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LOS COLEGIOS DE ABOGADOS DE LA
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EUROPEA RAAD VAN DE BALIES
VAN DE EUROPESE UNIE CONSELHO
DAS ORDENS DE ADVOGADOS DA UNIÃO
EUROPEIA ΣΥΜΒΟΥΛΙΟ ΤΩΝ
ΔΙΚΗΓΟΡΙΚΩΝ ΣΥΛΛΟΓΩΝ ΤΗΣ
ΕΥΡΩΠΑΙΚΗΣ ΕΝΩΣΗΣ RÅDET FOR
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EUROPEISKA UNIONEN **COUNCIL OF
THE BARS AND LAW SOCIETIES OF THE
EUROPEAN UNION****

**ANALYSIS OF THE NOVA I JUDGEMENT AND GUIDANCE TO BARS ON
PROFESSIONAL RULES FOLLOWING THE NOVA I DECISION**

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Analysis of Case C-309/99 - Wouters/NOvA

1. *Association of undertakings within the meaning of Article 81(1) EC*

Registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purpose of Articles 81, 82 and 86 EC (rec. 49).

The Bar of the Netherlands must be regarded as an association of undertakings within the meaning of Article 81(1) EC for the following reasons:

- When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity 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 (rec. 58).
- In addition: (i) the governing bodies of the Bar are composed exclusively of members of the Bar elected solely by members of the profession; (ii) when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not required to do so by reference to specified public-interest criteria; and (iii) the 1993 Regulation does not fall outside the sphere of economic activity, considering its influence on the conduct of the members of the Bar of the Netherlands on the market in legal services (recs. 61-63).

It is immaterial for the application of Article 81(1) EC that the constitution of the Bar of the Netherlands is regulated by public law. Two approaches must be distinguished (recs. 68-69):

- A Member State when granting regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings (rec. 68).
- The rules adopted by the professional association are attributable to it alone. According to the Court, this is the situation in the Netherlands (rec. 69).

The fact that these two approaches produce different results with respect to Community law in no way circumscribes the freedom of the Member States to choose one in preference to the other (rec. 70).

2. *Compatibility of the prohibition on MDP's with accountants with Article 81(1) EC*

The prohibition has an adverse effect on competition and may affect trade between Member States since (i) the areas of expertise of members of the Bar and of accountants may be

complementary. Clients would thus be able to turn to a single structure for a large part of the services necessary (rec. 87); (ii) a multi-disciplinary partnership would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation (rec. 88); (iii) it is conceivable that the economies of scale from such multi-disciplinary partnerships might have positive effects on the cost of services (rec. 89).

2.a Balancing of the adverse and positive effects on competition of the prohibition

The accountancy market is highly concentrated (rec. 91). The prohibition of conflicts of interest with which members of the Bar in all Member States are required to comply may constitute a structural limit to extensive concentration of law firms and so reduce their opportunities of benefiting from economies of scale of entering into structural associations with practitioners of highly concentrated professions (rec. 92). In these circumstances, certain limits on the authorisations of MDPs with accountants may have positive effects on competition (rec. 93). Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than NOvA's regulation, which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective size of the firms of lawyers and accountants concerned, those rules restrict competition (rec. 95).

2.b Specific context of the prohibition

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 81(1) EC. For the purposes of application of Article 81(1), account must be taken of the objectives of the prohibition which are 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 proportionate to the attainment of those objectives (rec. 97).

Each Member State is in principle free to regulate the exercise of the legal profession in its territory (rec. 99). The current approach of the Netherlands is that the essential rules adopted for the purpose of the proper practice of the profession are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest and the duty to observe strict professional secrecy (rec. 100). By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct (rec. 103). Accordingly, there may be a degree of incompatibility between the advisory activities carried out by a member of the Bar and the supervisory activities carried out by an accountant (rec. 104).

In such circumstances NOvA is entitled to promulgate a prohibition on MDPs with accountants, as this prohibition can reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Netherlands (rec. 107).

N.B.: It is important to note that the Court allows NOvA a certain discretion in this connection. It is sufficient for the Court that the prohibition "may reasonably be considered" to be necessary for the attainment of the objectives pursued.

3. *Freedom of establishment and freedom to provide services*

The Treaty provisions in the freedom of establishment and the freedom to provide services also apply to rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. Therefore, the Court leaves open the possibility that the prohibition on MDPs can simultaneously be assessed in the light of Articles 43 and 49 EC and Article 81 EC. However, as the prohibition in MDPs is justified for the attainment of the objectives mentioned under 2 above, it is not contrary to Articles 43 and 49 EC if those provisions did apply (rec. 122).

Guidance to bars on professional rules following the NOVA decision

(1) A first key element in the NOVA judgment is that the European Court of Justice (ECJ) takes the view that there are two ways to regulate the profession.

➤ Model I:

If a Member State defines the public interest criteria and the essential principles with which the professional rules must comply, and also retains the power to adopt decisions in the last resort, the professional rules will be considered to be state measures and will therefore not fall under the scope of the EC competition rules¹. Given the fact that national competition rules do largely follow EC competition law, the professional rules will then most likely also not fall within the scope of national competition law. However, the provisions of Article 43 (freedom of establishment) and Article 49 (freedom to provide services) of the EC Treaty still must be complied with.

➤ Model II:

If the professional rules are adopted by the professional association without the Member State being fully involved in the rulemaking process, the professional rules will be considered as having been adopted by an association of undertakings within the meaning of EC competition rules and will have to be scrutinized under the EC (and most likely also national) competition law.

It should be noted that the above categorisation may not be entirely workable in the future as the rulemaking process within some countries does not necessarily fall within one of the two categories defined by the ECJ². One may also wonder whether the ECJ has sufficiently taken into account the constitutional reasons against direct regulation of the bar by Member States (direct state interference with the regulation of the legal profession could affect the independence of the bar, which is one of the cornerstones of democracies based upon the rule of law).

Nevertheless, the NOVA judgment makes clear that EU bars and law societies, and the professional rules which they have adopted, can be subject to competition rules. **Accordingly, all bars and law societies may want to review their professional rules in the light of the judgment.**

(2) In carrying out this review, it is important to note that the judgment distinguishes between two kinds of rules: those that are considered necessary in order to ensure the proper practice of the legal profession (i.e. rules that are necessary to protect the core values of the profession, such as independence, confidentiality and the rule against conflicts of interest), and those which do not pursue that goal.

¹ The ECJ decision of 19 February 2002 in the *Arduino case (C-35/99)* with regard to compulsory lawyers' tariffs constitutes an example of such a mode of regulation.

² There are indications that the ECJ may not correctly have held that the Dutch Bar Association and its professional rules fall within the second model of rulemaking (a further reference to the ECJ in the future can therefore not be ruled out at this point).

Those rules which are considered necessary to ensure the proper practice of the legal profession – such as the rule against multi-disciplinary partnerships with accountants in the NOVA case itself – escape from the application of competition law. Rules which are not necessary in that regard will have to be assessed as to their impact on competition, and might have to be changed.

- (3) A further important point that must be noted in carrying out the aforementioned review is that **the NOVA judgment leaves a clear margin of discretion to the bar associations as to whether a particular rule is indeed necessary to ensure the proper practice of the legal profession as it is organized in their country.** The test is whether a particular rule "may reasonably be considered" (by the bar association) to be necessary for the attainment of the objectives pursued. It should be noted, however, that the exercise of discretion can eventually be scrutinized.

Finally, it is important to note that **once professional rules have been reviewed in the light of this case law, it will be easier to continue to enforce these rules.**