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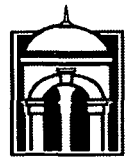

EUROPEAN UNION ANTITRUST LAW & PROFESSIONAL ASSOCIATIONS: THE STRATEGIC CHOICES OF "SOFT" WEAPONS BY THE EUROPEAN COMMISSION

Mary Catherine Lucey[*]

I. INTRODUCTION

This article highlights the strategic use of antitrust law initiatives other than formal enforcement decisions by the European Commission (Commission) in respect of professional associations. Increasing the efficiency and competitiveness of professional services in the European Union is part of the strategy voiced by the 2000 European Council in Lisbon to make Europe "the most dynamic knowledge based economy in the world" by 2010.[1] This article argues that, in its efforts to achieve the Lisbon objective, the Commission is trying to regulate professions to an extent which would not be possible under their formal enforcement powers.

II. EUROPEAN UNION ANTITRUST LAW

The Treaty on European Union (EC Treaty), which establishes the European Communities, contains two articles devoted to improving competition among private economic actors or, to use the Treaty term "undertakings." Article 81 EC (ex Article 85) prohibits anti-competitive arrangements among undertakings, which may affect trade among the Member States, and Article 82

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1. "More efficient and competitive professional services will benefit consumers directly and, as key inputs for other businesses they will also bring greater productivity to the economy as a whole, thus contributing to the Lisbon agenda . . . ." *Communication from the Commission: Report on Competition in Professional Services*, ¶ 104, COM (2004) 83 final (Feb. 9, 2004) [hereinafter *Commission Report* 2004].

EC (ex Article 86) prohibits the abuse of a dominant position by one or more undertakings.[2] The interpretation of these articles is informed by economic, political and social concerns.[3]

Article 81(1) EC prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . ."[4] Typically, a two-stage inquiry is undertaken to evaluate whether the restraint is anti-competitive in either its object or effect. The first question posed is whether the *object* of the arrangement is the restriction of competition. If an objective assessment of its aims pursued in the given economic context[5] reveals an anticompetitive object, then a determination of an infringement of Article 81(1) EC can be made without further analysis.[6] Absent such a finding in relation to the object, Article 81(1) EC is infringed only if the agreement may produce an appreciable,[7] actual or potential restrictive/distortive effect on competition.

To this end, account must be taken of the actual economic and legal context[8] of the restriction including examination of the products/services covered by the agreement, the relevant market structure and the actual conditions of its operation.[9] In order to ascertain the restriction's effect, the state of competition in the absence of the particular measure is examined.[10] According to European Court of Justice (ECJ) case law, Article 81(1) is not infringed if the agreement's effect on competition is not significant, "taking into account the weak position which the persons concerned have on the market . . . ."[11] The prohibition in Article 81(1) EC does not apply to a restriction that satisfies the

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2. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) arts. 81-82 [hereinafter EC Treaty Amsterdam].

3. *See generally* Joined Cases 6 & 7/73, Istituto Chemioterapico Italiano S.p.A v. Comm'n, 1974 E.C.R. 223.

4. EC Treaty Amsterdam art. 81 (as in effect 1997) (as amended by the Treaty of Amsterdam).

5. Joined Cases 29/83 & 30/83, Compagni Royale Asturienne des Mines SA v. Comm'n, 1984 E.C.R. 1679, ¶ 26.

6. Joined Cases 56 & 58/64, Etablissements Consten, S.A.R.L. v. Comm'n, 1966 E.C.R. 299, 343; Case 45/85, Verband der Sachversicherer e.V. v. Comm'n, 1987 E.C.R. 405, ¶ 39.

7. Case 5/69, Völk v. Vervaecke, 1969 E.C.R. 295, ¶ 1.

8. Case 56/65, Société Technique Minière v. Maschinenbau Ulm GmbH, 1966 E.C.R. 235, ¶ 8.

9. *Id.* at 250.

10. "In order to determine whether or not such clauses come within the prohibition in Article 85(1), it is necessary to examine what would be the state of competition if those clauses did not exist." Case 42/84, Remia BV v. Comm'n, 1985 E.C.R. 2545, ¶ 1.

11. *Völk*, 1969 E.C.R. 295, ¶ 5/7.

four conditions contained in Article 81(3) EC.[12] Until individual notifications were abolished in May, 2004, by Regulation 1/2003, the Commission could grant exemptions to notified restrictions for a specified period either with or without conditions following a detailed examination, and sometimes "negotiation."

Furthermore, balancing of pro- and anti-competitive considerations under Article 81(3) EC was the approach the Commission traditionally favored.[13] The Court of First Instance (CFI) sometimes indicated a similar preference for such balancing to occur under Article 81(3) EC rather than under Article 81(1) EC.[14] The Commission may issue Block Exemption Regulations, which exempt particular categories of agreements from the prohibition in Article 81(1) EC. Alternatively, Article 82 EC prohibits the abuse of a dominant position by one or more undertakings if there is a significant effect on interstate trade. A measure is not an "abuse" if it is objectively justifiable.

The Commission enjoys considerable formal enforcement powers in relation to violations of EC Treaty Articles 81 and 82. It may receive complaints about breaches. It has sizeable powers of investigation. These include power to enter the property of undertakings suspected of a violation[15] and, in some situations, the power to enter the residences of staff of the undertaking.[16] The Commission is free to determine that either article has been violated.[17] Its power to issue orders to violators includes orders that specify cessation of conduct.

For example, the Commission may order a violator to stop exchanging information. Additionally it may make "any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring

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12. A restriction will not infringe Article 85(1) EC if it satisfies all of the following four conditions of Article 85(3) EC:

> It must contribute to improving the production or distribution of goods or to promoting technical or economic progress; It must allow consumers a fair share of the resulting benefit; It must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of its objectives; It must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Remia BV, 1985 E.C.R. 2545, ¶ 38.

13. *White Paper on Modernisation of Rules Implementing Articles 85 and 86 of the EC Treaty*, ¶ 57, Commission Programme No. 99/027 of May 12, 1999, 1999 O.J. (C 132/1).

14. Case T-112/99, Metropole Television (M6) v. Comm'n, 2001 E.C.R. II-2459, ¶ 107; Case T-374/94, Eur. Night Servs. (ENS) v. Comm'n, 1998 E.C.R. II-3141, ¶ 136; Case T-193/02, Piau v. Comm'n, 2005 E.C.R. II-209, ¶ 101.

15. Council Regulation 1/2003, art. 20, 2003 O.J. (L 1) 1 (EC).

16. *Id.* at art. 21(1).

17. *Id.* at art. 7(1).

the infringement effectively to an end."[18] The Commission has power to impose financial penalties, up to a maximum of ten percent of a violator's annual worldwide turnover in the preceding business year, on undertakings that violated, "intentionally or negligently," Articles 81 or 82 EC.[19] In light of these mighty powers it is, at first glance, surprising that the Commission has not wholly relied on its formal enforcement powers but looked to informal initiatives to combat restrictions within the professions. Before examining the possible reasons for this strategy it is informative to first examine the informal measures.

Prompted by the Lisbon strategy, the Commission has adopted two reports and commissioned two independent studies on the competitiveness of particular professions. The first independent report was commissioned from the Institute for Advanced Studies in Vienna as part of a stock-taking exercise by the Commission. This research was integral in creating the Commission's first report titled *Competition in Professional Services* (Report).[20] The second report, titled *Professional Services-Scope for More Reform*, was then published in September 2005.[21] Following the reports, in December 2007, an independent study was undertaken by the Centre of European Law and Politics at Bremen University on the conveyancing services market.[22]

The Commission's first Report examined five types of restrictive practices of professional associations: (i) price fixing, (ii) recommended prices, (iii) advertising restrictions, (iv) entry requirements and reserved rights, and (v) regulations governing business structures and multi-disciplinary practices. The six selected professions were comprised of lawyers, notaries, accountants, architects, engineers and pharmacists.[23] Notably, the medical profession was not included. The Report aimed not just to explain why antitrust policy action was needed but rather acted pro-actively to set out "a future course of action to promote the elimination of unjustified restrictions."[24] Four aspects of the Report are interesting. First, the *instruments* proposed by the Commission to procure change, second, the *addressees of the initiatives*, third, the *interests* prioritized and lastly, its attitude towards restrictions on *business structures*.

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18. *Id.*

19. *Id.* at art. 23(2).

20. *See Commission Report* 2004, *supra* note 1, ¶ 14 n.12.

21. *Communication from the Commission: Professional Services- Scope for More Reform*, at 1, COM (2005) 405 final (Sept. 5, 2005).

22. Ctr. of Eur. L. & Politics, Univ. of Bremen, *Conveyancing Services Market*, COMP/2006/D3/003 (Dec. 2007).

23. *Commission Report* 2004, *supra* note 1, ¶ 6.

24. *Id.* ¶ 5 (parenthetical omitted).

First, the Report advocates for various informal measures to be deployed by the Commission and national antitrust authorities in each Member State.[25] The suggested measures are notable for their lack of legal cogency. They comprise *invitations* to entities to voluntarily review their restrictions, *discussions* with European organisations of professional bodies and *consultations* with consumer organisations. These instruments aim to secure "negotiated" changes to restrictive practices. Negotiation (in the shadow of the EC articles) is conducted by the antitrust authority with the restraining entity and with consumers, but does not deal discretely with the restrained individual. As such, the process is reminiscent of the discussions between the Commission and notifying parties that could occur before the abolition of individual notifications in 2004. As of May 1, 2004, it is no longer possible for parties to transmit an agreement to the Commission and receive feedback on the compatibility of their arrangement with Article 81 EC.

The second remarkable aspect is the *scale* of the desired reform because it extends beyond the usual addressees and confines of EC Treaty Articles 81 and 82. Articles 81 and 82 EC are specifically addressed to "undertakings" and, in the case of Article 81, to "associations of undertakings." The term "undertaking" is not defined by the EC Treaty, but has been interpreted to include: "every entity engaged in an economic activity, regardless of its [legal] status and the way in which it is financed . . . ."[26] Any activity consisting in offering goods and services on a given market is an economic activity.[27] The addressees envisioned by the reports are far broader because they include national antitrust authorities, other types of national regulatory authorities, the Member States' legislatures and professional associations.

The second report, adopted by the Commission in 2005, specifically exhorted national antitrust authorities to engage with national governments and to collaborate with them. This follows the initial Report's call to governments and their non-antitrust regulatory entities to examine anti-competitive restrictions within their control. Consequently, Commissioner Mario Monti even called on professional associations to propose legislative changes to their

25. EU Regulation 1/2004 obliged every Member State to designate national competition authorities with responsibility to enforce Articles 81 and 82 EC within their national territory. Commission Regulation 1/2004, art. 10, 2004 J.O. (L1) 9 (EC).

26. Case C-55/96, Job Ctr. Coop., 1997 E.C.R. I-7119, ¶ 21 (alteration to original text); *see generally* Commission Decision 85/615, 1985 O.J. (L 376) 2 (EC) (noting that the EC Treaty's Article 81 (ex Article 85) was applicable to non-profit-making associations, known as Protection and Indemnity Clubs, involved in providing marine insurance).

27. Case 118/ 85, Comm'n v. Italy, 1987 E.C.R. 2599, ¶ 7; Commission Decision 31/149, 1986 (L 230) 1, ¶ 99; *see* Case C-41/90, Hofner v. Macrotron GmbH, 1991 E.C.R. I-1979, ¶¶ 21, 23.

national legislative authorities.[28] This wide range of addressees shows that the application of antitrust policy to professionals is being shaped by informal and non-transparent interaction among private and public actors.

The third interesting aspect of the Report is its avowed goal of promoting the "public interest" and the interests of consumers. The focus on "public interest" is striking because this phrase does not appear in the text of Articles 81 or 82 EC.[29] In the Commission's view, "[r]ules must be objectively necessary to attain a clearly articulated and *legitimate public interest* objective and they must be the mechanism least restrictive of competition to achieve that objective."[30] The Report expressly invites national authorities and professional bodies to consider "whether the existing restrictions pursue a clearly articulated and *legitimate public interest* objective, whether they are necessary to achieve that objective and whether there are no less restrictive means to achieve this."[31]

Discussions between the Commission and European organisations of professional bodies center on "their understanding of the *public interest* in their domain and how it could be achieved with more pro competitive mechanisms."[32] The Commission pays regard to the interests of consumers or end users. The Report cites the European Parliament Resolution on regulation and competition rules which endorses the necessity, generally, of rules:

> [I]n particular those relating to the organisation, qualifications, professional ethics, supervision, liability, impartiality and competence of the members of the profession or designed to prevent conflicts of interest and misleading advertising, provided that they give *end users* the assurance that they are provided with the necessary guarantees in relation to integrity and experience, and do not constitute restrictions on competition.[33]

Input from consumers is specifically sought by the Commission on a variety of issues including: (i) "opinions on the advantages and disadvantages of this type of regulation",[34] (ii) "the relationships between levels of regulation and

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28. Mario Monti, Comm'r, Eur. Comm'n, Comments & Concluding Remarks of Commissioner Monti at the Conference on Professional Regulation 15 (Oct. 28, 2003).

29. The terminology of "public interest" is found in the cases dealing with the free movement of services, for example: Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37.

30. *Commission Report* 2004, *supra* note 1, at 4 (emphasis added).

31. *Id.* ¶ 93 (emphasis added).

32. *Id.* ¶ 95 (emphasis added).

33. *Id.* ¶ 29 (quoting Market Regulation and Competition Rules for the Liberal Professions, EUR. PARL. DOC. P5 TA0572 ¶ 11 (2003) (emphasis added).

34. *Commission Report* 2004, *supra* note 1, ¶ 96.

economic outcomes . . . as well as consumer satisfaction,"[35] and (iii) the definition of best practice.[36] Moreover, the Commission has advocated the enhancement of "consumer empowerment" by means of mechanisms such as "active monitoring by consumer associations, collection and publication of survey based historical data or public announcements of the abolition of tariffs."[37] This approach aggrandizes the influence of consumers to an extent that is not required by the EC Treaty under formal enforcement proceedings.

The fourth interesting aspect of the Report is its attitude to restrictions on professional business structures. It states that restrictions on business structure are least justifiable if "they restrict the scope for collaboration between members of the same profession" or in a profession "where there is no overriding need to protect practitioners' independence" giving the example of architects and engineers.[38] While it seems to agree that restrictions are more justifiable "where there is a strong need to protect practitioners' independence or personal liability", it argues that "alternative mechanisms for protecting independence and ethical standards . . ." could be less anti-competitive.[39]

The Commission's views do not wholeheartedly match the jurisprudence of the ECJ. Before examining particular judgments, it is appropriate to ask whether inter institutional discord offers a clue as to the attractiveness of the informal measures. Therefore, the next section analyzes some of the formal decisions of the Commission and judgments of the ECJ taken under Article 81 EC. The aim of this examination is to understand the intricacies of applying Article 81 EC formally and to highlight any disincentives to its application.

III. FORMAL DECISIONS & JUDGMENTS

Unlike antitrust legislation in some Member States,[40] neither Article 81 nor 82 EC make any particular provision for professionals. Three aspects of professionals' services are sometimes cited as reasons to qualify the application of EU antitrust law.[41] The first feature is the asymmetry of information between consumer and professional.[42] The point is made that where "[p]rofessional services are 'credence goods' . . .," their quality "cannot easily be judged either

35. *Id.*

36. *Id.* ¶ 97.

37. *Id.*

38. *Id.* ¶¶ 62-63.

39. *Id.* ¶ 64.

40. Philip Andrews, *Self-Regulation by Professions—The Approach Under E.U. and U.S. Competition Rules*, 23(6) EUR. COMPETITION L. REV. 281, 281-85 (2002).

41. *Commission Report* 2004, *supra* note 1, ¶ 24.

42. *Id.* ¶ 25.

by prior observation or, in some markets, by consumption or use."[43] The second feature of professionals' services concerns "externalities"[44] in the sense of impact on third parties.[45]

Thirdly, mention has been made of the public service dimension of some professionals' services. Sometimes, the restraining entity's regulatory function is applicable when professional services are regarded as "public goods that are of value for society in general."[46] The Commission is alive to the "*danger* that *without regulation* some professional services markets might undersupply or inadequately supply public goods."[47] "*Restrictive regulations* have therefore been justified as being designed to maintain the quality of professional services and to protect consumers from malpractice."[48] These observations show that there are arguments in favour of a tempered application of antitrust law to restrictions on professionals. This reveals a degree of complexity which is not found in cases involving, for example, a price fixing agreement among manufacturers.

As a result, rules restricting learned professionals, for instance, restrictions on professionals' freedom to advertise, to set their own fee structures and to engage in desired business structures are examined under competition law on a case by case basis. In *Institute of Professional Representatives v. Commission,* the Court of First Instance refused to accept that "rules which organise the exercise of a profession fall as a matter of principle outside the scope of Article 81(1) EC merely because they are classified as rules of professional conduct by the competent bodies."[49] This judgment was an appeal from the Commission's decision in *European Patent Institute Code of Conduct.*[50] In its decision, the Commission decided that the European Patent Office's (EPO) ban on comparative advertising and ban on approaching others' clients infringed Article

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43. *Id.*

44. "Externalities are benefits or losses (normally to society as a whole) which are not priced." Joined Cases C-180/98 & C-184/98, Pavlov v. Stichting Pensioenfonds Medische Specialisten, 2000 E.C.R. 6451, ¶ 85; *see Commission Report* 2004, *supra* note 1, ¶ 26.

45. *See Commission Report* 2004, *supra* note 1, ¶ 26.

46. Examples offered by the Commission "include the correct administration of justice or the development of high quality urban environments." *Commission Report* 2004, *supra* note 1, ¶ 27.

47. *Id.* (emphasis added).

48. The Commission offers examples of licensing restrictions as a means to "preclude incompetent or poorly qualified practitioners from offering services, while disciplinary procedures can be used to sanction providers whose quality fails to meet minimum standards." *Commission Report* 2004, *supra* note 1, ¶ 28 (emphasis added).

49. Case T-144/99, Inst. of Prof'l Representatives v. Comm'n, 2001 E.C.R. II-1087, ¶ 64.

50. Commission Decision 36/147, 1999 O.J. (L106) 14 (EC).

81(1) EC because of the disadvantages to the immediate consumers, the public (economy) and the operation of the restraining association.

The Commission desired comparative advertising because it allows consumers to distinguish between choices and also because it facilitates the establishment of new operators.[51] In its view, the bans were "not necessary to ensure professional responsibility, independence or secrecy or to prevent false or deceptive statements or conflicts of interest and thus to ensure that EPI members comply with the rules of professional conduct . . . ."[52] Thus, the cited reasons were concerned with the public interest and the proper running of the association.

More interestingly, the Commission decided (after many amendments to the notified arrangements) that Article 81(1) EC was not infringed by other restraints because they were "necessary, in view of the specific context of this profession in order to ensure impartiality, competence, integrity and responsibility on the part of representatives, to prevent conflicts of interest and misleading advertising, to protect professional secrecy or to guarantee the proper functioning of the EPO."[53] This list cites non-economic and non-competition criteria such as public interest type objectives that particularly advantage both the recipients of the services and the functioning of the restraining body. It is remarkable that the Institute Code's prohibition on members from charging fees related to the outcome of the service (a higher fee if application is successful or lower fee if unsuccessful) did not infringe Article 81(1) EC.

This despite the Commission's view that the professionals' merit and the quality of services are essential elements of competition and that "competition" among liberal professionals should additionally cover "other elements such as fees and advertising."[54] Nonetheless, it decided that "[t]his restriction on members' freedom of commercial action must be viewed in the *context* of the overall system by which the EPO grants patents, a system which is one of the major factors of economic growth."[55] It identified the danger of representatives being encouraged to take on cases offering good short-term prospects rather than cases with a long-term outcome. According to the Commission,

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51. *Id.* The Commission views advertising as "cover[ing] not only accurate information for the user but also a promotion of the services on offer, including comparison with a competitor . . . . [M]embers of a profession should have the freedom to actively seek out clients without thereby directly jeopardising the quality of the personal relationship between service providers and their clients." *Id.* ¶ 41 (alteration to original text).

52. On appeal, the Court of First Instance found the Commission had misunderstood the extent of the restriction on advertising and overturned its decision. *Id.* ¶ 43.

53. *Id.* ¶ 38.

54. *Id.* ¶ 40 (footnote omitted).

55. Commission Decision 36/147, *supra* note 50, ¶ 35 (emphasis added).

> Even if in other circumstances it might constitute a restriction of competition to prohibit fees from being determined according to outcome, it is *necessary* in the economic and legal context specific to the profession in question in *order to guarantee impartiality on the part of the representatives* and to *ensure the proper functioning of the EPO.*[56]

Here, portraying a broad economic vision of the importance of patents to the entire economy allowed the Commission to carve out a particular approach to fee setting by one type of professional regulator on which was bestowed a somewhat ethical veneer with the mention to guarantee impartiality.

The most challenging ECJ judgment on the applicability of Article 81 EC to restrictions on learned professionals is *Wouters*.[57] This judgment was issued after an Article 234 EC[58] reference on regulations of the Netherlands Bar Association prohibiting all contractual arrangements between lawyers practising in the Netherlands and accountants which provided in any way for shared decision making, profit sharing or for the use of a common name.[59] The referring tribunal (Raad van State) found that the aim of the measure was "to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance . . . ."[60] The ECJ decided that this type of rule does not violate Article 81(1) EC because the association "could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession . . ." in the Netherlands.[61]

The ECJ cited potential pro-competitive and anticompetitive effects of the rule including its effects on the structure of competition. It accepted that:

> [U]nreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall decrease in the degree

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56. *Id.* (emphasis added).

57. Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577, ¶ 3.

58. Article 234 allows, and in some cases requires, a national body to refer to the ECJ questions of the interpretation of EC law. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) art. 234.

59. In effect this rule renders any form of effective partnership difficult. *Wouters*, 2002 E.C.R. I-1577 ¶ 84.

60. *Id.* ¶ 39. This finding precluded the ECJ examining the argument that it had an anti-competitive object. *See id.* ¶ 72.

61. *Id.* ¶ 110.

> of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market.[62]

It also commented that the one stop advantages of combining complementary accountancy and legal expertise to offer a wider range of services and satisfy "needs created by the increasing interpenetration of national markets and consequent necessity for continuous adaptation to national and international legislation" supported the conclusion that the rules prohibiting absolutely all forms of cooperation restricted competition.[63]

The key passage is contained in paragraph 97. The ECJ stated:

> However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.[64]

It is, to say the least, interesting that having established the possibility of anti-competitive effects; the ECJ did not find an infringement of Article 81(1) EC. Instead, it advocates that a broader frame be established around the inquiry in order to take account of the "overall context in which the decision of the association of undertakings *was taken* or *produces its effects* . . . ."[65] The emphasized words show the breadth of the relevant overall context includes, firstly, the taking of the decision and, secondly, the effects of the decision. The first focus admits non-competition justifications (e.g. requirements of the

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62. *Id.* ¶ 93.

63. *Id.* ¶ 88.

> Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules such as the 1993 Regulation, which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition.

Wouters, 2002 E.C.R. I-1577 ¶ 94.

64. *Id.* ¶ 97 (parenthetical omitted).

65. *Id.* ¶ 3 (emphasis added).

operation of the organization). The second focus on effects does not specify which effects are relevant. Next, the ECJ requires that account be taken of the objectives of the decision and lists objectives that are not related to competition, but comprise the interests of the restrainor (organization, supervision) and the public/consumers (qualifications, ethics, liability, sound administration of justice). Finally, the ECJ's approach asks about the inherency of the restrictive effects in the pursuit of the restraints' objectives.

A variety of descriptive labels have been ascribed by commentators to the ECJ's approach in this case. For Richard Whish, the ECJ approach is one of "regulatory ancilliarity."[66] The tag of "regulatory" is interesting because it introduces a somewhat paternalistic element. Disagreeing with the ancilliarity prism, Giorgio Monti traces the transposition into Article 81(1) EC from the *Cassis de Dijon* rule, which hinders the free movement of goods, is not prohibited by "Article 28 if it is necessary to satisfy a mandatory requirement relating to, for example, fairness of commercial transactions or the defence of the consumer."[67] Terming this development as European-style rule of reason, it allows an anti-competitive agreement necessary to preserve a domestic mandatory requirement of public policy. Monti views this judgment as exemplifying Mortelmans convergence in the application of rules on free movement and competition. In Monti's view, the purpose of convergence in *Wouters* is to permit account to be taken of non-competition factors relating to domestic interests. Admitting different national interests along the mutual recognition pathway could well dilute a uniform EU wide attitude to restrictions on professional services.

Alternatively, D.G. Goyder viewed the *Wouters* judgment in terms of conflating Articles 81(1) and 81(3) EC which he regarded as a possible foretaste of the then future post May 2004 scenario.[68] Jones and Sufrin point out that the

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66. "What was is of interest about *Wouters*, however, is that the restriction in that case was not necessary for the execution of a commercial transaction or the achievement of a commercial outcome in the market; instead it was ancillary to a regulatory function . . . ." RICHARD WHISH, COMPETITION LAW 121, 121-22 (5TH ed., 2003) (emphasis in original).

67. Giorgio Monti, *Article 81 EC and Public Policy*, 39 COMM. MKT. L. REV. 1057, 1087 (2002).

68. D.G. GOYDER, EC COMPETITION LAW 94-95 (4th ed., 2003) (stating:

> What appears to have happened is that the two parts of the Article [81(1) and Article 81(3)] have been conflated and operated as if they were a single provision (in the same way as under section 1 of the Sherman Act in a case like *California Dental Assoc. v. FTC*). This may become the usual method of applying Article 81 from 1 May 2004 once the modernization programme has been implemented and after the Commission has surrendered its monopoly of granting individual exemptions. It is certainly not to be regarded as an application of the 'rule of reason'.)

ECJ did not say that rules regulating the provisions of professional services fall outside Art 81(1) EC (like it did in *Albany* for collective bargaining). They remark on how, at first sight, the ECJ went further than US courts because it "seemed to weigh the anti-competitive effects of the agreement against benefits which were not economic benefits" under Article 81(1) EC. Without doubt, the *Wouter*'s judgment embraces and gives weight to non-competition criteria under Article 81(1) EC to a greater extent than earlier judgments and decisions.

IV. CONCLUSION

The *Wouters* judgment has been described as "surprising and controversial",[69] "puzzling"[70] and "difficult."[71] In my opinion, this judgment suggests that the ECJ may tolerate restrictions on professionals that the Commission would not favour. If so, that divergence of view explains the Commission's enthusiasm for non-enforcement or informal measures. The formal jurisprudence examined in this article illustrates the complex tensions involved in applying Article 81 EC to restrictions that regulate the market behaviour of professionals. The less formal modes embrace a broader audience of public and private actors than would occur in a formal procedure under Articles 81 or 82 EC. Moreover, they encourage the Member States and their regulatory agencies to take ownership of the Lisbon agenda.[72] The key strength of the informal measures is the possibility of securing negotiated outcomes that emerge from a process of critical self-reflection by the restraining entity. In this light, the decision of the Commission not to rely solely on formal enforcement measures but, additionally, to pursue legally softer but potentially more effective initiatives must be seen as an informed strategic choice designed to secure the competitiveness of professional services in the European Union.

(alteration to original) (footnote omitted).

69. WHISH, *supra* note 66, at v.

70. GOYDER, *supra* note 68, at 94. *See* A.J. Vossestein, *Case C-35/99, Arduino; Case-309/99, Wouters et. Al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, 39 COMM. MKT. L. REV. 841 (2002).

71. ALISON JONES & B.E. SUFRIN, EC COMPETITION LAW: TEXT, CASES, AND MATERIALS 227 (2d ed. 2004).

72. The Italian government was cited as a good example of a Member State "taking ownership of the Lisbon Agenda" when it eliminated certain serious restrictions to competition in professions. Philip Lowe, Dir. Gen., Directorate Gen. for Competition, Eur. Comm'n, Opening Address to the Conference: The Economic Case for Professionals Services Reform 6 (Dec. 13, 2006), *available at* http://ec.europa.eu/comm/competition/speeches/text/sp2006_026_en.pdf.