Towards a proportionality test in the field of the liberal professions?

The pending reference for a preliminary ruling in Case C-202/04 Macrino and Capodarte raises the issue of the compatibility with Articles 10 and 81 EC of State regulation drafted by private actors

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Introduction

On 25 October the Grand Chamber (13 judges) of the European Court of Justice held an oral hearing on a reference for a preliminary ruling from the Tribunale di Roma in Case C-202/04 Macrino and Capodarte v. Meloni (2) (hereinafter Macrino).

The main issue raised by that case is similar to the one raised in Arduino (3), i.e. under which conditions a State measure compatible with Articles 10 and 81 EC (4) which makes a draft tariff submitted by representatives of a given profession fixing minimum fees for the services provided by that profession obligatory.

The Court has essentially to choose between three possible approaches:

— under the automatic legality approach such a State measure would be automatically outside the scope of the prohibition of Articles 10 and 81 EC independently of the procedure followed or of possible anticompetitive effects;

— under the procedural approach such a State measure would be compatible with Articles 10 and 81 EC independently of possible anticompetitive effects where there are sufficient procedural safeguards ensuring that the State did not effectively waive its decision making powers;

— under the proportionality approach such a State measure would be compatible with Articles 10 and 81 EC only if it pursues a legitimate public interest objective and complies with the proportionality principle.

The Court’s decision may have important implications for the Commission’s reform efforts in the sector of the liberal professions. (5) In that sector many of the more problematic restrictions are proposed by representatives of the professions and rendered obligatory by laws or State regulations. It may also have implications for other sectors of the economy in which Member States regulate prices or other key vectors of competition on the basis of draft regulatory measures prepared by professional or industry bodies (e.g. insurance, agriculture, energy, transport, health).

The reference for a preliminary ruling in the Macrino case

Under Italian law (6) the criteria for determining fees and emoluments payable to members of the Bar in respect of court proceedings and out-of-court work are to be set every two years by decision of the Consiglio Nationale Forense (National Council of the Bar, ’CNF’). (7) The CNF is composed of members of the Bar elected by their fellow members. In order to become compulsory deci-

(1) The views expressed are personal to the author and do not necessarily reflect those of the Commission or of DG Competition.

(2) At the same hearing the Court also dealt with Case C-94/04 Cipolla. In that case the referring Corte di Appello di Torino wants to know in essence whether a rule according to which no derogation from the tariffs setting minimum fees for the services of lawyers for legal proceedings is permitted is compatible with Article 81 in combination with Articles 3(1)(g) and 10 of the Treaty.


(4) In its case-law on State measures depriving the competition rules of their effectiveness often also to Article 3(1)(g). It is submitted that the reference to Article 3(1)(g) is not indispensable since the basis of the Member States’ legal obligations is Article 10 EC, see below. For easier reading the present article will therefore refer only to Articles 10 and 81 EC.

(5) Commission’s work in this area includes ‘Economic Impact of regulation in the field of liberal professions in different EU Member States’, Ian Paterson, Marcel Fink, Anthony Ogus, Institute for Advanced Studies, Vienna, January 2003


(6) The basic text governing the profession of avvocati and procuratori in Italy is Royal Decree-Law No 1578 of 27 November 1933 (GURI No 281 of 5 December 1933) which was converted into Law No 36 of 22 January 1934 (GURI No 24 of 30 January 1934).

(7) Article 57 of Royal Decree-Law No 1578 cited above.
sions of the CNF on fees and emoluments must be approved by the Minister of Justice after having obtained the opinion of the Comitato Interministeriale dei Prezzi (Interministerial Committee on Prices) and consulted the Consiglio di Stato (Council of State).

The tariff of fees for members of the Bar at issue in the main proceedings was adopted by decision of the CNF of 12 June 1993, as amended on 29 September 1994. That CNF decision was approved and made obligatory by Ministerial Decree No 585 of 5 October 1994 (1) after having obtained the opinion of the Interministerial Committee on Prices and consulted the Council of State. The tariff comprises three sections: (a) fees for legal services in civil or administrative law court proceedings, (b) fees for legal services in criminal law court proceedings and (c) fees for out-of-court work. The section concerning out-of-court work provides that the fees foreseen in that section are in principle binding minimum fees. (2)

In 1998 M. Meloni, a member of the Bar, sought and obtained an injunction ordering M. Macrino and Ms. Capodarte to pay for out-of-court legal work (comprising telephone consultations, meetings, oral opinions and letters to the opposing party's lawyer) performed for them in connection with copyright. The injunction was obtained on the basis of an opinion from the Bar based on the section of the tariff concerning out-of-court.

Before the referring Tribunale di Roma M. Macrino and Ms. Capodarte contest the injunction on the ground that the fees were disproportionate in the light of the work actually done. The referring court considers that under Italian law as it stands it has to determine the fees owed by M. Macrino and Ms. Capodarte by reference to the section of the tariff for out-of-court work. Since the referring court has however doubts about the compatibility of that section of the tariff with Articles 10 and 81 EC it referred the following question for a preliminary ruling:

'Do ... Articles 10 and 81 EC ... preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession in respect of services rendered in connection with activities (so-called out-of-court work), that are not reserved to members of the Bar but may be performed by anyone?'

In the order for reference, the referring court explains that in Italy the activity of providing legal assistance in court proceedings is reserved to members of the Bar, but out-of-court legal work (e.g. assistance in drawing up contracts, legal advice, drafting of demands for payment) may be performed by any economic operator.

The referring court also states that it seeks in particular a clarification from the Court of Justice on whether a State measure setting minimum fees for out-of-court activities, in order to be compatible with Articles 3(1)g, 10(2), and 81 EC, must not only guarantee a control of last resort by qualified public bodies (3), but according to the proportionality principle (4) also pursue a public interest objective and be the means least restrictive of competition to achieve that objective.

The Court’s case-law and the Commission’s ‘Report on competition in professional services’

According to its wording Article 81 EC concerns only the conduct of undertakings and not State measures. Under Article 10(2) of the Treaty the Member States must however abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Under Article 3(1)g of the Treaty a central (5) objective of the Treaty is to create and maintain a system ensuring that competition in the internal market is not distorted.

Already in 1977 in INNO v ATAB (6) the Court established therefore the general principle that, whilst Articles 81 and 82 were directed at undertakings, Articles 3(1)(g), 10(2) and 81/82 EC read together imposed a duty on the Member States not to adopt or maintain in force any measure which could deprive the competition rules of their effectiveness.

According to the Court’s subsequent case-law codified in the so-called Van Eycke (7) formula a State measure deprives the competition rules of their effectiveness where it:

/(1) GURI No 247 of 21 October 1994.
(2) See Articles 1, 4(2) and 9 of the section of the tariff concerning out-of-court work.
(3) See the operative part of the judgment in Case C-35/99 Arduino [2002] ECR I-1529. Two possible interpretations of that judgment are discussed in more detail below.
(4) The proportionality principle is discussed in detail below.
(5) See the preamble of the Treaty which refers to the need to guarantee fair competition and Article 4(1) of the Treaty pursuant to which the economic policy of the Member States and the Community must be conducted in accordance with the principle of an open market economy with free competition.
requires or favours the adoption of agreements, decisions or concerted practices of the kind referred to in Article 81 EC,

(2) reinforces the effects of agreements, decisions or concerted practices of the kind referred to in Article 81 EC, or

(3) deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

For the assessment of the Macrino case the second branch of that formula is of particular interest, i.e. under what conditions a Member State making a draft tariff submitted by a professional association compulsory infringes Article 10 and 81 of the Treaty by reinforcing the effects of a decision of an association of undertakings which establishes a tariff with uniform minimum prices. In its case-law the Court has always assessed this type of situation under the second branch of the Van Eyck formula.

In that respect in its early judgments in Asjes (1) and BNIC/Aubert (2) the Court found in comparable cases that

— the professional association submitting the draft tariff infringed Article 81 EC, and

— the Member State making the tariff compulsory infringed Articles 10 and 81 EC because it ‘reinforced the effects’ of the private conduct in question.

Under those early judgments all State measures making a draft tariff compulsory were therefore automatically contrary to Articles 10 and 81 of the Treaty. None of the early judgments discussed the possibility for a Member State to justify such measures on public interest grounds.

In a subsequent line of cases culminating in Pavlov (3) the Court reached the opposite result as in BNIC/Aubert and Asjes and held that a Member State which makes a draft measure submitted by a professional association compulsory for all members of the profession was compatible with Articles 10 and 81.

In order to understand that striking change of outcome it must be borne in mind that a decision by a professional association to submit a draft tariff to the public authorities for approval, taken in isolation, does not have as its object or effect to restrict competition on the market. That is first because the mere elaboration of a draft is neither intended nor capable to have effects on the market in the absence of its publication or approval (4). Secondly, the submission of the draft for approval by the State as indeed any other form of lobbying has also no anticompetitive effects on its own and is part of a process which is normal in our democratic societies. (5) The more recent case-law of the Court therefore overruled the first element of its early case-law and held that a decision by a professional association to submit a draft tariff to the public authorities taken as such is not contrary to Article 81(1). (6) It is submitted that the new case-law in so far as it concerns the liability of associations of undertakings under Article 81 EC is correct. All potential or real anticompetitive effects are caused by the State measure making the draft tariff obligatory and not by the draft itself.

In the line of cases culminating in Pavlov the Court went however one step further and required a ‘perfect’ infringement of Article 81(1) EC also in order to find that the ‘reinforcing’ State measure infringed Articles 10 and 81 EC. The Court established thus an automatic link between the legality of the behaviour of the undertakings under Article 81(1) and the legality of the State measure under Articles 10 and 81 EC. (7) On that basis the Court effectively held that because the submission of a draft to the State was not contrary to Article 81(1) the State measure making the draft compulsory could also not infringe Article 10 and 81 EC, since it was not reinforcing the effects of an agreement contrary to Article 81(1). The consequence of that new case-law was that a State measure making a

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(4) See by contrast for a case where a professional body uses a non-approved draft to restrict competition in the absence of State approval the recent Belgian Architects Commission decision (COMP 38.549): where a professional body publishes a draft tariff and asks its members to respect that tariff despite the fact that it did not receive State approval it signals the expected prices and creates thereby a focal point. In such cases there might be a restriction of competition independently of the State's intervention.
(5) See paragraphs 291 to 293 of the Opinion of AG Jacobs in Albany. See also paragraph 98 of the judgment in Pavlov.
(7) In paragraph 99 of the judgment in Pavlov, cited above, the Court concluded that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of such a fund compulsory for all members of the professions was not contrary to Article 81(1). In paragraph 100 the Court continued as follows: ‘Thus, for the same reasons, a decision by the Member State in question to make membership of such a fund compulsory for all members of the professions is not contrary to Articles [10] and [81 EC] either’ (emphasis added).
draft submitted by a professional association compulsory was automatically and independently of its potentially detrimental effects on competition outside the scope of Articles 10 and 81.

In their Opinions in Pavlov and Arduino Advocate General Jacobs and Advocate General Léger expressed concern as regards this new approach of 'automatic legality'. (1) Both Advocates General proposed to follow an alternative approach based on the principle of proportionality. (2)

The 2002 Arduino case (3) concerned in principle the same Decree as Macrino. The section of the fee tariff in issue in Arduino was however the one for court related work and not the one for out of court work. (4) The Court held that Articles 10 and 81 EC did not preclude a Member State from adopting a measure such as the Decree in issue.

It is however interesting to note that the Court refrained from expressly relying on the 'automatic legality' approach used in Pavlov. The Court instead dealt with the problem of 'reinforcement of the effects' only in one dense sentence which refers back to another section of the judgment dealing with the separate problem of unlawful delegation of regulatory powers:

Nor, for the reasons set out in paragraphs 41 and 42 above, is the Italian State open to the criticism that it requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article [81] of the Treaty or reinforces their effects. (5)

(1) Advocate General Jacobs stated in that respect at paragraph 161 of his Opinion in Pavlov: 'I must confess that I do not find that case-law with its automatic link between the legality of a private and a Member State's measure very satisfactory in cases such as the present one; the [association's] decision is not caught by Article [81(1)] because any restrictive effects are the result of subsequent State intervention; that State intervention in turn is not caught by Article [10] because the [association's] decision as such is not restrictive enough. Therefore, neither the concertation between medical specialists nor the State measure in question can be challenged under Community competition law although the Minister could not have restricted competition without prior concertation by economic actors.'

(2) Advocate General Jacobs stated at paragraph 163 of the Opinion in Pavlov in that respect: 'In cases such as the present ones it would thus be more satisfactory to accept a prima facie infringement justifiable on public interest grounds. In my view, measures taken by Member States comply with Article [10(2)] where, although they reinforce the restrictive effects of a concertation between undertakings, they are taken in pursuit of a legitimate and clearly defined public interest objective and where Member States actively supervise that concertation.'

(3) Cited above.

(4) The differences between the background in Arduino and Macrino are set out in more detail below.

(5) Paragraph 43 of the judgment.

In the operative part of the judgment the Court stated that Articles 10 and 81 EC did not preclude a Member State from adopting a decree such as the one in issue, 'where that State measure forms part of a procedure such as that laid down in [the Royal Decree-Law]'.

Since the question of reinforcement had been at the heart of the debate before the Court (6), the judgment is not easy to interpret.

According to one possible interpretation the Court wished to overrule the existing case-law on 'reinforcement' and establish a new 'procedural' test. Under that new test there would be no unlawful 'reinforcement' where there are sufficient procedural safeguards intended to ensure that the Member State in issue does not waive its power to make decisions of last resort and of reviewing the implementation of the rules in issue. In other words there would be no separate test for the 'reinforcement' branch of the Van Eycke formula any longer, since it would be replaced by the test for unlawful 'delegation'.

Under a second possible interpretation Arduino is, as regards 'reinforcement', a carefully drafted transitional judgment. For the 'reinforcement' branch of the Van Eycke formula the Court on the one hand did not wish to confirm the automatic legality approach, but on the other in the circumstances of the case found it unnecessary to establish a new test. That interpretation would explain why the Court hardly discussed the issue of reinforcement and relied very much on all the specificities of case before it. (7) Moreover, in the operative part it expressly linked the outcome to the specificities of the Italian law in issue. Finally, there is no indication in the judgment explaining why the Court would have wished to abandon its case-law on reinforcement altogether.

In its 2004 'Report on competition in professional services' (8) the Commission endorsed a proportionality approach similar to the one proposed by Advocates General Jacobs and Léger.

In section 5 of that Report entitled 'Possible application of EC Competition Rules' in subsection 5.2 entitled 'Liability of Member States' the Commission made statements which go beyond the existing case-law and thereby arguably signalled to the Court, to national courts and to economic actors that it would welcome a change of the case-law on Articles 10 and 81.

(6) See the summary of the arguments of the parties and their extensive discussion in paragraphs 43 to 119 of opinion of AG Léger.

(7) See paragraphs 41 and 42 of the judgment.

As regards the ‘reinforcement’ branch of the Van Eycke formula the Report states:

A proportionality test would seem appropriate to assess to what extent an anti-competitive professional regulation truly serves the public interest.

The section of the executive summary relating to the competition law section of the report contains the following statement:

Ultimately, in the Commission's view, in all scrutiny of professional regulation a proportionality test should be applied. Rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective. Such rules serve the interests of users and of the professional alike.

Should Macrino be decided under a proportionality test?

One of the purposes of the Commission's Report on competition in professional services was to trigger a debate about the appropriate approach in cases where State legislation or regulation is prepared by professional associations. That is how the referring Court in Macrino has understood the relevant passages in the Report. In its reference for a preliminary ruling the Tribunale di Roma refers extensively to the Report.

The referring court also rightly points out that there are important differences between Macrino and Arduino:

— Macrino concerns the section of the professional tariff for out-of-court legal services and not the one for legal services related to court proceedings;

— as regards legal services related to court proceedings Italian law obliges the CNF to establish a tariff with maximum and minimum limits. (1) It is by contrast not clear whether Italian law foresees the same obligation for out-of-court legal work. (2) It could thus be that the drawing up of the tariff for out-of-court work is attributable only to the initiative of the CNF.

— whilst maximum fee tariffs for legal services related to court proceedings exist in a number of Member States (3), Italy seems to be the only Member State with compulsory minimum fees for out-of-court legal work; for out-of-court legal work the usual access to justice argumentation seems less pertinent.

— in Italy out-of-court legal services are not reserved to members of the bar, but may be performed by any person; regulating the fees for out-of-court services provided by members of the Bar can therefore also not pursue the public interest objective of protecting consumers against low quality out-of-court legal services; it is therefore doubtful whether the tariff in issue pursues a legitimate public interest objective at all.

In view of the Commission's Report and the differences between Arduino and Macrino the referring Tribunale di Roma expressly supports the proportionality approach and invites the Court to either refine its case-law or to distinguish Arduino and Macrino on the facts.

Against that background the question arises whether the Court of Justice should apply in the Macrino case (a) the automatic legality approach relied on in Pavlov, (b) a procedural test as it was possibly suggested by Arduino or (c) a proportionality test as endorsed by two of its Advocates General, the Commission in its Report on competition in professional services and the referring court.

(a) The automatic legality approach

A first problem with the ‘automatic legality’ approach appears to be that it is based on circular reasoning. It is illogical for concertation between private actors, which is made compulsory by a State measure, to escape Articles 10 and 81, merely because the outcome of that concertation is not compulsory in itself. (4) By definition, in that type of scenario the function of the State intervention is that it makes an agreement compulsory, which previously had no such effect.

Moreover, the approach of ‘automatic legality’ appears to be incompatible with the basic idea underlying the case-law on Articles 10 and 81, namely that Article 10 prohibits the Member States from depriving Article 81 of its effective-

(1) Article 58(1) of Royal Decree-Law No 1578, cited above.
(2) Article 58(3) of Royal Decree-Law No 1578, cited above.
(3) The justification usually invoked for that type of regulation is access to justice at an affordable price.
(4) This important argument has already been made by Advocate General Darmon in his Opinion in Reiff [Case C-185/91 [1993] ECR I-5801] which was handed down before Pavlov. He referred first to Asjes and BNIC and then explained why such an approach was superior as compared to the automatic legality approach: ‘The Court does not require, for the combined application of Articles 3(f), 5 and 85, proof of a «perfect» cartel: a cartel created subject to the condition of precedent official approval, the only way of making it binding, is still caught by the latter article. Indeed, it would be illogical for concertation between undertakings, made binding by a State decision, to escape Articles 3(f), 5 and 85 merely because it did not produce effects in itself’. By definition, the advantage of regulations is, in the present case, that they endow with general and binding effect an agreement that previously had no such effect.’
ness. In reality, the adverse effects on competition of a State measure making a draft private measure compulsory do not depend on whether or not that draft had restrictive effects on its own. Depending on the circumstances of the case a State measure making a draft tariff compulsory can have much more detrimental effects on competition than a State measure which reinforces the effects of a pre-existing private restriction. For instance, under the approach of ‘automatic legality’, a State decree which makes a draft decision of an association of the cement industry on uniform prices compulsory would fall outside Articles 10 and 81. This suggests that the automatic legality approach may lead in some cases to absurd results.

In a key passage in the full court judgment in Consorzio Industrie Fiammiferi, which concerned a similar infringement of Articles 10 and 81 EC and was handed down after Arduino the Court stated:

‘[I]t is of little significance that, where undertakings are required by national legislation to engage in anti-competitive conduct, they cannot also be held accountable for infringement of Articles 81 EC and 82 EC (see, to that effect, Commission and France v Ladbroke Racing, paragraph 33). Member States’ obligations under Articles 3(1)(g) EC, 10 EC, 81 EC and 82 EC, which are distinct from those to which undertakings are subject under Articles 81 EC and 82 EC, none the less continue to exist.’ (1)

The Court of Justice seems thus to have accepted that there is no general rule according to which the Member States’ liability under Articles 3(1)(g), 10(2), 81/82 EC is dependent on whether in the same case the undertakings are liable under Articles 81/82 EC (i.e. have committed a ‘perfect infringement’).

It is therefore submitted that there are good reasons for the Court to definitively abandon the approach of ‘automatic legality’.

(b) A procedural test

Under a procedural test as possibly suggested by Arduino a Member State would comply automatically with Articles 10 and 81 EC, if procedural safeguards were in place which are intended to ensure that the ultimate decision on the content of a restrictive measure is taken by public authorities.

Since the procedural approach looks by definition only into procedural aspects, it appears to be incapable of preventing a Member State from adopting on the initiative of private actors rules which may be even deliberately in conflict with the idea of a system of undistorted competition in the Internal market (Article 3(1)(g) EC).

A procedural approach would seem to be in particular ineffective to deal with the well known phenomenon of ‘capture of the regulator’. Regulatory capture occurs where private actors manage to influence the content of State legislation or regulation in such a way that that legislation or regulation does not serve the public interest, but predominantly their own interests. It is submitted that where State legislation is drafted by private actors the danger of regulatory capture is particularly high.

The present case shows why a procedural approach can be insufficient and why it should at least be complemented by proportionality considerations. Italy appears to be the only Member State, in which the legal profession obtained from the State the approval of a compulsory tariff for out-of-court legal work for services which are not subject to a legal monopoly. Since the protection of consumers from low quality legal services does not appear to be the objective of the tariff (see above) one may wonder what public interest objective it actually pursues.

Finally, it should also be remembered that under Articles 86 and 87 the Court and the Commission engage in a proportionality assessment of State measures granting special or exclusive rights or of State aid. One of the reasons why the Court and the Commission have that power is the danger of regulatory capture, i.e. that special or exclusive rights or State aid do not serve so much the general public interest, but mainly narrow private interests. It is submitted that State measures which are adopted at the initiative of and drafted by private actors are as likely to be negatively affected by ‘regulatory capture’ as for example a State aid measure.

It is therefore submitted that there are good reasons for the Court not to decide Macrino according to a merely procedural test.

(c) The proportionality test

An assessment in two steps

As under a number of other rules of the Treaty (2) a proportionality test would require an assessment in two steps: first an assessment whether the State measure in issue reinforces private conduct

(1) Emphasis added. Case C-198/01, judgment of 9 September 2003, paragraph 51 of the judgment.

(2) See the case-law on Articles 86 and 87 EC, but also the case-law on free movement of goods or the freedom to provide services.
of the kind of referred in Article 81 (prima facie infringement of Articles 10 and 81 EC) and second an assessment whether the State measure is nonetheless objectively justified, because it pursues a legitimate public interest objective and complies with the principle of proportionality (compatibility assessment).

Under the first step of that approach there would be — as in BNIC/Aubert or Asjes and contrary to the ‘automatic legality’ approach used in Pavlov — a reinforcement of anticompetitive private conduct falling under Articles 10 and 81 also in situations where the concerted private behaviour (e.g. a draft tariff) requires first the approval or endorsement by the State in order to produce restrictive effects.

It is submitted that this has in fact always been the intention of the Court. The Court formulated in the operative part of the judgments in Meng and Ohra that the applicability of Articles 10 and 81 EC presupposed a ‘link with conduct on the part of undertakings of the kind referred to in Article [85(1)] of the Treaty’. (1) It did by contrast not expressly require a fully fledged infringement of Article 81(1) as had been suggested by Advocate General Tesauro in his Opinion in Meng and Ohra. (2)

Under the second step of the proportionality test Member States must be allowed to justify the regulation in issue under Article 10 of the Treaty, because a Member State may have legitimate reasons for reinforcing the effects of concerted private behaviour. (3) The duty to cooperate in good faith under Article 10(2) of the Treaty cannot be read as precluding Member States from adopting measures which, even though they restrict competition, pursue an overriding legitimate public interest goal. State measures reinforcing concerted private behaviour which are objectively necessary to attain a clearly articulated and legitimate public interest objective and comply with the principle of proportionality are therefore compatible with Articles 10 and 81 EC.

**Effectiveness of the competition rules**

In favour of the proportionality approach it can be argued first that it is the one of the three possible approaches most capable of ensuring the effectiveness of the competition rules.

As explained above the fundamental legal principle underlying Articles 10 and 81 is that those rules impose a duty on the Member States not to adopt or maintain in force any measure which could deprive the competition rules (in particular Article 81 EC) of their effectiveness.

In that connection the full Court has stated that in constitutional terms since entry into force of the Maastricht Treaty the objective in Article 3(1)(g) EC of ensuring that competition in the internal market is not distorted has gained in importance:

‘Moreover, since the Treaty of Maastricht entered into force, the EC Treaty has expressly provided that in the context of their economic policy the activities of the Member States must observe the principle of an open market economy with free competition (see Articles 3a(1) and 102a of the EC Treaty (now Article 4(1) EC and Article 98 EC)).’ (4)

As explained above, it would be contrary to the principle of effectiveness of the competition rules to adopt a formalistic ‘automatic legality’ approach by making the legality of a State measure reinforcing the effects of a private measure dependent on the legality of the reinforced private measure. The effects on competition of such a State measure do not depend on the legality of the reinforced private measure, but on the overall effects of the private measure and the reinforcing State measure taken together.

It would also be contrary to that fundamental principle to adopt a purely procedural approach. As explained above a procedural approach is ineffective to address the risk of regulatory capture.

**A balanced approach**

A second argument in favour of the proportionality approach is that it ensures an appropriate balance between the degree of undistorted competition aimed at by the Treaty and legitimate regulation of the professions in the public interest.

The risk of regulatory capture and therefore of regulation excessively restrictive of competition is particularly acute in economic sectors with a large amount of self-regulation such as in the area of the liberal professions.

This does not mean that self-regulation is as such problematic. Many sectors are so complex and evolve so rapidly that a certain amount of self-regulation is the best method to adopt the necessary

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(2) See paragraph 18 of the Opinion in the cases cited above.
(3) A Member State may for example wish to impose maximum legal fees for litigation related legal services in order to ensure access to justice to all at an affordable price.
(4) See Case C-198/01 Consorzio Industrie Fiammiferi, cited above, paragraph 47 of the judgment.
detailed and up-to-date rules. The professions are a key example of such a sector where some degree of self-regulation is necessary and useful.

Any form of self-regulation means however also that there is a conflict of interest. Where undertakings draft the rules which govern their activity there is a risk that some of those rules further mainly the narrow corporatist interests of those undertakings and not so much the wider interests of competitors, customers or consumers in general.

There is also the danger that the governments and public authorities of the Member States will not always be able or willing to prevent any abuse of regulatory powers in self-regulated sectors. In some cases they will be unable to prevent such abuses because they have effectively abandoned their regulatory powers to the economic actors in the sector. This issue is addressed through the ‘delegation’ branch of the Van Eycke formula. In other cases they will be unwilling to do so, because of the above-described phenomenon of regulatory capture. It is submitted that it is precisely this second issue which is addressed through the ‘reinforcement’ branch of the Van Eycke formula.

The proportionality approach with its two steps test is well suited to achieve the right balance between legitimate regulation of the professions in pursuit of public interest objectives and the need to ensure that self-regulation by the professions does not unnecessarily distort competition.

No undue encroachment on the freedom of the Member States to determine their economic policies

Against a proportionality approach it might be argued that it risks to apply in too many cases. In our modern societies almost all pieces of economic legislation are prepared with input from private actors. The proportionality approach might therefore be perceived by some as unduly encroaching on the freedom of the Member States to determine their economic policies.

The Court’s case-law appears however already today to provide for sufficient safeguards against too wide an application of the proportionality approach. According to the operative part of the Court’s judgement in Meng and Ohra the application Articles 10 and 81 EC presupposes ‘a link with conduct of the kind referred to in Article 81(1)’. Articles 10 and 81 apply therefore only if the State measure under examination

(1) reinforces the effects
(2) of an agreement between undertakings or a decision of an association of undertakings

(3) which may affect trade between Member States, and

(4) which once it has been made compulsory by the State has as its object or effect a restriction of competition.

In particular the first and the fourth condition appear to ensure that the proportionality approach will only apply in potentially problematic cases. (1)

The first condition of ‘reinforcement of effects’ implies that Articles 10 and 81 EC will only apply if the undertakings in question themselves prepare a measure which is then ‘reinforced’ by the State. Articles 10 and 81 will by contrast not apply where the measure is prepared by the State and the undertakings concerned are only consulted. The distinction between the former and the latter scenario is important because the danger of conflicting interests and of regulatory capture is greater in the former scenario, that is where the undertakings themselves ‘hold the pen’.

The fourth condition of ‘restriction of competition’ means that all State legislation prepared by private actors which does not restrict competition (e.g. on prices or output) to an appreciable extent is also automatically outside the scope of Articles 10 and 81 EC. For instance many technical rules or rules on ethical standards in the liberal professions have no appreciable effect on competition and would therefore be a priori outside the scope of Articles 10 and 81.

The proportionality approach would thus only apply in those cases where a State legislates on the basis of draft rules prepared by an association of undertakings and only in so far as the rules in issue as made compulsory by the State appreciably restrict competition and affect trade between Member States.

Conclusion

In the light of the above it is submitted that the proportionality approach — is a more faithful expression than the automatic legality or the procedural approach of the fundamental legal principle established by the

(1) The second condition (‘agreement or decision of an association of undertakings’) means that Articles 10 and 81 EC does not apply for example where individual undertakings or several unconcerted undertakings submit draft legislation to the State. The third condition (‘effect on trade’) means that all State legislation which does not have an appreciable effect on trade cannot fall under Articles 10 and 81 EC.
Court that Articles 10 and 81 EC prohibit the Member States from depriving Article 81 of its effectiveness;

— provides for balanced outcomes and prevents both under and over enforcement;

— given the requirements to show ‘reinforcement’ and a link with ‘conduct of the kind referred to in Article 81(1) EC’, would only apply to those categories of economic regulation for which the risks of regulatory capture and conflict of interest are particularly high.