

EU Competition Law and Liberal Professions: an Uneasy Relationship?

Ida E. Wendt

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By

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MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN · BOSTON
2013

Library of Congress Control Number: 2012946848

ISSN 2210-9765

ISBN 978 90 04 21449 1 (hardback)

ISBN 978 90 04 21451 4 (e-book)

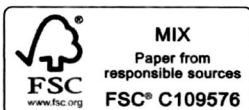
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Printed by Printforce, the Netherlands

**EU Competition Law and Liberal Professions:
an Uneasy Relationship?**

Nijhoff Studies in EU Law

VOLUME 2

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PREFACE

One cannot expect courts to be legislators. They deal with specific questions which parties happened to put to them in order to solve their conflict. Although judges will take account of the societal effects of their judgments, they must confine their rulings to the case at hand. They cannot and must not rule *ultra petita*. As Mrs. Ida Wendt correctly notes in her detailed analysis of the Court's case law on the application of competition rules to liberal professions, the Court never dealt with this issue in a comprehensive way. The case law evolved *ad hoc* and sometimes led to surprising or, if one so wishes, opportunistic solutions. The Court's judgment in *Wouters* (Case C-303/99, ECR 2002, p. I-1577) offers an example of this approach.

Opportunistic case law has its downside. It can become unstructured and, hence, difficult to predict. This is where academia has its role to play. It can propose models and structures in which *ad hoc* rulings may or may not find their logic place. In this book Mrs. Wendt offers such a model for the tortuous case law dealing with the application of competition rules to liberal professions. She does so with the conviction of a young lawyer inspired by two leading ideas.

First, Mrs. Wendt believes in the objectives of competition policy and law. She developed her expertise and analytical approach in a period in which competition policy and law has reached nearly all sectors of today's economy. It is therefore no surprise to note that her book strongly pleads in favour of extending the reach of competition law and its economic merits to liberal professions, which, in spite of this adjective, remain strongly (self) regulated.

This does not mean, however, that Mrs. Wendt is opposed to regulating liberal professions as a matter of principle. If restrictions are justified by the general interest, competition law can be set aside, provided that this justification can be based on the explicit rules in the Union Treaties and provided that these are democratically legitimized. This is the second 'file rouge' in Mrs. Wendt's analysis of the interplay between competition law and the regulation of liberal professions. One could rephrase this idea as follows; the responsibility to decide whether or not a particular rule is in the general interest does not rest with the professions themselves, but with the State.

When reading her thorough and exhaustive analysis of the European and national rules and case law governing this issue, one is tempted to follow Mrs. Wendt's reasoning and proposals aimed at modernising and improving regulation and competitiveness of the liberal professions at

European level. But one should not forget the origin of self regulation. Until the mid and late nineteenth century, States did not consider it to be their task or duty to regulate liberal and other professions. Since the Middle Ages, self regulation was the only means to define responsibility of these professions towards their members and towards society. There was no public authority to refer to.

Even so, times have changed and Mrs. Wendt offers a compelling and structured study for guiding this change. Her study also contains an exhaustive analysis of all rules and case law which are relevant for practitioners having to apply competition rules to liberal professions.

Marc van der Woude
Judge at the General Court of the European Union
Luxembourg, October 2011

ACKNOWLEDGEMENTS

Grateful I am to many people whom I have thanked on an earlier occasion, above all my parents. Grateful I am in particular to Hildegard Schneider and Wouter Devroe for their friendship and supervision, to Michael Faure, Walter van Gerven, Ellen Vos, Bruno de Witte and Marc van der Woude for their scientific appreciation of this book.

ABBREVIATIONS

ABA	American Bar Association
AG	Advocate General
AGCM	Autorità Garante della Concorrenza e del Mercato
ArchG	Architektengesetz (Architects Act, Germany)
ATM	Air Traffic Management
AW	Advocatenwet (Lawyers Act, Netherlands)
B to C	Business to consumer
B to B	Business to business
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BNotO	Bundesnotarsordnung (Federal Notaries Regulation, Germany)
BORA	Berufsordnung für Rechtsanwälte (Federal Lawyers Regulation, Germany)
BRAGO	Bundesrechtsanwalts-Gebührenordnung (former Lawyers Fees Act, Germany)
BRAK	Bundesrechtsanwaltskammer (German bar association)
BRAO	Bundesrechtsanwaltsordnung (Federal Lawyers Act, Germany)
BSB	Bar Standards Board
BVerfG	Bundesverfassungsgericht (German constitutional court)
BVerfGE	Bundesverfassungsgericht – Entscheidungssammlung (court report)
CAT	Competition Appeals Tribunal
CC	Competition Commission (UK)
CCBE	Comité Consultative des Barreaux Européens – Council of Bars and Law Societies of Europe
CEPLIS	European Council of Liberal Professions
CFI	Court of First Instance of the European Communities, since the Treaty of Lisbon the General Court (GC) of the Court of Justice of the European Union
CMLR	Common Market Law Report
CNUE	Conférence des Notariats de l'Union Européenne
COMP	DG Competition of the European Commission
DG Comp	Directorate General for competition
DG	Directorate General (e.g. for competition)
DGFT	Directorate General of Fair Trading (formerly UK competition authority)
EC	EC Treaty (Treaty of Amsterdam and Nice)
EC	European Community
ECJ	European Court of Justice of the European Union
ECN	European Competition Network

EEA	European Economic Area
EFTA	European Free Trade Association
EPO	European Patent Office
EU	European Union
EU	EU Treaty (depending on the context: Treaty of Amsterdam and Nice)
FIFA	Fédération internationale de football association
FLR	Front Line Regulators
FSA	Financial Services Authority
GDP	Gross domestic product
GEI	General economic interest
KNB	Koninklijke Notariële Beroepsorganisatie (Royal Notaries Association, Netherlands)
LSA	Legal Services Authority
LSB	Legal Services Board
LSC	Legal Services Commission
MArchG	Musterarchitektengesetz (model architects act)
MDP	multi-disciplinary partnership
MDW	Marktwetgeving, Deregulerend, Wetgevingsskwaliteit (Dutch projects on competition, deregulation, legislative quality)
Mw	Mededingingswet (Dutch competition act)
NATS	National Air Traffic Services
NATS	National Air Traffic Services Limited
NCA(s)	national competition authority(-ies)
NL	the Netherlands
NMa	Nederlandse Mededingingsautoriteit (Dutch competition authority)
NOvA	Nederlandse Orde van Advocaten (Dutch bar association)
OCPA	Office of the Commissioner for Public Appointments
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading (UK competition authority)
OJ C	Official Journal of the European Communities/ Union
OJ L	C-series for communications L-series for legislative acts
OLC	Office for Legal Complaints
PBS	Professional business services
RPC	Restrictive Practices Court
RVG	Rechtsanwaltsvergütungsgesetz (Lawyers Fees Act, Germany)
SGEI	Services of general economic interest (<i>which should be ESGI – economic services of general interest, see Chapter 7.A.1.1.</i>)
SGI	Service(s) of general interest

Stb.	Staatsblad
TEU	Treaty on European Union (Treaty of Lisbon)
TFEU	Treaty on the Functioning of the European Union (Treaty of Lisbon)
UK	United Kingdom
US	United States of America
WNA	Wet op het Notarisambt (Notaries Act, Netherlands)

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