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Self regulation by liberal professions and the competition rules

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I hear that most of this panel's members are representing one or another organisation, and thus I think it is best to clarify that I do not represent anyone or anything, except my strictly personal view. To be sure, I am a bar member and have had the privilege of representing a certain Mr. Wouters, who was the applicant in a case decided last year by the EC Court of Justice and that no doubt will be frequently referred to in today's debates. But any statements that I make today in no way should be ascribed to Mr. Wouters nor to any other of my clients.

With a view to stimulating the debate that is ahead of us, I would like to make a brief reflection on self-regulation by liberal professions.

Let me start by saying that self-regulation may have significant benefits. It may result in giving consumers of the relevant services assurance about the quality of the services and the service providers, and about the values that are said to be pursued by the relevant profession. Self-regulation that prohibits fraudulent or deceptive practices, or that requires an adequate level of service for all customers, in all likelihood carries strong virtues that outweigh any restrictive effect that such rules may have (even assuming such a restrictive effect would be "appreciable"). Of course I am assuming that we are dealing with rules that are truly non discriminatory and apply to all practitioners alike.

However, it is sometimes argued by representatives of the liberal professions that self-regulation should not be subject to the competition rules at all because that would endanger the profession's independence, or because such self-regulation is in the public interest, not in the interest of the profession. I would like to take a look at both of these arguments.

Firstly, the point on independence. I do not believe that the correct application of the competition rules is likely to endanger the independence of a liberal profession. The competition rules are aimed at prohibiting certain restrictive or abusive behaviour, not at making practitioners dependent on something. True, it is sometimes asserted that unbridled price competition will lead to unacceptable quality levels or to intolerable dependence of the practitioner to powerful clients. But if that really is the case, then it would seem to be for the legislator or the regulator to introduce mandatory rules, for example by setting minimum quality levels for all practitioners.

The second argument then: self-regulation should be immune from the application of the competition rules, since the professions in adopting these rules further the public interest, not the interest of the profession itself. I personally believe that such a claim calls for case by case verification. I personally am not convinced that (just to give an example) rules setting minimum prices, or rules prohibiting practitioners to work for customers that already are clients of another practitioner, serve the public interest.

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Do not get me wrong. I believe that many professional associations in promulgating rules for the profession have the best of intentions. And I do not contest that rules adopted on the basis of self-regulation may well be consistent with the public interest. But they can not a priori escape the application of the competition rules in the assumption that they have been adopted in the public interest.

Imagine an association of manufacturers of building products who agree to prohibit or boycott certain products that do not have "acceptable quality levels" as set by the association. I think that most of us would be suspicious of such a rule: perhaps the association is trying to neutralize competition from manufacturers of plain, simple products at low prices. It should not be for an association of manufacturers to determine what acceptable quality levels are. Those levels should be set by the public authorities. In a democratic system, the public authorities should define the public interest, thereby taking into account all interests, of both the manufacturers and of the consumers.

This observation brings me into highly contentious territory. What if an association of liberal practitioners sets rules that it believes to be in the public interest? Take for example the CCBE, an association that pretends to stand for the interests of bar members in the European Union. The CCBE is convinced that it is in the public interest to prohibit multi-disciplinary partnerships, certainly between lawyers and accountants. However, we also know that the United Kingdom Office of Fair Trading believes that a total ban on such partnerships is against the public interest, because it unduly restricts consumer choice.

It is only normal that opinions as to what is in the public interest differ. That's why we have a democratic system that allows the legislator or the regulator, who are supposed to further all individual interests in an equal fashion, to define what constitutes public interest. Indeed I have trouble in accepting that it should be for the professions, and not for the public authorities, to define what constitutes the public interest, and what rules are called for by the public interest. That principle a fortiori applies when we are dealing with the issue of multi-disciplinary partnerships: that issue by its very nature concerns more than one profession – and thus can not be addressed in a satisfactory manner by just one profession.

Surely some of my fellow panellists will object to this point of view. What about self-regulation that aims at "protecting" the core values of a profession? Surely that type of rules should escape the application of the competition rules? Since I only know the legal profession well, let's take that example. Can bar and law societies adopt rules to ensure that lawyers avoid conflicts of interest and do not disclose their client's confidential information? Of course they can. Do they need an exemption from the competition rules in order to adopt such rules? I do not think so, since in many cases such rules will not bring about appreciable restrictions on competition.

To be sure, rules on conflicts of interest, on confidential information and on independence could be qualified as "quality level" rules and it could be argued that it is for the public authorities (and not for the profession) to set quality levels. But if there is sufficient public consensus about what these core values are, and if there is demonstrable public policy in a member state to have such core values implemented by the relevant profession itself, then I agree that even if such rules have some restrictive effect, they do not run afoul of the competition rules.

That, I believe, is one of the lessons to be drawn from the Wouters judgment. The Court in that judgment accepted that a Netherlands law could entrust the Dutch bar with responsibility for adopting regulations designed to express the core values of the legal profession, and in the Court's view there was sufficient consensus in the Netherlands about what these core values were.

It is clear, however, that the protection of the profession's core rules does not automatically justify any type of self-regulation. The Wouters judgment again is in point here. The Court in that judgment upheld a rule by the Dutch Bar that prohibited multi-disciplinary partnerships between bar members and accountants. But it upheld such prohibition only to the extent that it prevents a bar member from working on a transaction that also must be reviewed (for purposes of the preparation of the annual accounts) by an auditor that belongs to the same partnership (point 105 of the judgment). Such a prohibition reflects the core value of "avoidance of conflicts of interest". However, that core value would not justify a broader prohibition. A recent judgment by the Belgian Supreme Court (Hof van Cassatie, 25 September 2003) invalidated a regulation that had been adopted by the Flemish Bar Association and that contained an across the board ban for bar members to engage in multi-disciplinary partnerships, precisely because there was no demonstrable rationale for such an indiscriminate ban. In my opinion, if a law firm in working with an audit firm were to separate "law clients" from "audit clients" (i.e. if a client contracts audit services then it can not also obtain legal representation from the firm), then such a combined firm would not create the problem identified in the Wouters judgment (since the conflict of interest problem would not arise), and hence the Wouters judgment would not be able to salvage a prohibition against such a combined firm.

Thus, as is often the case in competition law, the well know "necessity test" will be crucial. We will need to see whether the rule put forward is actually necessary to protect a core value of the profession, and whether that protection can not already be achieved through an alternative rule that is less restrictive.

I conclude by summing up the submissions that I put forward for discussion:

- Self-regulation can be a good thing for consumers.
- Self-regulation for the most part can be implemented without creating a conflict with the competition rules.
- In a democratic system, it should be for the public authorities to define what constitutes the "public interest".
- Whether rules adopted by professional associations are in fact consistent with the public interest should be ascertained on a case by case basis.
- Where in a member state there exists sufficient consensus as to what the core values of the profession are, and there is demonstrable public policy that allows the relevant profession to implement these core values, then self regulation that implements these values will be compatible with the competition rules, regardless of the restrictive effect thereof. However, the latter "exemption" from the competition rules only applies to rules that are demonstrably necessary for the relevant core values and provided those values can not be protected in alternative, less restrictive ways. Whether such a necessity does in fact exist will need to be demonstrated by the author of the restrictive practice.