the primary champions of MDP, and the Sarbanes-Oxley Act provides that accountants are not allowed to combine auditing services with other services offered to public corporations.[65] Nevertheless, as pointed out by Nnona (2004), the Sarbanes-Oxley Act did not address the fundamental question lying at the core of the MDP debate, namely whether there is any basis for shielding lawyers as a group from unrestrained co-operation with other professions.[66]

3.2 Australia

In Australia many changes were made to the lawyer regulations in the late 1990s and early 2000s. This was partly a result of antitrust initiatives[67], but also of other factors that have had an impact on the market for legal services, such as globalization. The regulatory changes included changes in reserved tasks, business structure, ethics and discipline, and fees and fiduciary accounts. According to Terry (2009), the regulatory changes in Australia have led to the world’s first publicly-traded law firms.[68]

3.3 England and Wales

In the United Kingdom, a report called ‘Competition in Professions’ was published in 2001 by the Office of Fair Trading (OFT).[69] The report provided an analysis of regulatory restrictions on entry, conduct and methods of supply with respect to solicitors, barristers, accountants and architects. With respect to ‘methods of supply’, the report concluded that several restrictions have significant adverse effects, including the Bar’s sole practice rules, a number of restrictions related to MDPs, and (though only indirectly related to the topic of this research) the 50% rule on the control of partnerships providing auditing services.

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the International Bar Association (IBA) and the Council of the Bars and Law Societies of the European Union (CCBE), have analyzed MDPs in different periods. See Mullerat (2000), pp. 484-490.

[64] Nnona (2004), p. 118.

[65] See also Philipsen (2009).

[66] Nnona (2004), pp. 118-119. The author then turns to recent developments in the EU, to find out whether there is a need to re-open the debate in the U.S. He concludes that there is “as yet no indication in transnational professional practice generally that MDP has become imperative; nor is there such an indication within the context of the specifics of the EU regime for legal services” (p. 176).

[67] For details see Fels (2006).

[68] See Terry (2009), pp. 7-9, and the website of the Law Council of Australia: http://www.lawcouncil.asn.au/programs/national_profession/npp-documents.cfm .

[69] OFT (2001). The main analysis was carried out by the Law and Economics Consulting Group (LECG).

Rules that prevent the establishment of MDPs were said to "*inhibit the formation of fully integrated practices bringing together accountants and lawyers; integrated property services practices that might involve surveyors, estate agents and solicitors; and financial services practices that might involve financial advisers in partnerships with accountants and solicitors*."[70] Arguments mentioned in the report that support the formation of MDPs resemble those presented in section 2:

- exploitation of possible economies of scale and scope;
- advantages in branding;
- overhead cost savings;
- the ability to transfer resources in response to fluctuations in demand;
- the ability to give a seamless service to clients.[71]

The 2001 report was followed one year later by a progress statement and again one year later by a government report on 'Competition and Regulation in the Legal Services Market'. This in turn gave rise to the famous Clementi review and report[72] and eventually a new Legal Services Act in 2007.[73]

The Clementi report includes a chapter on alternative business structure. According to Sir Clementi, a combination of legal and accounting skills could be a valuable asset for clients in areas such as consumer debt, inheritance planning and personal taxation. He also refers to research carried out by the survey company MORI (currently Ipsos MORI), which would suggest that there is "some consumer interest in the convenience and accessibility of 'one stop shopping', provided that appropriate regulatory safeguards are in place."[74] Because legal work might be only a minority of the work done by an MDP, there are according to Clementi considerable issues in the U.K. around such practices. Most fundamental is that of *regulatory reach*: how can a legal services regulator exercise power over non-lawyers who might have different codes of practice and who offer different services? Clementi presents (for England and Wales) a proposal for a Legal Services Board, but this board would of course not have jurisdiction over non-legal services. Different regulators would then have to enter into collaborative arrangements with one another, and might have to determine who has the 'lead' regulatory role. This will be difficult, especially if there are two or more professions represented in an MDP and none has a majority. Although there could be separate "Heads of Practice" for each service stream within the MDP, supplemented by an overarching Head of

[70] OFT (2001), p. 7.
[71] OFT (2001), p. 7.
[72] Clementi (2004).
[73] See also Terry (2009), pp. 9-10.
[74] Clementi (2004), pp. 133-134.

Practice that ensures the integrity of the whole entity, there would be few individuals who are able to demonstrate competence across a wide range of services, so Clementi argues.[75]

Another issue addressed in the Clementi report is '*legal professional privilege*', which refers to lawyers' professional secrecy. Clients of an MDP consisting of lawyers and accountants may be confused as to whether the duty of professional secrecy applies to all matters dealt with by the MDP. The Law Society of England & Wales (representing solicitors) suggested to "place a ring-fence around the legal practice, separating it from that part of the practice dealing with non-legal affairs", e.g. by placing the legal services business into a separate legal entity.[76] These are the 'Chinese walls' mentioned earlier.

Clementi also addresses the issue of *outside ownership* by people who are not managers. The benefit of this would be the ability to attract more capital as well as fresh business expertise. However, for collaboration between the different professions (legal and otherwise), each profession then would need to have a regulator that can bind the profession in its entirety, and rules of all professions would have to allow outside owners to invest in the MDP business. Clementi therefore concluded that (in England and Wales) in the future MDPs could be considered, if the regulatory authorities can make sure that sufficient safeguards are put in place. Before doing that the focus should be on the setting up of a new regulatory system for lawyers, and a focus on LDPs (legal disciplinary partnerships, where lawyers from different professional bodies co-operate), where outside ownership should be permitted.[77]

In the Legal Services Act that was adopted in 2007, many of Clementi's suggestions were incorporated. The regulatory structure for solicitors and barristers in England and Wales was changed quite drastically, while also new 'business models' were allowed for firms providing legal services. A Legal Services Board was created, as well as an Office for Legal Complaints. Both of these require a majority of members who are not lawyers.[78]

3.4 Ireland

In March 2003 the Irish Competition Authority published a report containing an overview and analysis of the regulation of eight distinct professions, including the legal profession (solicitors and barristers).

[75] Clementi (2004), pp. 134-135.
[76] Clementi (2004), p. 136. See furthermore pp. 135-137.
[77] Clementi (2004), pp. 137-139. For a further analysis of the Clementi proposals, see also Grout (2005), discussed in section 2 above.
[78] Terry (2009), p. 10.

This report contained an assessment of the Irish prohibition on solicitors to form MDPs. According to the authors, there were strong grounds for permitting solicitors to form MDPs, because of economies of scope and reduction in transaction costs for clients, "particularly for larger users who might want the benefits of accessing a range of legal and financial services in a one-stop shop environment."[79] Furthermore, the authors did "not accept the argument that solicitors would not be able to function ethically with other professionals and [they believed] that MDPs could be required to accept appropriate regulations and guidelines as rigorous as those for solicitors."[80] Similar conclusions were reached with respect to MDPs involving barristers. The authors did not accept the arguments raised by the Irish Bar Council against the formation of MDPs, which were based on the fear that MDPs might lead to a more concentrated market. According to the Bar Council, barristers might form alliances with the larger law (i.e. solicitor) firms and with the big accounting firms, which would make it more difficult for smaller clients to access barristers' services. The authors of the report, however, argued that, "[i]f anything, MDPs would expand, rather than contract, the ability of users to access the services of barristers, particularly if fully qualified employed barristers are allowed to compete with members of the Law Library" (i.e. practicing barristers who are not employed).[81]

The 2003 report was followed by studies on each of the eight professions.[82] The legal professions report, which included 29 recommendations to increase competition, was published in December 2006. Most importantly, the Competition Authority recommended introducing an independent regulator instead of the system of self-regulation by the Law Society (solicitors) and the Bar Council (barristers). Furthermore, like the OFT in England and Wales, the Competition Authority considered alternative business structures, concluding *inter alia* that barristers should be permitted to operate in partnerships and not be confined to sole practitioners.[83] However, as to MDPs, the Competition Authority stated that these raise "regulatory issues", because they relate to public policy issues not limited to the realm of competition policy and therefore require further examination by a larger group of stakeholders.[84] Before coming to this conclusion, the Competition Authority states that it believes that these issues are not insuperable (when applied to solicitors), as rules that apply to solicitors would apply with equal force to solicitors working in MDPs. Moreover, in a MDP governance arrangements can be implemented to make sure that "*confidentiality of*

[79] Indecon – London Economics (2003), p. viii.
[80] *Ibid.*
[81] Indecon – London Economics (2003), p. xiii.
[82] Philipsen (2010), p. 214.
[83] Competition Authority (2006), p. vi.
[84] Referring also the *Wouters* judgment, to be discussed below.

client communications could apply in relation to legal services delivered by the MDP, and, when one MDP member's duty of confidentiality conflicts with another member's duty of disclosure, the MDP would fully disclose the conflict to the client immediately." Also the MDP could inform clients of any limitations of the solicitor-client privilege arising from the MDP context.[85]

Although the Law Society (solicitors) and the Bar Council (barristers) have implemented many of the recommendations directed to them by the Competition Authority, some of the key recommendations have not yet been implemented. This includes the recommendation to introduce an independent regulator, but also the recommendation that barristers should be allowed to operate in business groups or partnerships and not be confined to operating as a sole-trader.[86]

3.5 European Union

With regard to the EU, the most famous competition cases concerning lawyer regulation are undoubtedly *Wouters* and *Arduino*. Whereas in the latter case[87] the European Court of Justice had to deal with minimum fee rules in Italy, in the former a Dutch ban on MDPs between lawyers and accountants was challenged by two lawyers working for PricewaterhouseCoopers and Arthur Andersen. Naturally, the Wouters case is of particular interest to this research. We mentioned in the introduction that the Court concluded in this case that the Dutch MDP rule did not violate the EU competition rules, despite its negative effects on competition. The reason is that the MDP rule could "reasonably be considered necessary in order to ensure the proper practice of the legal profession". In that respect the Court pointed to the duty of lawyers to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest, and the duty to observe strict professional secrecy. It also referred to the fact that Dutch accountants were not subject to comparable requirements of professional conduct.[88] The Dutch Bar was therefore "*entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.*"

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[85] Competition Authority (2006), pp. 102-103.
[86] See website of the Competition Authority: http://www.tca.ie/EN/Promoting-Competition/Market-Studies/Professions/Solicitors--Barristers.aspx.
[87] Case C-35/99, *Arduino*, 19 February 2002.
[88] C-309/99, *Wouters*, 19 February 2002, paras 100-102.

The Court furthermore made reference to the discussion within the accountancy profession itself, where the concurrent pursuit of the activities of statutory auditor and of adviser (in particular legal adviser) had raised questions.[89] It also acknowledged that the accountancy market is highly concentrated relative to the legal services market, and that allowing MDPs carries the potential to substantially reduce the number of practitioners on the legal market. This could lead to an overall decrease in the degree of competition in the legal services market. However, as stated by Wendt (2009), the Court did not accept that the unconditional prohibition of MDPs between lawyers and accountants was proportionate in view of the aim pursued. On the basis of its proportionality test, an absolute prohibition of MDPs was considered "too strict a measure to preserve a sufficient degree of competition on the legal services market". As a less restrictive measure the Court suggested a reference to the respective size of the firms to enter a MDP.[90]

The Court put forward several arguments to support its (intermediate) conclusion that it is likely that the Dutch MDP rule has an adverse effect on competition and may affect trade between Member States. The following arguments are mentioned in the judgment:

- the one-stop shop advantage: MDPs can offer a wider range of services, including new ones, especially in business law;
- an MDP would be capable of satisfying the needs created by the increasing interpenetration of national markets and continuous changes in (inter)national legislation;
- economies of scale might have positive effects on the cost of services.[91]

The appellants themselves maintained that members of the Bar would be best placed to offer their clients a wide range of legal services, and that accountants would be attractive partners in a professional partnership. There would be many clients interested in an "integrated service, supplied by a single provider and covering the legal as well as financial, tax and accountancy aspects of a particular matter".[92]

Around the time of the Wouters and Arduino judgments, the European Commission (DG Competition) started an extensive investigation into competition and regulation in professional services markets, focusing in particular on legal services, accountancy, technical

[89] C-309/99, *Wouters*, 19 February 2002, paras 105-106.
[90] Wendt (2009), pp. 227-229. On concentration in the audit market, see Philipsen (2009).
[91] C-309/99, *Wouters*, 19 February 2002, paras 86-89. Similar arguments were put forward by the Dutch competition authority NMa in a later market study, which included an analysis of restrictions on MDPs and outside ownership. See NMa (2006), pp, 36-40.
[92] C-309/99, *Wouters*, 19 February 2002, paras 82-83.

services, and pharmacy.[93] In the framework of this project, the EC in 2003 invited interested parties - such as professional associations and consumer representatives - to respond to a questionnaire and an earlier study[94] conducted by the Austrian *Institut für Höhere Studien* for DG Competition. One of the topics under discussion was the question to what extent MDPs between lawyers and accountants need to be regulated. The EC noted that: *"[t]here are rules governing co-operation between members of the legal profession and other groups in the majority of Member States. Legal practitioners are generally free to hire non-lawyers as employees in their companies. However, there are often severe restrictions on the scope for lawyers who work in companies other than law firms to provide legal advice to third parties or other legal services*."[95] The EC then pointed at the many differences in regulation between EU Member States, and wondered whether a full prohibition of MDPs is really necessary. In some countries (e.g. Austria, Denmark, Estonia[96], Ireland, Italy and Greece) legal practitioners (at the time) were forbidden from forming any type of MDP that brings together lawyers and other professionals in a joint firm. In others (e.g. France and Germany) lawyers were permitted to participate in MDPs under certain circumstances. In Germany, for example, lawyers were able to form co-operations with the members of comparable professions including chartered accountants and tax advisors. However, the rules governing formation of private limited companies have the effect of making inter-professional co-operation very difficult.[97]

The far majority of respondents to the questionnaire sent out by the EC consisted of professionals and professional associations. From the perspective of accountants, some respondents suggested that there is a need for some regulation of MDPs involving accountants. The *Fédération des Experts Comptables Européens* argued that some regulation may be needed in order to organise relationships between professionals who are not bound by the same ethical rules on confidentiality, independence, or conflicts of interest. However, a full prohibition of inter-professional co-operation would reduce competition unnecessarily.[98]

Many professional bodies for legal practitioners suggested that rules restricting co-operation between lawyers and other professions are necessary to protect lawyers' independence and respect for ethical values such as independence, professional secrecy and avoidance of conflicts of interest. For example, the *Council of Bars and Law Societies of Europe* (CCBE)

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[93] For details, see Terry (2009) and Philipsen (2010).
[94] Paterson, Fink, Ogus et al (2003).
[95] European Commission (2003b), p. 9.
[96] European Commission (2004).
[97] *Ibid.*
[98] European Commission (2003a), p. 7.

argued in favour of regulation limiting MDPs, suggesting that such rules protect the core values of the profession by ensuring that practitioners are subject to a single consistent code of conduct enforced by the local bar. Others argued that it is increasingly important for lawyers and other professionals to be able to provide a range of services within a single company, to the extent that it does not endanger lawyers' ethical values. The law firm *Clifford Chance* for example noted that different rules on inter-professional co-operation in the EU cause significant obstacles for international legal services companies.[99]

3.6 Canada

Also in Canada the professions have (quite recently) been under review by the competition authorities. In a report from 2007 the Canadian Competition Bureau presents its main findings, including those related to the legal professions. The report includes a small section on multi-disciplinary partnerships. In Canada, all provincial and territorial law societies, apart from those of Upper Canada and Québec, have made MDPs unfeasible by prohibiting lawyers from splitting, sharing or dividing clients' fees with anyone other than other lawyers. According to the Competition Bureau, however, MDPs translate into cost efficiencies and increased consumer choice and convenience. Restricting MDPs may cause harm to consumers, so it is argued, as they cannot take advantage of the numerous benefits of a one-stop shop. In Upper Canada and Québec the feasibility of such structures – under certain conditions and appropriate regulation - has been demonstrated. Therefore (and in line with the economic literature discussed in the previous section), the Competition Bureau recommends law societies to consider less intrusive mechanisms than prohibiting MDPs to circumvent possible conflicts of interest.

According to the Competition Bureau, the following should therefore be allowed:

- splitting, sharing or dividing clients' fees with non-lawyers
- entering into arrangements with non-lawyers regarding sharing fees or revenues generated by the practice of law
- activities other than providing legal services or services directly associated with providing legal services (by law corporations).[100]

[99] European Commission (2003a), pp. 12-13.
[100] Competition Bureau (2007), pp. 77-78.

4. Business types, liability risks and internal structure of MDPs

An important aspect to be taken into account when discussing the future of MDPs concerns the potential liability risks related to the combination of several disciplines in one partnership. There are several factors that can influence potential liability risks for MDPs. It is unfortunately not possible to give an exhaustive list of liability risks since these will have to be established on a case by case basis. Factors which can influence the potential liability risks connected to MDPs include the legal form of the MDP, the legal system in which it operates, and the legal system of its 'incorporation', in other words the system applicable to the chosen business form of the MDP.

The question regarding potential liability of large service providers/partnerships has recently attracted a lot of attention in the academic literature and in practice where it concerns the position of audit firms/networks. Liability proceedings initiated against these firms in the aftermath of large corporate scandals such as Enron and Parmalat and the role of audit firms and partnerships/networks in these scandals have fostered this debate. In the introduction the scope of the analysis of the present research was defined as being restricted to MDPs involving lawyers and accountants, as this is the most common type of MDP in which lawyers will generally be involved. This implies that also the liability risks stemming from accounting practice have to be taken into account.

In this chapter we will give a general overview of some of the potential liability risks that have to be taken into account. We do not strive to provide an exhaustive list of circumstances entailing potential liability risks. The creation of such an exhaustive list requires much more in-depth research which takes into account the specific types of MDPs and the circumstances in which they operate, such as the way in which and where they provide services, the chosen business format and the country of incorporation. Potential liability risks are closely related to the business form chosen for the MDP. We therefore start with an identification of the various legal forms that can be used to create MDPs. From there we will move on to the potential liabilities that might be triggered by MDPs. Following earlier research by the U.S. General Accounting Office and the U.K. Department of Trade and Industry, and a Roundtable Discussion organized by the OECD[101], the European Commission has recently initiated a debate with regard to the future of audit companies. This debate is to a large extent comparable to the MDP discussion. The questions addressed in that debate also concern issues such as how to deal with potential conflict of interest situations within ever enlarging

[101] Supra, note 51.

audit firms, the legal structure of these partnerships, their liability and the way in which they can be financed. The European Commission has recently launched a Green Paper titled: *"Audit Policy: Lessons from the Crisis"* (hereinafter: the Green Paper). The Green Paper forms the basis for a public consultation on the responsibilities and functioning of auditors. The outcome of this debate will inevitably also have consequences for the future prospects with regard to MDPs. Where relevant, the suggestions made by the Commission in the Green Paper will be mentioned throughout this section.

4.1 The legal structure of MDPs

4.1.1 Partnerships and limited liability companies

The use of the expression 'Multi-Disciplinary Partnerships' suggests that the cooperation, between for example accountants and lawyers, takes place in the form of a partnership. The Green Paper states in this respect with regard to audit firms the following[102]: "*So far, audit firms have operated under the partnership model (whether organized via a partnership or via a limited company).*" A partnership does not necessarily have to be the legal form in which the cooperation between multi-disciplinary service providers is embedded. Individual partners of law firms can for example each have their own limited liability company. These limited liability companies can in their turn take part in the overreaching partnership. In that case the cooperation itself is embedded in a partnership. However, it is also possible that the cooperation instead of making use of a partnership takes the form of a limited liability company. The main reason for making use of limited liability companies by either the individual partners or by the cooperation is often the protection of natural persons against full liability for their own professional mistakes and those of other partners.[103] Furthermore, it might be possible to make use of a limited liability partnership.

The use of limited liability companies or partnerships by lawyers or accountants or a combination of both in the form of an MDP is however not always allowed.[104] As stated earlier[105], in 2003 the European Commission (DG Competition) launched a public consultation inviting interested parties to comment on regulation of professional services in the EU Member States. Some of the comments made in this respect relate to the business structure used in the legal as well as the accountancy and audit profession. With regard to accountants it was established that the practitioners across the EU are free to make use of

[102] Green Paper, p. 13.
[103] It has to be mentioned that the use of limited liability companies is only possible in case national law or professional codes do not prohibit this. See in this respect also chapter 2 above.
[104] See in this respect Van den Bergh (2007), p. 48.
[105] See section 3.5 above.

partnerships as well as corporations. At that time Italy was the only exception to the rule where the formation of limited liability partnerships, private or public companies was prohibited.[106] The rules with regard to MDPs and the available business forms for such types of cooperation seem to differ significantly among Member States. In some Member States it is allowed to make use of limited liability partnerships or companies for MDPs, in others it is not.[107] The rules with regard to business forms that can be used by legal service providers also seem to differ significantly among Member States. In some Member States it is possible for lawyers to cooperate and set up a limited liability company; in others the use of such a business structure is prohibited.[108] Also, as we indicated earlier, the question whether or not lawyers are allowed to set up a cooperation with non-lawyers, differs from Member State to Member State.[109]

In the recently published Green Paper concerning the future of audit firms, the European Commission questions the ownership rules and partnership model currently applicable to those firms. The Commission refers to the 2006 Directive on Statutory Audit[110], which requires auditors to hold the majority of the voting rights in an audit firm. Furthermore, this Directive prescribes that auditors should control the management board. The Commission is of the opinion that the rationale for these provisions should be revised.[111] The reason behind this statement is the fear expressed by the Commission that, given the size and complexity of some large companies that have to be audited, it is doubtful whether or not audit firms have sufficient resources at their disposal to satisfy potential liability claims.[112] Against this background the European Commission proposes to investigate potential alternative structures that would make it possible for audit firms to raise capital from other sources. This discussion is also relevant for MDPs. One alternative structure, in our view, would be the incorporation of a public limited liability company with the possibility of trading shares on the stock market. This of course implies that MDPs are allowed to make public appeal to savings, which is not always the case. The use of a public limited liability company in itself already increases the transferability of shares and makes it possible to have a wider range of shareholders.

[106] European Commission (2003b), p. 5.
[107] European Commission (2003b), p. 6.
[108] European Commission (2003b), p. 9.
[109] European Commission (2003b), p. 9.
[110] Art. 3 of Directive 2006/43/EC on Statutory Audits of Annual Accounts and Consolidated Accounts (also: 8th Company Law Directive). See Green Paper, p. 13.
[111] Green Paper p. 13 with reference to the public consultation on control structures in audit firms and their consequences on the audit market, July 2009: http://ec.europa.eu/internal_market/auditing/liability/index_en.htm
[112] Green Paper p. 13.

In order to make optimal use of this business form, it is necessary that apart from lawyers and accountants/auditors themselves, also others are allowed to acquire share capital and act as a shareholder. Furthermore, this also implies that there is no prohibition of limiting the liability of partners in an MDP. As we have seen in the previous chapters, some jurisdictions have introduced regulation that prohibits the formation of limited liability partnerships because it is believed that unlimited liability leads to better control and supervision by the partners with regard to their fellow partners.[113] A stock market quotation would furthermore provide MDPs with a wider access to capital. A potential disadvantage of a stock market quotation is the emergence of another conflict of interest, namely between the interest of the client on the one hand and the desire to satisfy at the same time the interest of investors on the other hand.[114]

4. 1.2 Multi-disciplinary employees

Another way to create multi-disciplinary provision of services is by employing personnel from other disciplines instead of creating a partnership with these disciplines. This road has been used in the past in order to circumvent regulation aimed at prohibiting or limiting the possibilities for MDPs.[115] Lawyers can for example employ accountants and the other way around. In some countries there might however be rules prohibiting law firms or audit firms to provide non-legal or non-audit services to their clients. In France for example audit firms are prohibited from providing non-audit services to their clients. Such a total ban has not been implemented European wide and therefore in other EU Member States the rules might be more lenient.[116] However, Article 22 of the Directive on Statutory Audit states that audit services should not be provided if *"an objective, reasonable and informed third party would conclude the statutory auditor's or audit firm's independence is compromised."* The European Commission mentions in the Green Paper that this rule is European wide also applicable to the provision of non audit services by audit firms.[117]

4.1.3 Networks

Apart form embedding the cooperation between multi discipline service providers in a (limited or unlimited) partnership or incorporating a separate private or public limited liability company which embodies the cooperation, it is also possible to establish a so called network. This type of cooperation is often used in accounting organizations.[118] There is no uniform definition of what constitutes a network. Networks can be set up on a contractual basis in

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[113] Van den Bergh (2007), p. 48; European Commission (2003b), p. 5.
[114] Luppino (2004), p. 183; see also Van den Bergh (2007), p. 50.
[115] Fox (2000), p. 1097.
[116] See in this respect the Green Paper p. 12.
[117] Green Paper p. 12.
[118] See in this respect among others Mc Carthy (2003); David e.a. (2008-2009); Van Almelo (2009); Vetula (2009); Winer and Jensen (2009).

which case the members of the network are combined and kept together on the basis of contracts between already existing companies as opposed to for example by share ownership which is the case if the MDP itself is incorporated in a separate limited liability company of which the individual service providers are shareholders. All members within a network generally make use of the same brand name and adhere to certain general network standards. The intensity of the network, its coherence, its uniformity and consequently its flexibility or rigidness can differ between networks.

4.2. Liability risks of MDPs

Cooperation can under certain circumstances lead to an increase in liability risks. However, this is not only the case with regard to MDPs. An individually operating lawyer is in principle only responsible for his own professional mistakes. Once he enters a partnership with other lawyers, he can be exposed to an increased liability risk. After all, in that case he might risk liability for professional mistakes of his partners. It has to be acknowledged, however, that even though the increase in liability risks is not something which only plays a role within MDPs, it can be an important factor and it can increase the liability risk even further. After all, as a result of the combination of several disciplines in one multi-disciplinary partnership one type of discipline can be infected with liability risks attached to the other discipline embedded in the MDP. In this chapter we will not go into the ethical and professional rules applicable to lawyers, accountants or MDPs. We will however make some general remarks with regard to potential liability risks and signal some current trends and developments in this respect. The general liability risks to be discussed below are related to the legal structure of the cooperation/MDP. The liability risks of an MDP in a particular case have to be established on the basis of the circumstances of the case.

4.2.1 Vicarious liability

As was mentioned in the introduction to this chapter, the issue of potential liability risks for service providers gained a lot of attention in the aftermath of several accounting scandals such as Parmalat, Shell and Lernout & Hauspie. The mistakes made by auditors which contributed to the downfall of some of these multinational companies initiated the debate on the potential liability of global auditing networks and their members. Such a global auditing network often exists of independent member firms which have been established and incorporated according to the rules of national law. They all operate independently in their local market. However, these in principle independent firms are connected to each other through an umbrella organization. Generally the umbrella firm coordinates the activities of the member firms and is in charge of standard setting.

Often the member firms have to adhere to a common set of principles which enables them to guarantee a comparable service to their clients world wide. In some cases the umbrella firm also plays a disciplinary and controlling role within the network. The business form of the umbrella firm can differ; it can for example be a limited liability company or an association.[119] The network firms advertise and promote themselves on their website as one global worldwide firm, although the legal reality is different. What appears to be a unity from its outward appearance is in fact a compilation of legally independent firms or companies. As was already indicated above, also the intensity of the network relation can differ among networks.

After the accounting scandals surfaced, several auditing networks faced liability claims. Disappointed parties such as shareholders and creditors filed these claims in an attempt to hold not only the firm directly involved in the audit liable, but also other member firms belonging to the same network. In several cases these claims were based on the doctrine of vicarious liability stating that there was an agent-principal relation between the firm directly involved in the audit and other member firms. Even though these cases were initiated in the United States and traditionally most audit firms have been able to avoid such liability[120], the risk of being held vicariously liable on the basis of an agent-principal relation can pose a threat. Recently some courts have issued opinions allowing claims on the basis of vicarious liability to proceed to discovery and trail.[121] This liability risk deserves some consideration especially when discussing the establishment of global MDPs in which lawyers and auditors take part. It is therefore important to take these developments into account in order to avoid potential future liability threats to the legal parts within the MDP in case of mistakes made by the auditing members of the MDP. The requirement for establishing an agent-principal relation on the basis of which the principal can be held vicariously liable for mistakes made by his agent, differ between (US) jurisdictions. In general it can be said that in order for a principal-agent relation to exist it is required that there is[122]: *"(1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) an understanding between the parties that the principal is to be in control of the undertaking."*

[119] See about the organizational structure of global auditing networks, for example, Winer and Jensen (2009), p. 178, and Philipsen (2009), pp. 17-19.
[120] Winer and Jensen (2009), p. 177.
[121] Winer and Jensen (2009), p. 177.
[122] Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP, 2004 WL 112948 (S.D.N.Y. 2004), at *4.

The agent has to have the authority to bind the principal. It is said that such authority exists[123]. "[…] *where the agent may reasonably infer from the words or conduct of the principal that the principal has consented to the agent's performance of a particular act."*

Whether or not these requirements are met, depends on the structure of the network and the degree of control the umbrella firm has over its network members or the control that can be exercised by individual network members over other members of the same network.[124] In the Lernout & Hauspie case[125] it was for example alleged that local firms of the KPMG network which were directly involved in the audit of Lernout & Hauspie had to be regarded as agents of KPMG International. It is difficult to derive a clear list of circumstances that constitute the existence of such control from the existing body of case law. As was stated above, the allegations have rarely if ever lead to the recognition of vicarious liability of the umbrella organization for acts of its member firms and a lot will depend on the circumstances of the case. However, it can be derived from case law that the mere fact that the member firms use the same brand name and promote their services as one unitary firm with a common market strategy will not be sufficient to establish 'control'.[126]

Control of one member firm over the other or of the umbrella organization over its member firms might perhaps be more easily accepted in case the umbrella organization or the member firm which was not initially directly involved in the audit nevertheless cosigns the audit or the advisory work.[127] Courts may possibly also be more inclined to accept control in cases where the umbrella organization, instead of only setting common standards, has the power to control and discipline member firms and individual partners of those member firms.[128] These are just a few remarks derived from a large body of case law. As was mentioned above, a lot will depend on the circumstances of the case and further research is necessary to clearly identify all potential liability risks. Often a combination of facts will be necessary in order to establish the existence of an agent-principal relation.

4.2.2 Liability from a company law point of view: veil piercing

Limited liability companies are often used in order to minimize liability risks. However, there are some exceptions to the general rule that each limited liability company is in principle only

[123] See in this respect for further references Parmalat Securities Litigation, (S.D.N.Y. 2005) 375 F.Supp.2d 278, at * 290.
[124] Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP, 2004 WL 112948 (S.D.N.Y. 2004) at. *4-5; Banco Espirito Santo International LTD et al. Maritine Ventures Int`l, Inc. See also Parmalat Securities Litigation, (S.D.N.Y. 2009) 594 F.Supp.2d 444, at *451; Vetula (2009), MCCarthy (2003).
[125] Lernout & Hauspie Securities Litigation, (D. Mass.2002), 230 F.Supp.2d 152.
[126] See among others Lernout & Hauspie Securities Litigation, (D. Mass.2002), 230 F.Supp.2d 152; Vetula (2009), p. 1179-1188.
[127] Re Parmalat Securities Litigation, June 28, 2005 (S.D.N.Y. 2005), 375 F.Supp.2d 278 and Re Parmalat Securities Litigation, July 18 (S.D.N.Y. 2005), 2005, 377 F.Supp.2d 390.
[128] Vetula (2009), p. 1179-1188.

responsible for its own acts. Most jurisdictions recognize that in certain circumstances one company can be held liable for the acts of another company if there are direct links between these companies. This can for example be the case in company groups. The circumstances in which there is a possibility of piercing the corporate veil in order to hold one company liable for the acts or losses of another company, differ from jurisdiction to jurisdiction. The aspect of abuse of control of one company over another often plays an important role in this respect. In the Netherlands for example a parent company can be liable towards the creditors of its subsidiary if the subsidiary is unable to satisfy its creditors, if it can be established that there were strong family ties between the members of the group and that the parent company had the possibility to interfere in the subsidiaries affairs. This leads to the assumption of a duty of care of the parent company towards the creditors of its subsidiary due to the strong family ties and the previous intensive nature of the interference of the parent company in the affaires of the subsidiary.[129]

There is not an exhaustive set of circumstances which justify the piercing of the corporate veil.[130] In most cases the fact that there is a group structure is not sufficient to justify group liability. Often there has to be an abuse by the parent company of its dominant position.[131] Commingling company assets is often also regarded as a reason for veil piercing. The latter is for example the case in France.[132] English courts on the other hand are more reluctant to pierce the corporate veil. It is often restricted to cases in which the subsidiary is used as a mere sham or façade.[133] Furthermore, the fact that the parent company acted as shadow director can in several jurisdictions also serve as a ground for liability.[134] A parent company exercising such control over its subsidiary that the management of the subsidiary no longer independently manages the company but only carries out the instructions of the parent company can be held liable as a *de facto* director.[135] An in-depth discussion of all possible types of corporate liability and veil piercing types in all Member States would exceed the limits of the present research. Moreover, these liability risks are more of a general nature and therefore not restricted to or typical for MDPs.

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[129] See with regard to these criteria see Bartman & Dorresteijn (2009), p. 281.
[130] Dorresteijn, Monteiro, Teichmann and Werlauff (2009), p. 301 with reference to J.E. Antunes, Liability of Corporate Groups Deventer/Boston 1994, p. 486.
[131] Dorresteijn, Monteiro, Teichmann and Werlauff (2009), p. 301.
[132] Dorresteijn, Monteiro, Teichmann and Werlauff (2009), p. 303; Andenas and Woolridge (2009), p. 481.
[133] Dorresteijn, Monteiro, Teichmann and Werlauff (2009), p. 303.
[134] Andenas and Woolridge (2009), p. 483.
[135] This is for example the case in France and Belgium. The requirements established in Dutch case law as referred to above are comparable. See Andenas and Woolridge (2009), p. 483-484. In Dutch law it is also important that the parent company directed or had the possibility to instruct the management of the subsidiary.

5. Internal governance of MDPs

In the previous chapters several arguments against MDPs were mentioned. These arguments (and the reason why in some countries MDPs are prohibited, limited or highly regulated) often relate to the fear of increased conflicts of interest within MDPs and/or the fear that certain ethical rules and rules on professional secrecy that apply to the legal profession may not apply to other disciplines. Conflicts of interest have to be actively managed. However, they do not only constitute a problem for MDPs. It has to be admitted that the amount of potential conflicts of interest increases with the increasing size of the organization. For example, also in case of a merger between existing law firms, the risk of conflicts of interest increases. In previous chapters we already referred to the need to install so-called Chinese walls between the different divisions and professionals in an MDP to prevent free flow of sensitive information from one side to the other and to minimize potential conflicts of interest.[136] Furthermore, it is not inconceivable that partners within MDPs are liable for professional mistakes made by other partners. Again, this is not only a problem that is typical for MDPs. However, within MDPs the potential liability risks can increase due to the fact that certain liability risks of one professional discipline affect the other professional discipline within the MDP. It is for example possible that accountants and auditors are confronted with different types of liability risks or claims than lawyers traditionally would face. This can be the result of the difference in the type of work and services these professionals provide. Through the MDP, lawyers can be exposed to liability risks typical for the accounting profession. It can not be excluded that a partner of an MDP is held liable for professional mistakes made within the accounting division of the MDP. In this respect we have discussed the doctrine of vicarious liability and the potential risk of corporate veil piercing. These risks are more likely to materialize if there is a close link between the disciplines embedded in the MDP and if one of the disciplines controls the other. It is important to keep these issues in mind when deciding on the internal structure and governance of MDPs. In order to avoid conflicts of interest, in order to minimize liability risks, and to protect professional secrecy and ethical values, clear separation walls have to be installed between the disciplines that cooperate in the MDP. As was stated already, these separation walls can be established by making use of separate legal business entities, preferably business entities that are endowed with limited liability.

[136] See also Van den Bergh (2007), p. 49.

The Clementi report mentions one way to get around the differences in ethical rules as suggested by the Law Society[137], namely to:*"(...) to place a ring-fence around the legal practice, separating it from that part of the practice dealing with non-legal affairs. The easiest way to give effect to this ring-fence would be to place the legal services business into a separate legal entity."*[138] It is furthermore mentioned in the Clementi-report that *"it would be possible to get close to a de facto MDP through the existence of different practices (...) with common ownership and common branding."*

5.1 Creating separation walls

As argued in the Clementi report, one way to achieve such a ring fence is by incorporating each discipline in a separate legal person, preferably a separate limited liability company. The shares of each of these companies can be held by a parent company which in its turn is owned by the partners of both disciplines. This however assumes that common ownership is allowed and neither discipline requires that the (majority of) owners are professionals from that particular discipline. An alternative, in our opinion, would be to set up a foundation that holds the shares in both underlying companies, so both in the subsidiary that embodies the practice dealing with legal affaires and the subsidiary dealing with the accounting practice. The managing board of the foundation could consist of lawyers as well as accountants. The management board of the subsidiary dealing with the legal affairs could consist solely of lawyers while the management board of the subsidiary responsible for accounting could, if desirable, consist of accountants. If so desired and depending on the legal system in which the limited liability companies and the foundation are incorporated, it would be possible to install a supervisory board at the level of the subsidiaries or at foundation-level. Another alternative, in our view, can be to make use of an association, instead of using a foundation as the common shareholder of the two subsidiaries. In that scenario it is possible that the individual partners of the legal and the accounting profession become shareholders in the subsidiary in charge of the legal services respectively the accounting services while each of these subsidiaries becomes a member of one association which de facto embodies the MDP. It would in that case be up to the association to set general business standards, to provide manuals on how the members of the MDP will offer their services and promote the MDP as a uniform organization while making use of a common brand name. Membership of this association would entail that the companies have to adhere to these standards and can make use of common facilities provided by the association. The latter comes close to the system used in global accounting networks as described above.

[137] Clementi (2004), p. 136.
[138] See also section 3.3 above.

The legal form of the umbrella organization in audit networks may also vary. The American Courts have never really relied on these distinctions in legal forms when assessing their role within the network.[139] As was indicated above, in some instances it might be possible that the relation between the association and its members or between members among each other can be regarded as an agent-principal relation under the ‘American’ vicarious liability doctrine. A lot will depend on the way in which the (de facto) MDP[140] is structured. In order to avoid all potential risks emerging from this type of liability, it is important that it cannot be said that one company/discipline has control over the other. The association that sets the general standards should also not be able to exercise such control. However, as was indicated above, it is not yet clear in which cases such a liability claim on the basis of vicarious liability would be successful. Further research is needed. Furthermore, the success of such a claim will also depend on the circumstances of the case. It has to be emphasized that liability claims on the basis of vicarious liability as discussed above took place with regard to the accounting business and were initiated in the US. However, it is not unthinkable that this kind of claims can also play a role in the future of global MDPs who do business in the US or have American audit/law firms among their members.

5.2 The ownership structure

As was mentioned before, the European Commission proposes to investigate potential alternative structures that would make it possible for audit firms to raise capital from other sources. In this respect one can think of, as mentioned above, a public limited liability company which can, if considered desirable, be listed at the stock exchange. This of course implies that all disciplines of the MDP allow owners coming from outside their own professional discipline. The Clementi-report mentions in this respect that[141]:*“the opportunity for <u>outside owners</u> to participate in MDPs brings the opportunity of attracting capital investments as well as fresh business expertise.”* In the Green Paper the European Commission however states that[142]: “[t]*hese alternative structures would need to put in place safeguards (for example in terms of governance) to ensure that external owners do not interfere with the audit work.”*

We already referred in chapter 2 to the ongoing discussion with regard to existing restrictions on ownership and management of law firms. In this respect it is often argued that

[139] Winer and Jensen (2009), p. 178.
[140] In this case it is no longer an MDP in the literal sense of the word because the partnership form is no longer used. However, the result is comparable namely a cooperation between providers of different types of services and a bundling of various disciplines.
[141] Clementi (2004), p. 137.
[142] Green Paper p. 13.

law firms should not be owned or managed by (a majority of) non-lawyers because this would persuade them to act in the commercial interest rather than in the interest of their clients. It has been contended that the presence of passive equity investors, i.e. people who invest but not work as a lawyer on the MDP, leads to conflicts between fiduciary duties owed to the clients of the firm and those owed to its shareholders.[143]

As indicated in the Green Paper, further research is needed with regard to the possibility of making use of alternative investment structures for auditors as well as for MDPs. It can be said from a company law point of view that external passive equity investors will in principle not be able or allowed to interfere with the audit work and that this risk is small as long as there is an experienced board of directors and perhaps an independent supervisory board. It is up to the management board to determine the strategy of the company and to take business decisions. Shareholders are not allowed to interfere in the day to day business of the company. Of course the equity investors have the possibility to dismiss the management board and appoint a new management if desirable. However, we are of the opinion that the articles of association can be drafted in such a way that the position of the board of directors is strengthened. This can for example be done by awarding a lot of decision making power to the board of directors or by adopting a regime in which only the supervisory board can be directly appointed and dismissed by the shareholders which in its turn has the possibility to appoint and dismiss the management of the company. Furthermore, the adoption of a qualified majority rule with regard to the appointment of members of the management board or the board of directors can be considered. Whether or not this is allowed does however depend on the division of powers between the organs of the company as envisaged by the applicable provisions of national company law. The available protection measures can differ from jurisdiction to jurisdiction. We think that another way to further weaken the position of external investors and to minimize their direct influence on the operation and strategy of the company is by separating the voting power normally attached to equity investments from the investment function of share ownership. This can for example be done by issuing depositary receipts instead of shares to external investors. Depositary receipts reflect an equity investment in the company and entitle the owner of those receipts to dividend payments. However, the voting power which is normally attached to the equity investment is in the case of depositary receipts awarded to someone else who does not directly provide equity to the company but holds the shares for the benefit of the owners of the depositary receipts. This function is often fulfilled by a foundation. It is this foundation which can be regarded as the shareholder of the company.

[143] Luppino (2004), p. 183; see also Van den Bergh (2007), p. 50.

The external investors merely own depositary receipts which entitle them to dividend payments but do not give them voting power at the general meeting. Consequently professionals such as lawyers and/or auditors can be appointed as directors of the foundation. The voting rights at the general meeting can be exercised by this foundation. Whether or not it is possible to establish a separation between equity investments and the voting power normally attached to share ownership depends on its permissibility in national company law.

The influence of outside investors can furthermore be minimized by the creation of different classes of shares. The articles of association can entitle the company to issue two types of shares: type A and type B. Type A shares can for example be priority shares to which special voting rights are attached while type B shares entitle the shareholder to a limited amount of voting power. Type A shares can consequently only be issued to member of the MDP while external investors would only be able to acquire type B shares. The share ownership can be structured in such a way that the ‘internal MDP investors’ always have a majority vote at the general meeting. Again whether or not and to what extent this is possible again depends on national company law.

6. Concluding remarks

In this report we presented an overview of the (extensive) theoretical and empirical literature on MDP restrictions and restrictions to business organization in the legal professions. Although we of course attempted to discuss the most important findings on MDPs as found in this literature, the limits of this research (i.e. a quick-scan) did not allow us to present a list of *all* relevant papers and studies.

Chapter 2 of this report focused on the academic literature, mainly in the field of law and economics. The main arguments against MDP restrictions relate to 'one stop shopping', economies of scope and specialization, possibilities for risk spreading, and innovation (of consumer services and business types). Economists generally argue that MDPS are likely to lead to lower prices for clients of legal and accountancy services, for example in areas such as consumer debt and personal taxation. These arguments have also been forwarded by competition authorities and economic consultants in jurisdictions where professional regulation has been reviewed (see chapter 3). Well-known arguments that support MDP restrictions follow mainly from the legal professions and include professional secrecy (legal privilege), preventing conflicts of interest, and independence (which means something completely different for lawyers than it does for accountants). In addition there is some fear of further market concentration, in line with past events in accountancy service markets.

Naturally, these 'counter-arguments' are very important indeed. In order to benefit from the (theoretical) advantages of MDPs - in the form of lower prices, client convenience and accessibility, and innovation - we also need to make sure that there are no adverse effects on core values such as independence and the legal privilege, and that there are no serious conflicts of interest between lawyers and accountants/auditors who work together. From the literature discussed in Chapter 2 it follows that one could simply require that clients of MDPs are informed of potential conflicts of interest. This would imply that some services cannot be provided by one and the same firm. Other potential solutions mentioned include the so-called 'Chinese walls', preventing certain information flows within the partnership. In practice, setting up such walls will not be easy. It would be interesting to find out whether there exists any theoretical or empirical research on this more specific issue. One could also extend the duty of professional secrecy to all members in the MDP, although then one might ask to what extent MDPs can still offer 'one stop shop' benefits to clients.

From the *empirical* literature it became clear that studies on e.g. client demand for MDP services, economies of scope, and innovation are mostly lacking, although there have been some studies showing efficiency effects of MDPs, i.e. leading to lower costs and prices.

In many jurisdictions, regulation of MDPs has received attention from competition authorities, regulators and even courts (note in particular the *Wouters* case), often in the framework of a general review of regulation and competition in the legal services market. In chapter 3 we presented some results of these market reviews, notably from England and Wales, Ireland, the EU and Canada, and more briefly from the United States and Australia. In some cases, national competition authorities advised to critically look at MDP bans (e.g. England and Wales, Canada). In others, these reviews already led to quite dramatic reform (e.g. Ireland, but also the Netherlands, which is not discussed here), including reform with respect to business form (e.g. Australia, England and Wales). Our goal was not to describe the details of these reforms, as the International Bar Association is very much aware of this. The goal was rather to present the arguments in favour and against restrictions on MDPs and business organization as found in the various studies that were executed in these jurisdictions. Naturally, more extensive research into these market reviews and the resulting changes in particular jurisdictions could be extremely interesting and important in order to further judge the pros and cons of particular restrictions on MDPs.

An important aspect that has to be taken into account when discussing the future of MDPs concerns the potential liability risks related to the combination of several disciplines in one partnership. Some of these liability risks have been discussed in chapter 4 of this report. We have indicated that these potential liability risks are closely related to the business form of the MDP. With regard to certain practitioners the choice of business form is restricted either by law or by professional codes. We are of the opinion that the cooperation between different types of service providers can lead to an increase in liability. Even though this is a general consequence of any kind of cooperation and not only strictly related to MDPs, potential liability risks have to be taken into account. After all, as a result of the combination of several disciplines in a multi-disciplinary partnership one type of discipline can be infected with liability risks attached to the other discipline embedded in the MDP. In this respect we discussed potential liability risks based on vicarious liability and on the doctrine of piercing the corporate veil. These liability risks are still under development in case law and as we have indicated, it is not possible to provide an exhaustive list of liability grounds at this stage. Potential liability risks have to be established on a case by case base. Moreover, further in-depth research is necessary in this area. However, we have emphasized the importance of the creation of clear separation walls between the disciplines that are incorporated in the MDP in order to avoid liability risks, conflicts of interest and the violation of ethical rules such as professional secrecy. One way to achieve a certain degree of separation is by incorporating each discipline in a separate limited liability company and furthermore by installing the

Chinese walls (mentioned above) between the various divisions. We have made several suggestions in this respect.

Potential alternative ownership structures were discussed in chapter 5. In some countries the ownership of MDPs and the management of these partnerships is restricted to practitioners who are a member of the MDP or practitioners of the one particular professional discipline. We have made some suggestions with regard to minimizing the influence of outside investors on the operation and the strategy of the MDP. Whether or not these options are available depends on national law. The European Commission mentioned in the Green Paper with regard to audit firms that it is doubtful whether or not these firms have sufficient resources at their disposal to satisfy potential liability claims. Potential alternative structures that would make it possible for audit firms to raise capital from other sources should therefore be further investigated. The outcome of this discussion will also have an impact on the future of MDPs.

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