The Wouters case law, special for a different reason?

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Introduction

Several judgments have confirmed that the *Wouters* doctrine is "here to stay".[1] The question now is: is its meaning sufficiently clear? The doctrine allows for decisions of associations of undertakings containing a restriction of competition to escape the prohibition of art.101(1) TFEU if that restriction is inherent in the pursuit of a legitimate objective. The *Wouters* case dealt with a regulation containing a prohibition of multidisciplinary partnerships between lawyers and accountants, set by the Bar of the Netherlands (the Bar), the body that regulates the legal profession in the Netherlands.[2] This prohibition, which qualified as a decision of an association of undertakings, was liable to restrict competition.[3] Nevertheless, it could escape art.101(1) TFEU, because, according to the Court of Justice of the European Union (CJEU), the Bar could reasonably have considered that the regulation was necessary for the proper practice of the legal profession.[4]

The reasoning used by the CJEU in *Wouters* was new, and its interpretation is a source of debate. In particular, it is unclear what types of objectives may now be balanced against restrictions of competition within art.101(1) TFEU, and under what circumstances. In the literature, two main interpretations can be found. First, there are those who find that this case law offers the possibility that self-regulatory measures may escape the prohibition of art.101 TFEU if those measures serve a public interest. For example, Monti argues that the CJEU meant to include public policy considerations in the analysis of competition cases, similar to the way mandatory requirements of public policy play a role in the free-movement rules.[5] The general idea in this line of thinking is that *Wouters* incorporates objectives that were previously considered irrelevant in art.101 TFEU cases. Secondly, there are those that argue that, besides the condition that the self-regulatory measures serve a public interest, some kind of government involvement must exist in order to escape the prohibition. This view is best represented by the idea of "regulatory ancillarity", as proposed by Whish and Bailey. They argue that the restrictions in *Wouters* were ancillary to the regulatory function of providing guarantees to the consumers of legal services and the sound administration of justice.[6]

The aim of this article is to unravel some of the mystery surrounding *Wouters* by using an economic perspective. Following a description of the case law, this perspective will be used to qualify the justifications in *Wouters* and the other relevant cases. We find that most of the justifications in the case law are not that different from a normal art.101(3) TFEU efficiency defence. However, as not all elements of the justifications can be categorized in this way, we then continue by giving an explanation for those remaining elements. Finally, we will consider the rationale behind allowing for the assessment to take place within art.101(1) TFEU rather than art.101(3) TFEU.

Description of the case law

In *Wouters*, as mentioned, the CJEU had to assess whether the rules of the Bar, prohibiting multidisciplinary partnerships between lawyers and accountants, violated art.101 TFEU. The College of Delegates of the Bar may, under Dutch law, adopt regulations to ensure the proper practice of the legal profession.[7] The prohibition of multidisciplinary partnerships aimed at ensuring the independent exercise of the profession.[8] In its judgment, the CJEU first argues that the prohibition of multidisciplinary partnerships was liable to restrict competition within the meaning of art.101(1)(b) TFEU.[9] Then, however, the CJEU says that not every decision by an association of undertakings that restricts the freedom of action of the undertakings involved necessarily falls within the prohibition of art.101(1) TFEU. The overall context in which the decision was taken or which produces its effects must be taken into account:

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[1] J. Nowag, "Wouters, when the condemned live longer: A comment on OTOC and CNG" (2014) 36 E.C.L.R. 39.

[2] *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577; [2002] 4 C.M.L.R. 27.

[3] *Wouters* [2002] 4 C.M.L.R. 27 at [90].

[4] *Wouters* [2002] 4 C.M.L.R. 27 at [110].

[5] G. Monti, "Article 81 EC and Public Policy" (2002) 39(5) *Common Market Law Review* 1088. See also R. Nazzini, "Article 81 EC between time present and time past: A normative critique of "restriction of competition" in EU law" (2006) 43(2) *Common Market Law Review* 526 and A.P. Komninos, "Non-competition concerns: resolution of conflicts in the integrated Article 81 EC" University of Oxford, Working Paper (L) 08/05 (2005), p.13.

[6] R. Whish and D. Bailey, *Competition Law*, 7th edn (Oxford: Oxford University Press, 2012), pp.131–133.

[7] *Wouters* [2002] 4 C.M.L.R. 27 at [9].

[8] *Wouters* [2002] 4 C.M.L.R. 27 at [15].

[9] *Wouters* [2002] 4 C.M.L.R. 27 at [90].

> "More particularly, account must be taken of its *objectives*, which are here connected to 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."[10]

Considering this context in which the decision was taken, the CJEU concludes that the Bar

> "could have reasonably 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"

and that therefore art.101(1) TFEU was not infringed.[11] This shows that the CJEU balanced the objective of ensuring the proper practice of the legal profession against restrictions of competition caused by those rules.

After *Wouters*, the same type of reasoning has been applied in several other CJEU-cases. The *OTOC* judgment, for example, concerned rules by the Portuguese Order of Chartered Accountants related to the training of its members.[12] Again, certain restrictions of competition could be found in those rules. Such restrictions could potentially be justified by the legitimate objective of guaranteeing the quality of the services offered by chartered accountants. However, in this case, the rules of the professional body went beyond what was necessary to pursue this objective.[13]

The *CNG* judgment was also quite similar.[14] That case concerned professional rules for geologists concerning reference fees. Those rules were again liable to restrict competition, but could potentially be justified by the objective of ensuring that the ultimate consumers of the services by geologists are provided with the necessary guarantees.[15]

Finally, in the *API* judgment, the CJEU had to rule on Italian national legislation, which made it illegal to set the prices for road haulage services lower than the minimum operating costs.[16] The determination of those costs was delegated to a body composed mainly of representatives of the economic operators concerned, the so-called "*Osservatorio*". That body could be regarded as an association of undertakings.[17] The CJEU found that the setting of minimum prices could not be justified by a legitimate objective.[18] The objective of the legislation was to protect road safety, but the CJEU ruled that the fixing of minimum prices was not appropriate to attain that objective.[19] It went beyond what was necessary as there are more effective and less restrictive measures to protect road safety.[20, 21]

Market failure and the benefits for consumers

As the CJEU does not specify what types of objectives can be considered "legitimate" within the *Wouters* doctrine, it is sometimes inferred from this doctrine that such objectives may easily include a wide variety of "non-economic" or "public policy" objectives.[22] However, as Ibanez Colomo rightly points out, it is often (like, in our view, in the *Wouters* case) not necessary to resort to an approach based on the balancing between economic and non-economic objectives

> "[v]ery often, intervention allegedly based on non-economic grounds is in fact a response to a market failure and thus not necessarily in conflict with (allocative) efficiency."[23]

Therefore, it may be that, from an economic perspective, the objectives that have been taken into account in the application of the *Wouters* doctrine are not that much different from those under art.101(3) TFEU.[24]

In economics, the concept of perfect competition summarises a set of "ideal" conditions, under which the market will lead to an efficient outcome and thus to the maximization of welfare.[25] Those conditions include, inter

[10] *Wouters* [2002] 4 C.M.L.R. 27 at [97], emphasis added.
[11] *Wouters* [2002] 4 C.M.L.R. 27 at [110].
[12] *Ordem dos Téchnicos Oficiais de Contas (OTOC) v Autoridade da Concorrencia* (C-1/12) EU:C:2013:127; [2013] 4 C.M.L.R. 20.
[13] *OTOC* [2013] 4 C.M.L.R. 20 at [69].
[14] *Consiglio Nazionale dei Geologi (CNG) v Autorita Garante della Concorrenza e del Mercato* (C-136/12) EU:C:2013:489; [2013] 5 C.M.L.R. 40.
[15] *CNG* [2013] 5 C.M.L.R. 40 at [52]–[53].
[16] *API - Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti* (C-184/13) EU:C:2014:2147; [2014] 5 C.M.L.R. 21.
[17] *API* [2014] 5 C.M.L.R. 21 at [41].
[18] *API* [2014] 5 C.M.L.R. 21 at [49].
[19] *API* [2014] 5 C.M.L.R. 21 at [51].
[20] *API* [2014] 5 C.M.L.R. 21 at [55]–[57].
[21] Literally speaking, *Wouters* was also applied in *Meca-Medina v Commission of the European Communities* (C-519/04 P) EU:C:2006:464; [2006] 5 C.M.L.R. 18. However, we do not discuss this case in the present article because, in our view, it is very distinct from *Wouters*, *OTOC*, *CNG* and *API*. The CJEU did not address the interest of consumers or public-interest objectives, but rather the interest of the activity (professional sports) itself. This, as well as the references in *Meca-Medina* to the *Gøttrup-Klim* (or *DLG*) judgment (in [42] and [47]) seems to suggest that this case is more related to the (commercial) ancillary-restraints doctrine. Therefore, we believe that this case does not belong to the same jurisprudential category as *Wouters*, *OTOC*, *CNG* and *API*.
[22] Monti, "Article 81 EC and Public Policy" (2002) 39(5) *Common Market Law Review* 1088, J. Faull and A. Nikpay (eds), *The EU Law of Competition*, 3rd edn (2014), para.3.246. See also Nazzini, "Article 81 EC between time present and time past: A normative critique of "restriction of competition" in EU law" (2006) 43(2) *Common Market Law Review* 526 and Komninos, "Non-competition concerns: resolution of conflicts in the integrated Article 81 EC" University of Oxford, Working Paper (L) 08/05 (2005).
[23] P. Ibanez Colomo, "Market Failures, Transaction Costs and Article 101(1) TFEU Case Law" (2012) 37(5) *European Law Review* 541, 560–561.
[24] Article 101(3) TFEU allows for restrictions of competition that give rise to efficiency gains and benefit consumers. Those restrictions must be indispensable to the attainment of those efficiencies and must also not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
[25] A. Jones and B. Sufrin, *EU Competition Law: text, cases and materials*, 5th edn (Oxford: Oxford University Press, 2014), p.12.

alia, that market power is absent and that firms and consumers have perfect information about the opportunities in the market and the qualities and prices of all products.[26] Article 101 TFEU contributes to the attainment of such an efficient outcome by prohibiting undertakings from restricting competition, but also by considering possible efficiency benefits to anti-competitive behaviour under art.101(3) TFEU.

Such efficiency benefits may arise from the remedying of market failures.[27] Market failures are, in essence, deviations from the conditions of perfect competition. One of those market failures, which is particularly relevant for the *Wouters* case law, is asymmetric information. Asymmetric information means that buyers and sellers do not have the same knowledge of the quality of the product or service that is sold. This may lead to a deterioration of the quality of the service or product provided on the market, from which ultimately the consumers will suffer. If, for instance, the consumer is unable to assess the quality of something—say second-hand cars—before it is bought, he or she will tend to choose the lower-priced products.[28] This is, however, not the price for which sellers of good-quality goods or services are willing to sell.[29] Therefore, the relatively good-quality products or services will be driven out of the market, thus lowering the residual quality of the offered products further and further.[30]

Asymmetric information is especially likely to occur in the markets for the liberal professions, because of the complex nature of those services. Those professions typically require special training in the liberal arts or sciences.[31] Besides the *Wouters* case (lawyers), *OTOC* (chartered accountants) and *CNG* (geologists) deal with such professional service markets. In those professions, it may be very difficult for the consumers to assess the quality of the service in advance, and often even after the service has been provided. Consequently, there is a risk that consumers are only driven by low prices, thus undermining the incentive for the service providers to maintain a high standard of quality.[32]

Given potentially severe damaging effects of information asymmetries on the quality of the provided services in the markets for the liberal professions, it is not surprising that governments and professional associations set regulatory rules to address this issue. In *Wouters*, the Advocate General acknowledged that certain rules may be necessary to remedy the detrimental effects of information asymmetry by means of regulation of market behaviour.[33] Such rules are often referred to as "ethical" or "deontological" rules. The rules have the objective of preventing the unethical behaviour by professional service providers of abusing their knowledge advantage vis-a-vis the consumer. Such unethical behaviour will lead to short-term profits for the undertaking concerned, but the consumer will suffer from it. Furthermore, in the long run, such behaviour undermines the credibility of the entire profession. From an economic perspective, regulatory rules that remedy market failures lead to efficiencies that benefit the consumer.[34] The problem of asymmetric information primarily occurs between the service provider and the consumer. Regulatory rules may remedy this through setting quality standards or educational standards.

From the case law, it appears that the CJEU acknowledged the existence of such market failures. On several occasions, the CJEU accepted the proper practice of the profession as a legitimate objective, which could be pursued by the regulatory bodies of professions. The rules set by these bodies were aimed at providing guarantees to consumers about the quality of the services. Such rules can be related to the asymmetric information present in those markets, as they may prevent the deterioration of quality that would otherwise occur.

Seen in this way, the *Wouters* doctrine shows a clear resemblance with the art.101(3) TFEU framework. There are clear efficiency benefits related to addressing the market failure of asymmetric information, and those benefits could easily fall within the first condition of art.101(3) TFEU. The CJEU considered this in *Asnef-Equifax*, where information asymmetry was also an issue.[35] Furthermore, the rulings in *Wouters*, *OTOC* and *CNG* show clearly that the CJEU took into consideration that the professional rules could—at least in principle—be beneficial for the consumers. Information asymmetry is a problem from which typically consumers will suffer, and the regulations aim to provide those consumers with guarantees. Therefore, the efficiencies that were considered in these cases may also fit within the second condition of art.101(3) TFEU. Seen in this way, the *Wouters* case law does not seem so "special".

Other public interests and the relevance of government involvement

Not all aspects of this case law can, however, be explained in terms of efficiency benefits that directly accrue to consumers. Sometimes, other public-interest objectives play a role. In *Wouters*, the CJEU not only took into

[26] R.H. Frank, *Microeconomics and Behavior*, 7th edn (McGraw-Hill, 2008), pp.337–338.
[27] See Colomo, "Market Failures, Transaction Costs and Article 101(1) TFEU Case Law" (2012) 37(5) *European Law Review* 541.
[28] G.A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84(3) *The Quarterly Journal of Economics* 489.
[29] Akerlof, "The Market for 'Lemons'" (1970) 84(3) *The Quarterly Journal of Economics* 489.
[30] Akerlof, "The Market for 'Lemons'" (1970) 84(3) *The Quarterly Journal of Economics* 489, 490.
[31] European Commission, *Report on Competition in Professional Services*, COM(2004) 83 final (9 February 2004), paras 1 and 25.
[32] See the opinion of AG Jacobs in *Pavlov v Stichting Pensioenfonds Medische Specialisten* (C-180/98) [2000] E.C.R. I-6451; [2001] 4 C.M.L.R. 1 at [86]. See also: *European Competition Law Annual 2004: The Relationship between Competition Law and the (Liberal) Professions*, C.-D. Ehlermann and I. Atanasiu (eds) (Oxford: Hart Publishing, 2006).
[33] Opinion of AG Jacobs in *Wouters* [2002] 4 C.M.L.R. 27 at [112].
[34] European Commission, *Report on Competition in Professional Services*, COM(2004) 83 final (9 February 2004), paras 14 and 28.
[35] *ASNEF-EQUIFAX Servicios de Informacion sobre Solvencia y Credito SL v Asociacion de Usuarios de Servicios Bancarios (AUSBANC)* (C-238/05) [2006] E.C.R. I-11125; [2007] 4 C.M.L.R. 6.

consideration the guarantees to consumers but also the sound administration of justice.[36] Likewise, in *API*, the objective of the regulation was to protect road safety.[37] These objectives go beyond the direct interests of consumers.[38] *Wouters* and *API* thus seem to allow for the incorporation in the analysis of public interests other than those that are related to consumer welfare. This had previously seldom been allowed in art.101 TFEU cases. Firms that perform a primarily commercial activity may try to justify restrictions of competition by referring to the concept of "objective justification". However, such a justification on the basis of public interests is very uncommon as it is typically the task of the government to protect such interests.[39] It is generally speaking not the task of undertakings to protect public interests, and it should be kept in mind that apparent justifications of this nature may actually serve a commercial purpose.

Therefore, it should be pointed out that the case law contains another distinctive element, namely the involvement of the legislature. In *Wouters*, the regulatory function of the Bar was embedded in Dutch law.[40] It concerned the regulatory body of a profession, just as in *OTOC* and *CNG*. Also in *API*, the tasks of the Osservatorio had a foundation in public law.[41] Quite early on, the importance of this element was recognized by Whish, who referred to the *Wouters* doctrine as "regulatory ancillarity".[42] Although one must be careful about drawing hard conclusions on the basis of the present case law, it does seem that the government's involvement has been a decisive consideration in allowing for this specific type of justification. If it had not been relevant, the CJEU could have more easily referred to other analytical frameworks like the art.101(3) framework or the "objective justification".

The importance of the involvement of the legislature also became clear in the case of the *Ordre National des Pharmaciens* (*ONP*).[43] This case concerned a French professional association for pharmacists governed by the French Public Health Code.[44] This code delegated to the association the functions to ensure compliance with professional duties, to defend the honour and independence of the profession, to supervise the competence of pharmacists, and to contribute to promoting public health and the quality of health care.[45] The General Court (GC) pointed out that, in order to assess whether *Wouters* could apply, it was crucial that *ONP* acted within the limits of the French legal framework.[46] If that was the case, "its action is covered by an application of the legal provisions and serves to attain the objective intended by the law".[47] After an extensive review of the relevant behaviour of the *Ordre* as well as the applicable legal framework, the GC concluded that such was not the case. Consequently, *Wouters* did not apply as, under these circumstances, the *Ordre* could not claim that its behaviour is inherent in the pursuit of a legitimate objective.[48] According to the GC, it is not for a body, representing private persons (in this case, pharmacists), to protect their private interests beyond what has been assigned to it by law.[49] Clearly, in this case, the involvement of the government through the Member State's legal framework was considered an important factor for the GC to decide whether the *Wouters* exception could apply.

Rationale behind Wouters

Still, the *Wouters* doctrine does something unique: it allows for the balancing of restrictions of competition against certain benefits, either benefits to the consumer or to the public interest, within the provision of art.101(1) TFEU. The question is: why? It may have been that the CJEU treated art.101(1) and (3) TFEU as a single provision, as art.101(3) TFEU was not directly applicable at the time of *Wouters*.[50] However, in later cases, art.101(3) TFEU *was* directly applicable, so there would not be a reason for the European Courts to continue the *Wouters*-approach. Rather, an explanation can be found in the specifics of the cases. Most cases, *Wouters*, *OTOC*, *CNG*, as well as *ONP*, deal with the markets for professional services. Such markets are likely to suffer from market failures.[51] From an economic perspective, market failures may justify interventions into the market to enhance efficiency.[52]

[36] *Wouters* [2002] 4 C.M.L.R. 27 at [97].
[37] *API* [2014] 5 C.M.L.R. 21 at [50].
[38] However, in those cases, the Court did not clearly specify that this was indeed a legitimate objective in this context. In *Wouters*, it never used that term, and in *API*, it simply stated that "it cannot be ruled out" that it is legitimate, but that the regulation could not be justified by that objective as the fixing of minimum operating costs did not appear appropriate to ensure it. *API* [2014] 5 C.M.L.R. 21 at [51].
[39] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C45/7, para.29.
[40] *Wouters* [2002] 4 C.M.L.R. 27 at [4]–[5].
[41] *API* [2014] 5 C.M.L.R. 21 at [39]–[40].
[42] Whish and Bailey, *Competition Law* (2012), p.132.
[43] *Ordre national des pharmaciens (ONP) v Commission* (T-90/11) EU:C:2014:2201.
[44] *ONP* EU:C:2014:2201 at [2].
[45] *ONP* EU:C:2014:2201 at [2].
[46] *ONP* EU:C:2014:2201 at [44].
[47] *ONP* EU:C:2014:2201 at [44].
[48] *ONP* EU:C:2014:2201 at [346]–[347].
[49] *ONP* EU:C:2014:2201 at [346]–[347].
[50] Whish and Bailey, *Competition Law* (2012), p.133; J. Goyder and A. Albors-Llorens, *Goyder's EC Competition Law*, 5th edn (Oxford: Oxford University Press, 2009), pp.115–116.
[51] See the section "market failure and benefit for consumers" above.
[52] A. Shleifer, "Understanding regulation" (2005) 11(4) *European Financial Management* 440; C. Chaserant and S. Harnay, "The regulation of quality in the market for legal services: Taking the heterogeneity of legal services seriously" (2013) 10(2) *The European Journal of Comparative Economics* 271.

In certain cases, such regulatory functions are delegated to associations of undertakings, as they are able to deal with changes in the markets in a more flexible way.[53] Whereas pure government regulations are excluded from competition law, regulations by associations of undertakings, generally speaking, are not. In our opinion, they, too, *should* not be excluded from competition law in general, as there is potential for these associations to restrict competition more in the interest of their members than in that of society at large. On the other hand, in order to perform those regulatory tasks well, they require more freedom in making decisions than do undertakings or associations of undertakings that do not serve a public interest, either by solving a market failure to the benefit of the consumers or by taking into account a pure public interest. Balancing these regulatory tasks and the benefits that they may yield against the risk that those associations will be led by the private interests of their members, should be done with great care. As Advocate General Jacobs has put it

> "[t]he main challenge for every competition law system is […] to prevent abuses of regulatory powers without abolishing the regulatory autonomy of the professions."[54]

Seen in this perspective, we believe that the *Wouters* case law embodies a two-stage balancing act. In the first stage, the legislature entrusts an association of undertakings with a regulatory task to protect consumers and/or society at large against certain specific risks that would arise from unrestricted competition between the members of a profession. When, subsequently, questions arise about the conformity of certain decisions of the association with art.101(1) TFEU, an assessment under *Wouters* may take place. That such an assessment does not amount to a full balancing of the costs and benefits can be explained by the fact that a balancing has already taken place, implicitly or explicitly, by the legislature at the national level. This legitimises the more "marginal" assessment under *Wouters* than under art.101(3) TFEU. The intention of the CJEU to apply a more marginal test is reflected in the *Wouters* judgment by the use of the word "reasonably" (not repeated in subsequent judgments). This means that the CJEU assessed the case to the point where it could conclude whether the regulation of the Bar was *reasonably* necessary to ensure the proper practice of the profession.[55]

Conclusion

When looking at the *Wouters* case law from an economic point of view, we find that the majority of those judgments can be explained by a legitimate interest to protect consumers against possible detrimental effects of information advantages of members of the liberal professions. Thus, in those cases, the measures that were the subject of the proceedings could—in principle—have been aiming at resolving a specific market failure to the benefit of the consumers. We therefore conclude that, while the test that is developed in the *Wouters* doctrine is different from that under art.101(3), the nature of the efficiencies that are the subject of the analysis is not. However, the rulings in *Wouters* and *API* also include interests that go beyond those direct interests of the consumers, and therefore do not fit well in an assessment under art.101(3).

We opine that the specific treatment of cases by the CJEU under the *Wouters* test can only be explained by the involvement of the legislature. In all cases, the regulatory or supervisory tasks of the associations of undertakings were assigned to them through public law. It is considered that the delegation of regulatory tasks to associations of undertakings may, under certain circumstances, be efficient. When those associations have superior knowledge of the specific problems that may arise in the markets in which their members operate, they may be able to target these problems better than governmental agencies can. We believe that the more lenient substantial assessment that is developed in the *Wouters* doctrine in comparison with art.101(3) TFEU can only apply when a delegation of regulatory or supervisory powers by the government is present as only then part of the necessary "balancing act" has already been performed by the legislature.

[53] See the opinion of AG Jacobs in *Pavlov* [2001] 4 C.M.L.R. 1 at [92].
[54] See the opinion of AG Jacobs in *Pavlov* [2001] 4 C.M.L.R. 1 at [92].
[55] *Wouters* [2002] 4 C.M.L.R. 27 at [107], [110] and [123].