Professional ethics and restraints of competition

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When it comes to the question whether or not rules on professional ethics restrict competition, the current state of EC competition law is not clear. Since the decision of the Commission in EPI, the judgment on appeal of the Court of First Instance against this decision and the judgment of the Court of Justice in Wouters, it is uncertain whether or not Art.81(1) EC implies a public interest rule of reason. I contend that this is not the case. A public interest rule of reason runs counter to the function of Art.81(1)EC. The Court, moreover, effectively did not apply a public interest rule of reason in Wouters. In order to provide a concise legal framework, this contribution attempts to define the concept of "deontological ancillarity".

Introduction

The decision of the Commission in *EPI*, the judgment of the Court of First Instance against this decision and the judgment of the Court of Justice in *Wouters* triggered another round of discussions as to whether or not Art.81(1) EC implies a public interest rule of reason.[1] Analogous to a commercial rule of reason that implies a balancing of the anti-competitive effects against the competitive effects of an agreement within Art.81(1) EC, a public interest rule of reason implies that the anti-competitive effects of an agreement are balanced against its non-competition objectives within Art.81(1) EC.[2]

The idea of the public interest rule of reason seems to be the following. Professional services markets are characterised by different forms of market failure: asymmetry of information, externalities and public goods.[3] Since it increases welfare, a correction of market failure is, in principle, in the public interest. Deontological rules—rules on professional ethics agreed on by professions[4]—are often claimed to correct market failure. In *Wouters*, for example, the prohibition on multi-disciplinary partnerships issued by the

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[1] Commission Decision 1999/267, Case IV/36.147, *EPI code of conduct* (the *EPI* decision) [1999] O.J. L106/14; Case T-144/99 *Institute of Professional Representatives* (the *EPI* judgment) [2001] E.C.R. II-1087; [2001] 5 C.M.L.R. 2; and Case C-309/99 *Wouters* [2002] E.C.R. I-1577; [2002] 4 C.M.L.R. 413.

[2] The CFI rejected a commercial rule of reason in Case T-112/99, *Métropole* [2001] E.C.R. II-2459; [2001] 5 C.M.L.R. 33, at [72]–[78]. Confirmed in Case T-65/98, *Van den Bergh Foods* [2003] E.C.R. II-4653, at [106]–[107]. The Commission followed the CFI in its Guidelines on Art.81(3) EC, [2004] O.J. C101/97, para.11.

[3] The Commission Report on Competition in the Professional Services, COM(2004)83 final, paras 25–27.

[4] This article does not deal with deontological rules issued by Member States.

Bar of the Netherlands ("1993 Regulation") aimed "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".[5] At the same time, however, such a rule may restrict competition, which triggers the application of Art.81 EC. In *Wouters*, the Court is claimed to have applied a public interest rule of reason by taking non-competition considerations into account when examining whether competition is restricted within the meaning of Art.81(1) EC.[6]

I challenge the view that Art.81(1) EC implies a public interest rule of reason. First, one of the basic assumptions underlying the EC Treaty is that the state safeguards the public interest, whilst undertakings pursue private, economic interests.[7] Secondly, the public interest requires the supervision of the (potential) pursuance of private, economic interests under the competition rules. The competition rules only cover the public interest of effective competition, not the public interest at large.[8] Thirdly, the Court effectively[9] did not apply a public interest rule of reason in *Wouters*.

I will proceed as follows in this article. I will, first, give an overview of the different approaches taken by the EC authorities. Apart from the *EPI* decision of the Commission, the *EPI* judgment of the CFI and the judgment of the Court in *Wouters*, I will deal with the Report of the Commission on Competition in the Professional Services ("Professional Services Report") and the Commission's decision in *Belgian Architects*.[10]

Next, *Wouters* will be analysed. In order to do so, I will briefly reiterate the function of Art.81 EC. Since the interpretation of Art.81(1) EC should in my view converge ratione personae and ratione materiae, parallels will be drawn from case law on other parameters of Art.81(1) EC.

Having analysed *Wouters*, I will then attempt to provide a concise legal framework by defining the concept of "deontological ancillarity". Since both notions share similar requirements of ancillarity and necessity, "deontological ancillarity" will be defined along the lines of "commercial ancillarity".

[5] *Wouters* above fn.1, at [97].

[6] Giorgio Monti, "Article 81 EC and Public Policy" [2002] 39 C.M.L.Rev. 1057; Kamiel Mortelmans and Johan van den Gronden, "*Wouters: is het beroep van advocaat een aparte tak van sport?*" Ars Aequi 51(2002)6, 441; Richard Whish, *Competition Law* (2003), pp.120–127.

[7] See A.G. Darmon in his Opinion in Case C-185/91, *Reiff* [1993] E.C.R. I-5841, at [34]–[36]; [1995] 5 C.M.L.R. 145; and A.G. Jacobs in his Opinion in Case C-67/96, *Albany*; Joined Cases C 115/97, 116/97, 117/97, *Brentjens*; and Case C-219/97, *Drijvende Bokken* [1999] E.C.R. I-6025, at [184]; [2000] 4 C.M.L.R. 446.

[8] In this contribution I will use the notion public interest—as opposed to private interest—meaning the public interest at large. That is to say, public interest refers to the whole range of different public interests. The interest of effective competition, one of many public interests, will be addressed explicitly. So-called public interest considerations like the sound administration of justice or the environment will be addressed as non-competition considerations.

[9] The Court makes no findings of fact in an Art.234 reference. *Wouters*, however, provides a basis on which the Netherlands Council of State could decide that the rule in question did not infringe Art.81(1) EC.

[10] Professional Services Report, above fn.3; Commission Decision 2005/8 of June 24, 2004, *Belgian Architects,* COMP/A.38549, [2004] O.J. L4/10 (summary). See also the Follow-up to the Professional Services Report "Professional Services—Scope for more reform" Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee of the Regions, COM(2005)405 of September 5, 2005. The Follow-up mainly addresses the responsibility of the Member States to deregulate professional markets. Since it does not address the dilemma of the public interest rule of reason prompted by *Wouters*, I will not further elaborate on the Follow-up in this contribution.

The workings of the concept of "deontological ancillarity" will be illustrated by several decisions of national authorities based on national competition law, i.e. the decision of the Office of Fair Trading ("OFT") and the judgment of the Competition Appeals Tribunal ("CAT") in *GISC*, and the decision of the Dutch competition authority ("DCA") in *NOVA I* as well as its press release in *NOVA II*.[11] Since s.2(1) of the UK Competition Act and Art.6(1) of the Dutch Competition Act converge with Art.81(1) EC, "deontological ancillarity" within the framework of Art.81(1) EC is relevant to the latter's national counterparts, and vice versa.[12]

In addition, the judgment based on Art.81(1) EC by the Belgian Supreme Court in *Flemish Bar Rules* as well as the judgment by the CFI in *Piau* will be taken into account.[13]

To conclude, I will compare the concept of "deontological ancillarity" to the broader notion of "regulatory ancillarity" as suggested by Richard Whish.[14]

The EC authorities and a public interest rule of reason

EPI (Commission)

In *EPI* the Commission examined the code of conduct of the Institute of Professional Representatives before the European Patent Office ("*EPI* code of conduct"; "Institute"). Article 4(e) of the *EPI* code of conduct prohibited European patent representatives from charging fees directly related to the outcome of the services provided. The Commission found that the prohibition on contingency fees was "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 [European Patent Organisation]".[15] The reasons therefore are that there would be a risk that procedures would be initiated not because of the merits of a patent or of opposition to it but rather because of the representative's purely commercial motives. In addition, clients would for a long time be uncertain as to the price that would have to be paid for the services provided.

Thus, the Commission applied a public interest rule of reason. The analysis that the prohibition on contingency fees is necessary to guarantee the impartiality on the part of the representatives implies a value judgment on public interest considerations on which one can hold different views. After all, a market in which clients can choose between contingency fees and hourly rates will correct the fact that contingency fees encourage representatives to take on cases which offer short-term commercial prospects. In addition, in the case of hourly rates a client is also confronted with long-term uncertainty as to the *total* fee to be paid. As a result, the necessity test applied by the Commission

[11] OFT Decision of June 24, 2001, no.CA98/1/2001; and CAT judgment of September 17, 2001, nos 1002/2/1/01 (IR), 1003/2/1/01 and 1004/2/1/01; DCA Decision of Feb.21, 2002 in case no.560 (*NOVA I*), and the Press Release of March 4, 2005 concerning the report in case no.3447 (*NOVA II*).

[12] s.60 of the UK Competition Act 1998; and the Explanatory notes to the Dutch Competition Act (*Memorie van Toelichting*), TK 1995–96, 24707, no.3, pp.7 and 10.

[13] Judgment of the Belgian Supreme Court of September 25, 2003, no.RC039P3_1; and the judgment of the CFI of January 26, 2005 in Case T-193/02, *Piau*, available at *www.curia.eu.int*.

[14] Richard Whish, cited above fn.6, pp.120–123.

[15] *EPI* decision, above fn.1, at [35].

contains a marginal review of the prohibition on contingency fees against its public interest objectives.

EPI (CFI)

Notwithstanding the Commission's favourable approach to the prohibition on contingency fees, the Institute appealed the *EPI* decision to the CFI. One of the reasons for this is that the Commission had been less generous on the prohibition on comparative advertising.[16]

The CFI upheld the Commission's decision on the prohibition on comparative advertising. In doing so, however, it declined the application of a public interest rule of reason. The Institute had argued that professional codes of conduct pursue a public interest aim. By application of the rule of reason, professional codes would therefore be indispensable and not fall within the scope of Art.81(1) EC. The CFI, however, determined that rules of professional conduct do not fall as a matter of principle outside the scope of Art.81(1) EC.[17] It considered the case law on freedom of establishment and on freedom to provide services irrelevant in the context of Art.81(1) EC.[18] Instead, the CFI determined that in order for Art.81(1) EC not to apply to the prohibition on comparative advertising, this prohibition had to be "objectively necessary in order to preserve the dignity and rules of conduct of the profession concerned, [. . .]."[19]

The objective necessity test introduced by the CFI paralleled its earlier analysis of a commercial ancillary restraint in *Métropole*.[20] In that case the CFI determined that "commercial ancillarity" requires objective necessity. Further to the CFI an objective necessity test cannot be but "relatively abstract" which means:

> "[. . .] whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation."[21]

Translated to "deontological ancillarity", objective necessity would imply the following. A restrictive deontological rule can be considered objectively necessary if without the restraint, the fundamental principles governing a liberal profession—like for example the duty for lawyers to act for clients in complete independence and in their sole interest—are difficult or even impossible to live up to. In other words, objective necessity requires a deontological restraint to follow directly from those fundamental principles. Contrary to the marginal necessity test applied by the Commission in *EPI*, an objective necessity test excludes the balancing of pros and cons in the public interest. Restraints that are not objectively necessary fall within the scope of Art.81(1) EC and are submitted to a regular competition analysis.

[16] *EPI* decision, above fn.1, at [39]–[45].
[17] *EPI* judgment, above fn.1, at [64] and [65].
[18] See fn.1 at [66].
[19] See fn.1 at [78].
[20] *Métropole*, above fn.2, at [72]–[78].
[21] See fn.2 at [109].

Wouters

The 1993 Regulation in *Wouters* prohibited structural partnerships between lawyers that are members of the Bar of the Netherlands and accountants. Like the Commission and the CFI, the Court applied a necessity test. Notwithstanding the restrictive effects of the 1993 Regulation, the Court determined that the Bar could reasonably have considered that it is necessary for the proper practice of the legal profession as organised in the Netherlands.[22]

Wording like "could reasonably have considered" suggests that the Court followed the marginal necessity test applied by the Commission in its *EPI* decision rather than the objective necessity test applied by the CFI in its *EPI* judgment. Consequently, legal writers have drawn a parallel to the case law on the free movement rules.[23] I will come back to *Wouters* in more detail later.

The Professional Services Report

Meanwhile, the Commission seems to prefer an objective necessity test. In its Professional Services Report it notes that:

> "[r]egulations which are objectively necessary to guarantee the proper practice of the profession, as organised in the Member State concerned, fall outside the scope of the prohibition."[24]

Unfortunately, this in itself clear principle is undermined by the Commission's subsequent referral to the marginal necessity test it applied in its *EPI* decision. The following brief reiteration of *Wouters* does not bridge the gap between these two conflicting interpretations.[25]

Belgian Architects

In its decision in *Belgian Architects* the Commission does not address the issue of objective necessity as against marginal necessity. The recommended fee scale laid down an architect's fee as a percentage of the value realised by the entrepeneur. The Belgian Association of Architects had claimed that the fee scale: (i) prevented extremely low fees that may indicate manifestly illegal practices; and (ii) acted as a guideline for replies to questions from parties to the contract or from a court of law.[26] However, the Commission found, on the first point, that an agreement on prices does not correct such market failure. On the second point, the Commission considered that less restrictive means were available.[27] In other words, the fee scale was neither necessary nor proportionate in order to guarantee the proper practice of the profession.

[22] *Wouters*, above fn.1, at [110].

[23] Giorgio Monti, p.1087; Kamiel Mortelmans and Johan van den Gronden, p.459; and, Whish, p.121. All cited above fn.6.

[24] Executive Summary of the Professional Services Report, above fn.3, p.5. Commissioner Monti had already favoured an objective necessity test in "Comments and concluding remarks of Commissioner Monti" Conference on Professional Regulation Brussels, October 28, 2003.

[25] Professional Services Report, above fn.3, paras 72 and 74–75.

[26] *Belgian Architects*, above fn.10, at [99].

[27] Since the Association was not automatically informed of the fees demanded by the architects and extremely low fees are not in themselves sufficient proof of illegal practices, the Association was considered

Summary

Further to the above, the dilemma as to the competitive assessment of restrictive deontological rules can be summarised as follows. One view is that Art.81(1) EC implies a public interest rule of reason by way of a marginal necessity test of deontological rules (Commission decision in *EPI*). This would mean that Art.81(1) EC provides for a balancing of the anti-competitive effects of such rules against acclaimed non-competition considerations. As a result, (associations of) undertakings and competition authorities would safeguard the public interest in the context of Art.81(1) EC.

The other view is that the public interest requires a strict application of Art.81(1) EC. This would imply an objective necessity test. The requirement of objective necessity is met if a deontological rule follows directly from the fundamental principles governing a liberal profession (i.e. if without the restraint the fundamental principles are difficult or even impossible to live up to). Such a test excludes the balancing of the pros and cons of deontological rules in the public interest (CFI decision in *EPI*).

At first glance *Wouters* seems to support the first view. Upon closer analysis, however, I doubt whether this judgment should be interpreted along these lines.

Wouters revisited

Before analysing *Wouters* I recall that the basic assumption underlying the EC Treaty is that the state safeguards the public interest, whilst undertakings act in their own, private interests.[28] In addition, the public interest requires the supervision of the pursuance of private, economic interests under the competition rules. Articles 81 and 82 EC only aim at protecting and promoting effective competition, one of many public interests. A public interest rule of reason runs counter to all the above.

The public interest within the context of Article 81 EC

Commentators on *Wouters* have drawn a parallel to the free movement rules by interpreting "could reasonably have considered" as excluding deontological rules from Art.81 EC in the same way as Art.49 EC had the case been argued under those provisions.[29] Under Art.49 EC a Member State may adopt rules which restrict the freedom

to be able to perform its supervisory function without a fee scale. In addition, the Commission considered that the scale did not prevent unscrupulous architects from offering poor quality services. On the contrary, it may even have protected them by guaranteeing them a minimum fee. To conclude, the Commission considered that the scale may have discouraged architects from working in a cost-efficient manner.

[28] See above fn.7. Joined Cases 43/82 & 63/82, *VBVB and VBBB* [1984] E.C.R. 19, at [37]; [1982] 1 C.M.L.R. 27, and Case T-30/89, *Hilti* [1991] E.C.R. II-1439, at [115]–[119]; [1992] 4 C.M.L.R. 16.

[29] See Giorgio Monti, Kamiel Mortelmans and Johan van den Gronden, and Richard Whish, all cited above fn.6. In "Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC" Assimakis Komninos compares *Wouters* to *Albany* (Symposium: "Trends in Retail Competition: Private Labels, Brands and Competition Policy" June 9, 2005, The University of Oxford Centre for Competition Law and Policy). Instead of balancing non-competition considerations within the context of the first or the third paras of Art.81 EC, he suggests balancing at a different level "as between the whole of Article 81 EC and the conflicting competition norm, always subject to the principle of proportionality" (p.13). The legal reasonings in both cases, however, differ. In *Albany* the Court indeed determined that "agreements concluded in the context of collective negotiations between management and labour in the pursuit of such objectives must, by their

of services to the extent that they are necessary to achieve a public interest.[30] By analogy, a marginal necessity test of restrictive deontological rules agreed on by the professions, would imply that professionals (or their organisations) may safeguard the public interest within the framework of Art.81(1) EC. Since it contravenes the function of Art.81(1) EC, this parallel seems to me to be a step too far.[31]

When defining a "restriction of competition", parallels to the case law on other parameters of Art.81(1) EC are, in my view, more appropriate. The case law on the definition of an "undertaking" and the definition an "agreement between undertakings" (or a "decision of an association of undertakings") shows that the Court answers the question whether or not undertakings can safeguard the public interest within the context of Art.81(1) EC negatively.

(a) The definition of an "undertaking"

Undertakings are defined as entities that are engaged in economic activities.[32] In most cases, the finding of an economic activity does not pose a problem. However, in sectors where governments opt for a combination of regulation and competition, the determination of an economic activity is more difficult. Since the public interest requires that the pursuance of private, economic interests is supervised under the competition rules, an economic activity is found to exist if an entity is in a position to potentially pursue private economic interests in a particular market.[33] By contrast, no economic activity is found to exist where the entity concerned has to strictly apply the law.[34]

AOK Bundesverband provides the proverbial exception to the rule.[35] Amongst other things, the Court established that the German sickness funds as such did not constitute undertakings within the meaning of Arts 81 and 82 EC.[36] This conclusion seems to

very nature and purpose, be regarded as falling outside the scope of Article [81(1)] of the Treaty" (above fn.7, at [60]). In *Wouters*, the Court, however, does *not* determine that the 1993 Regulation falls outside the scope of Art.81 EC as such. In principle, Art.81(1) EC applies. The 1993 Regulation does not constitute a restriction of competition as meant within Art.81(1) EC because it is considered necessary to ensure the proper practice of the members of the Bar of the Netherlands.

[30] Case C-3/95, *Reisebüro Broede* [1996] E.C.R. I-6511; [1997] 1 C.M.L.R. 224, at [28].

[31] See also *EPI* in which the CFI held that the case law on the freedom of establishment and the freedom to provide services is irrelevant in the context of Art.81(1)EC, above fn.1, at [66].

[32] Case C-41/90 *Höfner* [1991] E.C.R. I-1979; [1993] 4 C.M.L.R. 306.

[33] Case C-244/94 *Fédération française d'assurance* [1995] E.C.R. I-4013; [1996] 4 C.M.L.R. 536, and *Brentjens*, above fn.7.

[34] Case C-364/92 *SAT Fluggesellschaft* [1994] E.C.R. I-43; [1994] 5 C.M.L.R. 208; Case C-343/93 *Diego Cali* [1997] E.C.R. I-1547; [1997] 5 C.M.L.R. 484; Joined Cases C 159/91 & 160/91, *Poucet and Pistre* [1993] E.C.R. I-637; and Case C-218/00 *Cisal* [2002] E.C.R. I-691; [2002] 4 C.M.L.R. 24. In *SAT Fluggesellschaft* and *Diego Cali* the Court followed a public power line of reasoning. According to the Court the activities of both entities were, by their very nature, connected with the exercise of public power. Moreover, the Court established that neither could influence the amount of the charges imposed. In *Poucet and Pistre* and *Cisal* the Court established that within the framework of the social nature of the schemes at hand, the funds concerned did not enjoy commercial autonomy with regard to neither benefits provided by them nor the contributions they levied.

[35] Joined Cases C 264/01, 306/01, 354/01 & 355/01 *AOK Bundesverband* [2004] E.C.R. I-2493. Markus Krajewski and Martin Farley, "Limited competition in national health systems and the application of competition law: the *AOK Bundesverband* case" [2004] E.L.Rev. 842–851.

[36] See fn.35 at [57].

be legally unsound.[37] Since the funds are in a position to decide on the level of the contribution rates and compete amongst themselves and private insurance companies in order to attract clients, at least part of their activities seem to be of an economic nature.[38] They should, consequently, have triggered supervision under the competition rules.

(b) The definition of an "agreement between undertakings" (or a "decision of an association of undertakings")

Regulatory processes involving the private sector trigger the question whether the outcome results in an "agreement between undertakings" or a state measure. Article 81(1) EC applies in principle to the former, not to the latter. Further to the case law on effet utile,[39] the crucial issue is whether or not the state delegated its regulatory powers to the private sector. Delegation does not occur if the participation of the private sector is embedded in a regulatory process that is actually controlled by the state.[40] Otherwise, the regulation qualifies as an "agreement between undertakings".[41] Thus, the safeguarding of the public interest at large remains with the state, whilst the purpose of Art.81 EC—the supervision of (potential) pursuance of private economic interests—is left intact.

Actually, the fact that undertakings may have taken public interest considerations into account is irrelevant under Art.81(1)EC.[42] The requirement of actual control over the regulatory process by the state, for example, overrules any legal obligation on undertakings to take public interest considerations into account. In *Reiff*, the tariff experts of the road haulage industry were required by German law to take commercial interests other than their own into account when fixing tariffs. Nevertheless, the Court verified whether Germany had delegated its regulatory powers.[43] Conversely, if a legal obligation to take public interest considerations into account is lacking, this does not necessarily

[37] K.P.E. Lasok, "When is an Undertaking not an Undertaking?" [2004] 7 E.C.L.R. 383; and, Marc Reysen and Günter Bauer, "Health Insurance and European Competition Law" [2004] 4 ZWeR 568.

[38] In his Opinion in *AOK Bundesverband* of May 21, 2003, A.G. Jacobs therefore concluded that the funds should be regarded as undertakings within the meaning of Art.81 EC (at [37]). Key element to the Court's analysis is the *Risikoausgleich* as a result whereof the sickness-funds would be joined together. This analysis is questionable. The *Risikoausgleich* is a mechanism put in place to balance the fact that the funds insure different levels of risks. Whilst clients may freely choose funds, funds are not allowed to refuse clients based on their risk profile. As such, the *Risikoausgleich* rather provides a level playing field enabling competition (see Reysen and Bauer, above fn. 37).

[39] In *INNO/ATAB* the Court established that, further to Art.10 EC, Member States may not adopt or maintain measures which deprive EC competition rules of their effectiveness (Case 13/77, [1977] E.C.R. I-2115; [1978] 1 C.M.L.R. 283).

[40] *Reiff*, above fn.7; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] E.C.R. I-2517; [1996] 4 C.M.L.R. 21; Case C-96/94 *Spediporto* [1995] E.C.R. I-2883; [1996] 4 C.M.L.R. 613; Case C-38/97, *Librandi* [1998] E.C.R. I-5955; [1998] 5 C.M.L.R. 966; Case C-35/99 *Arduino* [2002] E.C.R. I-1529; [2002] 4 C.M.L.R. 25; Case C-250/03 *Mauri*, Order of the Court, unreported, February 17, 2005 available at *www.curia.eu.int*. See the Professional Services Report, above fn.3, para.86. See also Adrian Vossestein, "Corporate effects to influence public authorities, and the EC rules on competition" (2000) 37 C.M.L.Rev. 1383, 1401.

[41] Case 123/83, *BNIC* [1985] E.C.R. 391; [1985] 2 C.M.L.R. 430, and Case C-35/96, *CNSD* [1998] E.C.R. I-351; [1998] 5 C.M.L.R. 889. See also the Professional Services Report, above fn.3, para.87.

[42] The point is that undertakings cannot be counted on to disregard private economic interests. According to the Report on Trial in *Wouters* it is, for example, doubtful whether the Bar of the Netherlands would have prohibited structural co-operation with accountants, had there not been a competitive threat by big accountancy firms, p.I-38/39.

[43] *Reiff*, above fn.7, at [17]–[19] and [21]–[22].

imply delegation. In *Arduino*, the Consiglio Nazionale Forense ("CNF") was not legally obliged to take any public interest considerations into account. All the same, the tariff fixing minimum and maximum fees was considered to merely constitute a tariff proposal since the Italian government had not waived its power to make decisions of last resort or to review implementation of the tariff.[44] Put shortly, the state is the *exclusive* guardian of the public interest.

In *Wouters* the Court applied the effet utile rule on delegation directly within Art.81(1) EC. Since actual state control was lacking, the Court—albeit implicitly—concluded that the Bar of the Netherlands had actually determined the 1993 Regulation.[45] As a result, the latter was found to constitute a "decision by an association of undertakings" (irrespective of the fact that the Bar is a public body authorised by statute to adopt measures like the 1993 Regulation).

(c) Summary

The definitions of an "undertaking" and of an "agreement between undertakings" (or a "decision of an association of undertakings") form a closed circuit. Since the public interest requires supervision of the pursuance of private, economic interests under the competition rules, the (potential) pursuit of such interests triggers the finding of an "undertaking". For the same reason, the (potential) pursuit of such interests proves to be the decisive factor in differentiating between the finding of an "agreement between undertakings" as against a state measure. Subsequently, the circuit is closed by the irrelevancy of undertakings taking public interest considerations into account in the context of an "agreement between undertakings". The state is the exclusive guardian of the public interest.

In my view, a concise legal framework requires consistency between the interpretation of Art.81(1) EC ratione personae and ratione materiae. A public interest rule of reason does not meet this requirement.

Non-competition considerations within Article 81 EC

Since a public interest rule of reason does not fit in easily, it has been justified as follows. A strict application of Art.81 EC would not always be in the public interest at large. The public interest would sometimes require a more flexible approach in order to take non-competition considerations—like the sound administration of the law, culture, environment, public health and sport—into account under Art.81(1) EC.[46]

It must be noted, first, that the traditional distinction between economic and non-economic interests has dissolved. Further to the consumer welfare approach[47] both notions can be

[44] *Arduino*, above fn.40, at [40]–[44].
[45] *Wouters*, above fn.1, at [68]–[69].
[46] Monti and Mortelmans and Van den Gronden, cited above fn.6.
[47] Commission Guidelines on Art.81(3) EC, above fn.2, para.13. See also Commissioner Monti in his speech held in Amsterdam on October 22, 2004 on the occasion of the 10th Competition Day.

included in the preferences of consumers and as such be expressed in an economically defined Art.81 EC.[48]

This being said, however, it remains that the aim of the competition rules is to protect and promote effective competition, only one of many public interests. This does not mean that competition is more important than other public interests. It only means that the aim of the competition rules is limited to correcting market failure by market power. If competition yields inefficient or unwanted social results, it is up to the legislator to act.[49]

In line with the above the Commission rejects the possibility of exempting agreements on policy considerations other than economic efficiencies.[50] In its Guidelines on the application of Art.81(3) of the Treaty it states that:

> "the four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)."[51]

Back to Wouters

From the above it may be concluded that as far as "could reasonably have considered" was meant to introduce a marginal necessity test within Art.81(1) EC, it would be legally unsound. This observation prompts the question as to what the necessity test in Wouters effectively did imply?

(a) Necessity

Before being able to examine the necessity of the 1993 Regulation, the Court had to determine the legal context for lawyers and accountants in the Netherlands.[52] To that end the Court referred to its case law on the provisions on the free movement of services in which it had already held that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory.[53] Nothing wrong with that.

[48] Eric van Damme, "*Op de welvaartseconomie gebaseerd mededingingsbeleid*" in *Mededinging en niet-economische belangen*, *Mededingingsmonografieën Memo 3* (Kluwer 2001).

[49] Compare Luc Peeperkorn and Emil Paulis who refer to the rule formulated by Tinbergen—together with Frisch the first winner of the Nobel prize for economics—that a society needs at least the same amount of instruments as the number of goals it wants to achieve. Each instrument or policy should be linked to the goal for which it is devised and to which it can credibly contribute. It is the totality of different policies that should ensure a better society, a proper balance between efficiency and social justice. In "Competition and Innovation: Two Horses Pulling the Same Cart!" *On the Merits* Liber Americorum Peter Plompen, 2005 Intersentia, Antwerpen—Oxford.

[50] Thereby denouncing its earlier approach in its CECED Decision 2000/475 of January 24, 1999, [2000] O.J. L187/47.

[51] Commission Guidelines on Art.81(3), above fn.2, para.42. See also Jacques Bourgeois and Jan Bocken who add that allowing national courts and competition authorities, when decentrally applying Art.81 EC, to take account of other policy considerations could endanger the uniform application of Art.81 EC. In "Guidelines on the Application of Art.81(3) of the EC Treaty or How to Restrict a Restriction" (2005) 32/2 *Legal Issues of Economic Integration* 111 at p.120.

[52] *Wouters*, above fn.1, at [97]–[98].

[53] See above fn. *1* at [99], with reference to Case 107/83, *Klopp* [1984] E.C.R. I-2971, and *Reisebüro Broede*, above fn.29.

As to the actual necessity test, the Court, subsequently, did *not* examine the 1993 Regulation in light of the public interest. It *merely* examined the relationship between the 1993 Regulation and the essential rules—that is to say the fundamental principles—that apply to the members of the Bar of the Netherlands. The essential rules at hand in *Wouters* are the duty 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.[54] These essential rules are the ones that safeguard the public interest. The 1993 Regulation prohibiting structural partnership with accountants *merely* serves to ensure that members of the Bar comply with these rules. The 1993 Regulation was considered necessary because there was a high degree of incompatibility between the fundamental principles applicable to members of the Bar and the fundamental principles applicable to accountants in the Netherlands.[55] In other words, the 1993 Regulation follows directly from the essential rules governing the legal profession in the Netherlands. Thus, the necessity test de facto applied by the Court in *Wouters* meets similar objective standards as set by the CFI in its *EPI* judgment.

(b) Proportionality

In order to examine the proportionality of the 1993 Regulation the Court again referred to the case law on free movement. Referring to *Mac Quen*[56] the Court stated that the fact that different rules may be applicable in one Member State does not mean that the rules in force in another Member State are incompatible with Community law.[57] Similar to the determination of the legal context, this reasoning can indeed be transposed to the framework of Art.81(1) EC. Since in the absence of Community rules each Member State is in principle free to regulate the legal profession and the accountancy profession on its territory, the lack of a uniform approach throughout the EC does indeed not say anything as to the proportionality of the 1993 Regulation in relation to the fundamental principles governing the proper practice of the legal profession in the Netherlands.

The Court's referral to *DLG*, however, is misleading.[58] *DLG* is one of those judgments that fuelled the commercial rule of reason debate.[59] The Court propagated a variation of an ancillary restraint applied in *Remia*.[60] According to current legal thinking, only restraints that are subordinate to another main agreement may qualify as an ancillary restraint.[61] The exclusive nature of an agreement is not something subordinate to the agreement. Instead, it is one of those characteristics that may warrant a competition analysis under Art. 81 EC. Further to the economic approach, exclusivity only restricts competition in case the parties concerned have market power.[62] Since *DLG* is superseded, it no longer seems to provide an appropriate basis for developing case law introducing yet another kind of rule of reason within Art.81(1) EC.

[54] *Wouters*, above fn.1, at [100].
[55] See above fn.1 at [104]. See also A.G. Léger in his Opinion in *Wouters*, at [185].
[56] Case C-108/96 *Mac Quen* [2001] E.C.R. I-837; [2002] 1 C.M.L.R. 29, at [33].
[57] *Wouters*, above fn.1, at [108].
[58] See above fn.1 at [109].
[59] Case C-250/92 *DLG* [1994] E.C.R. I-5641, at [35]; [1996] C.M.L.R. 191.
[60] Case 42/84, *Remia* [1985] E.C.R. 2545; [1987] 1 C.M.L.R. 1.
[61] *Métropole*, above fn.2, at [105]. Guidelines on Art.81(3) EC, above fn.2, para.29.
[62] Guidelines on Art. 81(3) EC, above fn.2, paras 24–27.

(c) Summary

Although the Court did use wording like "could reasonably have considered", it effectively did not apply a marginal necessity test. Instead, the Court established objective necessity. The 1993 Regulation was considered necessary since structural partnerships with accountants would make it difficult or even impossible for members of the Bar of the Netherlands to live up to the essential rules applicable to them. Mere wording, in my view, does not provide a sufficiently sound basis to introduce a public interest rule of reason. Especially not since such an interpretation deviates from basic principles consistently applied under other parameters of Art.81(1) EC.

Meanwhile, the legal framework for analysing deontological rules under Art.81(1) EC is not clear. This is not satisfactory in an era when Art.81 EC is enforced decentrally. Uniform decision-making requires substantive clarity.[63] To solve this, I introduce the concept of "deontological ancillarity".

The concept of "deontological ancillarity"

I define the concept of "deontological ancillarity" based on a strict application of *Wouters*. I will structure the concept of "deontological ancillarity" along the lines of "commercial ancillarity", for "deontological ancillarity" parallels its commercial counterpart to a significant extent.[64] The difference is that deontological ancillary restraints are not necessary to implement another agreement, but are necessary to ensure the compliance with the fundamental principles of a particular profession.

The concept of "commercial ancillarity" was introduced in *Remia*.[65] It covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive agreement and proportionate to it.[66] A restriction is directly related to the main agreement if it is subordinate to the implementation of the main agreement and is inseparably linked to it (the requirement of ancillarity). The test of necessity implies that the restriction must be objectively necessary for the implementation of the main agreement and be proportionate to it (the requirement of necessity).

Ancillarity

Further to "commercial ancillarity" only restraints that are subordinate can qualify as ancillary restraints. Ancillarity, therefore, presumes a two-tier approach. The main agreement, the first tier, is examined on its competition merits. The subordinate restraint, the second tier, is examined on its relationship of necessity to the main agreement. The result of this two-tier approach being that commercial ancillary restraints are not submitted to a competition test.

[63] See also Hans Gilliams, "Modernisation: from policy to practice" (2003) E.L.Rev. 604–615; and, Koen Lenaerts and Damien Gerard, "Decentralisation of EC Competition Law Enforcement: Judges in the Frontline" [2004] 27 W.Comp. 3, 313, 329.

[64] Compare Richard Whish, cited above fn.6, pp.121–122.

[65] *Remia*, above fn.60.

[66] Commission Guidelines on Art.81(3) EC, above fn.2, para.29.

The necessity test applied by the Court in *Wouters* presumes a similar two-tier approach. The 1993 Regulation is subordinate to the essential rules that ensure the proper practice of the legal profession in the Netherlands. The essential rules, the first tier, were examined on their public interest merits (which was rather an abstract analysis finding that in the absence of specific Community rules each Member State is in principle free to regulate the exercise of the legal profession in its territory). The 1993 Regulation, the second tier, was examined on its relationship of necessity to the essential rules. The result of this two-tier approach was that the deontological ancillary restraints are not submitted to a public interest test.

This two-tier approach raises the question whether the concept of "deontological ancillarity" is limited to professions that are uniformly organised by the state. *Wouters*, *EPI* as well as *Belgian Architects* concerned professions that were uniformly organised by the state.[67] The relevance of such a statutory basis for the analysis of deontological rules under Art.81(1) EC remains, however, unclear. When qualifying the 1993 Regulation as an ancillary restraint, the Court seems to have merely and incidentally referred to the fact that the restraint was statutorily embedded.[68] Further to the judgment of the CAT in *GISC* and the judgment of the CFI in *Piau*, a statutory basis does, however, seem relevant for the application of the concept of "deontological ancillarity".[69]

(a) GISC

Unlike the Bar of the Netherlands in *Wouters*, the Institute in *EPI* and the Belgian Association of Architects in *Belgian Architects*, the General Insurance Standards Council ("GISC") did not have of any statutory basis nor any statutory power to adopt mandatory rules for the profession concerned. GISC was a self-regulatory body for the general insurance industry that was established to create a harmonised set of standards for those engaging in general insurance activities in the United Kingdom (the GISC Rules). The intention of those promoting GISC was that the GISC Rules should apply to all intermediaries active in the supply of general insurance in the United Kingdom. Therefore, r.F42 prohibited members of GISC from carrying on general insurance activities with any intermediary that was not operating within the GISC regime.[70]

The OFT found that the GISC Rules did not restrict competition.[71] The quality requirements were considered to—partly—correct the asymmetry of information between clients and insurers. This correction of market failure by the industry was considered to be pro-competitive. The mandatory nature of the GISC Rules resulting from r.F42 was taken for granted.

[67] *Wouters* and *EPI* decision, above fn.1, at [3]–[9] resp.3–12; *Belgian Architects*, above fn.10, at [2]–[10].

[68] *Wouters*, at [110]. In her speech "Better Regulation of Professional Services" Commissioner Kroes again does not make a difference between the examination of State rules and self-regulation by professional bodies (UK Presidency Seminar, Brussels, November 21, 2005, SPEECH/05/711, p.4).

[69] By contrast, the fact that an organisation and its powers have a statutory basis is irrelevant for the qualification of an organisation as an "association of undertakings", and the qualification of the decisions of that organisation as "decisions by associations of undertakings": *BNIC* and *CNSD*, above fn.41, at [17] resp.40; *Wouters*, above fn.1, at [64]–[68].

[70] OFT Decision, above fn.11, at [5]–[9].

[71] See above fn.11 at [29]–[35].

On appeal, the CAT rejected such an approach and determined that r.F42 restricted competition.[72] According to the CAT the OFT had "finessed" r.F42 altogether by concluding that a mandatory rule, which was there to enforce rules which are for the protection of the consumer and which do not themselves restrict competition, cannot be said to restrict competition either.[73]

> "[. . .] The means for compelling observance by the intermediaries of the GISC regime is a horizontal agreement among competing undertakings, namely the insurers, not to deal with certain persons who do not respect certain rules which they (the insurers), together with others, consider that it is in the interests of the industry and the public to observe. As we have said, by so agreeing, the insurers have deprived themselves of an essential and intrinsic element of undistorted competition, namely the freedom of an undertaking to deal with whom it pleases without being restricted in that regard by an agreement made with its competitors."[74]

According to the CAT a restriction of competition is not taken outside Art.81(1) EC or s.2(1)(b) of the Competition Act 1998 by the fact that it pursues some public interest objective.[75]

(b) Piau

Not unlike the OFT in *GISC*, the Commission submitted in *Piau* that the FIFA rules on professional conduct for the occupation of players' agents worldwide "[. . .], that can be justified by the general interest, are proportionate and compatible with competition law".[76]

Similar to the CAT in *GISC*, the CFI, however, disagreed. According to the CFI, the compulsory FIFA licence system constituted "a barrier to access to [the economic activity of carrying on the occupation of player's agent] and therefore necessarily affects competition".[77] Thus, the CFI excluded a balancing of pros and cons in the public interest within the prohibition of Art.81(1) EC.

All the same, the CFI found that the Commission did not commit a manifest error of assessment by considering that the restrictions stemming from the compulsory nature of the licence might benefit from an exemption on the basis of Art.81(3) EC.[78] According to the CFI, professional standards were raised whilst competition was not eliminated.[79]

Apart from the fact that the Commission meanwhile maintains that non-competition considerations can only be taken into account to the extent that they can be subsumed under the conditions of Art.81(3) EC, the CFI's approach under Art.81(3) EC is not consistent with its approach under Art.81(1) EC. The basic assumption that Art.81

[72] CAT Judgment, above fn.11, at [182]–[192].
[73] See above fn.11 at [206] and [210].
[74] See above fn.11 at [210].
[75] See above fn.11 at [191] and [214]–[216].
[76] *Piau*, above fn.13, at [60]–[61].
[77] See above fn.11 at [101].
[78] See above fn.11 at [104].
[79] See above fn.11 at [102] and [103].

EC only covers the public interest of effective competition applies to both paragraphs. Mandatory rules, by their very nature, exclude alternative professional rules. Even though higher professional standards may well be in the public interest, mandatory rules cannot be approved of under Art.81(3) EC.

(c) Summary

Wouters, *EPI* and *Belgian Architects* as against *GISC* and *Piau* therefore lead me to conclude that "deontological ancillarity" should only apply to professions that are uniformly organised by the state. The subject of review is the relationship of necessity. Such a test by its very nature differentiates between the fundamental principles that govern a profession and further deontological rules that ensure professionals to comply with such fundamental principles. The uniform organisation of a profession by the state seems to provide the fundamental principles with a certain statutory status. In addition, the fact that a professional organisation is statutorily empowered to issue further deontological rules based on those fundamental principles justifies the mandatory nature of those deontological rules. Deontological rules issued by professions lacking such a statutory basis and powers—like the insurers in *GISC* and the FIFA agents in *Piau*—affect competition in a similar way as ordinary standardisation or certification schemes do.[80] To qualify such deontological rules as ancillary restraints would imply the application of a public interest rule of reason after all. However, deontological ancillary restraints are not submitted to a public interest analysis (no more than commercial ancillary restraints are submitted to a competition analysis).

Necessity

Further to "commercial ancillarity" the requirement of necessity is met if the restriction is objectively necessary for the implementation of the main agreement and proportionate to it.[81] The requirement of objective necessity excludes a competition test, i.e. the balancing of the anti-competitive and pro-competitive effects of an agreement within Art.81(1) EC.

''Deontological ancillarity" would require a similar two-fold examination. It is necessary to establish, first, whether the restraint is objectively necessary for the observance of the applicable fundamental principles and, secondly, whether the restraint is proportionate to the observance of those principles. The requirement of objective necessity, by analogy, excludes a public interest test, i.e. the balancing of anti-competitive effects of the rules against non-competition considerations within Art.81(1) EC. How the requirements of objective necessity and proportionality work out in practice is illustrated below by an analysis of the Dutch *NOVA* cases, and to a lesser extent, the *Belgian Flemish Bar Rules* case.

(a) Objective necessity

NOVA I and *NOVA II* concern the prohibition of no-cure-no-pay and quota pars litis (hereinafter together referred to as no-cure-no-pay) that the Bar of the Netherlands had

[80] CAT Judgment, above fn.11, at [224].
[81] Commission Guidelines on Art.81(3) EC, above fn.2, at [29].

adopted in order to ensure the proper practice of the legal profession by the members of the Bar.[82] On the one hand, the Dutch Minister of Justice claims that the prohibition on no-cure-no-pay follows directly from the fundamental principles applicable to the Dutch legal profession. In his view, no-cure-no-pay would provide lawyers with a financial interest of their own, in the handling of a case as a result of which their impartiality would be affected. A prohibition would therefore be "essential" to the sound administration of justice and as such be in line with *Wouters*.[83] The Bar of the Netherlands, on the other hand, advocated a marginal necessity test.[84]

To avoid misunderstanding: from a political point of view, the Minister may well not be in favour of no-cure-no-pay. In that case, he could consider prohibiting no-cure-no-pay by law.[85] He is, however, mistaken to presume that the prohibition on no-cure-no-pay issued by the Bar of the Netherlands is in line with *Wouters*. The reason therefore is that it does not follow directly from the fundamental principles applicable to the members of the Bar of the Netherlands. Unlike the 1993 Regulation in *Wouters* no-cure-no-pay does not make it impossible or difficult for lawyers to comply with the fundamental principles applicable to them. Like a professional representative before the European Patent Office, a member of the Bar is an entrepeneur who has a personal, financial interest in the handling of a case, irrespective of the fee method used. De Jong rightly points out that although the interests of lawyers and their clients in the short run are not always parallel, in the long run their interests do not diverge much.[86] The reason being that a lawyer who pursues a profitable business in the long run not only optimises current cases but also future cases.[87]

The fact that a prohibition on no-cure-no-pay does not follow directly from the fundamental principles governing the legal profession also shows from the fact that other states with similar fundamental principles, do allow no-cure-no-pay.[88] Moreover,

[82] In particular, members of the Bar should defend their clients' interests without taking any interests of their own into account. Prior to the decision of the DCA the prohibition on no-cure-no-pay was non-binding (Professional r.25, second and third paragraph). After *NOVA I* the Bar had issued a binding regulation that could profit from a temporary exemption to Art.6(1) of the Dutch Competition Act (*Verordening op de Praktijkuitoefening (onderdeel Resultaatgerelateerde Beloning*), June 26, 2002, Stcrt. 2002, 125). As from Jan.1, 2003, however, the exemption based on Art.16 of the Dutch Competition Act expired. Thereupon, the original complainant filed another complaint (including a request for interim measures) which led to *NOVA II*.

[83] Early 2004 the Bar of the Netherlands adopted a regulation amending its regulation prohibiting no-cure-no-pay in order to allow for an experiment with regard to injury cases. Further to Art.30 of the *Advocatenwet* regulations may be suspended or annulled by Royal Decree in so far as they are contrary to law or to the public interest. The Minister suspended this regulation twice and finally annulled it (decision of Sept.15, 2004, Stbld. 2004, 480; decision of Feb.15, 2005, Stbld. 2005, 100; decision of March 9, 2005, Stbld. 2005, 123).

[84] *NOVA I*, above fn.11, at [28]–[29].

[85] Further to the advice of the Netherlands Council of State, the Minister has announced to prepare a prohibition on no-cure-no-pay by law (TK 2004–2005, 29800 VI, no.114). Parliament, however, does not necessarily share the same view (see Bas J. de Jong "*Kanttekeningen bij Donners bezwaren tegen 'no cure no pay'*" [2005] N.J.B. 631–633).

[86] He points out that, in case of hourly rates, impartiality will not preclude that a member of the Bar has an interest in writing many hours. On the other hand, lawyers will not easily take on weak cases on the basis of contingency fees, which will not always be in the interest of the client concerned. Lawyers may also be (too) interested in reaching a settlement. However, all in all, contingency fees do trigger lawyers to work efficiently.

[87] *idem* De Jong. See also *NOVA I*, above fn.11, at [68] and [70].

[88] For example: the United Kingdom, Ireland, Greece and the USA.

the Dutch prohibition on no-cure-no-pay does not apply to contingency fees that come on top of a basic hourly rate. As long as lawyers cover their costs, additional contingency fees are permitted. In so far as contingency fees affect the proper practice of the legal profession, this naturally also goes for contingency fees that come on top of a basic hourly rate covering costs.

Since the prohibition on no-cure-no-pay does not follow directly from the fundamental principles governing the Dutch legal profession, the DCA did not consider it necessary in *NOVA I*.[89] Because competition was thought to be appreciably restricted, the DCA ruled that the prohibition on no-cure-no-pay constituted a restriction of competition within the meaning of Art.6(1) of the Dutch Competition Act.[90]

As such the DCA rejected the application of a marginal necessity test as advocated by the Bar of the Netherlands. I think rightly so for the following reasons. A marginal necessity test would have implied that the Bar of the Netherlands could make a value judgment on what is and what is not in the interest of a sound administration of justice. However, being an association of undertakings,[91] the Bar is not authorised to decide that the general public benefits from restrictive agreements the Bar has adopted. The requirement of objective necessity ensures that "associations of undertakings", when in a position to pursue commercial interests, do so in accordance with Art.81(1) EC.

At the same time, the requirement of objective necessity ensures that competition authorities safeguard the public interest only by a strict application of Art.81(1) EC. A marginal necessity test would have implied that the DCA had overstepped its competences laid down in Art.6(1) of the Dutch Competition Act. The DCA is, however, not authorised to value non-competition considerations under the Dutch equivalent of Art.81(1) EC.[92] In order to avoid a balancing of pros and cons in the public interest, it can only examine whether or not a restraint follows directly from the fundamental principles that apply to a particular profession. In case a restraint does not follow directly from those fundamental principles (like the prohibition on no-cure-no-pay in *NOVA I* without which it is not difficult or impossible to comply with the fundamental principles), the public interest requires a competition authority to proceed with the competition analysis.

(b) Proportionality

NOVA II concerns the relationship between necessity and proportionality. Early in 2005 the DCA issued a statement of objections in *NOVA II* after having it presented to the European Competition Network. In its press release the DCA indicated that a *limited*

[89] *NOVA I*, above fn.11, at [65]–[75]. According to the DCA the fundamental principles "would not be weakened by no-cure-no-pay" (translation EL), at [77].

[90] See above fn.11 at [78]–[79]. Another case in which the Rotterdam Court of Appeals turned down a public interest rule of reason is *Koninklijke Nederlandse Vereniging voor Diergeneeskunde v DCA*, MEDED. 99/2584-SIMO, May 16, 2001.

[91] *cf. Wouters* in which the status of being a public body that is empowered by statute to issue deontological did not alter the fact that the Bar qualified as an "association of undertakings", and the 1993 Regulation as a "decision of an association of undertakings" above fn.1.

[92] Unless explicitly instructed to do so—quod non—by the Minister of Economic Affairs further to Art.4(1)j°(2) of the Dutch Competition Act. Compare on this point: Martijn Snoep "*NMa mist kans om eind te maken aan discussie*" [2002] *Advocatenblad* 194–198.

prohibition on no-cure-no-pay—that would not apply to injury cases—might qualify as necessary.[93] Such necessity would be based on the proportionality of the prohibition.[94]

I doubt whether such an approach is legally sound. Again, no parallels can be drawn from the Court's analysis of the 1993 Regulation. The 1993 Regulation concerns structural partnerships between two professions that are governed by different fundamental principles. In that context, it follows only naturally that the necessity of the 1993 Regulation depends on the scope of the prohibition. In line with *Wouters*, the Belgian Supreme Court held in *Flemish Bar Rules* that the fundamental principles that apply to the members of the Flemish Bar might not be compatible with *specific* forms of cooperation with *specific* professionals. An absolute prohibition on co-operation irrespective of the profession and the nature of the cooperation was, however, not considered necessary.[95]

A prohibition on no-cure-no-pay on the other hand concerns the compliance with fundamental principles *within* the profession concerned. It seems to me that prohibitions of that type, if necessary, have to be absolute by their very nature. Turning it round, a prohibition on no-cure-no-pay that is not necessary for lawyers handling injury cases, cannot be considered necessary for lawyers handling other cases. By—potentially—qualifying such a limited prohibition on no-cure-no-pay as necessary, the DCA would be making a value judgment on non-competition considerations as a result whereof it would overstep its powers (see above). The DCA simply provides the wrong forum for balancing arguments like the prevention of an American claim culture as against more access to justice.[96]

"Deontological ancillarity" as against "regulatory ancillarity"

Further to the above, the scope of applicability of "deontological ancillarity" seems to be fairly limited. Whish, however, is of the opinion that the ancillarity concept applied in *Wouters* can be applied to any regulatory rule adopted for the protection of consumers, provided that the rule in question is not disproportionate. He therefore speaks of "regulatory ancillarity", a concept that could be applied in various situations: "for example to ensure prudential supervision of financial institutions, to protect the environment, to achieve effective waste disposal, or to guarantee the safety of products or to maintain the integrity of sporting tournaments".[97]

For several reasons I think that "regulatory ancillarity" is too broad a concept. To start with sport. The Commission indeed rejected a complaint against the International Olympic Committee by swimmers banned from competitions for doping on the necessity

[93] The statement of objections is not public. Press Release of March 4 no.05/06. To be found at *www.nmanet.nl/nl/nieuws en publicaties/persberichten/0506.asp*.

[94] "The DCA doubts whether an absolute prohibition on contingency fees is necessary to ensure the aims of the Bar of the Netherlands. It does not rule out that an amended prohibition does comply with the competition rules. The DCA is of the opinion that no-cure-no-pay should in any event be allowed in case of injury cases. This would, in favour of consumers, encourage access to justice." (Translation EL).

[95] *Flemish Bar Rules*, above fn.13, at [3].

[96] The Commission's "approval" of the statement of objections in *NOVA II* is rather surprising considering the Commission's adamant plea for objective necessity and proportionality regarding state regulations in the Professional Services Report and the Follow-up thereto.

[97] Richard Whish, cited above fn.6, p.122.

test applied in *Wouters*.[98] In *Meca-Medina and Majcen,*[99] the CFI, however, clarified that the question whether a rule is *inherent* in the organisation and proper conduct of sporting competition as applied in *Walrave*, *Donà* and *Deliège*[1] must be differentiated from the question whether a deontological rule is *inherent* in the pursuit of the need to make rules to ensure the proper practice of a particular profession as applied in *Wouters*.[2] Purely sporting rules—like anti-doping rules—fall outside Art.81(1) EC because they do not relate to an economic activity.[3] Deontological rules like the 1993 Regulation, by contrast, do relate to an economic activity as a result whereof Art.81(1) EC, in principle, does apply.[4]

Nor can the ancillarity concept applied in *Wouters* in my view be invoked for agreements that are claimed to protect the environment. First, in view of environmental claims a difference must be made between the requirement of necessity under Art.81(1) EC and Art.81(3) EC. The requirement of necessity under Art.81(1) EC concerns the question whether in the absence of the restraint an agreement would not have been concluded or the fundamental principles would not have been complied with. The requirement of necessity under Art.81(3) EC concerns the question whether in the absence of the restraint fewer efficiencies would have been produced. Whilst the former is a rather abstract analysis (see above), the latter is at the heart of the competition analysis. Secondly, Mortelmans correctly points out that interests like the protection of the environment can be accomodated in the first two conditions of Art.81(3) EC.[5] A more far-reaching interpretation, in which the objective of protecting the environment could be decisive in setting an agreement outside the scope of Art.81(1) EC,[6] would, however, run counter to the fact that the competition rules merely protect the public interest of effective competition. The protection of the environment covers another public interest safeguarded by the state in other policies.

Conclusion

So far the Commission has not clarified the issue whether or not Art.81(1) EC implies a public interest rule of reason. The institutional decentralisation of Arts 81 and 82 EC based on Council Regulation 1/2003, however, requires the utmost substantive clarity.

[98] Commission Decision of Aug.1, 2002, COMP. 38.158. Similarly, Commission Decision of June 25, 2002, COMP. 37.806, rejecting a complaint by ENIC Plc against rules of the UEFA, the body responsible for the Champions League football tournament, which restricted the ownership of shares in no more than one football team competing in the Champions League.

[99] Judgment of December 30, 2004 in Case T-313/02, *Meca-Medina and Majcen*, available at *www.curia.eu.int*.

[1] Case 36/74, *Walrave and Koch* [1974] E.C.R. 1405; [1975] 1 C.M.L.R. 320, at [8]; Case 13/76, *Donà* [1976] E.C.R. 1333; [1976] 2 C.M.L.R. 578, at [14]; and, Joined Cases C 51/96 & 191/97, *Deliège* [2000] E.C.R. I-2549, at [64].

[2] *Wouters*, above fn.1 (1st ser.), at [97].

[3] *Meca-Medina and Majcen*, above fn.99, at [65].

[4] Critical of the CFI's ruling in *Meca-Medina and Majcen*: Stephen Weatherill, "Anti-Doping Rules and EC Law" [2005] E.C.L.R. 416–421.

[5] Kamiel Mortelmans, "Towards convergence in the Application of the Rules on Free Movement and on Competition?" [2001] 38 C.M.L.Rev. 613–649, p.641.

[6] According to Mortelmans a more far-reaching interpretation, in which the objective of protecting the environment would be decisive in setting an agreement outside the scope of Art.81(1) EC, would lead to greater convergence between the competition rules and the rules on free movement.

As a primus inter pares among competition authorities claiming intellectual leadership[7] it is up to the Commission to clarify the concept of ancillarity as applied by the Court in *Wouters*.

In my view, Art.81(1) should not imply a public interest rule of reason. A public interest rule of reason would introduce a marginal review of non-competition considerations within Art.81(1) EC. The basic assumption underlying the EC Treaty, however, is that the state safeguards the public interest. In addition, the aim of the competition rules is and should be limited to promoting and protecting effective competition. As a result, a public interest rule of reason would contravene the function of Art.81 EC, i.e. the supervision of (potential) pursuance of private, economic interests.

Moreover, although the Court referred to "could reasonably have considered", it effectively did not apply a public interest rule of reason in *Wouters*. The 1993 Regulation was considered necessary because there was a high degree of incompatibility between the fundamental principles applicable to members of the Bar, and the fundamental principles applicable to accountants in the Netherlands. Put differently, it followed directly from the fundamental principles governing the legal profession in the Netherlands. As such, the Court effectively established objective necessity.

Put shortly, Art.81(1) EC should be applied strictly, also in the case of deontological rules. Based on this presumption, the concept of "deontological ancillarity" implies the following. First, it is limited to rules issued by professions uniformly organised by the state. Secondly, rules qualify as deontological ancillary restraints if they are objectively necessary to comply with the fundamental principles that govern the profession concerned, and are proportionate to those principles.

[7] Philip Lowe in his speech "The Role of the Commission in the Modernisation of EC Competition Law" at the UKAEL Conference of January 23, 2004 on Modernisation of EC Competition Law: Uncertainties and Opportunities.