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From Freedom of Establishment for Lawyers to European Competition Law

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ing on the Republic of Austria from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession to the Communities.[15]

51. It is appropriate therefore, in order to reply to the second question, to determine whether the situation in which a fixed-term contract of employment was concluded prior to the date of the Europe Agreement's entry into force, for a term expiring after that date, constitutes a situation arising prior to the Europe Agreement, to which the Europe Agreement could therefore apply retrospectively only if it was clearly intended to have that effect, or whether it concerns, on the contrary, a situation which arose prior to the entry into force of that agreement but whose future effects are governed by it from the date of its entry into force, in accordance with the principle that new rules immediately apply to current situations.

52. The conclusion of a fixed-term contract of employment does not exhaust its legal effects on the date of its signature, but, on the contrary, continues regularly to produce its effects throughout the duration of that contract. Therefore, the application of a new rule, such as the first indent of Article 37(1) of the Europe Agreement, from the date of its entry into force, to a contract of employment concluded prior to its entry into force, cannot be regarded as affecting a situation arising prior to that date.

53. It follows from the foregoing that the first indent of Article 37(1) of the Europe Agreement constitutes a new rule which applies immediately to contracts of employment still running at the date of the entry into force of that agreement.

54. That interpretation is not undermined by the defendant's argument that, in order to determine the validity of a clause limiting the duration of a contract of employment, it would be appropriate to take into consideration, in accordance with the principle of legal certainty and to ensure the protection of the legitimate expectations of the persons concerned, only the matters of law and fact which existed at the time of the conclusion of that contract, save where subsequent provisions validly prescribed their retrospective application.

55. It follows from settled case-law that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules.[16]

56. Such an approach applies particularly to a situation such as that in the main proceedings, in which the new rule introduced by the first indent of Article 37(1) of the Europe Agreement consists of a principle of equality of treatment as regards conditions of employment, which, by its nature, is apt to apply indiscriminately to all workers of Polish nationality legally employed within the territory of a Member State, from the entry into force of that agreement, without any need to consider whether they are employed under a contract of employment concluded before or after that entry into force.

57. Therefore, the second question must be answered to the effect that the first indent of Article 37(1) of the Europe Agreement applies, from the date of entry into force of that agreement, to a fixed-term contract of employment which was concluded prior to the date of its entry into force but which is due to expire after that date. (...)"

[15] ECJ 2 October 1997 – C-122/96 – *Saldanha and MTS* [1997] ECR I-5325, para. 14.

[16] See, among other cases, ECJ 14 January 1987 – 278/84 – *Germany* v *Commission* [1987] ECR 1, para. 36, and ECJ 29 June 1999 – C-60/98 – *Butterfly Music* [1999] ECR I-3939, para. 25.

THE EUROPEAN LEGAL PROFESSION

From Freedom of Establishment for Lawyers to European Competition Law*

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A. Introduction

After many decades of stagnation, the law of the legal profession underwent some important developments in the last 15 years. Some of these changes have their origins in European law. The culmination of this development hitherto was the EC Directive on the Freedom of Establishment and its subsequent implementation into the various domestic legal orders. In theory, the innovative impact of this development is indeed overwhelming. In practice, however, the number of practising lawyers established in a foreign country is rather limited, not only in Germany, but in all the Member States of the European Community. There is little prospect that things will quickly change in this respect.

In contrast, the new and very substantial challenge of the traditional standards of the law relating to the legal profession comes from European competition law. This challenge is likely to affect the every day business of every practising lawyer regardless of whether or not he has foreign clients.

One particular judgment of the European Court of First Instance on the one hand, and a judgment of the European Court of Justice on the other, as well as two lengthy opinions

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An epilogue was subsequently added to the paper after the European Court of Justice rendered its judgments in the Arduino *(C-35/99) and* Wouters *(C-309/99) cases.*

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of Advocate General Léger are the obvious signals of this challenge.

The judgment of the Court of First Instance develops the thesis that freedom of competition includes the freedom of advertising. Both of the Advocate General's opinions make a stand for the proposal that even legislative acts of the Member States, and not only decisions of private associations of undertakings, may infringe the legal rules of the Treaty of Rome (now Amsterdam) prohibiting anti-competitive activities. The very fact that the Advocate General is dealing with regulations of the Italian and Dutch Chambers of Lawyers, is a reflection of the particular impact which the decision will have on the legal profession – although its impact cannot be limited to these professions only.

I shall address you in two parts. In each of the chapters I shall make you familiar with what has been decided or, as the case may be, what the Advocate General wants to be decided. Subsequently, I shall discuss the impact that the decision and the Advocate General's opinions, respectively, will have on the German and other continental legal systems within the European Communities. In the case of the Advocate General's opinions, however, I shall add some reflections on the likelihood that the Court of Justice will adopt the new doctrine.

B. The right to advertise as part of the freedom of competition

Nowadays, three things are common ground.

Firstly: The professional activity of a lawyer is covered by the EC-Directive on Misleading Advertising and the German Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act).

Secondly: A law office is an undertaking within the meaning of Article 81 of the Treaty of Rome (now Amsterdam).

Thirdly: It is completely irrelevant whether or not an association of undertakings has a private or a public law structure.[1]

Against this background, I shall first give an account of the main statements of the Court of First Instance (I). Subsequently, I shall elaborate on the decision's impact on the legal framework of the lawyer's profession (II).

I. The decision of the Court of First Instance

The judgment of the European Court of First Instance of 28 March 2001[2] is of paramount importance. It does not deal with the legal profession directly, however. The profession affected was rather the "Professional Representatives before the European Patent Office". It is nevertheless clear that everything the Court said in this context is also relevant for the legal profession in general.

The Patent Office Organisation set up a so-called "Institute of Professional Representatives before the European Patent Office". This organisation is entrusted, among other things, with the supervision of the professional conduct of representatives and fulfils this task by making recommendations on conduct. Thus, the Council of the Organisation established a Code of Conduct, which includes the following two provisions:

1. (Article 2 – Advertising)

(a) Advertising is generally permitted provided that it is true and objective and conforms with basic principles such as integrity and compliance with professional secrecy.

(b) The following are exceptions to permitted advertising:

(1) Comparison of the professional services of one member with those of another; (...) (3) the mention of the name of another professional entity, unless there is a written co-operation agreement between the member and that entity; (...)

2. (Article 5 – Relationship with other Members)

(...)(c) A member must avoid any exchange of views about a specific case which he knows or suspects is being handled by another member with the client of the case, unless the client declares his wish to have an independent view or to change his representative. The member may inform the other member only if the client agrees.

The Commission was of the opinion that the Institute was an "association of undertakings"; this assumption was subsequently not disputed, but even confirmed by the Court. The Commission qualified the ethical rules quoted above as a restriction of competition within the meaning of Article 81 Treaty of Rome (now Amsterdam). It granted an exception, but only for a rather short period. The main issues of the lawsuit of the Institute against the Commission were:

Firstly: Whether or not the prohibition of the comparison of professional services amounted to an unlawful restriction of competition, and

Secondly: Whether the prohibition of contacting a potential client in view of a case which had been handled by another member of the profession amounts to an unlawful restriction of competition.

As to the first point, the reasoning of the Court was very short. It was clear to the Court, that the prohibition of any form of comparative advertising was tantamount to a restriction of competition. Since the Institute had however requested an exception to be granted without any time limit, the Court was compelled to state why the reasons forwarded in support ofsuch a far-reaching exception were not convincing. The Institute had brought forward the argument that comparative advertising was irreconcilable with the "discretion", "dignity" and "necessary courtesy" that must prevail within the liberal profession. The Court commented on that argument as follows:

"However, where it is not shown that the absolute prohibition of comparative advertising is objectively necessary in or-

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1 ECJ, established case-law, for example, ECJ 18 June 1998 – C-35/96 – *Commission* v *Italy* (*"spedizioneri doganali"*), Comp. 1998; I-3851.

2 CFI 28 March 2001 – T-144/99 – *Institute of Professional Representatives before the European Patent Office* v *Commission,* reprinted in this edition at 114.

der to preserve the dignity and rules of conduct of the profession concerned, the applicant's argument is not capable of affecting the lawfulness of the Decision."

Restricting competition and, hence, restricting advertising is a matter of European law only if *trade* among Member States is affected (Article 81 Treaty of Rome). The Court did not offer a single word as to why the activities of the respective profession are considered as "trade". The Court took this as self-evident and thus made only a short remark stating that advertising was a means to gain better access to foreign clients.

As to the second point – establishing contact with clients of other members of the profession – the Institute was successful. Yet this success was due only to the finding of the Court that the Commission had misapprehended the respective rule. The Commission had indeed not generally objected to the prohibition of approaching a current client of another member of the profession in a given matter. The objection was limited, rather, to the extent of the prohibition, namely also to situations where another colleague's client is approached after that colleague has already completed his work for the client in a given matter. The Court ruled, however, that the prohibition did not include such a restriction and that, hence, the objection of the Commission was unfounded.

Notwithstanding the particular outcome of these proceedings, the way the legal issues were dealt with by the Court is of considerable importance for the legal framework of the lawyer's profession.

II. Impact of the decision on the legal framework of the lawyer's profession

Expressed in general terms, the consequence of the decision is that European law allows hardly any restriction of advertising of members of the traditional liberal professions other than those restrictions commonly recognised in commercial life. This is particularly remarkable, since it is stated in Article 7(5) of the Directive on Misleading Advertising,[3] as amended by Directive 97/55/EC,[4] that:

"Nothing in this Directive shall prevent Member States from, in compliance with the provisions of the Treaty, maintaining or introducing bans or limitations on the use of comparisons in the advertising of professional services, whether imposed directly or by a body or organisation responsible, under the law of the Member States, for regulating the exercise of a professional activity".

The German legislature believed that § 43b of the Bundesrechtsanwaltsordnung (Federal Code of Lawyers) and § 6 of the Berufsordnung (Professional Code of Ethics), both of which restrict competition extensively, were covered and validated by this provision.

The Court, however, derived its conclusion directly from European primary law, arguing literally that:

"The principle of the hierarchy of norms precludes this provision [Article 7(5) of the Directive] in a measure of secondary legislation from permitting a derogation from a Treaty provision."[5]

In other words: The above-mentioned provision of the Directive and the respective national implementation legislation can no longer be applied, because they do not comply with the Treaty of Rome (now Amsterdam).

The innovative force of this approach can hardly be overestimated. In many respects, the limitations on advertising such as established by the Directive and the national implementation legislation may now be null and void. Comparative advertising, for example, is only permitted by the Directive to a very limited extent (Article 3a(1)(b) and (c)) :

"comparative advertising shall as far as the comparison is concerned, be permitted when the following conditions are met: (...)

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;(...)"

This restriction may easily be characterised as lacking conformity with European primary law.

As far as services – as opposed to goods – are concerned, one must, however, take into consideration that it is much more difficult to deal with comparative advertising. In Germany, there is no published case-law on the subject of comparative or similar advertising within the context of services. In the field of the legal profession, it is particularly difficult to conceive forms of comparative advertising relating to the quality of legal advice. This would also be the case even if the provision of the Directive quoted above were null and void. "Our advice is more reliable than the advice of any of our local competitors" – no one would have the idea to attract clients with such advertising. Nevertheless, the driving force of the judgment is strong.

In practice, the reasoning of the Court amounts to the non-application of § 43b of the Bundesrechtsanwaltsordnung and § 6 of the Berufsordnung because of their incompatibility with European primary law. The latter of the two has already been interpreted as permitting the usage of comparative advertising, including advertisements which mention the name of another professional.[6] Non-informative, boasting advertising by lawyers such as "Ihre Rechtsfragen sind unsere Aufgabe" ("Your legal matters are our business") has already been validated by the Bundesverfassungsgericht (German Federal Constitutional Court).[7]

According to the doctrine created by of the Court of First

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3 Directive 84/450/EEC of 19 September 1984, OJ L 250, at 17 et seq.

4 Directive 97/55/EC of 23 October 1997, OJ L 290, at 18 et seq.

5 *Institute of Professional Representatives before the European Patent Office* v *Commission* (*supra* note 2).

6 Although the Court upheld the prohibition in Article 2(3) of the Institute, namely "to mention the name of another professional [in the context of advertising]", it did so only because it construed the provision to be applicable to attempts to profit from the goodwill of somebody else's name only.

7 BRAK-Mitt. 2000, at 89.

Instance, it is also permitted to use eye-catching and spectacular advertising including making Benetton-like publicity. The OLG Düsseldorf (Higher Regional Court, Düsseldorf) found that it was illegal for a law firm to use as its logo a bull bowing its horns.[8] Since this is not misleading, it is doubtful whether this holding still stands. Furthermore, it is also permissible to advertise lower fees. Insofar as lawyers are free to negotiate their fees anyway, the comparison of prices in advertising is now legal.[9] In all of these cases, the defenders of any restriction could hardly be in a position to "show" to the satisfaction of the Court that the prohibition of the respective kind of advertising "is objectively necessary in order to preserve the dignity and rules of conduct of the profession".

Last but not least, under such a premise one is allowed to individually approach a potential client, including the client of a colleague, in view of securing a mandate. Immediately after any mass disaster, lawyers may then approach the victims and their families.

It may even be questioned whether primary European law really justifies the few restrictions the Directive on Misleading Advertising imposes on comparative advertising. For example, how could professional "discretion," "dignity" and "necessary courtesy" be affected by comparing hourly fees and thereby not respect the Directive's requirement that the comparison must be related to services for the same demand or the same purpose (Article 3b of the Directive)?

In sum: In a recent judgment, the German Federal Court has already reversed its approach underlying its case-law hitherto in matters pertaining to advertising by lawyers.[10] Now, the Court states:

"A restriction of a given form of advertising rather than its permissibility must be the object of justification."

This conclusion is derived from the constitutional provision on the freedom of professional (including commercial) conduct. The European Court of First Instance takes a different starting point: freedom of competition. Nevertheless, the Court comes to very similar, if not identical, conclusions.

Neither party in the proceedings appealed against the judgment of the Court of First Instance. Therefore, one may speculate as to whether the Court of Justice may overrule the judgment in a subsequent case. Yet, in a rather recent judgment, the Court of Justice was very mindful to give full effectiveness to European competition law as applied to the liberal professions. It is very likely that the Court will develop this case law further in the two pending cases.

C. Legislative and quasi-legislative restrictions of competition – the newly discovered field of the European Law on Competition

The efforts of the Court of Justice are focused on legal fees and institutionalised co-operation rather than advertising. So far, the legal framework for this development has not been litigation by associations against the Commission, but – in one case – litigation by the Commission against the Member State Italy and – in two pending cases – requests for a preliminary ruling in rather administrative law-related matters, emanating from an Italian *pretore* and from the highest court of the Netherlands for administrative matters, respectively.

The latter two cases are still pending, although the opinions of the Advocate General have already been available for more than six months. Apparently, the Court of Justice is fully aware of the far-reaching impact its judgments may acquire, particularly should it accept the innovative approach of Advocate General Léger.

I. The cases

Again, I shall start by pointing out the main aspects of the cases.

1. The Italian "spedizioneri doganali"-case[11]

The first case relates to an Italian profession unknown elsewhere, the "spedizioneri doganali". This is translated as "customs agents". The services rendered by "spedizioneri doganali" are described only in very abstract terms:

"Services relating to customs clearance procedures in the import, export and transit of goods", "the provision of customs services in the monetary, commercial and fiscal areas" are the key elements. Just as lawyers have a national body, very often called national chambers of lawyers, the "spedizioneri doganali" also have a representative body called the "Consiglio Nazionale degli Spedizioneri Doganali" (National Council of Customs Agents). Like the national chambers of lawyers, it is an entity of public law. One of its important tasks is to establish mandatory tariffs. Traditionally, the latter distinguishes between minimum and maximum fees, which affords the respective professional the discretion to charge his client a fee somewhere in between. The coming into force of the tariff is not dependent on its approval by any other authority. Nevertheless, the Italian Minister of Finances gave its official approval with the intention, as the Court of Justice ironically remarked, "to create the appearance, that the tariff is a matter of public law". The Commission was successful in the Court, as to its assertion that Italy had infringed the Treaty of Rome by tolerating and supporting such a tariff. The Court of Justice had no doubt that the main infringement of the Treaty was attributable to the "Consiglio degli Spedizioneri Doganali". Yet the Italian Republic was cited as a proper defendant because it had also infringed the Treaty. The Court of Justice literally stated:

"Although Article 85 of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with measures adopted by Member States by law or regulation, the fact nevertheless remains that Article 85 of the Treaty, in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which

[8] BRAK-Mitt. 2000, at 46.

[9] BGH NJW 98, at 3561.

[10] BGH NJW 2001, at 2087.

[11] *Commission* v *Italy* ("*spedizioneri doganali*")(*supra* note 1).

may render ineffective the competition rules applicable to undertakings."

I have intentionally emphasised the fact that, in the eyes of the Court of Justice, the "Consiglio Nazionale" was the primary infringing party and that the Italian Republic was cited a proper defendant only because it gave assistance, so to speak, to the treaty's infringement. In its finding that the "Consiglio Nazionale" was an infringing party, the Court of Justice pointed out the fact that the members of the "Consiglio" and preparatory councils where not bound by any "rule in the national legislation in question obliging or even encouraging them to take into account public interest criteria".

It is not difficult to understand that a Member State of the European Union is lacking loyalty if it gives official legal and administrative assistance to such activities. But what to do if a Member State itself, independently from any organisation of undertakings, makes legal rules in view of restricting competition? This is the crucial point in the next case.

2. The Italian lawyers' tariff case[12]

The Italian body corresponding by and large to the German "Bundesrechtsanwaltskammer" (Federal Chamber of Lawyers) is the "Consiglio Nazionale Forense" (National Council of the Bar, the 'Consiglio'). Unlike the Bundesrechtsanwaltskammer, it is formally involved in the establishment of a tariff structure for lawyers that specifies minimum and maximum fees for the various professional services of a lawyer. Since the conformity of this tariff with European competition law is in dispute in Italy, the "*pretore*" (magistrate) of Pinerolo took the opportunity to submit the issue to the European Court of Justice. In my opinion the tariff to be adopted, and in the present case indeed adopted by the "Consiglio", must be approved by the Minister of Justice. The Advocate General, however, expressed the legal position in domestic Italian law in slightly different terms. He said that the "Consiglio" makes "a proposal" to the minister and that the latter subsequently enacts the tariff. Although the minister cannot deviate from the Consiglio's "proposal", in the view of the Advocate General, the minister is responsible for the enactment of the tariff. This approach leads the Advocate General to the following conclusion: The activity of an association in making a proposal to legislative bodies may never be tantamount to a "decision" of that organisation or to its concerted practice in so far as this may affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition – even if the ultimate purpose of the association's activities is to achieve such an effect.

This kind of reasoning, in turn, forces the Advocate General to give up the requirement of a link between legislative or quasi-legislative activities, on one side, and agreements and decisions of undertakings and their organisations on the other. He literally states:

"[I consider] that, in cases such as this, it is more justified to accept that the State measure may infringe Articles 5 and 85 of the Treaty i n d e p e n d e n t l y of the legality of the conduct of the private operators. In other words, it must be possible to find that a State measure appreciably restricts competition even if the conduct of the economic operators at the root of the State action is not, in itself, contrary to Article 85(1) of the Treaty."

Once having taken this position, the next conclusion is inevitable: A Member State cannot be expected to request from the Commission an exception under Article 81(3) of the Treaty. The wording of this provision does not even permit the anti-trust provision of the Treaty to be "declared inapplicable" to legislative measures of Member States. Hence, as the Advocate General puts it:

"(...) it is also necessary to permit the State to justify its conduct under Article 5 of the Treaty, because a Member State may have legitimate reasons for reinforcing the effects of an agreement, decision or concerted practice within the meaning of Article 85 of the Treaty. In that case, the duty to cooperate in good faith under Article 5 of the Treaty cannot prohibit a Member State from adopting legislative or regulatory measures which, even though they restrict competition, pursue a legitimate goal."

Implicitly assuming that there must have been an activity of the respective association prior to the legislative or regulatory act of the state, the Advocate General continues to develop three "criteria of assessment":

"(1) the public authorities of the Member State concerned exercise effective control over the content of the agreement, decision or concerted practice;

(2) the State measure pursues a legitimate aim in the public interest, and

(3) the State measure is proportionate to the aim which it pursues."

Applying these criteria to the case before the Court of Justice, the Advocate General comes to his final proposal, namely to respond to the question submitted to the Court as follows:

"Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not preclude a Member State from adopting a legislative or regulatory measure approving, on the basis of a draft produced by a professional association of lawyers, such as the Consiglio Nazionale Forense, a scale setting the minimum and maximum fees for services provided by members of the profession on the threefold condition that: (1) the public authorities of the Member State concerned exercise effective control over the content of the fee scale proposed by the professional association; (2) the State measure approving the fee scale pursues a legitimate aim in the public interest; and (3) the State measure is proportionate to the aim which it pursues. It is for the national court to determine whether this is the case."

This looks like a green light for the further application of the Italian lawyers' tariff. Nevertheless, the contrary is the case. The only point which was made in the proceedings in support of the idea that the tariff for fees represents a legitimate aim in the public interest was the argument that one has to maintain "the high quality of the services supplied by the legal profession". While recognising that such an aim "would

[12] ECJ 19 February 2002 – *Manuele Arduino*, reprinted in this edition at 111.

undoubtedly constitute a legitimate objective in the public interest", the Advocate General clearly stated:

"(...) such a measure does not seem to me to be suitable for the purpose of achieving the desired objective. First, I consider that there is no causal effect between the level of fees charged and the quality of services supplied. I fail to see how a system of mandatory prices would prevent members of the profession from offering inadequate services if, in any event, they lacked qualifications, competence or moral conscience. Second, the quality of services is - or ought to be - guaranteed by measures of a different type, such as those governing the conditions of entry to the profession and lawyers' professional liability."

I cannot withhold expressing my disappointment at such a naive kind of argument. It is a matter of course that the financial attractiveness of jobs and professions is an important precondition for the quality of the services to be rendered. Yet, be that as it may, the Advocate General still saw the possibility of justifying the tariff.

Firstly, in the opinion of the Advocate General, other aims pursued by the Minister of Justice which were in the public interest could have existed. According to the Advocate General, it should be for the national court, in the present case the *pretore* of Pinerolo, to establish, by means of judicial taking of evidence, whether the Minister of Justice pursued other aims in the public interest.

Secondly and amazingly enough, it should also be for the *pretore* of Pinerolo to finally decide on the suitability of the measure for maintaining or improving the quality of legal services.

3. The Wouters-case – partnership of lawyers and accountants[13]

The third case relates to the issue whether or not the Dutch National Bar Association acted in conformity with European competition law in prohibiting partnerships of lawyers and accountants. The "Raad van State" (Netherlands Council of State) had submitted no less than nine questions. Hence, the opinion of Advocate General Léger is rather lengthy and so will certainly be the judgment. The significance of the case is due to the fact that the "Raad van State" had an idea which the *pretore* of Pinerolo did not have and which, therefore, the Advocate General could not discuss in the Italian tariff case. The idea was that lawyers' "undertakings" could fall under Article 86 of the Treaty of Amsterdam (previously Article 90 Treaty of Rome). In its relevant part, this Article is drafted in the following terms:

"*Undertakings entrusted with the operation of services of general economic interest (...) shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them (...).*"

It is hardly conceivable that the economic interest in legal services could be more "general" than the economic interest in many other services. Therefore, it was really surprising to find Advocate General Léger in favour of applying this provision to the "undertakings" of lawyers. He simply identified the fact that lawyers' activities are "essential in a State government by the rule of law" in order to "ensure the effectiveness of the principle of access to the law and to the courts" with "general economic interest".

This approach led him again to examine whether, in this context, restrictions of competition by laws or regulations can be justified. In so proceeding, he emphasised the traditional concerns for ethical rules of the legal profession such as independence and professional secrecy. He did, however, not propose to the Court to decide the issue definitively. Like in the Italian case, he simply stated:

"*It is for the national Court to determine whether that is the case*",

that is to say, whether the prohibition of partnerships with accountants is necessary in order to safeguard lawyers' independence and professional secrecy. Yet, in contrast to his very sceptical comments in the Italian tariff case, he was in this case rather confident that the Dutch "Raad van State" would find a justification for the restrictive measure. For example, one of his concluding statements reads as follows:

"I believe that the restriction of competition caused by the regulation is necessary if features which form part of the very essence of the legal profession in the Netherlands are to be protected in the public interest."

II. Impact of the decision and the Advocate General's legal opinion on the legal framework of the lawyers' profession

1. European Law and the German Bundesrechtsanwaltsgebührenordnung *(federal schedule of fees for lawyers, BRAGO)*

It has become very questionable whether the German BRAGO is still compatible with European Law. The Court has repeatedly emphasised that European competition law also requires that the Member States not introduce measures, even of a legislative nature, which may render ineffective the competition rules. True, when making the statement that "the state measure may infringe Articles 5 and 85 of the Treaty independently of the legality of the conduct of the private operators," in his opinion in the Italian tariff case, the Advocate General always had in mind that the a kind of activity of an organisation of undertakings was in the background. The existence of such previous conduct on the part of private persons/entities, however, is not a precondition of a State's obligation not to undermine the policies of the EC competition law. Therefore, I see no possibility of BRAGO being maintained as a tariff for minimum fees. The possibility does not even exist if the Court of Justice should adopt the completely new idea of the Dutch "Raad van State", namely that a lawyers' "undertaking" is exempted by Article 86(2) of the Treaty, thus granting privileged treatment to undertakings en-

[13] ECJ 19 February 2002 – C-309/99 – *J. C. J. Wouters and Others* v *Algemene Raad van de Nederlandse Orde van Advocaten*, reprinted in this edition at 121.

trusted with the operation of services of general economic interest. Most judges of the Court and its advocates general come from countries where no legal minimum tariffs exist. The most influential treatise on the law of the legal profession in France was written by M[e] Martin.[14] He states:

"Toute entente corporatiste contraire à cette liberté est contraire à cet ordre public économiste. Notament la publication par les Ordres de barèmes d'honoraires est préscrite comme une entrave à la libre concurrence. C'est elle qui doit réaliser le juste équilibre."

Indeed, on several occasions the competition authorities in France, with the subsequent approval of the courts, took action against tariffs proposed by chambers of lawyers – even though these tariffs were and could only be recommendations.

The latter is indeed an exaggeration. Non-binding legal tariffs and corporate tariffs controlled by and subject to the approval of State authorities are justifiable within the approach expressed by Advocate General Léger in the two cases in which only binding minimum tariffs were at issue. The market prices for legal services can never be transparent. In contrast, a non-binding legal tariff can create transparency in this field. The link between the amount at issue and the lawyer's fees such as to be found in the German BRAGO is clearly defensible, because it is a disincentive for lawyers to overextend their working-hours unnecessarily.

2. The impact of the pending judgments on other deontological rules of the legal profession

The pending judgments of the Court of Justice will certainly also have a considerable impact on other rules of professional conduct. Why, for example, should a lawyer have a professional duty to refrain from giving advice multiple clients with divergent interests if all the clients agree?

I wish to address a sensitive issue in more detail: contingency fees. Expressed in terms of competition law, it is clear that the prohibition of contingency fees amounts to a restriction of competition. Not only the competition among lawyers is affected. It is very often forgotten that there also exists a market among customers and clients and that this market is also subject to protection of European law.[15] Potential clients may compete amongst each other for competent and willing lawyers by proposing to them a contingency fee or a contingency element to their fees. The absolute prohibition of contingency fee elements in some legal orders of Europe and the lack of such a prohibition in others is certainly a distortion of the competitive background for legal services. If, according to the opinion of Advocate General Léger, for the justification of any restriction of competition it is necessary that it be judicially shown that the measure was in the public interest and proportionate to the aim pursued, the abstract objective of the legislator to safeguard the independence[16] of lawyers would certainly not be very convincing in the Court of Justice. In many respects, a lawyer does not enjoy any independence from his client. One may make the point that if a lawyer has the opportunity to gain a fortune through contingency fees should his client win, he may be induced by his greed to commence lawsuits with little prospect of success. It is most likely that considerations such as these would not be sufficient to justify the prohibition of the agreement upon some form of contingency fee or similar elements within fees.

D. Concluding perspective: Impact of the pending judgments on mandatory law in general

In lieu of a concluding remark, I would prefer drawing your attention to the fact that I have not explained the entire dimension of Advocate Léger's view. Had I approached the matter on such a basis, it would have become apparent that the pending judgments may also have a general impact, namely on mandatory rules of law on the whole. One can also view many mandatory rules of law from the perspective of the restriction of competition. For example, to the degree that commercial agents, franchisees and holders of concessions are protected by mandatory law, they are also prevented from competing amongst one another, by means of offering more favourable conditions to their co-contracting parties. If a link between the activities of an organisation of enterprises and state activities is no longer a precondition for the respective state's liability for anti-competitive legislation, then the entirety of the economy-oriented mandatory rules of a legal order becomes a potential object of control under European competition law. Hence, a state would have to justify to the European Court of Justice any mandatory rule of its legal system whatsoever. This, however, would clearly exhaust the sources of the Court, not to mention the spirit of the Treaty. Also in this context, one hopes that the Court will not uncritically follow the innovative steps of Advocate General Léger and that it will find a convincing criterion to determine the kind of legislation which is subject to the control of European competition law.

E. Epilogue: The plenary judgments

In the light of the foregoing, the plenary judgments of the Court of Justice are a great surprise and, in their intellectual structure, disappointing.

1. This is particularly true in respect to the Italian lawyers' tariff case. The Court avoided expressing any views to the conclusions which Advocate General Léger derived from the Court's own case-law. The decisive reason for upholding the "Real Decreto Legislativo" was the supposed fact that "the Italian State cannot be said to have delegated to private economic operators [the] responsibility for taking decision affecting the economic sphere, which would have the effect of depriving the provisions at issue in the main proceedings of the character of legislation". True, the Court reiterates its former ruling that the Treaty "requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competi-

[14] *Raymond Martin*, Déontologie de l'avocat, éditions litec (F), 1999, at 110.

[15] See *Helmut Köhler*, Wettbewerbsbeschränkungen durch Nachfrager, Münchner Universitätsschriften vol. 37, 1977 at 56 et seq.

[16] See *Henssler/Prütting/Dittmann* BRAO § 49b para. 15 et seq.

tion rules applicable to undertakings". The Court did, however, not mention a single word on the point whether, by prescribing minimum tariffs, the "Real Decreto Legislativo" restricts competition. Since Advocate General Léger had emphasised in express terms that he could not see any justification for such minimum tariffs, one is perplexed by the fact that the Court of Justice did not even address the issue, which by no means had become obsolete by the Court's way of reasoning. Regarding the German "Bundesrechtsanwaltsgebührenordnung", it is crucial to note that the Court, like its Advocate General, apparently implicitly disapproved the idea, that "legislative or regulatory measures" could infringe Article 10 in conjunction with Article 81 of the Treaty, even in the absence of any previous proposal or application of an association of undertakings. Therefore, for all practical purposes, the question of the German BRAGO's conformity with EC-Law is not open any more.

2. As to the Dutch accountants' case, the Court followed its Advocate General's proposal that national chambers of lawyers, even if they are public law entities, are associations of undertakings within the meaning of Article 82. The Court rejected in this context the reasoning of the German government that the mere public law structure of an organisation exempts it from the application of the competition provisions of the Treaty.

The Court did, however, not follow its Advocate General's proposal to apply Article 86 to services of general economic interest. The Court, as a matter of courtesy, it seems, did not comment on the Advocate General's representations in this regard. Instead, it accepted in a somewhat modified way, an idea which the Advocate General had developed in the Italian lawyers' tariff case. If associations of professionals are empowered to enact mandatory ethical rules, their activities in this respect may be justified, even if it amounts to a restriction of competition.

The final outcome of the Dutch proceedings is particularly remarkable for German observers. The prohibition of partnerships of lawyers and (Dutch!) accountants is justified because for the Court it was crucial, "that in the Member State concerned [the Netherlands] accountants are not bound by a rule of professional secrecy comparable to that of members of the Bar, unlike the position under German law, for example".

Were the European legal position to change, should the Dutch professional organisation of accountants adopt the German rule?

Specialisation, Internationalisation and the Fascination with Big Numbers

Trends and developments in the European legal profession in an environment of rapid growth[*]

Dr Benno Heussen[**]

1. Remarks on comparisons between individual legal cultures

1.1. Problem: Comparability

If you want to compare the professional picture of German lawyers in some way with the situation outside of Germany, you will run into obstacles quite soon, as lawyers differentiate themselves from country to country through certain essential elements, such as their legal systems, social environments, traditions and many other influences.

Here I am comparing all advisers who are entitled to hold their own titles in their respective countries indicating that they are legal advisers and court advocates – titles such as "Rechtsanwalt", "avocat" or the like. Difficulties naturally begin to surface at this point, as in the United Kingdom the notion of "lawyer" embraces the most varied forms of legal scholars (including judges), whereas the legal practitioners in a narrower sense lack "subtitles" – they are either "solicitors" or "barristers". Hence the amount of comparisons already differ from the outset.

Thus we need additional elements that are characteristic to the "adviser-type" we are discussing. The following are some possibilities:

Academic degree: Most countries require it; others do not (e.g. Japan).

Admission by the state or the bar: This criteria seems to hold relatively uniform validity, but it remains a mere formal criteria, since in Sweden, for instance, although the title is contingent upon admission, anyone can still offer legal advice without any limitations.

Independence from the state: One should be able to take this for granted, yet in totalitarian states it is in many cases just a facade and the only way for a lawyer to succeed at all is through close collaboration with state authorities.

Independence from clients: Here I would not venture to make the general statement that lawyers in most cases are truly independent. They should at least have an unrestricted option of this sort. Ironically, lawyers that are dependent on the state are to a large measure independent with regard to their clients, as the example of the East German lawyers illustrates.

[*] *Lecture held at the AEA (Association Européenne des Avocats) Conference "Changing Standards: The European Legal Profession Today", Seefeld (A), 25 - 26 January 2002.*

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