

Case C-309/99

J.C.J. Wouters and Others

v

Algemene Raad van de Nederlandse Orde van Advocaten

(Reference for a preliminary ruling
from the Raad van State (Netherlands))

(Professional body — National Bar — Regulation by the Bar of the exercise of the profession — Prohibition of multi-disciplinary partnerships between members of the Bar and accountants — Article 85 of the EC Treaty (now Article 81 EC) — Association of undertakings — Restriction of competition — Justification — Article 86 of the EC Treaty (now Article 82 EC) — Undertaking or group of undertakings — Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) — Applicability — Restrictions — Justification)

Opinion of Advocate General Léger delivered on 10 July 2001 I-1582
Judgment of the Court, 19 February 2002 I-1653

Summary of the Judgment

1. *Competition — Community rules — Undertaking — Definition — Members of the Bar — Included*
(EC Treaty, Arts 85, 86 and 90 (now Arts 81 EC, 82 EC and 86 EC))

2. *Competition — Agreements, decisions and concerted practices — Decisions taken by associations of undertakings — Definition — Regulation applicable to professional partnerships of members of the Bar with other professions adopted by the Bar of a Member State — Included*
(EC Treaty, Art. 85 (now Art. 81 EC))
 3. *Competition — Agreements, decisions and concerted practices — Prejudicial to competition — Partnerships of Members of the Bar with accountants prohibited by the Bar of a Member State — Assessed with regard to the overall context of the prohibition — Justification — Proper practice of the legal profession*
(EC Treaty, Art. 85(1) (now Art. 81(1) EC))
 4. *Competition — Dominant position — Collective dominant position — Definition — Bar of a Member State — Excluded*
(EC Treaty, Art. 86 (now Art. 82 EC))
 5. *Freedom of movement for persons — Freedom of establishment — Freedom to provide services — Treaty provisions — Scope — Rules which are not public in nature designed to regulate collectively self-employment and the provision of services — Included*
(EC Treaty, Arts 52 and 59 (now, after amendment, Art. 43 EC and 49 EC))
 6. *Freedom of movement for persons — Freedom of establishment — Freedom to provide services — Restrictions — Prohibition of partnerships of members of the Bar with accountants laid down by the Bar of a Member State — Justification — Proper practice of the legal profession*
(EC Treaty, Arts 52 and 59 (now, after amendment, Arts 43 EC and 49 EC))
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1. Members of the Bar carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty (now Articles 81 EC, 82 EC and 86 EC), and the complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion. Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.

(see paras 48–49)

2. When it adopts a regulation concerning partnerships between Members of the Bar and members of other professions, the Bar of a Member State is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies, nor exercising powers which are typically those of a public authority. It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

It is, moreover, immaterial that the constitution of the Bar is regulated by public law. According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned.

The fact that the governing bodies of a Bar are composed exclusively of members of the Bar elected solely by members of the profession, and that in adopting acts such as that regulation, the Bar is not required to do so by reference to specified public-interest criteria, supports the conclusion that such a professional organisation with regulatory powers cannot escape the application of Article 85 of the Treaty (now Article 81 EC).

It follows that a regulation concerning partnerships between members of the Bar and members of other liberal professions, adopted by a body such as the Bar, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty.

(see paras 58, 60–63, 65–66, 71, operative part 1)

Moreover, having regard to its influence on the conduct of the members of the Bar on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, that regulation does not fall outside the sphere of economic activity.

3. Prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in a regulation adopted by the Bar of a Member State, is therefore liable to limit production and technical deve-

lopment within the meaning of Article 85(1)(b) of the Treaty (now Article 81(1)(b) EC).

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

Account must be taken of the legal framework applicable in the Member State concerned, on the one hand, to members of the Bar and to the Bar which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

A regulation concerning partnerships of members of the Bar with members of other liberal professions adopted by a body such as the Bar of a Member State thus does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

(see paras 90, 97–98, 110,
operative part 2)

4. Since it does not carry on any economic activity, the Bar of a Member State is not an undertaking within the meaning of Article 86 of the Treaty (now Article 82 EC). Nor can it be categorised as a group of undertakings for the purposes of that provision, inasmuch as registered members of the Bar of a Member State are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated. The legal profession is not concentrated to any significant degree, is highly heterogenous and characterised by a high degree of internal competition. In the absence of sufficient structural links between them, members of the Bar cannot be regarded as occupying a collective dominant

position for the purposes of Article 86 of the Treaty.

(see paras 112–114)

5. Compliance with Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 EC and 49 EC) is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.

(see para. 120)

6. It is not contrary to Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 EC and 49 EC) for a national regulation concerning partnerships of members of the Bar with members of other liberal professions to prohibit any multi-disciplinary partnership between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

(see para. 123, operative part 4)